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TABLE OF CASES REPORTED

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As per Section 3 of the State Act, levy of tax is not only on a vehicle which is used but also on a vehicle which is kept for use – Section 3(2) raises a statutory presumption that if certificate of registration is valid then the transport vehicle is presumed to be in use or kept for use notwithstanding the expiry of the certificate of fitness – For want of fitness certificate, liability of the owner of vehicle cannot be absolved to pay tax under the State Act – Further held – Issuance of registration certificate is dependent upon fitness certificate but once the vehicle is registered, Section 56 of the Central Act does not lead to the consequence that registration certificate is deemed to be cancelled or it becomes ineffective for the reason that fitness certificate ceased to be valid for any reason – Once the vehicle is registered, the registration certificate can be suspended in terms of Section 53 or cancelled u/S 55 of the Central Act but there is no deemed cancellation of registration for not possessing fitness certificate. [Puspraj Singh Baghel Vs. State of M.P.] (DB)…79

मोटरयान कराधान अधिनियम, म.प्र. (1991 का 25), धारा 3(1) व (2) एवं मोटर यान अधिनियम (1988 का 59), धारा 56 – विरोधाभासी उपबंध – रजिस्ट्रीकरण प्रमाण–पत्र, ठीक हालत में होने का प्रमाण पत्र एवं कर का अधिरोपण – अभिनिर्धारित – राज्य के अधिनियम की धारा 3 के अनुसार, कर का उद्ग्रहण न केवल उस वाहन पर होता है जिसका उपयोग किया जाता है, परन्तु उस वाहन पर भी जिसे उपयोग हेतु रखा गया है – धारा 3(2) एक कानूनी उपधारणा उत्पन्न करती है कि यदि रजिस्ट्रीकरण का प्रमाण–पत्र विधिमान्य है तो ठीक हालत में होने का प्रमाण–पत्र का अवसान होते हुए भी, परिवहन वाहन उपयोग में माना जायेगा या उपयोग हेतु रखा गया माना जायेगा – ठीक हालत में होने के प्रमाणपत्र के अभाव में वाहन के स्वामी की, राज्य के अधिनियम के अन्तर्गत कर का भुगतान करने के दायित्व से मुक्ति नहीं हो सकती – आगे अभिनिर्धारित– रजिस्ट्रीकरण प्रमाण–पत्र का जारी किया जाना, ठीक हालत में होने के प्रमाण–पत्र पर निर्भर है, परन्तु एक बार वाहन रजिस्ट्रीकृत हो जाने पर केन्द्रीय अधिनियम की धारा 56 इस परिणाम पर नहीं पहुँचाती कि रजिस्ट्रीकरण प्रमाण–पत्र को रद्द माना जायेगा या वह निष्प्रभावी बन जायेगा इस कारण से कि किसी कारण से ठीक हालत में होने का प्रमाण–पत्र विधिमान्य नहीं रहा – एक बार वाहन रजिस्ट्रीकृत हो जाने पर केन्द्रीय अधिनियम की धारा 53 के अनुसार रजिस्ट्रीकरण प्रमाण–पत्र का निलंबन या धारा 55 के अनुसार रद्दकरण किया जा सकता है, परन्तु ठीक हालत में होने का प्रमाण–पत्र धारण नहीं करने के कारण रजिस्ट्रीकरण का रद्दकरण नहीं समझा गया है। (पुष्पराज सिंह बघेल वि. म.प्र. राज्य) **(DB)…79**

***Municipal Employees (Recruitment and Conditions of Service) Rules, M.P. 1968, Rule 9 & 10(2) – See* – Penal Code, 1860, Section 302 & 323 [Shambhu Khare Vs. State of M.P.] …*11**

have been furnished by the appellant and have not been commented adversely by the Commission – Further held, will of the people in electing a candidate cannot be set at naught on such mere technicalities – Production of Bank Register is not mandatory or essential condition – Further held – Disqualification for five years for not opening a bank account is wholly disproportionate to alleged misconduct – Removal or disqualification of elected representative has serious repercussion, thus they must not be removed unless a clear cut case is made out – Order of Election Commission and one passed by Single Bench is set aside – Writ appeal allowed. [Ajay Kumar Dohar Vs. State of M.P.] **(DB)…12**

नगरपालिका अधिनियम, म.प्र. (1961 का 37), धारा 32–C व 35 – निरर्हता – आधार – निर्वाचन व्यय – अपीलार्थी को पाँच वर्ष की अवधि के लिए नगरपालिक पार्षद के रूप में निर्वाचित किये जाने से, इस आधार पर निरर्हित किया गया कि उसने रकम (निर्वाचन व्यय) बैंक के जरिए खर्च नहीं की और न ही बैंक खाता खोला इस प्रकार उसने निर्वाचन आयोग के निदेशों का उल्लंघन किया, यद्यपि आवेदक ने निर्वाचन व्यय प्रस्तुत किया है – अभिनिर्धारित – निर्वाचन व्यय प्रस्तुत करने का उद्देश्य एवं प्रयोजन यह सुनिश्चित करना है कि निर्वाचन पारदर्शी स्वरूप का है और निर्वाचन के परिणाम को बदलने के लिए धन शक्ति का उपयोग नहीं हुआ है – बैंक खाता खोलने की शर्त एक आवश्यक शर्त नहीं, यह केवल खातों के उचित संधारण सुनिश्चित करने हेतु एक कदम है – बैंक खाता खोला जाना केवल एक प्रक्रिया है और इसे एक आनुषांगिक शर्त के रूप में लिया जा सकता है – बैंक खाता न खोलने या बैंक खाते के जरिए निर्वाचन व्यय खर्च नहीं करना, एक प्रत्याशी को निरर्हित करने का आधार नहीं हो सकता विशेषतः तब जब अपीलार्थी ने निर्वाचन व्यय प्रस्तुत किये हैं और आयोग द्वारा प्रतिकूल टिप्पणी नहीं की गई है – आगे अभिनिर्धारित – मात्र उक्त तकनीकी आधार पर प्रत्याशी को निर्वाचित करने में जनता की इच्छा को शून्य नहीं बनाया जा सकता – बैंक रजिस्टर का प्रस्तुतीकरण आज्ञापक अथवा आवश्यक शर्त नहीं – आगे अभिनिर्धारित – बैंक खाता न खोले जाने के लिए पाँच वर्ष के लिए निरर्हता पूर्ण रूप से अभिकथित अपचार/कदाचार के अननुपातिक है – निर्वाचित प्रतिनिधि को हटाने या निरर्हित किये जाने के गंभीर परिणाम होते हैं अतः उन्हें हटाया नहीं जाना चाहिए जब तक कि स्पष्ट प्रकरण न बनता हो – निर्वाचन आयोग का एवं एकल न्यायपीठ द्वारा पारित आदेश अपास्त – रिट अपील मंजूर। (अजय कुमार दोहर वि. म.प्र. राज्य) **(DB)…12**

Non-Recovery of Weapon – Effect **– Held – Mere non recovery of weapon would not falsify the entire prosecution case where there is ample unimpeachable evidence available. [Munna Singh Vs. State of M.P.]**

(DB)…127

का मूल्यांकन – अभिनिर्धारित – घटना बच्चों के बीच हाथापाई के एक छोटे से विवाद/मुद्दे पर हुई थी – घटना गुस्से के आवेश में घटित हुई जहाँ तैयारी, पूर्व–योजना या पूर्वचिन्तन का कोई संकेत मौजूद नहीं – केवल एक चोट पहुँची – घटना की प्रकृति एवं चोटें कारित करने का ढंग एवं यह तथ्य कि घटना अकस्मात क्षण की उत्तेजना में घटित हुई, को विचार में लेते हुये, प्रकरण धारा 304 भाग II की परिधि में आता है – धारा 302 के अन्तर्गत दोषसिद्धि अपास्त – न्याय के उद्देश्य की पूर्ति तब होगी यदि अपीलार्थीगण को धारा 304 भाग II के अन्तर्गत दोषसिद्ध किया जाता है एवं भुगताई जा चुकी 11 वर्ष 6 माह की अवधि का दण्डादेश दिया जाता है – अपील अंशतः मंजूर। (बिलावर वि. म.प्र. राज्य)

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***Penal Code (45 of 1860), Section 302 & 323 and Municipal Employees (Recruitment and Conditions of Service) Rules, M.P. 1968, Rule 9 & 10(2) – Moral Turpitude – Termination from Service* – Petitioner was convicted and sentenced u/S 302 IPC whereby he was terminated from service – In appeal, conviction and sentence u/S 302/34 was set aside and petitioner was convicted u/S 323/34 IPC, whereby he approached the department vide an application for his reinstatement, which was been dismissed – Held – From the conjoint reading of Rule 9 and 10(2) of the Rules of 1968, it is established that petitioner who is sentenced to one year rigorous imprisonment for an offence which do not involve moral turpitude, there cannot be any legal impediment in his reinstatement – Respondents directed to reinstate the petitioner from the date of dismissal of his application – Petition allowed. [Shambhu Khare Vs. State of M.P.] …*11**

दण्ड संहिता (1860 का 45), धारा 302 व 323 एवं नगरपालिका कर्मचारी (भर्ती तथा सेवा की शर्तें) नियम, म.प्र., 1968, नियम 9 व 10(2) – नैतिक अधमता – सेवा समाप्ति – याची को भा.द.सं. की धारा 302 के अंतर्गत दोषसिद्ध एवं दण्डादिष्ट किया गया जिससे उसकी सेवा समाप्त की गई थी – अपील में, धारा 302/34 के अंतर्गत दोषसिद्धि एवं दण्डादेश अपास्त किया गया तथा याची को भा.द.सं. की धारा 323/34 के अंतर्गत दोषसिद्ध किया गया था जिससे वह अपनी सेवा में बहाली हेतु आवेदन द्वारा विभाग के समक्ष गया, जिसे खारिज किया गया – अभिनिर्धारित – नियम, 1968 के नियम 9 व 10(2) को एकसाथ पढ़ने पर यह स्थापित होता है कि याची, जिसे एक ऐसे अपराध हेतु एक वर्ष के सश्रम कारावास से दण्डादिष्ट किया गया है जिसमें नैतिक अधमता शामिल नहीं है, तब उसकी सेवा में बहाली हेतु कोई विधिक बाधा नहीं – प्रत्यर्थीगण को याची के आवेदन की खारिजी की तिथि से बहाल किये जाने हेतु निदेशित किया गया – याचिका मंजूर। (शंभू खरे वि. म.प्र. राज्य) …*11**

victim suffered a fracture of Clavicle and also a head injury as skull was found to be fractured – Sufficient evidence to proceed against the petitioner – No illegality in framing the charge – Revision dismissed. [Hari Kishan Vs. State of M.P.] ...*7

दण्ड संहिता (1860 का 45), धारा 307 – आशय – चोट का स्वरूप – भा.द.सं. की धारा 307 के अंतर्गत आरोप विरचित किये जाने के विरूद्ध पुनरीक्षण – अभिनिर्धारित – निर्धारक प्रश्न, आशय या ज्ञान है, जैसा कि प्रकरण हो, और न कि चोट का स्वरूप – यदि पीड़ित ने मात्र छोटी चोट सहन की है, इसका लाभ प्राप्त करने के लिए हमलावर हकदार नहीं होगा – कोई विशिष्ट चोट कारित करने का आशय कारित चोट के स्वरूप से सदैव नहीं निकाला जा सकता, विशेष रूप से तब जबकि चोट शरीर के महत्वपूर्ण अंगों पर कारित की गई हो – अभिलेख प्रकट करता है कि पीड़ित ने हंसली का अस्थिभंग और सिर की चोट भी सहन की क्योंकि कपाल अस्थिभंग पाया गया था – याची के विरूध्द कार्यवाही हेतु पर्याप्त साक्ष्य – आरोप विरचित करने में कोई अवैधता नहीं – पुनरीक्षण खारिज। (हरिकिशन वि. म.प्र. राज्य) ...*7

***Penal Code (45 of 1860), Section 376 – Rape – Minor Girl – Acquittal – Appreciation of Evidence – Testimony of Prosecutrix* – Trial Court acquitted the accused on the ground that prosecution failed to produce the lady doctor who examined the prosecutrix and her evidence was necessary for corroboration of the testimony of prosecutrix – Held – It is not in dispute that at the time of incident, as per the ossification test conducted by the doctor, (PW-6), prosecutrix was below 15 years – Prosecutrix also stated that she was 12 years old – No question regarding her age was put forth by counsel of accused to the parents of prosecutrix, hence it was established that prosecutrix was a minor and under the age of 15 years and therefore no question of consent arises – Testimony of prosecutrix is in corroboration with FIR, statement of her parents and Investigating officer also and thus is unshaken and found to be trustworthy – No contradictions between her statement and FIR – FIR on the same day, thus no undue delay in FIR – No personal enmity between the family of prosecutrix and the accused – Trial Court wrongly evaluated the prosecution evidence and findings are based on presumptions and surmises – Trial Court's judgment set aside – Accused is found guilty and hereby convicted and sentenced for the offence u/S 376 IPC – Appeal allowed. [State of M.P. Vs. Siddhamuni] (DB)...121**

दण्ड संहिता (1860 का 45), धारा 376 – बलात्संग – अप्राप्तवय बालिका – दोषमुक्ति – साक्ष्य का मूल्यांकन – अभियोक्त्री का परिसाक्ष्य – विचारण न्यायालय ने अभियुक्त को इस आधार पर दोषमुक्त किया कि अभियोजन उस महिला चिकित्सक को

प्रस्तुत करने में विफल रहा जिसने अभियोक्त्री का परीक्षण किया था और उसका साक्ष्य, अभियोक्त्री के परिसाक्ष्य की संपुष्टि हेतु आवश्यक था – अभिनिर्धारित – यह विवादित नहीं कि चिकित्सक (अ.सा.–6) द्वारा किये गये अस्थिपरीक्षण के अनुसार घटना के समय अभियोक्त्री 15 वर्ष से कम की थी – अभियोक्त्री का भी कथन है कि वह 12 वर्ष की आयु की थी – उसकी आयु के संबंध में अभियुक्त के अधिवक्ता द्वारा अभियोक्त्री के माता–पिता से कोई प्रश्न नहीं पूछा गया था, अतः यह स्थापित किया गया था कि अभियोक्त्री अप्राप्तवय एवं 15 वर्ष से कम आयु की थी और इसलिए सम्मति का प्रश्न उत्पन्न नहीं होता – अभियोक्त्री का परिसाक्ष्य, प्रथम सूचना रिपोर्ट, उसके माता–पिता का कथन एवं अन्वेषण अधिकारी के भी कथन की संपुष्टि करता है और इस प्रकार स्थिर एवं विश्वसनीय पाया गया – उसके कथन एवं प्रथम सूचना रिपोर्ट के मध्य विरोधाभास नहीं – उसी दिन प्रथम सूचना रिपोर्ट, अतः प्रथम सूचना रिपोर्ट में अनुचित विलम्ब नहीं – अभियोक्त्री के परिवार एवं अभियुक्त के बीच व्यक्तिगत वैमनस्यता नहीं – विचारण न्यायालय ने अभियोजन साक्ष्य का गलत मूल्यांकन किया और उपधारणाओं एवं अनुमानों पर निष्कर्ष आधारित किया गया है – विचारण न्यायालय का निर्णय अपास्त – अभियुक्त को दोषी पाया गया और एतद् द्वारा भा.द.सं. की धारा 376 के अंतर्गत दोषसिद्ध एवं दण्डादिष्ट किया गया – अपील मंजूर। (म.प्र. राज्य वि. सिद्धमुनी) **(DB)…121**

Penal Code (45 of 1860), Section 376 and Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, (33 of 1989), Section 3(1)(xii) - Rape - Quashment of FIR **– Held - Though prosecutrix belonged to a scheduled caste, she was a mature and educated lady, worked in different organizations like NGO's and Insurance Companies - In the FIR as well as statements u/S 161 and 164 Cr.P.C., she concealed the fact of her earlier marriage which was in existence from 2007 and continued till 2012 when the decree of divorce was passed - From 2010 to 2012, she was in a live-in-relationship with the petitioner, knowingly that she continued to be a legally wedded wife from her earlier marriage and thus her sexual relationship with the petitioner was in nature of adulterous relationship - Due to her subsisting valid marriage, there was no question of any one being in a position to induce her into a physical relationship under an assurance of marriage thus contentions of prosecutrix is per se false and unacceptable - It was a relationship between two consenting adults for mutual sexual enjoyment without any commitment to marriage - Allowing the prosecution to continue would amount to abuse of the process of Court - FIR quashed and charges framed are set aside - Petition allowed. [Anant Vijay Soni Vs. State of M.P.] …203**

दण्ड संहिता (1860 का 45), धारा 376 एवं अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 3(1)(xii) – बलात्संग – प्रथम

दण्ड संहिता (1860 का 45), धारा 409, 420, 467, 468, 471, 120–B एवं भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 13(1)(d), एवं विशेष पुलिस स्थापना अधिनियम, म.प्र. (1947 का 17), धारा 3 – अन्वेषण – स्थानीय पुलिस की अधिकारिता – आरोप–पत्र का अभिखंडन – अभिनिर्धारित – एक बार आरोप–पत्र प्रस्तुत हो गया हो, मात्र इसलिए कि अन्वेषण एजेन्सी को मामले का अन्वेषण करने की अधिकारिता नहीं है, आरोप–पत्र अभिखंडित नहीं किया जा सकता क्योंकि यह कहना संभव नहीं है कि एक अविधिमान्य पुलिस रिपोर्ट पर संज्ञान प्रतिषिद्ध है एवं इसलिए शून्य है – अधिनियम में ऐसा कोई उपबंध नहीं है जो कि इस अधिनियम के अंतर्गत अपराधों का अन्वेषण केवल विशेष पुलिस स्थापना द्वारा तथा न कि स्थानीय पुलिस द्वारा किया जाना अपेक्षित करता हो – याचिका खारिज। (मनीष कुमार ठाकुर वि. म.प्र. राज्य)

(DB)…235

***Penal Code (45 of 1860), Section 420, 467, 468, 471, 120-B and Criminal Procedure Code, 1973 (2 of 1974), Amendment of 2007 – Retrospective Effect* – After taking cognizance by the JMFC, the case was committed to Sessions Court – Challenge to – Held – It is settled principle of law that the statutes dealing merely with matters of procedure are presumed to be retrospective unless such construction is textually inadmissible – Further held, it is also the law that proceedings or trials completed before the change of law in procedure are not reopened for applying the new procedure – In the present case, trial was not completed and therefore committal of case to the Sessions Court in terms of amendment will not render it illegal – No illegality in the impugned order – Revision dismissed. [Laxmi Thakur (Smt.) Vs. State of M.P.]** **…199**

दण्ड संहिता (1860 का 45), धारा 420, 467, 468, 471, 120–B एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), 2007 का संशोधन – भूतलक्षी प्रभाव – न्यायिक मजिस्ट्रेट प्रथम श्रेणी के द्वारा संज्ञान लेने के पश्चात्, प्रकरण सत्र न्यायालय को उपांतरित किया गया था – को चुनौती – अभिनिर्धारित – यह विधि का सुस्थापित सिद्धान्त है कि मात्र प्रक्रिया के मामलों से संबंधित कानूनों को भूतलक्षी उपधारित किया जाएगा जब तक कि ऐसा अभिप्राय पाठ की दृष्टि से अग्राह्य न हो – आगे अभिनिर्धारित, यह भी विधि है कि प्रक्रिया विधि में परिवर्तन होने से पहले पूर्ण हुई कार्यवाहियों या विचारणों को नई प्रक्रिया लागू करने हेतु फिर से शुरू नहीं किया जाता है – वर्तमान प्रकरण में, विचारण पूर्ण नहीं हुआ था एवं इसलिए संशोधन के रूप में प्रकरण को सत्र न्यायालय को उपांतरित किया जाना, इसे अवैध नहीं बनायेगा – आक्षेपित आदेश में कोई अवैधता नहीं – पुनरीक्षण खारिज। (लक्ष्मी ठाकुर (श्रीमती) वि. म.प्र. राज्य)

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विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 41 एवं सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 11 – याची/प्रतिवादी द्वारा सिविल प्रक्रिया संहिता के आदेश 7 नियम 11 के अन्तर्गत प्रस्तुत आवेदन की खारिजी के विरूद्ध पुनरीक्षण – करार के विनिर्दिष्ट पालन का दावा किये बिना आज्ञापक व्यादेश हेतु वाद – अभिनिर्धारित – करार के विनिर्दिष्ट पालन का दावा किये बिना मात्र नकारात्मक व्यादेश हेतु एक वाद पोषणीय नहीं है – जब वाद स्वयं पोषणीय नहीं है, प्रथम दृष्टया प्रकरण का प्रश्न विद्यमान नहीं होता – याची/प्रतिवादी द्वारा आदेश 7 नियम 11 के अन्तर्गत प्रस्तुत आवेदन मंजूर एवं प्रत्यर्थीगण/वादी द्वारा प्रस्तुत सिविल वाद खारिज – पुनरीक्षण मंजूर। (गनपत वि. अश्वनी कुमार सिंह)

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***The Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act (34 of 2003), Sections 7, 8, 9 & 10 – Conflict with the Act of 2006* - Held – Act of 2003 has no conflict with provisions of Act of 2006 - Even though the Act of 2003 specifically deals with Tobacco Products but the same is an additional legislation apart from the Act of 2006 which is to be followed by the companies dealing in Tobacco Products used for chewing – In case of adulteration, Act of 2006 will have to be roped in for prosecuting the delinquent companies or individual - In cases of misbranding, stipulations mentioned in both the Acts are to be strictly adhered to - Both Acts have independent penal provisions and shall have concurrent application with respect to tobacco products used for chewing - No illegality committed by the Trial Court – Application dismissed. [Manoj Kumar Jain Vs. State of M.P.] ...240**

सिगरेट और अन्य तंबाकू उत्पाद (विज्ञापन का प्रतिषेध और व्यापार तथा वाणिज्य, उत्पादन, प्रदाय और वितरण का विनियमन) अधिनियम (2003 का 34), धाराएँ 7, 8, 9 एवं 10 – 2006 के अधिनियम के साथ विरोध – अभिनिर्धारित – 2003 के अधिनियम का 2006 के अधिनियम के उपबंधों के साथ कोई विरोध नहीं है – यद्यपि 2003 का अधिनियम विनिर्दिष्ट रूप से तंबाकू उत्पादों से संबंधित है परन्तु उक्त, 2006 के अधिनियम के अलावा एक अतिरिक्त विधान है जिसका पालन, चबाने के उपयोग में लाये जाने वाले, तंबाकू उत्पादों में व्यवहार करने वाली कंपनियों द्वारा किया जाना है – अपमिश्रण की दशा में, अपचारी कम्पनियों या व्यक्ति को अभियोजित करने के लिए 2006 के अधिनियम का आश्रय लिया जायेगा – मिथ्या छाप के प्रकरणों में, दोनों अधिनियमों में उल्लिखित शर्तों का दृढ़ता से पालन किया जाना चाहिए – दोनों अधिनियमों के स्वतंत्र दाण्डिक उपबंध हैं तथा चबाने के उपयोग में लाए जाने वाले तंबाकू उत्पादों के संबंध में समवर्ती रूप से लागू होंगे – विचारण न्यायालय द्वारा कोई अवैधता कारित नहीं हुई – आवेदन खारिज। (मनोज कुमार जैन वि. म.प्र. राज्य)

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THE INDIAN LAW REPORTS M.P. SERIES, 2018

(Vol.-1)

JOURNAL SECTION

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

MADHYA PRADESH ACT

No. 1 OF 2018

THE MADHYA PRADESH CO-OPERATIVE SOCIETIES (AMENDMENT) ACT, 2017

[Received the assent of the Governor on the 4th January, 2018; assent first published in the "Madhya Pradesh Gazette (Extra-ordinary)", dated the 6th January, 2018].

An Act further to amend the Madhya Pradesh Co-operative Societies Act, 1960.

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

1. Short title and commencement. (1) This act may be called the Madhya Pradesh Co-operative Societies (Amendment) Act, 2017.

(2) It shall come into force on the date of its publication in the Madhya Pradesh Gazette.

2. Amendment of Section 2. In Section 2 of the Madhya Pradesh Co-operative Societies Act, 1960 (No. 17 of 1961), for clause (a-ii), the following clause shall be substituted, namely:-

"(a-ii) "Administrator" means any Government Servant, not below the rank of class III executive or any person eligible for election as a member of the Board of Directors of Society or same class of Society, who has been appointed as Administrator by the Registrar under the provisions of this Act, to conduct the business of the Society and who shall work under the control and guidance of the Registrar;".

3. Repeal and saving. (1) The Madhya Pradesh Co-operative Societies (Amendment) Ordinance, 2017 (No. 5 of 2017) is hereby repealed.

(2) Notwithstanding the repeal of the said Ordinance, anything done or any action taken under the said Ordinance shall be deemed to have been done or taken under the corresponding provision of this Act.

MADHYA PRADESH ACT

No. 2 OF 2018

THE MADHYA PRADESH NAGARPALIK VIDHI (SANSHODHAN) ADHINIYAM, 2017

[Received the assent of the Governor on the 4th January, 2018; assent first published in the"Madhya Pradesh Gazette (Extra-ordinary)", dated the 6th January, 2018].

An Act further to amend the Madhya Pradesh Municipal Corporation Act, 1956 and the Madhya Pradesh Municipalities Act, 1961.

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

1. Short title. This Act may be called the Madhya Pradesh Nagarpalik Vidhi (Sanshodhan) Adhiniyam, 2017.

PART I

AMENDMENT TO THE MADHYA PRADESH MUNICIPAL CORPORATION ACT, 1956 (No. 23 OF 1956)

2. Amendment to the Madhya Pradesh Act No. 23 of 1956. In the Madhya Pradesh Municipal Corporation Act, 1956 (No. 23 of 1956), in section 301, after sub-section (4), the following new sub-section shall be added, namely:-

"(5) In respect of cases, where building permission has been granted as per the provisions of sub-section (5) of section 294, by the registered and authorised architect or structural engineer, such architect or structural engineer shall be empowered to issue completion certificate and permission to occupy for such building after ensuring the compliance of statutory provisions and conditions of building permission. The copy of completion certificate and permission to occupy issued under this sub-section shall be provided to the Commissioner at his office within seven days.".

PART II

AMENDMENT TO THE MADHYA PRADESH MUNICIPALITIES ACT, 1961 (No. 37 OF 1961)

3. Amendment to the Madhya Pradesh Act No. 37 of 1961. In the Madhya Pradesh Municipalities Act, 1961 (No. 37 of 1961), in section 191, after sub-section (2), the following new sub-section shall be added, namely :-

"(3) In respect of cases, where building permission has been granted as per the provisions of sub-section (3A) of section 187, by the registered and authorised architect or structural engineer, such architect or structural engineer shall be empowered to issue completion certificate and permission to occupy for such building after ensuring the compliance of statutory provisions and conditions of building permission. The copy of completion certificate and permission to occupy issued under this sub-section shall be provided to Council at his office within seven days.".

4. Repeal and saving. (1) The Madhya Pradesh Nagarpalik Vidhi (Sanshodhan) Adhyadesh, 2017 (No. 6 of 2017) is hereby repealed.

(2) Notwithstanding the repeal of the said Ordinance, anything done or any action taken under the said Ordinance shall be deemed to have been done or taken under the corresponding provision of this Act.

MADHYA PRADESH ACT

No. 5 OF 2018

THE MADHYA PRADESH LAND REVENUE CODE (AMENDMENT AND VALIDATION) ACT, 2017

[Received the assent of the Governor on the 4th January, 2018; assent first published in the "Madhya Pradesh Gazette (Extra-ordinary)", dated the 18th January, 2018].

An Act further to amend the Madhya Pradesh Land Revenue Code, 1959 and its validation with retrospective effect.

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

1. Short title. This Act may be called the Madhya Pradesh Land Revenue Code, (Amendment and Validation) Act, 2017.

2. Amendment of Section 15. In section 15 of the Madhya Pradesh Land Revenue Code, 1959 (No. 20 of 1959) (hereinafter referred to as the principal Act), for sub-section (1), the following sub-section shall be substituted, namely :-

"(1) The State Government may appoint one or more Additional Commissioner in a division.".

3. Validation. The amendment made in the principal Act by section 2 shall be deemed to have been made with effect from the 1st day of July, 2017, and

accordingly any action or thing taken or done or purporting to have been taken or done under the principal Act on or after the said date and before the commencement of this Act, shall, notwithstanding anything contained in any judgment, decree or order of any court, tribunal or other authority, be deemed to be, and to have always been, for all purposes, as validly and effectively taken or done as if the said amendment had been in force at all material times.

AMENDMENT IN THE MADHYA PRADESH LOK SEVA (ANUSUCHIT JATIYON, ANUSUCHIT JAN JATIYON AUR ANYA PICHHADE VARGON KE LIYE ARAKSHAN)

RULES, 1998

[Notification published in Madhya Pradesh Gazette (Extra-ordinary), dated 16th January, 2018 page no. 56]

No. F. 6-1-2002-RC-I.- In exercise of the powers conferred by Section 13 of the Madhya Pradesh Lok Seva (Anusuchit Jatiyon, Anusuchit Jan Jatiyon Aur Anya Pichhade Vargon Ke Liye Arakshan) Adhiniyam, 1994 (No. 21 of 1994), the State Government, hereby, makes the following further amendment in the Madhya Pradesh Lok Seva (Anusuchit Jatiyon, Anusuchit Jan Jatiyon Aur Anya Pichhade Vargon Ke Liye Arakshan) Rules, 1998 namely :-

AMENDMENT

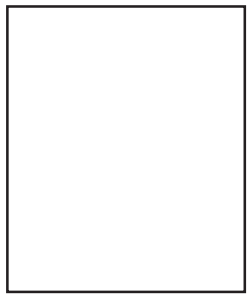
In the said rules, for rule 4-B, the following rule shall be substituted namely :-

"4-B. **Special provisions for primitive tribes.-** If an applicant belonging to the Sahariya/Saharia Primitive tribe of districts Sheopur, Morena, Datia, Gwalior, Bhind, Shivpuri, Guna and Ashok Nagar, Baiga primitive tribe of districts Mandala, Dindori, Shahdol, Umaria, Balaghat and Anuppur and Bhariya primitive tribe of Tamia block of district Chhindwara, applies for the post of Samvida Shala Shikshak or any post of class III/IV or Forest Guard (Executive) and possesses the minimum prescribed qualification for that post, then he shall be appointed on the said post without adopting the recruitment procedure."

By order and in the name of the Governor of Madhya Pradesh,

K.K. KATIA, Addl. Secy.

FAREWELL



HON'BLE MR. JUSTICE VED PRAKASH SHARMA

Born on January 2, 1956 at Agra. Did B.Sc., LL.B and joined M.P. State Judicial Services as Civil Judge Class II on April 16, 1983 at Gwalior. Was promoted to Higher Judicial Services on June 3, 1996. Was granted Selection Grade Scale on June 1, 2002 and Super Time Scale on January 2, 2012. Worked at Gwalior, Pichhore, Jora, Raipur (now Chhattisgarh) and Khandwa. Also served as Dy. Commissioner (Bhopal Gas Commission). Held the post of Additional Director and thereafter Director of the State Judicial Academy between May 2002 to June 2007. Has delivered lectures and speeches in various training programmes on varied subjects in different institutions including National Judicial Academy, Bhopal and National Law Institute University, Bhopal. From February, 2009 to March, 2010 served as Professor at the National Judicial Academy, Bhopal and thereafter, as District & Sessions Judge, Sehore. From March 2010 to March 2011, worked as Principal Registrar (Judl.) and thereafter, from April 2013 till 31.01.2016 as Registrar General of the High Court of M.P. Was Chairman, M.P. State Co-operative Tribunal, Bhopal from 01.02.2016 till elevation.

Elevated as Additional Judge of the High Court of Madhya Pradesh and took oath on 07.04.2016. Was appointed on 01-01-2018 as Judge of the High Court of M.P. and demitted office on 01-01-2018.

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

FAREWELL OVATION TO HON'BLE MR. JUSTICE VED PRAKASH SHARMA, GIVEN ON 21-12-2017, AT THE HIGH COURT OF M.P., INDORE, BENCH INDORE.

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

We have gathered here today to bid farewell to Justice Ved Prakash Sharma, who is demitting the Office in a few days, after rendering distinguished service to this prestigious constitutional Office for about twenty months. I can say, without any hesitation, that with the retirement of Justice Sharma, the Bench and Bar of Madhya Pradesh High Court will be loosing a good and illustrious Judge. A judge is required not only to faithfully interpret and apply law but it is equally essential for him to be conscious of the social realities of the world and to decide the cases fairly and in an unbiased manner. In this respect, Justice Sharma has made a valuable contribution in the form of his extremely balanced judgments.

To recount, Justice Shri Ved Prakash Sharma was born on 2nd January, 1956 at Agra (UP). After obtaining B.Sc. Degree from Kanpur University and LL.B. Degree from Lucknow University, he joined Madhya Pradesh State Judicial Service as Civil Judge, Class-II on April 16, 1983 at Gwalior and was promoted to Higher Judicial Service on June 3, 1996. He was granted Selection Grade on June 1, 2002 and thereafter Super Time Scale on January 2, 2012. He also served as Deputy Commissioner (Bhopal Gas Commission). He held the post of Additional Director and thereafter Director of the State Judicial Academy between May, 2002 to June, 2007. Being a good Orator, he has delivered Lectures and Speeches in various Training Programmes on varied subjects in different Institutions including National Judicial Academy, Bhopal and National Law Institute University, Bhopal. From February, 2009 to March, 2010, he served as Professor at the National Judicial Academy, Bhopal and thereafter as District and Sessions Judge. From March, 2010 to March, 2011, he worked as Principal Registrar (Judicial) and thereafter from April, 2013 till 31.01.2016 as Registrar General of the High Court of Madhya Pradesh. In July, 2015, he attended International Conference on Judicial Governance held at Singapore organized by Singapore Supreme Court, State Courts, Singapore and Administrative College, Singapore. He has authored a book 'LEGAL ISSUES – AN ANTHOLOGY' a compilation of articles on various legal issues. He also authored a book in Hindi on "Panchayat Raj in Madhya Pradesh",

published by Madhya Pradesh Legal Services Authority. He was appointed as Chairman of Madhya Pradesh Cooperative Tribunal, Bhopal from 01.02.2016 till his elevation.

Looking to the ability, judicial approach, deep knowledge of law and his overall performance, he was elevated as Judge of High Court of Madhya Pradesh on 7th April 2016.

A Judge entrusted with the task of administering justice should be bold and feel fearless while acting judicially and giving expression to his views and constructing his judgment or order. The availability of such fearlessness is essential for the maintenance of judicial independence. I can say this without a doubt that Justice Sharma is a perfect example of this.

The judicial approach of Justice Ved Prakash Sharma is excellent and is well known to all of you. As a Judge of this Court, Justice Sharma rendered a number of landmark judgments having far reaching implications. He is well known for his sound knowledge of law and the legal acumen. He is uncompromising, firm and unbending when it comes to upholding the rule of law and independence of judiciary. He has maintained highest standards of judicial conduct and behaviour. He has a very pleasing personality. All those who have had an opportunity to coming into close contact of him, have held him in high esteem and regard, because of his simplicity, modesty and integrity.

Justice Sharma's intelligence is reflected by the series of cases that have been decided by him, not only does Justice Sharma possess sound knowledge of law but he is also courteous and polite which makes the lawyers come out with their best in the course of arguments. It is through his loyalty to ethics and commitment to the cause of upholding the nobility of justice administration system, he has secured a remarkable reputation not just for himself but for this institution as well.

Invincible independence, originality of thought, a firm belief in ideals and uniqueness in expressions are the hallmark of his personality as a Judge. He is a Judge with gentleness, modesty with dignity and firmness with kindness.

His contribution to the legal fraternity is an asset and he will be remembered always for his deeds. His retirement as a Judge of High Court will be a great loss for all of us.

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

On behalf of my brother Judges and myself, I take this opportunity to extend my gratitude to Justice Sharma for his distinguished contribution to this institution. His lordship will be remembered through his judgments and through his dedication to the cause of Justice.

On the eve of his demitting the Office of the Judge of the High Court, we all wish him every success and long life with the best health and happiness in all times to come.

Thank you,

Shri Manoj Dwivedi, Additional Advocate General, High Court of M.P., Bench Indore bids farewell :-

We all have assembled here to bid farewell to Hon'ble Shri Justice Ved Prakash Sharma Sahab and convey our greetings for his future endeavours.

A judge's work should always reflect the judicial independence which is essential to protect the system and to give life to the words of Constitution. Hon'ble Justice V.P. Sharma has always stood up to glorify the judiciary.

Nyaya literally means "rules", method or judgment. Methodical approach is what is required for the systematic development of the theory of logic. Hon'ble Justice Shri V.P. Sharma has always had a methodical approach whenever he was to adjudicate the matters.

Returns righteous people what is theirs and deprive sinners what isn't theirs is the essence to adjudicate, which time and again has been said in many ways and in many words and I think both Bench and Bar would agree that Hon'ble Shri Justice V.P. Sharma has lived these words to meet the ends of Justice.

It is a difficult and tedious job which has been entrusted to the judiciary not only to protect life and liberty but to keep the system as whole on right track which needs hard work, patience and skills.

He has the skills required for perception, comparison of valid means to reach to conclusion i.e. to draw inference. He as a Judge has always stood to identify the problem, inconsistencies, doubts and errors. He with his vast experience always had a perception to find deception.

Hon'ble Justice Shri V.P. Sharma shall not be available to this Bench and Bar from tomorrow as a Judge but My lord shall always occupy a place in heart of Bar and Bench.

It is the contribution he has made to the judicial system for last more than 3 decades which had added to the glory of Judiciary.

In a short span Shri Justice Ved Prakash Sharma sahib became a popular Judge. He also has dealt with almost all types of cases brought before him irrespective of their nomenclature.

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

I believe life comes in chapters so its not the end but beginning of new horizon, I, on behalf of the state, all my colleagues at AG office along with the staff wish him well in his years of retirement ahead and all his future endeavours.

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

आज हम सभी माननीय न्यायमूर्ति श्री वेद प्रकाश शर्मा साहब के सम्मान में आयोजित विदाई समारोह में उपस्थित हुए है।

विदाई के क्षण हमेशा वेदना के होते हैं। आज न्यायमूर्ति श्री शर्मा साहब द्वारा अभिभाषकों के साथ किया गया व्यवहार, सद्भावना एवं बड़प्पन चलचित्र की तरह हमारी आँखों के सामने एक बार पुनः साकार हो रहा है। एक न्यायमूर्ति को कैसा होना चाहिये, इसके आदर्ष उदाहरण की तरह न्यायमूर्ति हमारे सामने विराजमान है। माननीय न्यायमूर्ति श्री वेद प्रकाष शर्मा साहब का जन्म 02 जनवरी 1956 में हुआ था। माननीय महोदय ने सन् 1975 में कानपुर विश्वविद्यालय, उत्तरप्रदेश से उच्च शिक्षा व विधि की शिक्षा हासिल की। माननीय महोदय ने सन् 2007 से ज्यूडिशियल सर्विस में अपनी उच्च स्तरीय कुशलता और कार्य के प्रति समर्पण से कई विशेष उपलब्धियां हासिल की। महोदय सर्वप्रथम जिला एवं सत्र न्यायालय, ग्वालियर में स्पेशल जज महोदय के रूप में पदस्थ रहे,

सन् 2008 से 2009 तक महोदय मध्यप्रदेश उच्च न्यायालय में ओ.एस.डी. के पद पर रहे। सन् 2009 से 2010 तक नेशनल ज्यूडिशियल अकादमी में प्रोफेसर के पद पर पदस्थ रहे। माननीय महोदय ने सन् 2009 में **''संकलन में कानूनी मुद्दे''** के विषय पर बुक का प्रकाशन सुविधा लॉ हाऊस प्रा.लि., भोपाल के माध्यम से भी किया।

सन् 2010 से 2011 में जिला एवं सत्र न्यायाधीश के रूप में जिला कोर्ट, सिहोर पदस्थ किये गये। सन् 2011 से 2013 तक मध्यप्रदेश उच्च न्यायालय में प्रिंसिपल रजिस्ट्रार (ज्यूडिशियल) के पद पर पदस्थ रहे। सन् 2013 से 2016 तक मध्यप्रदेश उच्च न्यायालय, जबलपुर में रजिस्ट्रार जनरल के पद पर भी पदस्थ रहे।

माननीय महोदय को जुलाई 2015 में माननीय सर्वोच्च न्यायालय के मुख्य न्यायाधिपति महोदय के आदेष पर स्पेषल ज्यूडिशियल गवर्नन्स कान्फ्रेंस हेतु सिंगापुर भेजा गया। उसके पश्चात् माननीय महोदय ने दिनांक 07.04.2016 को मध्यप्रदेश उच्च न्यायालय में न्यायमूर्ति का पद ग्रहण किया एवं माननीय महोदय ने अपने कोर्ट में कई प्रकरणों मे पक्षकारों के न्यायहित में न्यायदान प्रदान किया व माननीय महोदय की सबसे प्रमुख विशेषता यह रही कि उनके कोर्ट में भले ही एक दिन मे 200 से 250 प्रकरण लगे हों श्रीमान महोदय सदैव ही अपने प्रकरणों की पूरी सुनवाई करके ही बोर्ड छोड़ते थे।

माननीय महोदय अपने न्यायालयीन कार्य के अतिरिक्त खाली समय में कविता लिखने एवं संगीत सुनने में रूचि रखते हैं एवं माननीय महोदय को कविता लिखने के साथ ही पुराने वाद्य यंत्रो को बजाने व सुनने का भी बहुत अधिक शौक है।

माननीय महोदय ने अल्प समय में ही कई महत्वपूर्ण प्रकरणों में मील के पत्थर साबित होने वाले निर्णय दिये। आपका व्यवहार सदैव सकारात्मक और सहयोगात्मक रहा उसके लिये हाईकोर्ट बार एसोसिएशन, इंदौर की कार्यकारिणी एवं अधिवक्ता सदस्य साथीगण तहेदिल से आपका धन्यवाद प्रेषित करते हैं। न्यायमूर्ति शर्मा साहब के साथ व्यतीत किया गया समय सदैव के लिये स्मरणीय रहेगा।

आपके आभारी है और आपके सेवानिवृत्ति के बाद के जीवन के खुशहाल, स्वस्थ और समृद्ध होने की कामना करते हैं। आपके साथ के पल हमारे ह्रदय में हमेशा संग्रहित होकर रहेंगे। धन्यवाद महोदय।

आपके लिये उच्च न्यायालय अभिभाषक संघ आपको अपने सभी सदस्यों की तरफ से अपनी सद्भावना प्रेषित करता है। हमारी सद्भावना है कि आप यहाँ से सेवानिवृत्त होने के पश्चात् और अधिक सक्रिय जीवन जियें तथा न्याय क्षेत्र में अपनी अलग भूमिका में महत्वपूर्ण रोल अदा करें। आपकी रूचि के अनुरूप आपका जीवन संगीतमय व साहित्यमय हो हमारी ढ़ेर सारी शुभकामनायें।

आपके सम्मान में कुछ शब्द :–

आप चले जाओगे पर मेरे पास रह जाएगी,
प्रार्थना की तरह और अदम्य।
आपकी उपस्थिति छंद की तरह गूँजता
आप के पास होने का अहसास।
आप चले जाओगे।।

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

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

माननीय न्यायमूर्ति श्री वेदप्रकाश जी शर्मा साहब का जन्म 02 जनवरी 1956 को आगरा उत्तर प्रदेश में हुआ। आपने बी.एस.सी., एल.एल.बी. की उपाधि अर्जित करने के पश्चात 16 अप्रैल 1983 में व्यवहार न्यायाधीष वर्ग–2 के रूप में राज्य न्यायिक सेवा में प्रवेश किया। आपने मध्यप्रदेश उच्च न्यायालय में रजिस्ट्रार जनरल के रूप में पदस्थ रहते हुये कार्य किया। दिनांक 07 अप्रैल, 2016 को म.प्र. उच्च न्यायालय में न्यायाधिपति के पद पर आसीन हुए। आपने प्रदेश की विभिन्न अदालतों सहित माननीय उच्च न्यायालय में अपनी कार्यशैली, शालीनता, सादगी व निर्भीकता से न्यायदान कर अपनी एक पहचान बनाते हुए सभी दायित्वों का आपके द्वारा सफलतापूर्वक निर्वहन किया गया।

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

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

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

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

धन्यवाद सहित।

Shri Deepak Rawal, Asstt. Solicitor General, High Court of M.P., Indore, bids farewell:-

आज हम सब माननीय न्यायमूर्ति श्री वेद प्रकाष शर्मा साहब के सेवानिवृत्ति के अवसर पर एकत्रित हुए हैं।

रिटायरमेंट हर इंसान की जिन्दगी का वह अवसर होता है, जब इंसान अपनी जिंदगी में एक सुनहरे पल को छोड़ देता है जिस पल के साथ उसने अपनी जिंदगी सँवारी हो या यूँ कहें कि रिटायरमेंट के वक्त व्यक्ति एक आंख से रोता है तो दूसरी आंख से हँसता भी है, उसे दुख होता है एक परिवार को छोड़कर जाने का, वहीं उसे खुशी होती है अपने परिवार के लिये सदैव उपलब्ध रहने की।

मेरे पूर्व, माननीय प्रशासनिक न्यायमूर्ति श्री पी.के. जायसवाल साहब एवं श्रीमान् मनोज द्विवेदी साहब व हाईकोर्ट बार के अध्यक्ष श्री अनिल ओझाजी ने अपने कथन में जो परिचय श्री शर्मा साहब का दिया है उसमें सहभागी होते हुये मैं कहना चाहूंगा कि माननीय शर्मा साहब का जन्म दिनांक 02 जनवरी, 1956 को हुआ एवं अपना शैक्षणिक सत्र पूर्ण होने के उपरान्त उन्होंने 16 अप्रैल, 1983 से न्यायिक सेवा में प्रवेष कर न्यायिक जगत को लगभग 34 वर्षों तक अपनी सेवाएं दी जिसमें कई वर्षों तक उन्होंने नेशनल ज्यूडिशियल एकेडमी भोपाल में पदस्थ रहते हुये कई न्यायधीशों को भविष्य के लिये तैयार किया, साथ ही बतौर न्यायाधीश काम करते हुए भी आपने अपने ज्ञान से कई अधि ावक्ताओं को भी न्यायिक सेवाओं के लिये तैयार किया।

माननीय न्यायमूर्ति श्री वेद प्रकाश शर्मा साहब ने 07 अप्रैल 2016 को न्यायमूर्ति के रूप में उच्च न्यायालय में शपथ लेने के पूर्व कई वर्षों तक बतौर रजिस्ट्रार एवं रजिस्ट्रार जनरल रहते हुए न्यायिक जगत को असीमित योगदान दिया और आज जो हम न्याय प्रकरणों की सुनवाई 2 से 5 दिन के अन्दर होना देख रहे हैं तो उसमें श्री शर्मा साहब का बड़ा योगदान है। कहने का तात्पर्य यह है कि कम्प्यूटर युग में इस उच्च न्यायालय को अगर स्थापित करने में कोई महत्वूपर्ण नाम है तो वह माननीय न्यायमूर्ति श्री वेद प्रकाश शर्मा साहब का है।

माननीय न्यायमूर्ति श्री वेद प्रकाश शर्मा साहब का बतौर न्यायमूर्ति हम लोगों को या इस न्यायिक जगत को बहुत कम समय के लिये ही अवसर प्राप्त हुआ लेकिन इस लगभग डेढ़ वर्ष में ही उन्होंने अपने सामर्थ्य से अधिक हम लोगों को दिया है।

आज जबकि माननीय न्यायमूर्ति श्री वेद प्रकाश शर्मा साहब हम लोगों के बीच बतौर न्यायमूर्ति अन्तिम दिवस के लिये उपलब्ध हैं, ऐसे समय पर उनके लिये मैं चार पंक्ति कहना चाहता हूँ।

'कुछ लोग दिल पर इस तरह असर कर जाते हैं
टूटे हुए शीशों में भी साबुत नजर आते हैं
मिलते तो हैं घड़ी भर के लिये,
मगर दिल में उतर जाते हैं'

माननीय न्यायमूर्ति श्री वेद प्रकाश शर्मा साहब ने अपने बतौर न्यायमूर्ति रहते हुये कई निर्णय दिये हैं जो कानून की किताबों में हमेशा के लिये बतौर नजीर दर्ज हो गये, जो आने वाले कई वर्षों तक न्यायिक जगत को मार्गदर्शन प्रदान करते रहेंगे। श्री शर्मा साहब ने प्रकरणों की सुनवाई के दौरान जूनियर हो या सीनियर सभी अधिवक्ताओं के साथ समान व्यवहार किया वह किसी चेहरे को देखकर अपने फैसले निश्चित नहीं करते थे अपितु प्रकरण को देखते हुए निर्णय किया करते थे। उनकी कोर्ट में बहस करने में जूनियर अधिवक्ता भी अपनी बात रखने में कभी भी संकोच या डर महसूस नहीं करता था। अधिवक्ता की गलती पर श्री शर्मा साहब ने कभी भी झुंझलाहट प्रकट नहीं की अपितु उसकी गलती को अपनी ओर से सुधारने का ही प्रयास किया। उनकी सेवानिवृति से इन्दौर बार को तो अपूर्णीय क्षति होना ही है साथ ही न्यायिक जगत को भी एक बड़ी क्षति होना है जिसकी भरपाई निकट भविष्य में होना प्रतीत नहीं हो रही है।

मैं अपनी ओर से एवं भारत सरकार की ओर से माननीय न्यायमूर्ति श्री वेद प्रकाश शर्मा साहब को उनके उज्जवल भविष्य की शुभकामना देता हूँ साथ ही उनके उत्तम स्वास्थ्य की कामना भी करता हूँ व परमपिता परमेश्वर से प्रार्थना करता हूँ कि उनकी हर ख्वाईश पूरी हो व सेवानिवृति के उपरान्त वह अपने परिवार को वह सब खुशियाँ प्रदान कर पायें जो न्यायिक परिवार को समय देने के कारण वह अपने परिवार को नहीं दे पाये हैं।

Farewell speech delivered by Hon'ble Mr. Justice Ved Prakash Sharma :-

At the very outset I would like to place on record my deepest sense of gratitude to the esteemed speakers who primarily because of their affection have spoken kind words and have very generously showered praise upon me.

Well, proverbially, it has been said that 'time and tide wait for none'. Though it is really very hard to say 'Good Bye'; but today it happens to be my turn to say 'goodbye' to all of you, as a Judge of this Court. It was on 7th of April, 2016 that I was administered oath of the Office of the Judge of this Court – a Court, which has a glorious past and a rich legacy. Since then, time passed away very quickly.

Today, when I speak before all of you, I feel a bit nostalgic about the long and arduous journey undertaken by me and the path traversed in this journey. No wonder, it spreads to the prime part of my life covering a span of almost 35 years. Throughout these years, I had been of the view that 'justice' is the greatest virtue and as the saying goes Bar and the Bench, being the two wheels of the chariot of justice, play a meaningful and significant role in dispensation of justice. In that sense, I feel little elated for having been part of this process. As a matter of fact, it has given meaning to my life and a sense of fulfillment to me.

I must admit with all humility at my command that being part of this great institution, was indeed a great experience and honour to me. Of course, I firmly believe that it could so happen because of the blessings of God, blessings of my parents, who are no more, and love and affection of my family members, friends and well wishers.

On this occasion I would like to remember with deep reverence Late Shri Umakant Shrivastava a distinguished lawyer- a member of Oudh Bar, Lucknow, and a doyen in the field of law, under whose able guidance I learned elementary lessons of advocacy. The value system which I got inculcated in those initial years throughout enabled me to keep my head up even in most challenging situations. I must say that I could never have wished for a better Guru, one, who treated me with compassion, consideration and generosity.

As you know, I have had a brief tenure here at Indore, but I have really enjoyed every minute of my work on the Bench. What has made it so pleasant has been my relations with members of the Bar and the quality assistance rendered by them which helped me in acquiring deeper knowledge and understanding of law. Well, as I think, I throughout remained a keen learner and each one of you, one way or the other, helped me in fathoming new concepts and ideas from the unfathomable ocean of law. An enthralling and captivating aspect which always kept my interest alive in the 'dynamics of law' is the fact that in discharge of my duties, each day, I came across with new ideas, approaches and perspectives about many a legal concepts which otherwise appear to be stale, ordinary and of routine nature. This churning process can be said to be the greatest contribution of the Bar in the growth and development of law, which is perceived to be organic.

Frankly speaking, difference of opinion on legal and academic issues apart, something not unusual in intellectual arena, but then I genuinely believe that overall I enjoyed your love, affection and last but not the least your trust and confidence in my working which happens to be the greatest asset for a Judge.

My esteemed brothers at the bench were always generous and kind to me in providing valuable guidance and share their rich experiences at times when the same was most needed. Their helping attitude enabled me to discharge my duties in a confident manner. I express my deep sense of gratitude to Hon'ble Justice Hemant Gupta, the Chief Justice, Hon'ble Justice P.K. Jaiswal, Administrative Judge and other companion Judges and hope that I will continue to enjoy their love and affection in years to come.

On this occasion, I would also like to pay utmost regards to Hon'ble Justice R.V. Raveendran and Hon'ble Justice A.K. Patnaik, both Former Judges of the Supreme Court, Hon'ble Justice S.A. Bobde and Hon'ble Justice A.M. Khanwilkar, both Sitting Judges of the Supreme Court under whom I had privilege to work.

Having headed the Registry for almost three years, I am aware of the sensitive nature of responsibilities to be shouldered by officials of the Registry. I would like to express my fullest appreciation to Principal Registrar Shri Tarkeshwar Singh, Registrar Shri V.B. Singh and other officials and staff of the Registry for discharging their duties in a most befitting manner and rendering quality assistance in running the court in a hassle free manner. I am also grateful to Dr. Rajesh Solanki and his colleagues for rendering advice and support with regard to my health issues.

Before I conclude, I would like to express my sincere thanks to my wife Smt. Arti Sharma, who has always been a source of strength to me. In most critical situations, she offered meaningful support and advise to me. I would also like to appreciate the support provided by my daughter, my son-in-law, my son and my daughter-in-law, who, as a matter of fact, never bothered me about their own problems and thus allowed me to have more time for my work. I also express my gratitude to my personal staff including Private Secretary – Mr. Soumya Ranjan Dalai, Mr. Alok Gargav, Smt. Sumathi Jagdeeshan and Mr. Santosh Tiwari and Court Reader Shri R.K. Mehta, who have diligently worked to ensure that I can discharge my judicial duties in a prompt and efficacious manner.

I have been asked by few of my friends as to what I am going to do in the next inning of my life. Well, I have a lot of things in my mind. To narrate a few, I will travel to different places to which I always wanted to be around; I am going to read books that have been waiting on my must read list for years. I will visit art galleries, will enjoy music and will spend more quality time with my family and friends. Briefly put, I plan to lead a fulfilled, enjoyable and satisfying next inning of my life.

Wishing you all, the very best in your personal and professional life. Thanks everyone.

JAI HIND

NOTES OF CASES SECTION

Short Note
****(1)***
Before Mr. Justice Sushil Kumar Palo
M.Cr.C. No. 2438/2015 (Jabalpur) decided on 13 November, 2017

ABHISHEK MISHRA ...Applicant
Vs.
STATE OF M.P. & anr. ...Non-applicants

Penal Code (45 of 1860), Section 107 & 306 – Abetment of Suicide – **Abetment requires an active act or direct act, which led the deceased to commit suicide seeing no option and this act must have been intended to push the deceased into such position that he/she committed suicide – In the present case, husband wife travelling in train and as per statements of the co-passengers, were not talking to each other – Wife was repeatedly going to wash room, husband use to go behind her and take her back to her berth – Wife jumped from the train and died – Alleged harassment by quarrelling is not such that it should have induced her to end her life – It appears that victim was hypersensitive to ordinary petulance, discord and differences in domestic life – FIR quashed – Petition allowed.**

दण्ड संहिता (1860 का 45), धारा 107 एवं 306 – आत्महत्या का दुष्प्रेरण – दुष्प्रेरण के लिए एक सक्रिय कृत्य या प्रत्यक्ष कृत्य अपेक्षित है जो मृतक को कोई विकल्प न देखते हुए आत्महत्या कारित करने के लिए अग्रसर करता है एवं यह कृत्य मृतक को ऐसी स्थिति में लाने हेतु आशयित होना चाहिए, कि उसने आत्महत्या कर ली – वर्तमान प्रकरण में, पति–पत्नी ट्रेन में यात्रा कर रहे थे एवं सह–यात्रीगण के कथनों के अनुसार वे एक–दूसरे से बात नहीं कर रहे थे – पत्नी बार–बार शौचालय जा रही थी, पति उसके पीछे जाता एवं उसे उसकी सीट पर वापस ले आता – पत्नी ट्रेन से कूद गई और मर गई – अभिकथित झगड़े द्वारा उत्पीड़न ऐसा नहीं है जिसने उसे उसका जीवन समाप्त करने हेतु उतप्रेरित किया हो – यह प्रतीत होता है कि पीड़िता सामान्य बदमिजाजी, विरोध एवं घरेलू जीवन में मतभेद के प्रति अति संवेदनशील थी – प्रथम सूचना प्रतिवेदन अभिखंडित – याचिका मंजूर।

Cases referred :

(2011) 3 SCC 626, 2008 (2) MPHT 160, AIR 2010 SC 327, (2010) 1 SCC 750, (2001) 9 SCC 618, (1992) Supp. 1 SCC 335.

Sneha Singh with *Dinesh Tripathi,* for the applicant.
Pratibha Mishra, P.L. for the non-applicant No. 1/State.
Anoop Nair, for the non-applicant No. 2.

NOTES OF CASES SECTION

Short Note
****(2) (DB)***
Before Mr. Justice R.S. Jha & Smt. Justice Nandita Dubey
Cr.A. No. 200/2006 (Jabalpur) decided on 6 November, 2017

AJAY KOL & ors. ...Appellants
Vs.
STATE OF M.P. ...Respondent

Penal Code (45 of 1860), Section 302/34 – Murder – Conviction – Name of Accused not in FIR **– Held – It is settled law that FIR is not an encyclopedia of the entire case and any omission in the FIR cannot be said to be fatal to the prosecution case as the involvement of the accused persons cannot be determined solely on the basis of what has been mentioned in the FIR – Impact of omission has to be considered in the backdrop and totality of the circumstances – Merely because the name of the accused was not mentioned in the FIR, it cannot be said that he was not involved in the incident – All witnesses were consistent with their testimony, there were no discrepancy regarding medical and ocular evidence – Prosecution version was substantially tallied with the medical evidence – Commission of offence is clearly established beyond reasonable doubt – Trial Court rightly convicted the appellants – Appeal dismissed.**

दण्ड संहिता (1860 का 45), धारा 302/34 – हत्या – दोषसिद्धि – प्रथम सूचना प्रतिवेदन में अभियुक्त का नाम नहीं – अभिनिर्धारित – यह सुस्थापित विधि है कि प्रथम सूचना प्रतिवेदन संपूर्ण प्रकरण का विश्वकोष नहीं और प्रथम सूचना प्रतिवेदन में कोई लोप अभियोजन प्रकरण के लिए घातक नहीं कहा जा सकता क्योंकि अभियुक्तगण की संलिप्तता का निर्धारण, एक मात्र जो प्रथम सूचना प्रतिवेदन में उल्लिखित किया गया है, के आधार पर नहीं किया जा सकता – लोप के प्रभाव पर विचार, परिस्थितियों की पृष्ठभूमि में एवं पूर्णता में किया जाना चाहिए – मात्र इसलिए कि प्रथम सूचना प्रतिवेदन में अभियुक्त का नाम उल्लिखित नहीं किया गया था, यह नहीं कहा जा सकता कि वह घटना में शामिल नहीं था –सभी साक्षीगण उनकी परिसाक्ष्य के साथ अनुरूप थे, चिकित्सीय एवं चाक्षुष साक्ष्य में विसंगति नहीं थी –अभियोजन कथा का मिलान चिकित्सीय साक्ष्य के साथ सारवान रूप से किया गया था –अपराध कारित किया जाना, युक्तियुक्त संदेह से परे स्पष्ट रूप से स्थापित होता है –विचारण न्यायालय ने अपीलार्थीगण को उचित रूप से दोषसिद्ध किया –अपील खारिज।

The judgment of the Court was delivered by : **Nandita Dubey, J**

Cases referred :

AIR 2011 SC 632, (2017) 6 SCC 1, (2011) 4 SCC 324, (1997) 4 SCC 161,

AIR 1994 SC 957, (2003) 12 SCC 155, AIR 1987 SC 826, AIR 1976 SC 2191, AIR 1965 SC 257.

Surendra Singh with *Shivam Singh,* for the appellants.
Anubhav Jain, G.A. for the State.

Short Note
****(3)***
Before Mr. Justice S.C. Sharma

C.R. No. 88/2017 (Indore) decided on 1 November, 2017

ANITA JAIN (Smt.) ...Applicant
Vs.
DILIP KUMAR & anr. ...Non-applicants

Limitation Act (36 of 1963), Article 59 – Limitation to file suit – **Revision against dismissal of application filed by the petitioner/defendant regarding disposal of preliminary issue of limitation – Held – Registered sale deed on 23.01.2010 in favour of petitioner – Respondent/plaintiff filed a suit on 03.02.2016 to declare the sale deed null and void, nearly after lapse of 6 years – Sale deed reveals that plaintiff no.1 and wife of plaintiff no.2 are the attesting witnesses – They were well aware with the sale deed and its nature – Certified copy of the sale deed was also obtained by them on 16.07.2010 – Limitation to file suit is 3 years – Suit is barred by limitation under Article 59 of the Limitation Act – Suit dismissed as barred by limitation – Revision allowed.**

परिसीमा अधिनियम (1963 का 36), अनुच्छेद 59 – वाद प्रस्तुत करने के लिए परिसीमा – याची/प्रतिवादी द्वारा प्रस्तुत परिसीमा के प्रारंभिक विवाद्यक के निपटारे से संबंधित आवेदन की खारिजी के विरूद्ध पुनरीक्षण – अभिनिर्धारित – दिनांक 23.01.2010 को याची के पक्ष में पंजीकृत विक्रय विलेख – प्रत्यर्थी/वादी ने विक्रय विलेख को अक्रत एवं शून्य घोषित किये जाने हेतु वाद 03.02.2016 को प्रस्तुत किया, करीब 6 वर्ष व्यपगत होने के पश्चात् – विक्रय विलेख प्रकट करता है कि वादी क्र. 1 व वादी क्र. 2 की पत्नी अनुप्रमाणक साक्षीगण है – वे विक्रय विलेख एवं उसके स्वरूप से भलीभांति अवगत थे – उनके द्वारा 16.07.2010 को विक्रय विलेख की प्रमाणित प्रतिलिपि भी अभिप्राप्त की गई थी – वाद प्रस्तुत करने के लिए परिसीमा 3 वर्ष है – परिसीमा अधिनियम के अनुच्छेद 59 के अंतर्गत, वाद परिसीमा द्वारा वर्जित है – परिसीमा द्वारा वर्जित होने के कारण वाद खारिज – पुनरीक्षण मंजूर।

Cases referred :

C.R. No. 275/2011 decided on 08.03.2016, 2006 (iii) MPWN 88.
Veer Kumar Jain with *Abhishay Jain,* for the applicant.
Rajendra Kumar Samdani, for the non-applicants.

NOTES OF CASES SECTION

Short Note

****(4)***

Before Mr. Justice J.K. Maheshwari

W.P. No. 6766/2015 (Gwalior) decided on 7 November, 2017

CHARAN SINGH KUSHWAH …Petitioner

Vs.

SMT. GOMATI BAI & ors …Respondents

Civil Procedure Code (5 of 1908), Order 23 Rule 1(3) - Withdrawal of Suit - "Formal Defect" - Recording of "Satisfaction" - **"Formal defect" is a defect such as, want of notice u/s 80 CPC, improper valuation of suit, insufficient court fee, confusion regarding identification of suit property, misjoinder of parties, failure to disclose a cause of action - Rejection of a material document for not having a proper stamp, also comes in the purview of formal defect - "Satisfaction" ought to be recorded by the Trial Court that suit must fail by reason of some "formal defect" - Trial Court, while allowing the plaintiff's application under Order 23 Rule 1(3) has properly recorded the satisfaction and has assigned reasons with respect to improper valuation on account of not asking the relief of possession which may result into failure of the suit - Jurisdiction exercised by the Trial Court is just and proper - No interference called for - Petition dismissed.**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 23 नियम 1(3) – वाद का प्रत्याहरण –" प्ररूपिक त्रुटि" –"समाधान" का अभिलिखित किया जाना – "प्ररूपिक त्रुटि" एक ऐसी त्रुटि है जैसे कि, सिविल प्रक्रिया संहिता की धारा 80 के अन्तर्गत नोटिस का अभाव, वाद का अनुचित मूल्यांकन, अपर्याप्त न्यायालय फीस, वाद संपत्ति की पहचान के संबंध में भ्रम, वाद हेतुक प्रकट करने में विफलता – उचित स्टाम्प न होने के कारण एक तात्विक दस्तावेज की नामंजूरी भी प्ररूपिक त्रुटि की परिधि में आती है – "समाधान" विचारण न्यायालय द्वारा अभिलिखित किया जाना चाहिए कि किसी "प्ररूपिक त्रुटि" के कारण वाद अवश्य विफल हो जाएगा – विचारण न्यायालय ने आदेश 23 नियम 1(3) के अन्तर्गत वादी का आवेदन मंजूर करते समय उचित रूप से "समाधान" अभिलिखित किया एवं कब्जे का अनुतोष नहीं माँगने के कारण अनुचित मूल्यांकन के संबंध में कारण दिये हैं जिसका परिणाम वाद की विफलता हो सकता है – विचारण न्यायालय द्वारा प्रयोग की गई अधिकारिता न्यायसंगत और उचित है – कोई हस्तक्षेप की आवश्यकता नहीं – याचिका खारिज।

NOTES OF CASES SECTION

Cases referred :

2016 (1) MPJR 50, 2008 (1) MPHT 83, 1983 MPWN 378, (2000) 5 SCC 458, (2017) 5 SCC 63, AIR 1940 Bombay 121, (1869) 13 MIA 161.

P.C. Chandil, for the petitioner.
D.D. Bansal, for the respondent Nos. 1 to 5.
Anand Kumar Dubey, for the respondent Nos. 6 to 13.
Nidhi Patankar, G.A. for the respondent No. 14.

Short Note
****(5)***
Before Mr. Justice S. C. Sharma
W.P. No. 3408/2017 (Indore) decided on 1 November, 2017

DILIP KUMAR & anr. ...Petitioners
Vs.
SMT. ANITA JAIN ...Respondent

***Court Fees Act (7 of 1870), Section 7(iv) – Ad-valorem Court Fees* – Trial Court directed the petitioner/plaintiff to pay ad-valorem court fee – Challenge to – Held – Sale deed in question was executed by mother of plaintiff – In the said sale deed, petitioner/plaintiff himself was a witness – Plaintiff claiming declaration of sale deed as null and void – Required to pay ad-valorem court fee – Trial Court's order justified – Petition dismissed.**

न्यायालय फीस अधिनियम (1870 का 7), धारा 7(iv) – मूल्यानुसार न्यायालय फीस – विचारण न्यायालय ने याची/वादी को मूल्यानुसार न्यायालय फीस का भुगतान करने हेतु निदेशित किया – को चुनौती – अभिनिर्धारित – प्रश्नगत विक्रय विलेख वादी की माँ द्वारा निष्पादित किया गया था – कथित विक्रय विलेख में, याची/वादी स्वयं एक साक्षी था – वादी ने विक्रय विलेख को अकृत व शून्य घोषित करने का दावा किया– मूल्यानुसार न्यायालय फीस का भुगतान करना अपेक्षित – विचारण न्यायालय का आदेश न्यायोचित – याचिका खारिज।

Cases referred :

2010 (4) MPHT 477, AIR 1973 SC 2384, 2010 (1) MPLJ 50, (2010) 8 SCC 329.

Rajendra Kumar Samdani, for the petitioners.
V. K. Jain with *Abhishay Jain,* for the respondent.

NOTES OF CASES SECTION

Short Note
****(6)***
Before Mr. Justice Sujoy Paul
C.R. No. 53/2012 (Jabalpur) decided on 30 October, 2017

GANPAT …Applicant

Vs.

ASHWANI KUMAR SINGH & anr. …Non-applicants

***Specific Relief Act (47 of 1963), Section 41 and Civil Procedure Code (5 of 1908), Order 7 Rule 11* – Revision against the dismissal of application filed by Petitioner/defendant under Order 7 Rule 11 of C.P.C. – Suit for Mandatory injunction without claiming specific performance of agreement – Held – A suit for mere negative injunction without claiming specific performance of agreement is not maintainable – When the suit itself is not maintainable, the question of *prima facie* case does not exist – Application filed by petitioner/defendant under Order 7 Rule 11 is allowed and Civil Suit filed by the respondents/plaintiff is dismissed – Revision allowed.**

विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 41 एवं सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 11 – याची/प्रतिवादी द्वारा सिविल प्रक्रिया संहिता के आदेश 7 नियम 11 के अन्तर्गत प्रस्तुत आवेदन की खरिजी के विरूद्ध पुनरीक्षण – करार के विनिर्दिष्ट पालन का दावा किये बिना आज्ञापक व्यादेश हेतु वाद – अभिनिर्धारित – करार के विनिर्दिष्ट पालन का दावा किये बिना मात्र नकारात्मक व्यादेश हेतु एक वाद पोषणीय नहीं है – जब वाद स्वयं पोषणीय नहीं है, प्रथम दृष्टया प्रकरण का प्रश्न विद्यमान नहीं होता – याची/प्रतिवादी द्वारा आदेश 7 नियम 11 के अन्तर्गत प्रस्तुत आवेदन मंजूर एवं प्रत्यर्थीगण/वादी द्वारा प्रस्तुत सिविल वाद खारिज – पुनरीक्षण मंजूर।

Cases referred :

AIR 1961 MP 102, AIR 1980 P&H 351, 2011 SCC Online MP 559.

Ankit Saxena, for the applicant.

Darshan Soni brief holder of *Saurabh Shrivastava,* for the non-applicant No.1.

Rahul Mishra, G.A. for the non-applicant No. 2/State.

NOTES OF CASES SECTION

Short Note

****(7)***

Before Mr. Justice Subodh Abhyankar

Cr.R. No. 769/2017 (Jabalpur) decided on 4 October, 2017

HARI KISHAN & ors. …Applicants

Vs.

STATE OF M.P. …Non-applicant

***Penal Code (45 of 1860), Section 307 – Intention – Nature of Injury – Revision against framing of charge u/S 307 IPC* – Held – The determinative question is the intention or knowledge, as the case may be, and not the nature of the injury – Merely if victim has suffered a minor injury would not entitle the assailant to get the benefit of the same – Intention to cause a particular injury cannot always be gathered from the nature of injury caused especially when the injury is caused on the vital parts of the body – Record reveal that victim suffered a fracture of Clavicle and also a head injury as skull was found to be fractured – Sufficient evidence to proceed against the petitioner – No illegality in framing the charge – Revision dismissed.**

दण्ड संहिता (1860 का 45), धारा 307 – आशय – चोट का स्वरूप – भा.द.सं. की धारा 307 के अंतर्गत आरोप विरचित किये जाने के विरूध्द पुनरीक्षण – अभिनिर्धारित– निर्धारक प्रश्न, आशय या ज्ञान है, जैसा कि प्रकरण हो, और न कि चोट का स्वरूप – यदि पीड़ित ने मात्र छोटी चोट सहन की है, इसका लाभ प्राप्त करने के लिए हमलावर हकदार नहीं होगा – कोई विशिष्ट चोट कारित करने का आशय कारित चोट के स्वरूप से सदैव नहीं निकाला जा सकता, विशेष रूप से तब जबकि चोट शरीर के महत्वपूर्ण अंगों पर कारित की गई हो – अभिलेख प्रकट करता है कि पीड़ित ने हंसली का अस्थिभंग और सिर की चोट भी सहन की क्योंकि कपाल अस्थिभंग पाया गया था – याची के विरूध्द कार्यवाही हेतु पर्याप्त साक्ष्य – आरोप विरचित करने में कोई अवैधता नहीं – पुनरीक्षण खारिज।

Case referred :

(2009) 12 SCC 585.

Sanjay Patel, for the applicants.
G. S. Thakur, G.A. for the non-applicant/State.

NOTES OF CASES SECTION

Short Note
****(8)***
Before Mr. Justice Anurag Shrivastava
C.R. No. 107/2016 (Jabalpur) decided on 22 September, 2017

KESHAV PRASAD (DEAD) THROUGH LRs. …Applicants
Vs.
SHRIRAM GAUTAM & ors. …Non-applicants

Civil Procedure Code (5 of 1908), Section 47 & Order 21 Rule 32(5) – Execution of Decree **– Revision against dismissal of application/objection filed in the execution proceedings by Applicant/defendant u/S 47 and Order 21 CPC – Under a compromise, a consent decree passed declaring the title and possession of plaintiff on disputed house and permanent injunction was passed restraining defendants to interfere with possession – Held – In execution proceeding, plaintiff is praying for delivery of possession of the suit house – Under Order 21 Rule 32(5), the expression "the act required to be done" covers prohibitory as well as mandatory injunction and empowers the Court to issue mandatory injunction in order to enforce the decree of perpetual injunction - It includes the order of delivery of possession against the encroacher, because without possession a person cannot enjoy perpetual injunction granted in his favour – No illegality in the impugned order – Revision dismissed.**

सिविल प्रक्रिया संहिता (1908 का 5), धारा 47 एवं आदेश 21 नियम 32(5) – डिक्री का निष्पादन – आवेदक/प्रतिवादी द्वारा सिविल प्रक्रिया संहिता की धारा 47 एवं आदेश 21 के अंतर्गत निष्पादन कार्यवाहियों में प्रस्तुत आवेदन/आक्षेप की खारिजी के विरूध्द पुनरीक्षण – एक समझौते के अन्तर्गत, विवादित मकान पर वादी का स्वत्व एवं कब्जा घोषित करते हुए एक सहमति डिक्री पारित की गई एवं प्रतिवादीगण को कब्जे के साथ हस्तक्षेप करने से अवरूध्द करने हेतु स्थाई व्यादेश पारित किया गया था – अभिनिर्धारित – निष्पादन कार्यवाही में, वादी वाद संपत्ति के कब्जे के परिदान हेतु प्रार्थना कर रहा है – आदेश 21 नियम 32(5), के अन्तर्गत अभिव्यक्ति "वह कार्य जो किया जाना अपेक्षित है", निषेधात्मक के साथ–साथ आज्ञापक व्यादेश का भी समावेश करती है एवं न्यायालय को, स्थाई व्यादेश की डिक्री का प्रवर्तन करने के लिए आज्ञापक व्यादेश जारी करने हेतु सशक्त करती है – यह अतिक्रमणकर्ता के विरूध्द कब्जे का परिदान करने का आदेश सम्मिलित करती है, क्योंकि कब्जे के बिना एक व्यक्ति उसके पक्ष में जारी किये गये शाश्वत व्यादेश का उपभोग नहीं कर सकता – आक्षेपित आदेश में कोई अवैधता नहीं – पुनरीक्षण खारिज।

Sudipta Choubey, for the applicants.
Shitla Prasad Tripathi, for the non-applicants.

NOTES OF CASES SECTION

Short Note
****(9)***
Before Mr. Justice G. S. Ahluwalia
Cr.R. No. 629/2017 (Gwalior) decided on 13 December, 2017

PAMMY ALIAS PARMAL …Applicant
Vs.
STATE OF M.P. …Non-applicant

Penal Code (45 of 1860), Section 306 & 107 – Abetment to Suicide – **Held – a person can be said to have instigated another person, when he actively suggests or stimulates him by means of language, direct or indirect, to do an act – In the present case, deceased was in habit of gambling – Inspite of repeated requests by the father of the deceased, applicant continued to lend money to deceased at high rate of interest – Accused use to compel the deceased to repay the amount or give his property – Father of deceased sold some land to return the money but even after that, accused continued to lend money to the deceased so that deceased may gamble more – Accused got an agreement to sell executed from the deceased – Accused tried to take possession of the house – Further held, it is not a case of simple lending and demanding money – Sufficient evidence available on record to frame charge u/s 306 IPC – While framing of charges, meticulous appreciation of evidence is not required, even a strong suspicion is sufficient – Revision dismissed.**

दण्ड संहिता (1860 का 45), धारा 306 एवं 107 – आत्महत्या का दुष्प्रेरण – अभिनिर्धारित – एक व्यक्ति द्वारा अन्य व्यक्ति को उकसाया जाना तब कहा जा सकता है, जब वह उसे कोई कृत्य करने हेतु, प्रत्यक्ष या अप्रत्यक्ष भाषा के माध्यम से सक्रिय रूप से सुझाता है या बढ़ावा देता है – वर्तमान प्रकरण में, मृतक को द्यूत की आदत थी – मृतक के पिता द्वारा बार–बार अनुरोध किये जाने के बावजूद भी, आवेदक मृतक को ब्याज की उच्च दर पर पैसे उधार देता रहा – अभियुक्त, मृतक को पैसे लौटाने या अपनी संपत्ति देने के लिए विवश करता रहा – मृतक के पिता ने पैसे लौटाने हेतु कुछ भूमि विक्रय की परन्तु उसके बाद भी, अभियुक्त ने मृतक को पैसे उधार देना जारी रखा ताकि मृतक द्यूत खेल सके – अभियुक्त ने मृतक से विक्रय करार निष्पादित करा लिया – अभियुक्त ने मकान का कब्जा लेने का प्रयत्न किया – आगे अभिनिर्धारित किया गया कि यह साधारण पैसे उधार देने या माँगने का प्रकरण नहीं है – भारतीय दण्ड संहिता की धारा 306 के अंतर्गत आरोप विरचित करने हेतु अभिलेख पर पर्याप्त साक्ष्य उपलब्ध हैं – आरोप विरचित करते समय, साक्ष्य का बारीकी से मूल्यांकन अपेक्षित नहीं है, यहाँ तक कि एक प्रबल संदेह पर्याप्त है – पुनरीक्षण खारिज।

NOTES OF CASES SECTION

Cases referred :

1995 MPLJ 458, ILR 2015 MP 3072, 2014 (3) MPHT 103, 2008 (2) MPHT 160, 2009 (2) MPLJ 147, AIR 2008 SC 1446, (2010) I SCC 750, ILR 2016 MP 2073, (2009) 16 SCC 605, (2012) 9 SCC 734, (2002) 5 SCC 371, (1994) 1 SCC 73, AIR 2011 SC 1238, (2007) 10 SCC 797, (2010) 1 SCC 707, (2012) 9 SCC 460, 2007 AIR SCW 3683, 2010 CRI.L.J. 1427, AIR 1977 SC 2018, AIR 1979 SC 366, AIR 1990 SC 1869, AIR 2013 SC 52.

Ankur Maheshwari, for the applicant.
Devendra Chaubey, P.P. for the non-applicant/State.

Short Note
****(10) (DB)***
Before Mr. Justice S.K. Seth & Smt. Justice Anjuli Palo
M.Cr.C. No.16302/2017 (Jabalpur) decided on 9 October, 2017

SAROJ RAJAK & anr. …Applicants
Vs.
STATE OF M.P. …Non-applicant

***Practice - Restoration of Case - Grounds – Dismissal of case for non-appearance* – Counsel for applicants submitted that he could not mark the case in the cause list and for this mistake of the counsel, party should not suffer – Held – Computer generated cause list shows that case was fixed on 18.09.2017 and intimation to this effect was sent to the counsel well in advance through SMS on his mobile phone on 15.09.2017 and therefore submission of the counsel is not acceptable rather it is an afterthought – Not a case of bonafide mistake but a deliberate and conscious attempt to hood wink the Court and process of administration of justice – If applicants suffered because of the lapse of their counsel, they are free to take recourse to legal remedy available – Restoration of case is not to be taken as a matter of right – Petition dismissed.**

पद्धति – प्रकरण का पुनःस्थापन – आधार – अनुपस्थिति के लिए प्रकरण की खारिजी – आवेदकगण के अधिवक्ता ने यह प्रस्तुत किया कि वह प्रकरण को वाद सूची में चिन्हित नहीं कर सका तथा अधिवक्ता की इस गलती के लिए, पक्षकार को नहीं भुगतना चाहिए – अभिनिर्धारित – कम्प्यूटर जनित वाद सूची यह दर्शाती है कि प्रकरण 18.09.2017 को नियत किया गया था एवं इसकी सूचना अधिवक्ता को 15.09.2017 को मोबाइल फोन पर एस.एम.एस. के माध्यम से अग्रिम रूप से भेजी गई थी एवं इसलिए अधिवक्ता का निवेदन स्वीकार किये जाने योग्य नहीं है बल्कि यह एक पश्चात् कल्पना है – सद्भाविक भूल का

प्रकरण नहीं बल्कि न्यायालय एवं न्याय प्रशासन की प्रक्रिया के साथ चालाकी करने हेतु एक जानबूझकर एवं सचेतना से किया गया प्रयास है – यदि आवेदकगण को उनके अधिवक्ता की गलती के कारण भुगतना पड़ता है तो वे उपलब्ध विधिक उपचार का अवलंब लेने हेतु स्वतंत्र हैं – प्रकरण के पुनःस्थापन को अधिकार के मामले के रूप नहीं लिया जाना है – याचिका खारिज।

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

Cases referred :

M.Cr.C. No. 9915 of 2015, decided on 08.07.2016 & SLP (Crl.) No. 6437 of 2016 (Supreme Court), order dated 03.05.2017.

Raghuvansh Kumar Choubey, for the applicants.
Naveen Dubey, G.A. for the non-applicant/State.

Short Note
****(11)***
Before Mr. Justice Subodh Abhyankar
W.P. No. 6201/2012 (Jabalpur) decided on 4 October, 2017

SHAMBHU KHARE …Petitioner
Vs.
STATE OF M.P. & ors. …Respondents

***Penal Code (45 of 1860), Section 302 & 323 and Municipal Employees (Recruitment and Conditions of Service) Rules, M.P. 1968, Rule 9 & 10(2) – Moral Turpitude – Termination from Service* – Petitioner was convicted and sentenced u/S 302 IPC whereby he was terminated from service – In appeal, conviction and sentence u/S 302/34 was set aside and petitioner was convicted u/S 323/34 IPC, whereby he approached the department vide an application for his reinstatement, which was been dismissed – Held – From the conjoint reading of Rule 9 and 10(2) of the Rules of 1968, it is established that petitioner who is sentenced to one year rigorous imprisonment for an offence which do not involve moral turpitude, there cannot be any legal impediment in his reinstatement – Respondents directed to reinstate the petitioner from the date of dismissal of his application – Petition allowed.**

दण्ड संहिता (1860 का 45), धारा 302 व 323 एवं नगरपालिका कर्मचारी (भर्ती तथा सेवा की शर्तें) नियम, म.प्र., 1968, नियम 9 व 10(2) – नैतिक अधमता – सेवा समाप्ति – याची को भा.द.सं. की धारा 302 के अंतर्गत दोषसिद्ध एवं दण्डादिष्ट किया गया जिससे उसकी सेवा समाप्त की गई थी – अपील में, धारा 302/34 के अंतर्गत दोषसिद्धि

एवं दण्डादेश अपास्त किया गया तथा याची को भा.द.सं. की धारा 323/34 के अंतर्गत दोषसिद्ध किया गया था जिससे वह अपनी सेवा में बहाली हेतु आवेदन द्वारा विभाग के समक्ष गया, जिसे खारिज किया गया – अभिनिर्धारित – नियम, 1968 के नियम 9 व 10(2) को एकसाथ पढ़ने पर यह स्थापित होता है कि याची, जिसे एक ऐसे अपराध हेतु एक वर्ष के सश्रम कारावास से दण्डादिष्ट किया गया है जिसमें नैतिक अधमता शामिल नहीं है, तब उसकी सेवा में बहाली हेतु कोई विधिक बाधा नहीं – प्रत्यर्थीगण को याची के आवेदन की खारिजी की तिथि से बहाल किये जाने हेतु निदेशित किया गया – याचिका मंजूर।

Cases referred :

(2008) 3 SCC 273, (2016) 2 MPLJ 403, (2011) 4 SCC 644.

S.R. Tamarkar, for the petitioner.
G.S. Thakur, G.A. for the respondents/State.
Arvind Shrivastava with *Sumit Kanojia,* for respondent no.3.

Short Note
****(12)***
Before Mr. Justice Sushil Kumar Palo
M.Cr.C. No. 6387/2017 (Jabalpur) decided on 5 October, 2017

SURENDRA SHARMA …Applicant
Vs.
STATE OF M.P. …Non-applicant

***Penal Code (45 of 1860), Sections 107 & 306 – Abetment of Suicide – Quashment of FIR* – Deceased committed suicide due to loss of agriculture production on account of which he was unable to repay loan amount of accused - Name of the accused was mentioned in the suicide note – Held – Accused repeatedly asking for return of his borrowed money cannot be equated to that of abetment to commit suicide as it do not amount to instigation or aiding in commission of suicide – There has to be *mens rea* to commit the offence – Deceased committed suicide because of constant pressure for repayment of loan which indicates that he was hypersensitive to ordinary petulance and discord – It does not constitute abetment to commit suicide – Prima facie offence u/S 306 IPC not made out – Proceedings liable to be quashed – Petition allowed.**

दण्ड संहिता (1860 का 45), धारा 107 एवं 306 – आत्महत्या का दुष्प्रेरण – प्रथम सूचना प्रतिवेदन का अभिखंडन – मृतक ने कृषि उत्पादन में हानि होने के कारण जिसकी

वजह से वह अभियुक्त को ऋण की राशि प्रतिसंदाय करने में असमर्थ था, आत्महत्या की – अभियुक्त का नाम आत्महत्या लेख में उल्लिखित था – अभिनिर्धारित – अभियुक्त का अपने द्वारा उधार दी गई राशि की वापसी हेतु बार–बार कहा जाना, आत्महत्या के दुष्प्रेरण के समान नहीं हो सकता क्योंकि यह आत्महत्या करने के लिए उकसाने या सहायता करने के बराबर नहीं है – अपराध कारित करने के लिये आपराधिक मनः स्थिति होनी चाहिए – मृतक ने ऋण का प्रतिसंदाय किये जाने के लिये निरंतर दबाव के कारण आत्महत्या की जो यह दर्शाता है कि वह सामान्य बदमिजाजी और कलह के प्रति अतिसंवेदनशील था – भारतीय दण्ड संहिता की धारा 306 के अन्तर्गत प्रथम दृष्ट्या अपराध नहीं बनता – कार्यवाहियॉं अभिखंडित किये जाने योग्य हैं – याचिका मंजूर।

Cases referred :

2008 (2) M.P.H.T.160, (2010) 1 SCC 750, (2001) 9 SCC 618, 2003 (I) MPWN 73, 2009 (2) M.P.L.J 147, AIR 2011 SC 1238, (1992) Suppl. 1 SCC 335.

S.K. Gangrade, for the applicant .
T. Sheikh, P.L. for the non-applicant/State.

Short Note
****(13)***
Before Mr. Justice G.S. Ahluwalia

Cr.A. No. 88/2012 (Gwalior) decided on 7 October, 2017

TILAK SINGH …Appellant
Vs.
STATE OF M.P. …Respondent

(Alongwith Cr.A. No. 91/2012 & Cr.A. No. 248/2012)

Penal Code (45 of 1860), Section 394 & 397 and Evidence Act (1 of 1872), Section 9 – Test Identification Parade - Delay – Effect **– Held – Mere delay in holding Test Identification Parade, by itself cannot be a ground to discard the identification of accused – Purpose of conducting Test Identification Parade during investigation is for satisfaction of investigating officer that the suspect is the real culprit, but the substantive evidence is identification in the Court - Test Identification Parade may be discarded on ground of delay but where delay is duly explained or where it occurred due to reasons beyond the control of investigating officer, then delay is not fatal - Effect of delay has to be considered in the light of facts and circumstances of each case – During evidence where an explanation is not sought from investigating officer for holding the Test Identification Parade belatedly, then delay itself may not be fatal.**

(Paras 40 & 44)

NOTES OF CASES SECTION

दण्ड संहिता (1860 का 45), धारा 394 व 397 एवं साक्ष्य अधिनियम (1872 का 1), धारा 9 – पहचान परेड – विलंब – प्रभाव – अभिनिर्धारित – मात्र पहचान परेड कराने में विलंब, अपने आप में अभियुक्त की पहचान अमान्य करने हेतु आधार नहीं हो सकता – अन्वेषण के दौरान पहचान परेड संचालित करने का प्रयोजन, अन्वेषण अधिकारी की संतुष्टि हेतु है कि संदिग्ध ही वास्तविक अपराधी है, परन्तु न्यायालय में पहचान सारभूत साक्ष्य है – विलंब के आधार पर पहचान परेड अमान्य की जा सकती है परन्तु जहाँ विलंब सम्यक् रूप से स्पष्ट किया गया हो या जहाँ वह अन्वेषण अधिकारी के नियंत्रण से परे किन्हीं कारणों से घटित हुआ हो, तब विलंब घातक नहीं है – विलंब के प्रभाव को प्रत्येक प्रकरण के तथ्यों एवं परिस्थितियों के आलोक में विचार में लिया जाना चाहिए – साक्ष्य के दौरान, जहाँ अन्वेषण अधिकारी से पहचान परेड विलंबित रूप से कराने का स्पष्टीकरण नहीं चाहा गया है, तब विलंब अपने आप में घातक नहीं हो सकता।

Cases referred :

2011 Cr.L.J. 4461, (2014) 8 SCC 340, (2016) 11 SCC 265, (2010) 3 SCC 508, (2004) 13 SCC 150, (2003) 3 SCC 569, (2003) 12 SCC 554, (2015) 9 SCC 588, AIR 2009 SC (Supp) 940, AIR 2004 SC 2729, (2003) 1 SCC 456, (1975) 1 SCC 797, (2013) 7 SCC 77, (2016) 1 SCC 463.

Rajmani Bansal, for the appellant in Cr.A. No. 88/2012.
A.K. Jain, for the appellants in Cr.A. No. 91/2012 & Cr.A. No. 248/2012.
RVS Ghuraiya, P.P. for the respondent/State.

I.L.R. [2018] M.P. 1 (SC)
SUPREME COURT OF INDIA

Before Mr. Justice R. K. Agrawal & Mr. Justice Abhay Manohar Sapre

C.A. No. 7665/2009 decided on 25 October, 2017

SURESH KUMAR WADHWA ...Appellant

Vs.

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

Contract Act (9 of 1872), Section 74 – Auction of Nazul Plots – Terms and Conditions – Addition and alteration – Forfeiture of Security Amount – **Appellant deposited 3 lacs as security amount as per the advertisement – He was declared the highest bidder, accordingly deposited 1/4th of total amount vide cheque – Later, by issuing a letter, further terms and conditions were intimated to appellant, which he refused to accept as same was not informed earlier in advertisement/ public notice – Appellant made stop payment of cheque – State Government cancelled the allotment and forfeited the security amount of Rs. 3 lacs – Appellant filed a suit before the Trial Court claiming his security amount alongwith interest, which was dismissed – Appeal was also dismissed by the High Court – Challenge to – Held – A party to the contract has no right to unilaterally "alter" or "add" any additional terms and conditions unless both the parties agree to it – The four additional conditions were not the part of public notice which was mandatory on the part of State nor they were communicated to bidders before auction proceedings, for the purpose of compliance, in case their bid is accepted – Further held – In order to forfeit the security amount, contract must have such stipulation of forfeiture and if there is no such stipulation, as in the present case, State has no such right available – No breach of terms by appellant – Action of the State was unjustified as well as bad in law – Money decree of refund of Rs. 3 lacs alongwith interest of 9% p.a. passed with cost of Rs. 10,000 - Appeal allowed.**

(Paras 23, 26, 30, 31, 39 & 46)

संविदा अधिनियम (1872 का 9), धारा 74 – नजूल भूखंडों की नीलामी – निबंधन और शर्तें– जोड़ा जाना एवं परिवर्तन – प्रतिभूति की राशि का समपहरण – अपीलार्थी ने विज्ञापन के अनुसार तीन लाख रू. प्रतिभूति की राशि के रूप में जमा किये– उसे सबसे ऊँची बोली लगाने वाला घोषित किया गया था, तद्नुसार चैक के माध्यम से कुल राशि का एक चौथाई जमा किया था – बाद में, पत्र जारी करके अपीलार्थी को आगे निबंधन और *शर्तें* सूचित की गई, जिसे स्वीकार करने से इंकार किया क्योंकि उक्त, पहले विज्ञापन/सार्वजनिक

नोटिस में सूचित नहीं की गई थी – अपीलार्थी ने चैक का भुगतान रोक दिया – राज्य सरकार ने आबंटन रद्द किया एवं तीन लाख रूपये की प्रतिभूति राशि को समपहृत किया – अपीलार्थी ने ब्याज सहित अपनी प्रतिभूति राशि का दावा करते हुये विचारण न्यायालय के समक्ष वाद प्रस्तुत किया जो कि खारिज किया गया था – अपील भी उच्च न्यायालय द्वारा खारिज की गई – को चुनौती – अभिनिर्धारित – संविदा के किसी पक्षकार को यह अधिकार नहीं है कि वह कोई अतिरिक्त निबंधन एवं शर्तें जोड़े या परिवर्तित करें जब तक दोनों पक्षकार उस पर सहमत न हों – अतिरिक्त चार शर्तें सार्वजनिक सूचना का हिस्सा नहीं थीं जो कि राज्य की ओर से आज्ञापक थी, न ही वे बोली स्वीकार होने की दशा में अनुपालन हेतु नीलामी की कार्यवाही से पूर्व बोली लगाने वालों को सूचित की गई – आगे अभिनिर्धारित – प्रतिभूति राशि का समपहरण करने के लिए, संविदा में समपहरण की शर्त होना चाहिए और यदि ऐसी कोई शर्त न हो तो, जैसे कि वर्तमान प्रकरण में, राज्य को ऐसा कोई अधिकार उपलब्ध नहीं है – अपीलार्थी द्वारा निबंधनों का कोई उल्लंघन नहीं – राज्य की कार्रवाई अनुचित होने के साथ विधि विरूद्ध भी है – तीन लाख रूपये नौ प्रतिशत प्रतिवर्ष ब्याज की दर के साथ प्रतिदाय करने की धन संबंधी डिक्री, दस हजार रूपये के व्यय सहित पारित की गई – अपील मंजूर।

Cases referred :

F.A. No. 794/2000 decided on 11.11.2006 (M.P.), (1828) Moc. & M. 189, 1969 (2) SCC 354, 1969 (3) SCC 522, (2015) 16 SCC 198, AIR 1954 Bombay 50.

J U D G M E N T

The Judgment of the Court was delivered by :

Abhay Manohar Sapre, J. :- This appeal is filed by the plaintiff against the final judgment and order dated 21.11.2006 passed by the High Court of Madhya Pradesh, Bench at Jabalpur in First Appeal No.127 of 1998 whereby the Division Bench of the High Court dismissed the appeal filed by the appellant herein and affirmed the judgment and decree dated 23.12.1997 passed by the 9th Additional District Judge, Bhopal in C.S.No.2-A/97 by which the appellant's suit for declaration and refund of security amount deposited with the respondents was dismissed.

2. Facts of the case lie in a narrow compass. They, however, need mention, in brief, to appreciate the controversy involved in the appeal.

3. The appellant is the plaintiff whereas the respondents (State of M.P. and its officials) are the defendants in a civil suit out of which this appeal arises.

4. Respondent No. 3 (defendant No. 3)-a Nazul Officer, Bhopal issued an advertisement on 07.01.1996 in daily newspaper for and on behalf of State of M.P wherein it was published that four nazul plots of the State would be sold in public

auction on 11.01.1996 on the terms and conditions set out therein. Anyone interested could participate in the public auction by following the terms and conditions mentioned in the public notice. It is apposite to reproduce the public notice including its terms/conditions hereinbelow:

"All are hereby informed that the public auction of Government nazul plots of situated at Mahavir Nagar, Arera Colony, Bhopal is to be carried out. The description of the nazul plots is as follows:

Place	**Plot No.**	**Area**
Arera Colony,		
Bhopal	**E 5/5**	**2880 sq ft**
	E 5/17	**2880 sq ft**
	E 2/12	**13251.03 sq ft**
	E 2/12	**9600 sq ft**

The public auction of the aforesaid plots will done on 11.01.1996 starting at 11 A.M. in the court of the nazul officer capital city scheme Bhopal and the conditions of the auction will be as follows:

1. **Each plot shall be auctioned separately.**
2. **Bidder must be Income Tax Assessee and proof of Assessment for 1994-95 shall be necessary.**
3. **Before taking part in the bid, each bidder shall have to deposit a Bank draft of Rs. 3.00 lacs with Nuzul Officer as a security.**
4. **The highest bidder shall have to deposit 1/4th amount of his bid immediately after closure of auction for the plot in question.**
5. **Within 7 days from the date of acceptance of his bid, the bidder shall have to deposit entire amount of his bid after adjustment of security deposit and one fourth amount already deposited.**
6. **After receipt of full payment, the possession of plot after demarcation shall be delivered to bidder on site and he shall be granted a permanent lease for 30 years.**

7. Collector, Bhopal shall have power to cancel any auction/bid without assigning any reasons."

5. The appellant was one of the participants in the auction proceedings. The appellant, accordingly, in terms of clauses 2 and 3 of the public notice deposited his Income Tax Return for the year 1994-95 and also deposited a sum of Rs. 3 lakhs vide Bank Draft No. 6858812 dated 10.01.1996 with respondent No. 3 as security.

6. The auction was held on 11.01.1996. The appellant quoted his bid at Rs.53,80,000/- for plot No.E-5/5 situated in Mahavir Nagar, Arera Colony, Bhopal. The appellant's bid was declared the highest amongst those who participated. The Respondent No. 3 accordingly accepted the appellant's bid for plot No. E-5/5.

7. The Respondent No. 3 then asked the appellant to deposit 1/4th amount of the total amount on the same day in terms of public notice. The appellant accordingly deposited a sum of Rs.10.45 lakhs by cheque No. 309991 dated 11.01.1996 drawn in favour of respondent No. 3.

8. On 25.01.1996, the appellant received a letter dated 24.01.1996 from respondent No. 3 informing him that his bid for plot No. E-5/5 is accepted subject to "special terms and conditions". These conditions, which are mentioned in the letter, read as under:

"1. Annual lease rent @ 7.5% will be charged from the bidders on the accepted bid amount.

2. If the lease rent for 10 years is deposited in lumpsum, then the remaining 20 years will be free from lease rent.

3. The lease shall have to be renewed as per rules after 30 years.

4. All the conditions of auction will be binding on the bidders."

9. The appellant, on receipt of aforesaid letter, replied to respondent No.3 on 29.01.1996 stating that the "special terms and conditions" mentioned in the letter were neither published nor informed to him at any point of time earlier and nor was he ever made aware of any such terms and conditions till he received the letter dated 25.01.1996. The appellant, therefore, declined to accept the "special terms and conditions" and requested respondent No. 3 to return the security amount of Rs.3 lakhs, which he had deposited at the time of submission of the bid.

10. On 08.02.1996, respondent No. 2 issued a show cause notice to the appellant stating therein as to why the amount of Rs.3 lakhs be not "forfeited" and the plot in question is re-auctioned. The appellant, vide his reply dated 12.02.1996 replied that since he has not accepted the "special terms and condition" offered by respondent No. 3 in their acceptance letter, the appellant is entitled to ask for refund of the security amount of Rs.3 lakhs from respondent No. 3 and that respondent No. 2 has no right to forfeit such amount.

11. Respondent No. 2, by his letter dated 24.02.1996 informed to the appellant that a sum of Rs. 3 lakhs deposited by him (appellant) towards security has been forfeited.

12. The appellant, on 28.02.1996, then served a legal notice to the respondents under Section 80 of the Code of Civil Procedure, 1908 and demanded refund of Rs. 3 Lakhs. The respondents, however, did not refund the money. The appellant was, therefore, constrained to file the civil suit against the respondents for a declaration that the letter dated 24.02.1996 forfeiting the security amount of Rs 3 lakhs be declared as bad in law and further prayed for refund of Rs. 3 lakhs along with interest at the rate of Rs.18% p.a..

13. In substance, the appellant's suit was founded on the allegations, *inter alia,* that firstly, the appellant was within his right to refuse to accept the "special terms and conditions" contained in the acceptance letter dated 24.01.1996 of respondent No.3 because according to the appellant these terms and conditions were never part of the original public auction notice pursuant to which he had submitted his bid and nor such terms and conditions were communicated to the appellant till his bid was accepted and hence these conditions were not binding on him; Secondly, in the absence of any terms and conditions published in the public notice empowering respondent No. 2 to forfeit the security amount (Rs.3 lakhs), respondent No. 2 had no right/authority to forfeit a sum of Rs. 3 lakhs deposited by the appellant; and lastly, the appellant had performed his part by ensuring compliance of all necessary terms of the public notice whereas it was the respondents, who committed breach of the terms.

14. The respondents filed their written statement. While denying the appellant's claim, the respondents justified their action in forfeiting the security amount of Rs. 3 lakhs. The respondents, however, contended that firstly, the "special terms and conditions" were orally told to the appellant at the time of auction; secondly, these terms and conditions were applicable to the auction proceedings because they are part of the Revenue Book Circular (RBC) which applies to all the plots in question;

and lastly, the appellant committed breach of terms by withholding the payment of 1/4th amount, when he directed "stop payment" of his cheque amount for being paid to respondent No.3. These were essentially the grounds taken in the written statement to justify the forfeiture as being legal and proper.

15. The Trial Court framed issues. Parties led evidence. By judgment/decree-dated 23.12.1997, the Trial Court dismissed the suit. It was held that the appellant failed to deposit the 1/4th amount immediately as per the terms of the public notice inasmuch as the appellant deposited the amount by cheque and later stopped its payment, which constituted a breach on his part of the terms of the public notice. It was also held that the demand of certain money by way of "special terms and conditions" mentioned in the acceptance letter dated 24.01.1996 was in accordance with the Rules of RBC and, therefore, such terms and conditions were binding on the appellant for ensuring its compliance and lastly, in the light of the two breaches committed by the appellant, the respondents were justified in forfeiting the security amount deposited by the appellant.

16. The appellant, felt aggrieved, filed first appeal before the High Court. The Division Bench, by impugned order, dismissed the appeal and upheld the judgment/decree of the Trial Court. The High Court held that since the similar issue was the subject matter of another appeal *(F.A. No. 794/2000- M/s Priyanka Builders vs State of MP* decided on 11.11.2006) and the said appeal having been dismissed, this appeal also deserves dismissal in the light of judgment rendered in *Priyanka Builders' case.* The impugned judgment, however, neither recorded any reason given in the *Priyanka's case* and nor mentioned the facts of *Priyanka's case* with a view to show similarity between both the cases and nor recorded any independent reasoning for dismissal of the appeal.

17. The appellant (plaintiff), felt aggrieved, has filed this appeal by way of special leave before this Court.

18. Heard Mr. Prasenjit Keswani, learned counsel for the appellant and Mr. Mishra Saurabh, learned counsel for respondents 1 & 2.

19. Having heard learned counsel for the parties and on perusal of the record of the case, we are inclined to allow the appeal, set aside the impugned judgment and the decree of the two Courts below and decree the appellant's (plaintiff's) suit against the respondents as indicated infra.

20. Three questions, basically, arise in this appeal. First, whether the appellant (plaintiff) committed any breach of the terms and conditions of the public auction

notice dated 07.01.1996; second, whether the State was justified in forfeiting the security money (Rs.3 lakhs) deposited by the appellant for the alleged breach said to have been committed by the appellant of any terms and conditions of public notice dated 07.01.1996; and third, whether the State had power to forfeit the security money in the facts of this case?

21. These questions need to be answered keeping in view the provisions of Section 74 of the Indian Contract Act, 1872 (hereinafter referred to as "the Act") and some settled legal principles relating to law of contract.

22. Section 74 of the Act reads as under:

> **"74. Compensation for breach of contract where penalty stipulated for- When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.**
>
> **Explanation- A stipulation for increased interest from the date of default may be a stipulation by way of penalty.**
>
> **Exception- When any person enters into any bail-bond, recognizance or other instrument of the same nature or, under the provisions of any law, or under the orders of the Central Government or of any State Government gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.**
>
> **Explanation- A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested."**

23. Reading of Section 74 would go to show that in order to forfeit the sum deposited by the contracting party as "earnest money" or "security" for the due performance of the contract, it is necessary that the contract must contain a stipulation of forfeiture. In other words, a right to forfeit being a contractual right and

penal in nature, the parties to a contract must agree to stipulate a term in the contract in that behalf. A *fortiori*, if there is no stipulation in the contract of forfeiture, there is no such right available to the party to forfeit the sum.

24. The learned author-Sir Kim Lewison in his book "The Interpretation of Contracts" (6th edition) while dealing with subject "Penalties, Termination and Forfeiture clauses in the Contract" explained the meaning of the expression "forfeiture" in these words:

> **"A forfeiture clause is a clause which brings an interest to a premature end by reason of a breach of covenant or condition, and the Court will penetrate the disguise of a forfeiture clause dressed up to look like something else. A forfeiture clause is not to be construed strictly, but is to receive a fair construction."(See page 838)**

25. The author then quoted the apt observations of Lord Tenterden from an old case reported in (1828) Moo. & M.189 *Doe d Davis vs. Elsam* wherein the learned Lord while dealing with the case of forfeiture held as under:

> **"I do not think provisoes of this sort are to be construed with the strictness of conditions at common law. These are matters of contract between the parties, and should, in my opinion, be construed as other contracts" (see pages 840).**

26. Equally well settled principle of law relating to contract is that a party to the contract can insist for performance of only those terms/conditions, which are part of the contract. Likewise, a party to the contract has no right to unilaterally "alter" the terms and conditions of the contract and nor they have a right to "add" any additional terms/conditions in the contract unless both the parties agree to add/alter any such terms/conditions in the contract.

27. Similarly, it is also a settled law that if any party adds any additional terms/conditions in the contract without the consent of the other contracting party then such addition is not binding on the other party. Similarly, a party, who adds any such term/condition, has no right to insist on the other party to comply with such additional terms/conditions and nor such party has a right to cancel the contract on the ground that the other party has failed to comply such additional terms/conditions.

28. Keeping in view the aforementioned principle of law, when we examine the facts of the case at hand then we find that the public notice (advertisement), extracted above, only stipulated a term for deposit of the security amount of Rs.3

lakhs by the bidder (appellant) but it did not publish any stipulation that the security amount deposited by the bidder (appellant herein) is liable for forfeiture by the State and, if so, in what contingencies.

29. In our opinion, a stipulation for deposit of security amount ought to have been qualified by a specific stipulation providing therein a right of forfeiture to the State. Similarly, it should have also provided the contingencies in which such right of for feiture could be exercised by the State against the bidder. It is only then the State would have got a right to forfeit. It was, however, not so in this case.

30. So far as the four special conditions are concerned, these conditions were also not part of the public notice and nor they were ever communicated to the bidders before auction proceedings. There is no whisper of such conditions being ever considered as a part of the auction proceedings enabling the bidders to make their compliance, in case, their bid is accepted.

31. In our considered opinion, it was mandatory on the part of the respondents (State) to have published the four special conditions at the time of inviting the bids itself because how much money/rent the bidder would be required to pay to the State on allotment of plot to him was a material term and, therefore, the bidders were entitled to know these material terms at the time of submitting the bid itself. It was, however, not done in this case.

32. Since these four conditions were added unilaterally and communicated to the appellant by respondent No. 3 while accepting his bid, the appellant had every right to refuse to accept such conditions and wriggle out of the auction proceedings and demand refund of his security amount. The State, in such circumstances, had no right to insist upon the appellant to accept such conditions much less to comply and nor it had a right to cancel the bid on the ground of non-compliance of these conditions by the appellant.

33. Learned counsel for the respondents (State), however, argued that it was not necessary for the State to specify the condition relating to forfeiture and four additional terms/conditions in the public notice because they were already part of RBC, which is applicable to the nazul lands in question.

34. We find no merit in this submission for more than one reason. First, the public notice inviting bids did not even contain a term that all the provisions of RBC will be applicable to the auction proceedings and second, the relevant clauses of RBC which, according to the State, were to govern the auction proceedings ought to have been quoted in verbatim in the public notice itself. It was, however, not done.

35. In our considered opinion, the object behind publishing all material term(s) is/are three fold. First, such term(s) is/are made known to the contracting parties/bidders; second, parties/bidders become aware of their rights, obligations, liabilities *qua* each other and also of the consequences in the event of their non-compliances; and third, it empowers the State to enforce any such term against the bidder in the event of any breach committed by the bidder and lastly, when there are express terms in the contract/pubic notice then parties are bound by the terms and their rights are, accordingly, determined in the light of such terms in accordance with law.

36. When we read the facts and law laid down by this Court in the case of *Maula Bux vs. Union of India,* 1969(2) SCC 354 and *Shri Hanuman Cotton Mills & Ors. Vs. Tata Air Craft Ltd.*, 1969(3) SCC 522, we find that there was a specific clause of forfeiture in the contract in both the cases. Such clause empowered one party to forfeit the earnest money/security deposit in the event of non-performance of the terms of the contract. It is in the light of such facts, Their Lordships examined the question of forfeiture in the context of Section 74 of the Contract Act. Such is not the case here.

37. Our reasoning is supported by a recent decision of this Court in *Union of India vs. Vertex Broadcasting Company Private Limited & Ors.,* (2015) 16 SCC 198 wherein Their Lordships held *inter alia* that in the absence of any power in the contract to forfeit the license money deposited by the licensee, the action of the Union to forfeit the license fees is held illegal. This is what was held:

> **"10. Coming to the aforesaid question of availability of a power to order forfeiture, a reading of the relevant clauses i.e. Clauses 8(f), 10(d) and 12 extracted above would go to show that the Union had not protected/empowered itself to forfeit the licence fee. The forfeiture contemplated by the aforesaid clauses are altogether in different contexts and situations. In the absence of any such power, the forfeiture that has taken place in this case will have to be adjudged as null and void."**

38. Learned counsel for the respondents (State) then argued that the appellant had committed the breach of clause 4 of public notice inasmuch as he failed to pay 1/4th amount and "stopped payment" of the cheque amount to the respondents.

39. We do not agree to this argument. In the first place, the appellant ensured compliance of the term because he deposited 1/4th amount of Rs. 10,45,000/- on the same day, i.e.,11.01.1996 by cheque. Secondly, the respondents also accepted the cheque from the appellant because deposit of money by cheque was one of the modes

of payment. Had it not been so, the respondents would not have accepted the cheque from the appellant. Thirdly, the stop payment was done when the appellant received the acceptance letter containing four additional conditions to which he was not agreeable. He had, therefore, every right to wriggle out of the auction proceedings and stop further payment towards the transaction. Such action on the part of the appellant (bidder) did not amount to a breach of clause 4 so as to give right to the State to forfeit the security deposit.

40. In the light of foregoing discussion, we are of the considered opinion, that the appellant did not commit any breach of the term(s) and condition(s) of the notice inviting bids and on the other hand, it was the respondents who committed breaches. In these circumstances, the State had no right to forfeit the security amount and instead it should have been returned when demanded by the appellant.

41. Learned counsel for the appellant, however, brought to our notice that after cancellation of the auction proceedings in question, the plot in question was re-auctioned by the State and the same fetched Rs.134.00 lakhs as against appellant's bid amount of Rs.53,50,000/-. Learned counsel for the respondents did not dispute this fact. In such circumstances, we find that the respondent did not suffer any monetary loss in the transaction and on the other hand earned more money as against what they would have got from the appellant. It is for this additional reason also, we are of the view that the action on the part of the respondents(State) in forfeiting the security deposit of the appellant was wholly unjustified.

42. In this case, it was expected from the State officials to have acted as an honest person while dealing with the case of an individual citizen and in all fairness should have returned the security amount to the appellant without compelling him to take recourse to the legal proceedings for recovery of his legitimate amount which took almost 21 years to recover.

43. Indeed, this reminds us of the apt observations made by the Chief Justice M.C. Chagla in a case reported in *Firm Kaluram Sitaram vs. The Dominion of India* (AIR 1954 Bombay 50). The learned Chief Justice in his distinctive style of writing while deciding the case between an individual citizen and the State made the following pertinent observations in para 19:

> **"…..we have often had occasion to say that when the State deals with a citizen it should not ordinarily reply on technicalities, and if the State is satisfied that the case of the citizen is a just one, even though legal defences may be open to it, it must act, as has been said by eminent Judges, as an honest person."**

44. We are in respectful agreement with the aforementioned observations as, in our considered opinion, they apply fully to the case in hand against the State.

45. We are, therefore, of the considered opinion that both the Courts below were not justified in their respective reasoning and the conclusion in dismissing the appellant's suit. The appellant's suit should have been decreed against the respondents. We hereby do so.

46. The appeal thus succeeds and is allowed with cost throughout. Impugned judgment and decree of the High Court and the Trial Court are set aside and the appellant's (plaintiff) suit is decreed against the respondents (defendants). It is declared that letter dated 24.02.1996 of the respondents forfeiting the security deposit of the appellant is illegal and bad in law. A money decree for refund of Rs.3 lakhs is accordingly passed in favour of the appellant(plaintiff) and against the respondents (defendants) along with interest payable on Rs.3 lakhs at the rate of 9% p.a. from 01.02.1996 till realization.

47. Cost of the appeal **Rs.10,000/-** be payable by the respondents to the appellant.

Appeal allowed

I.L.R. [2018] M.P. 12 (DB)
WRIT APPEAL

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

W.A. No. 648/2017 (Jabalpur) decided on 9 November, 2017

AJAY KUMAR DOHAR ...Appellant
Vs.
STATE OF M.P. & ors. ...Respondents

***Municipalities Act, M.P. (37 of 1961), Section 32-C & 35 – Disqualification – Grounds – Election Expenditures* – Appellant was disqualified from being elected as Municipal Councilor for a period of five years on the ground that he has not spent the amount (*election expenses*) through bank nor opened a bank account thereby violating the directions of Election Commission, although applicant has furnished election expenses – Held – Object and purpose of furnishing election expenses is to ensure that there is transparent form of election and money power is not used to change result of election – Condition of opening bank account is not an essential**

condition, it is only a step to ensure proper maintenance of accounts – Opening bank account is only a procedure and can be taken as an ancillary condition – Non opening of bank account or not spending the election expenses through bank account, cannot be a ground to disqualify a candidate especially when election expenses have been furnished by the appellant and have not been commented adversely by the Commission – Further held, will of the people in electing a candidate cannot be set at naught on such mere technicalities – Production of Bank Register is not mandatory or essential condition – Further held – Disqualification for five years for not opening a bank account is wholly disproportionate to alleged misconduct – Removal or disqualification of elected representative has serious repercussion, thus they must not be removed unless a clear cut case is made out – Order of Election Commission and one passed by Single Bench is set aside – Writ appeal allowed.

(Paras 16, 26 & 32)

नगरपालिका अधिनियम, म.प्र. (1961 का 37), धारा 32–C व 35 – निरर्हता – आधार – निर्वाचन व्यय – अपीलार्थी को पाँच वर्ष की अवधि के लिए नगरपालिक पार्षद के रूप में निर्वाचित किये जाने से, इस आधार पर निरर्हित किया गया कि उसने रकम (निर्वाचन व्यय) बैंक के जरिए खर्च नहीं की और न ही बैंक खाता खोला इस प्रकार उसने निर्वाचन आयोग के निदेशों का उल्लंघन किया, यद्यपि आवेदक ने निर्वाचन व्यय प्रस्तुत किया है – अभिनिर्धारित – निर्वाचन व्यय प्रस्तुत करने का उद्देश्य एवं प्रयोजन यह सुनिश्चित करना है कि निर्वाचन पारदर्शी स्वरूप का है और निर्वाचन के परिणाम को बदलने के लिए धन शक्ति का उपयोग नहीं हुआ है – बैंक खाता खोलने की शर्त एक आवश्यक शर्त नहीं, यह केवल खातों के उचित संधारण सुनिश्चित करने हेतु एक कदम है – बैंक खाता खोला जाना केवल एक प्रक्रिया है और इसे एक आनुषांगिक शर्त के रूप में लिया जा सकता है – बैंक खाता न खोलने या बैंक खाते के जरिए निर्वाचन व्यय खर्च नहीं करना, एक प्रत्याशी को निरर्हित करने का आधार नहीं हो सकता विशेषतः तब जब अपीलार्थी ने निर्वाचन व्यय प्रस्तुत किये हैं और आयोग द्वारा प्रतिकूल टिप्पणी नहीं की गई है – आगे अभिनिर्धारित – मात्र उक्त तकनीकी आधार पर प्रत्याशी को निर्वाचित करने में जनता की इच्छा को शून्य नहीं बनाया जा सकता – बैंक रजिस्टर का प्रस्तुतीकरण आज्ञापक अथवा आवश्यक शर्त नहीं – आगे अभिनिर्धारित – बैंक खाता न खोले जाने के लिए पाँच वर्ष के लिए निरर्हता पूर्ण रूप से अभिकथित अपचार/कदाचार के अननुपातिक है – निर्वाचित प्रतिनिधि को हटाने या निरर्हित किये जाने के गंभीर परिणाम होते हैं अतः उन्हें हटाया नहीं जाना चाहिए जब तक कि स्पष्ट प्रकरण न बनता हो – निर्वाचन आयोग का एवं एकल न्यायपीठ द्वारा पारित आदेश अपास्त – रिट अपील मंजूर।

Cases referred :

2005 (1) MPLJ 245, 2003 (1) MPLJ 180, (2014) 7 SCC 99, (2012) 4 SCC 407, (1976) 2 SCC 455, (1977) 2 SCC 23, (1995) 5 SCC 347, (2002) 5 SCC 294, (2011) 1 SCC 236, (1976) 1 SCC 719, (2012) 11 SCC 390, (2012) 3 SCC 314, (2014) 14 SCC 189, (1991) 3 SCC 273, (2006) 11 SCC 548, (2017) 2 SCC 528.

Rohit Sohgaura, for the appellant.
Pradeep Singh, G.A. for the respondent/State.
Siddharth Seth, for the respondent No. 2/State Election Commission.

O R D E R

The Order of the Court was delivered by :
Hemant Gupta, C.J. :- The challenge in the present appeal is to an order passed by the learned Single Bench on 20.7.2017 in W.P. No.20968/2016, whereby the challenge to an order passed by the State Election Commission (for short "the Commission") on 21.11.2016, disqualifying the appellant to contest the election for five years under Section 32-C of the M.P. Municipalities Act, 1961 (for short the Act), remained unsuccessful.

2. The appellant contested the election to the office of President, Municipal Council Jaitwara for which polling was held on 2.12.2014. In the said election, the appellant was declared as a returned candidate on 7.12.2014. The appellant filed the election expenses within time granted. The appellant was served with a notice dated 17.3.2015 on the ground that the Part I and II, of the expenses book, and Annexure 1 to 9 of the election expenses furnished after the poll are incomplete and to explain as to why the expenses were not done through the bank account. The reply of the appellant is that he be given time for completion of the incomplete document but, in respect of expenses through bank, the assertion of the appellant was that he has incurred the election expenses from the money lying in the house for which expenses has been accounted for. It is in pursuance of such show cause notice, an order was passed on 21.11.2016 published in the official Gazette dated 22.12.2016 that since the appellant has not spent the amount through bank nor opened the bank account, therefore, he has violated the directions of the Election Commission. Therefore, in terms of Section 32-C of the Act, he was disqualified from being elected as Municipal Councilor and President for a period of five years from the date of the said order.

3. Challenge to such order before the learned Single Judge has remained unsuccessful. Learned counsel for the appellant relied upon the judgment of this Court in the case of *Mahendra Vs. M.P. State Election Commission and others*

reported as 2005 (1) MPLJ 245 and *Jawaharlal Gupta Vs. Rajya Nirvachan Ayog, Bhopal* reported as 2003 (1) MPLJ 180. On the other hand, learned counsel for the Commission relied upon the judgment of Supreme Court in the case of *Ashok Shankarrao Chavan Vs. Madhavrao Kinhalkar and others* reported as (2014) 7 SCC 99. After considering the contentions and the judgment relied upon by the learned counsel for the parties, the learned Single Bench dismissed the writ petition. The relevant paragraphs of the order in appeal are reproduced as under:-

> "Para 14.....
>
> 14.2 If the provision contained in Section 32-A(3) are read in conjunction with that of article 243 Z A as reproduced supra, it is crystal clear that the State Election Commission can provide all the necessary particulars for maintaining accounts of expenditure by passing necessary directions in exercise of its supervisory jurisdiction for conduct of free, fair and impartial election to any office in a Municipality including that of the President.
>
> 14.3 Having interpreted the contents of Section 32-A (3) in the manner as explained supra there is no scintilla of doubt that the Order of 2014 issued by the Commission can very well provide the manner in which the accounts are maintained as regards receipt and expenditure during election. The provision of maintaining a bank account which though does not expressly find place in Section 32-A of the 1961 Act but the same has to be understood to be prescribed by way of the 2014 Order issued by the Commission in exercise of its powers u/S 32-A (3) of 1961 Act.
>
> 15. Analyzed in the above said manner, it becomes crystal clear that opening of a bank account for maintaining the pecuniary transactions during election to the office of President squarely falls within the expression 'manner prescribed' used in Section 32-C (A) of the 1961 Act, thereby rendering the petitioner liable to penal action under Section 32-C (B) of disqualification due to failure to do so."

4. When the matter came up for hearing before this Court on 8.8.2017, this Court framed the following questions which require examination. The same read as under :-

> "1. Whether the requirement of furnishing of bank register of election expenses could be mandated by the State Election Commission in terms of sub-section (3) of Section 32-A of the Act ?

2. The ancillary question which arises is whether the condition of bank register of election expenses is directory or mandatory ?

3. The other question is whether disqualification for failure to lodge the account of election expenses is can be vested on a candidate for the next election as well ?"

5. Shri Rohit Sohgaura, learned counsel for the appellant, argued that for transparent and probity in election expenses, furnishing of election expenses is the requirement and not opening of the bank account. The furnishing of election expenses is the essential condition whereas; the requirement of bank account is only a form, an ancillary condition. Therefore, the appellant having submitted account of expenses, he could not be disqualified only for the reason that the bank account was not opened in terms of the Nirvachan Vyay (Lekha Sandharan Aur Prastuti) Aadesh, 2014 published on 10.7.2014 (for short "the Order"). The condition of opening a bank account is not a mandatory condition, but is a step to obtain proper election account expenses. Even in the absence of bank account, the expenses could be verified. The Commission has not found any illegality or irregularity in the expenses furnished, therefore, the appellant could not be disqualified only for the reason that he has not opened a bank account.

6. In response to the questions framed, learned counsel for the Commission has filed response of the Commission on 28.8.2017. The stand of the Commission is that as per Section 32-A of the Act, every candidate at an election of the President shall, either by himself or by his agent, keep a separate and correct account of all expenditure in connection with the election incurred or authorized by him or by his election agent between the date on which he has been nominated and the date of declaration of the result. Sub-section 3 of Section 32-A provides that account of expenditure shall contain particulars as may be prescribed by the Commission. Section 32-C of the Act provides for disqualification for failure to lodge account of election expenses. The appellant has not submitted the election expenses in the prescribed format in the manner prescribed by the Commission in the Order published on 10.7.2014. It is submitted that the appellant has not opened the bank account which was a mandatory condition, thus, the appellant has been disqualified in accordance with law.

7. Mr. Seth, learned counsel for the Commission relied upon hand book of instructions containing the Order as well as the instructions for the candidates. One of the instructions is that a candidate has to open a bank account out of which expenses have to be incurred, though such instruction is not part of the statutory order. Mr. Seth also relied upon an affidavit which is part of the manual as Performa

"D", which contains a declaration that the daily account of expenditure supported by vouchers is being produced for the perusal of the Commission. It is argued that in terms of Clause 7 of the Order, the necessary documents to comply with the requirement of the expenditure includes, Performa "A" mentioned in Clause 4 of the Order containing daily expenses; Performa "B", a Register of expenses in cash; and Performa "C", Bank Register of the election expenses is required to be furnishes. It is contended that all three documents cumulatively satisfy the test of the requirement of the Statute. Since the appellant has admittedly not opened the bank account as is directed in the Manual as well as in terms of Clause 7 (2) (A) of the order, the impugned order passed by the Commission is perfectly legal and justified. It is also argued that the Commission is a Constitutional Authority who is to ensure free and fair election in a transparent manner, therefore, the conditions of submission of expenses has to be strictly construed.

8. The some of the necessary statutory provisions need to be extracted for ready reference. The relevant provisions read as under :-

> "**32.Preparation of electoral rolls and conduct of elections**.
>
> xxx xxx xxx
>
> **32-A. Account of election expenses.** (1) Every candidate at an election of President shall, either by himself or by his election agent, keep a separate and correct account of all expenditures in connection with the election incurred or authorized by him or by his election agent between the date on which he has been nominated and the date of declaration of the result thereof, both dates inclusive.
>
> xxx xxx xxx
>
> (3) The account of expenditure shall contain such particulars as may be prescribed by the State Election Commission.
>
> **32-B. Lodging of account of election expenses.-** Every contesting candidate at an election of President shall, within thirty days from the date of election of the returned candidate lodge with the officer notified by the State Election Commission an account of his election expenses which shall be a true copy of the account kept by him or by his election agent under Section 32-A.
>
> **32-C. Disqualification for failure to lodge account of election expenses.-** If the State Election Commission is satisfied that a person –

(a) has failed to lodge an account of election expenses within the time and in the manner required by or under this Act; and

(b) has no good reason or justification for the failure, the State Election Commission shall, by order published in the official Gazette, declare them to be disqualified and any such person shall be disqualified for being chosen as, and for being Councillor or President of the Municipal Council or Nagar Panchayat, as the case may be, for a period not exceeding five years from the date of the order.

xxx xxx xxx

35. Disqualification of candidates. -

(a) xxx xxx xxx

(r) has been disqualified under Section 32-C."

The relevant definition and Clauses from the Order, when translated from Hindi read as under:-

"Clause 2.....

(g) "**Election Expenditure**" means the expenditure incurred, or authorized by a candidate or his election agent in relation to an election made between the date of the nomination and the date of declaration of election result thereof, (both dates inclusive).

(h) "**Performa**" means-**Performa "A**"-Day to day Account Register of election expenditure; Performa "B"- Cash Register of election expenditure and Performa "C"- Bank Register of election expenditure and Performa "D" Affidavit.

xxx xxx xxx

Clause 7.Filing of accounts of Election Expenses-(1) Every candidate contesting election or his election agent shall file an account of election expenses to the District Election Officer, as specified in the Act. within 30 days from the date of election.

(2) The account of the election expenses shall consists of the following documents i.e.-

(a) Performa "A" referred to in clause-4- Day to day account register of election expenditure, Performa "B"- Cash Register of election expenditure and Performa "C"- Bank Register of election expenditure, in original,

(b) Vouchers relating to the entries lodged in account register of election expenditure in Performa "A"- Day to day Account Register of election expenditure, Performa "B"- Cash Register of election expenditure and Performa "C"- Bank Register of election expenditure.

(c) Summary of election expenses referred to in Clause 6."

9. It may be mentioned that Clause 3 of the Order contemplates that what is required to be contained in Performa "A", "B" and "C". Performa "C" relating to bank accounts is required to contain, the date of receipt of an amount, name of the person from whom such amount is received, whether the amount is received in cash or cheque and cheque number. Such Performa requires that on payment side, the name of payee, nature of the expenditure and the amount, the balance amount and the remarks should be given.

10. We have heard learned counsel for the parties and examined the relevant provisions.

11. Before, the respective arguments of the Learned Counsel for the parties are discussed; some basic principles of the role of municipalities, the election to the institutions of local self-government, scope of interference in the result of the elections need to be discussed. In *Ravi Yashwant Bhoir Vs. Collector reproted as* (2012) 4 SCC 407, the Supreme Court held that amendment in the Constitution by adding Parts IX and IX-A confers upon the local self-government a complete autonomy on the basic democratic unit unshackled from official control. Thus, exercise of any power having effect of destroying the Constitutional institution besides being outrageous is dangerous to the democratic set-up of this country. Therefore, an elected official cannot be permitted to be removed unceremoniously without following the procedure prescribed by law, in violation of the provisions of the Constitution. It was held that where the statutory provision has very serious repercussions, it implicitly makes it imperative and obligatory on the part of the authority to have strict adherence to the statutory provisions. It was further held that removal of an elected office-bearer is a serious matter. The elected office-bearer must not be removed unless a clear-cut case is made out, for the reason that holding and enjoying an office, discharging related duties is a valuable statutory right of not only the elected member but also of his constituency or electoral college. The relevant extract read as under:-

"28. In *State of Punjab v. Baldev Singh – (1999) 6 SCC 172*, this Court considered the issue of removal of an elected office-bearer

and held that where the statutory provision has very serious repercussions, it implicitly makes it imperative and obligatory on the part of the authority to have strict adherence to the statutory provisions. All the safeguards and protections provided under the statute have to be kept in mind while exercising such a power. The Court considering its earlier judgments in *Mohinder Kumar* v. *State* – (1998) 8 SCC 655 and *Ali Mustaffa Abdul Rahman Moosa*v. *State of Kerala* – (1994) 6 SCC 569 held as under: (*Baldev Singh case (supra)*, SCC p. 199, para 28)

> "*28*. … It must be borne in mind that severer the punishment, greater has to be the care taken to see that all the safeguards provided in a statute are scrupulously followed."

30. There can also be no quarrel with the settled legal proposition that removal of a duly elected member on the basis of proved misconduct is a quasi-judicial proceeding in nature. [Vide *Indian National Congress (I)* v. *Institute of Social Welfare* – (2002) 5 SCC 685]. This view stands further fortified by the Constitution Bench judgments of this Court in *Bachhitar Singh* v. *State of Punjab* – AIR 1963 SC 395 and *Union of India* v. *H.C. Goel* – AIR 1964 SC 364. Therefore, the principles of natural justice are required to be given full play and strict compliance should be ensured, even in the absence of any provision providing for the same. Principles of natural justice require a fair opportunity of defence to such an elected office-bearer.

33. This Court examined the provisions of the Punjab Municipal Act, 1911, providing for the procedure of removal of the President of the Municipal Council on similar grounds in *Tarlochan Dev Sharma* v. *State of Punjab* – (2001) 6 SCC 260 and observed that removal of an elected office-bearer is a serious matter. The elected office-bearer must not be removed unless a clear-cut case is made out, for the reason that holding and enjoying an office, discharging related duties is a valuable statutory right of not only the elected member but also of his constituency or electoral college. His removal may curtail the term of the office-bearer and also cast stigma upon him. Therefore, the procedure prescribed under a statute for removal must be strictly adhered to and unless a clear case is made out, there can be no justification for his removal. While taking the decision, the

authority should not be guided by any other extraneous consideration or should not come under any political pressure.

34. In a democratic institution, like ours, the incumbent is entitled to hold the office for the term for which he has been elected unless his election is set aside by a prescribed procedure known to law or he is removed by the procedure established under law. The proceedings for removal must satisfy the requirement of natural justice and the decision must show that the authority has applied its mind to the allegations made and the explanation furnished by the elected office-bearer sought to be removed.

35. The elected official is accountable to its electorate because he is being elected by a large number of voters. His removal has serious repercussions as he is removed from the post and declared disqualified to contest the elections for a further stipulated period, but it also takes away the right of the people of his constituency to be represented by him. Undoubtedly, the right to hold such a post is statutory and no person can claim any absolute or vested right to the post, but he cannot be removed without strictly adhering to the provisions provided by the legislature for his removal (vide *Jyoti Basu* v. *Debi Ghosal* – (1982) 1 SCC 691, *Mohan Lal Tripathi* v. *District Magistrate, Rae Bareily* – (1992) 4 SCC 80 and *Ram Beti* v. *District Panchayat Raj Adhikari* – (1998) 1 SCC 680).

36. In view of the above, the law on the issue stands crystallised to the effect that an elected member can be removed in exceptional circumstances giving strict adherence to the statutory provisions and holding the enquiry, meeting the requirement of principles of natural justice and giving an incumbent an opportunity to defend himself, for the reason that removal of an elected person casts stigma upon him and takes away his valuable statutory right. Not only the elected office-bearer but his constituency/electoral college is also deprived of representation by the person of their choice.

37. A duly elected person is entitled to hold office for the term for which he has been elected and he can be removed only on a proved misconduct or any other procedure established under law like "no confidence motion", etc. The elected official is accountable to its electorate as he has been elected by a large number of voters and it would have serious repercussions when he is removed from the

office and further declared disqualified to contest the election for a further stipulated period."

12. Still further, the Hon'ble Supreme Court in a judgment reported as *D. Venkata Reddy Vs. R. Sultan,* (1976) 2 SCC 455 held that an election is a politically sacred public act, not of one person or of one official, but of the collective will of the whole constituency. Courts naturally must respect this public expression secretly written and show extreme reluctance to set aside or declare void an election which has already been held unless clear and cogent testimony compelling the court to uphold the corrupt practice alleged against the returned candidate is adduced. Indeed election petitions where corrupt practices are imputed must be regarded as proceedings of a quasi-criminal nature wherein strict proof is necessary. Though the judgment relates to an election petition before the Election Tribunal under the Representation of People Act but the test laid down are equally applicable to the question of disqualification of a candidate after declaration of result of a municipality. In fact, the Commission has now dual jurisdiction, one to conduct elections, and another to disqualify a candidate which may include an elected representative as well. When the Commission exercises jurisdiction to disqualify a candidate, it acts a quasi judicial tribunal and that the strict interpretation is required as the will of the people of an elected candidate is to be set at naught. The relevant extract from the judgment read as under:-

> **"3** …. In a democracy such as ours, the purity and sanctity of elections, the sacrosanct and sacred nature of the electoral process must be preserved and maintained. The valuable verdict of the people at the polls must be given due respect and candour and should not be disregarded or set at naught on vague, indefinite, frivolous or fanciful allegations or on evidence which is of a shaky or prevaricating character. It is well settled that the onus lies heavily on the election petitioner to make out a strong case for setting aside an election. In our country election is a fairly costly and expensive venture and the Representation of the People Act has provided sufficient safeguards to make the elections fair and free. In these circumstances, therefore, election results cannot be lightly brushed aside in election disputes. At the same time it is necessary to protect the purity and sobriety of the elections by ensuring that the candidates do not secure the valuable votes of the people by undue influence, fraud, communal propaganda, bribery or other corrupt practices as laid down in the Act.

6. Similarly in *Rahim Khan* v. *Khurshid Ahmed* – (1974) 2 SCC 660, Krishna Iyer, J., speaking for the Court most lucidly and aptly observed as follows: (p. 666, para 9) "An election once held is not to be treated in a lighthearted manner and defeated candidates or disgruntled electors should not get away with it by filing election petitions on unsubstantial grounds and irresponsible evidence, thereby introducing a serious element of uncertainty in the verdict already rendered by the electorate. An election is a politically sacred public act, not of one person or of one official, but of the collective will of the whole constituency. Courts naturally must respect this public expression secretly written and show extreme reluctance to set aside or declare void an election which has already been held unless clear and cogent testimony compelling the court to uphold the corrupt practice alleged against the returned candidate is adduced. Indeed election petitions where corrupt practices are imputed must be regarded as proceedings of a quasi-criminal nature wherein strict proof is necessary. The burden is therefore heavy on him who assails an election which has been concluded."

To the same effect is the decision of this Court in *Abdul Hussain Mir* v. *Shamsul Huda* – (1975) 4 SCC 533, where this Court observed as follows: [pp. 538-39, paras 4 and 5]

"Even so, certain basic legal guidelines cannot be lost sight of while adjudging an election dispute. The verdict at the polls wears a protective mantle in a democratic polity. The Court will vacate such ballot count return only on proof beyond reasonable doubt of corrupt practices. Charges, such as have been imputed here, are viewed as quasi-criminal, carrying other penalties from losing a seat, and strong testimony is needed to subvert a Returning Officer's declaration….

When elections are challenged on grounds with a criminal taint, the benefit of doubt in testimonial matters belongs to the returned candidate."

13. In a later three Judge Bench judgment reported as *Mohd. Yasin Shah Vs. Ali Akbar Khan,* (1977) 2 SCC 23, it was held that it is well settled that the sanctity and purity of electoral process in the country must be maintained. The election of a duly returned candidate cannot be set at naught on the basis of interested or partisan evidence which is not backed by cogent circumstances or unimpeachable documents.

14. In a judgment reported as *Gajanan Krishnaji Bapat and another Vs. Dattaji Raghobaji Meghe and others,* (1995) 5 SCC 347, the Supreme Court again reiterated that the election of a successful candidate is not to be interfered lightly and that one of the essentials of the election law is to safeguard the purity of the election process and to see that people do not get elected by flagrant breaches of the law. The relevant extract reads as under :-

> "13. Though the election of a successful candidate is not to be interfered with lightly and the verdict of the electorate upset, this Court has emphasised in more than one case that one of the essentials of the election law is to safeguard the purity of the election process and to see that people do not get elected by flagrant breaches of the law or by committing corrupt practices. It must be remembered that an election petition is not a matter in which the only persons interested are the candidates who fought the election against each other. The public is also substantially interested in it and it is so because election is an essential part of a democratic process. It is equally well settled by this Court and necessary to bear in mind that a charge of corrupt practice is in the nature of a quasi-criminal charge, as its consequence is not only to render the election of the returned candidate void but in some cases even to impose upon his a disqualification fro contesting even the next election....."

15. The Supreme Court in the judgment reported as *Union of India Vs. Association for Democratic Reforms and another,* (2002) 5 SCC 294 held that the Commission can ask the candidates about the expenditure incurred by the political parties and this transparency in the process of election would include transparency of a candidate who seeks election or re-election. The relevant extract reads as under :-

> "46.4. To maintain the purity of elections and in particular to bring transparency in the process of election, the Commission can ask the candidates about the expenditure incurred by the political parties and this transparency in the process of election would include transparency of a candidate who seeks election or re-election. In a democracy, the electoral process has a strategic role. The little man of this country would have basic elementary right to know full particulars of a candidate who is to represent him in Parliament where laws to bind his liberty and property may be enacted."

16. The Order has been published by the Commission in terms of the powers conferred on it under sub-clause (3) of Section 32-A of the Act of 1961, but the question required to be examined is whether the condition of opening the bank account is essential / mandatory condition or is a directory condition. The purpose of the furnishing of the account of election expense is to ensure that a candidate renders true and faithful account of expenditure. Learned counsel for the Commission could not point out that a person is mandated to open a bank account under any statute. The object and purpose of the furnishing of election expenses is to ensure that there is transparent form of election and money power is not used to change the result of election.

17. In *Ashok Shankarrao Chavan's* case (supra), on which the learned counsel for the Commission has vehemently relied upon, was a case dealing with Conduct of the Election Rules, 1961 in respect of elections to the State Legislative Assembly under the Representation of People Act, 1951. Rule 86 contemplated different election expenses to be maintained from day to day, but even in such elections to the State Legislature, there is no condition of the expenses has to be incurred through the bank. Still further, while examining the said Rules, the Supreme Court held that purity in the election is to be maintained at any cost and nobody is allowed to take the voting public of this country for a ride. Therefore, we find that furnishing of day to day expenditure is the essential and mandatory condition, whereas spending the amount through the bank account is only an ancillary condition. If a candidate has not spent the election expenses through the bank does not mean that the detail of expenditure furnished by a candidate is false or untrue. Neither the Commission has returned such finding nor there is any allegation to that effect. The only finding recorded is that the appellant has not opened the bank account for the purpose of election expenses.

18. In *Ashok Shankarrao Chavan's* case (supra) the Supreme Court also examined that what is expected of the Election Commission while scrutinizing the details of the accounts of election expenses. The Court held as under:-

> "49. In our considered opinion if such a onerous responsibility has been imposed on the Election Commission while scrutinizing the details of the accounts of the election expenses submitted by a contesting candidate, it will have to be stated that while discharging the said responsibility, every care should be taken to ensure that no prejudice is caused to the contesting candidate. The Election Commission should also ensure that no stone is left unturned before reaching a satisfaction as to the correctness or the proper manner in

> which the lodgment of the account was carried out by the concerned candidate. If such a meticulous exercise has to be made as required under the law, it will have to be held that the onerous responsibility imposed on the Election Commission should necessarily contain every power and authority in him to hold an appropriate enquiry. Only such an exercise would ensure that in ultimately arriving at the satisfaction for the purpose of examining whether an order of disqualification should be passed or not as stipulated under Section 10-A, the high expectation of the electorate, that is the citizens of the country reposed in the Election Commission is fully ensured and also no prejudice is caused to the contesting candidate by casually passing any order of disqualification without making proper ascertainment of the details of the accounts, the correctness of the accounts and the time within which such account was lodged by the candidate concerned."

The Court also held that the Election Commission is required to act with utmost care and caution before passing an order of disqualification of a candidate (see para 51).

19. Hon'ble Supreme Court in a judgment reported as *CCE Vs. Hari Chand Shri Gopal,* (2011) 1 SCC 236, held that a distinction between the provisions of a statute which are of substantive character and were built in with certain specific objectives of policy, on the one hand, and those which are merely procedural and technical in their nature, on the other, must be kept clearly distinguished. It was held that an eligibility criteria, therefore, deserves a strict construction, although construction of a condition thereof may be given a liberal meaning if the same is directory in nature. It was held that the doctrine of substantial compliance is a judicial invention, equitable in nature, designed to avoid hardship in cases where a party does all that can reasonably be expected of it, but failed or faulted in some minor or inconsequent aspects which cannot be described as the "essence" or the "substance" of the requirements. The extract from the Judgment read as under:-

> "**31.** Of course, some of the provisions of an exemption notification may be directory in nature and some are mandatory in nature. A distinction between the provisions of a statute which are of substantive character and were built in with certain specific objectives of policy, on the one hand, and those which are merely procedural and technical in their nature, on the other, must be kept

clearly distinguished. In *TISCO Ltd. Vs. State of Jharkhand* – (2005) 4 SCC 272 this Court held that the principles as regard construction of an exemption notification are no longer res integra; whereas the eligibility clause in relation to an exemption notification is given strict meaning wherefor the notification has to be interpreted in terms of its language, once an assessee satisfies the eligibility clause, the exemption clause therein may be construed literally. An eligibility criteria, therefore, deserves a strict construction, although construction of a condition thereof may be given a liberal meaning if the same is directory in nature.

Doctrine of substantial compliance and "intended use"

32. The doctrine of substantial compliance is a judicial invention, equitable in nature, designed to avoid hardship in cases where a party does all that can reasonably be expected of it, but failed or faulted in some minor or inconsequent aspects which cannot be described as the "essence" or the "substance" of the requirements. Like the concept of "reasonableness", the acceptance or otherwise of a plea of "substantial compliance" depends upon the facts and circumstances of each case and the purpose and object to be achieved and the context of the prerequisites which are essential to achieve the object and purpose of the rule or the regulation. Such a defence cannot be pleaded if a clear statutory prerequisite which effectuates the object and the purpose of the statute has not been met. Certainly, it means that the Court should determine whether the statute has been followed sufficiently so as to carry out the intent for which the statute was enacted and not a mirror image type of strict compliance. Substantial compliance means "actual compliance in respect to the substance essential to every reasonable objective of the statute" and the Court should determine whether the statute has been followed sufficiently so as to carry out the intent of the statute and accomplish the reasonable objectives for which it was passed.

33. A fiscal statute generally seeks to preserve the need to comply strictly with regulatory requirements that are important, especially when a party seeks the benefits of an exemption clause that are important. Substantial compliance with an enactment is insisted, where mandatory and directory requirements are lumped together, for in such a case, if mandatory requirements are complied with, it will be proper to say that the enactment has been

substantially complied with notwithstanding the non-compliance of directory requirements. In cases where substantial compliance has been found, there has been actual compliance with the statute, albeit procedurally faulty. The doctrine of substantial compliance seeks to preserve the need to comply strictly with the conditions or requirements that are important to invoke a tax or duty exemption and to forgive non-compliance for either unimportant and tangential requirements or requirements that are so confusingly or incorrectly written that an earnest effort at compliance should be accepted.

34. The test for determining the applicability of the substantial compliance doctrine has been the subject of a myriad of cases and quite often, the critical question to be examined is whether the requirements relate to the "substance" or "essence" of the statute, if so, strict adherence to those requirements is a precondition to give effect to that doctrine. On the other hand, if the requirements are procedural or directory in that they are not of the "essence" of the thing to be done but are given with a view to the orderly conduct of business, they may be fulfilled by substantial, if not strict compliance. In other words, a mere attempted compliance may not be sufficient, but actual compliance with those factors which are considered as essential."

20. In an another judgment reported as *State of Punjab Vs. Shamlal Murari,* (1976) 1 SCC 719, the Court was examining the question as to whether the requirement of filing of three copies of paper book in an intra-court is an essential condition. It was held that the use of "shall" — a word of slippery semantics — in a rule is not decisive and the context of the statute, the purpose of the prescription, the public injury in the event of neglect of the rule and the conspectus of circumstances bearing on the importance of the condition have all to be considered before condemning a violation as fatal. The relevant extract read as under:-

"**7.** It is true that, in form, the rule strikes a mandatory note and, in design, is intended to facilitate a plurality of Judges hearing the appeal, each equipped with a set of relevant papers. Maybe, there is force in the view taken by the Full Bench that certain basic records must be before the court along with the appeal if the court is to function satisfactorily in the exercise of its appellate power. In this sense, the needs of the rule transcend the directory level and may,

perhaps, be considered a mandatory need. The use of "shall" — a word of slippery semantics — in a rule is not decisive and the context of the statute, the purpose of the prescription, the public injury in the event of neglect of the rule and the conspectus of circumstances bearing on the importance of the condition have all to be considered before condemning a violation as fatal.

8. It is obvious that even taking a stern view, every minor detail in Rule 3 cannot carry a compulsory or imperative import. After all, what is required for the Judges to dispose of the appeal is the memorandum of appeal plus the judgment and the paper-book. Three copies would certainly be a great advantage, but what is the core of the matter is not the *number* but the presence, and the overemphasis laid by the court on *three* copies is, we think, mistaken. Perhaps, the rule requires three copies and failure to comply therewith may be an irregularity. Had no copy been furnished of any one of the three items, the result might have been different. In the present case, copies of all the three documents prescribed, have been furnished but not three copies of each. This omission or default is only a breach which can be characterised as an irregularity to be corrected by condonation on application by the party fulfilling the condition within a time allowed by the court. We must always remember that processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. It has been wisely observed that procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice. Where the non-compliance, thou' procedural, will thwart fair hearing or prejudice doing of justice to parties, the rule is mandatory. But, grammar apart, if the breach can be corrected without injury to a just disposal of the case, we should not enthrone a regulatory requirement into a dominant desideratum. After all, courts are to do justice, not to wreck this end product on technicalities. Viewed in this perspective, even what is regarded as mandatory traditionally may, perhaps, have to be moderated into wholesome directions to be complied with in time or in extended time……".

21. The Supreme Court in the judgment reported as *Shambhu Prasad Sharma Vs. Charandas Mahant and others,* (2012) 11 SCC 390, the papers were said to be incomplete for want of proper affidavit in terms of judgment of Supreme Court in the case of *Association for Democratic Reforms* (supra). As per the instructions

issued by the Election Commission, the candidates were required to file an affidavit alongwith their nomination papers. The Court held that the objection that the affidavit was not in the required format is objection to form rather than substance of the affidavit. The relevant extract reads as under:-

> "16. The directions (*Union of India Vs. Association for Democratic Reforms and another,* (2002) 5 SCC 294, *People's Union for Civil Liberties v. Union of India,* (2003) 4 SCC 399) issued by this Court, and those issued by the Election Commission make the filing of an affidavit an essential part of the nomination papers, so that absence of an affidavit may itself render a nomination paper non est in the eye of the law. But where an affidavit has been filed by the candidate and what is pointed out is only a defect in the format of the affidavit or the like, the question of acceptance or rejection of the paper shall have to be viewed in the light of sub-section (4) of Section 36 of the Act which reads: ....."

22. In another judgment of the Supreme Court reported as *Mangani Lal Mandal Vs. Bishnu Deo Bhandari,* (2012) 3 SCC 314, the election was challenged on the ground that the returned candidate suppressed the facts in the affidavit he filed alongwith his nomination papers that he has two wives and the dependent children by marriage with his first wife. The Court held that mere non-compliance or breach of the Constitution or the statutory provisions by itself does not result in invalidating the election of a returned candidate. Though, the order pertains to an election petition under the Representation of People Act, but the fact remains that every violation of the statutory provision is not by itself a ground for setting aside the elections. The relevant extract from the judgment reads as under :-

> "11. A mere non-compliance or breach of the Constitution or the statutory provisions noticed above, by itself, does not result in invalidating the election of a returned candidate under Section 100(1)(d)(iv). The sine qua non for declaring the election of a returned candidate to be void on the ground under clause (iv) of Section 100(1)(d) is further proof of the fact that such breach or non-observance has resulted in materially affecting the result of the returned candidate. In other words, the violation or breach or non-observation or non-compliance with the provisions of the Constitution or the 1951 Act or the rules or the orders made thereunder, by itself, does not render the election of a returned

candidate void Section 100(1)(d)(iv). For the election petitioner to succeed on such ground viz., Section 100(1)(d)(iv), he has not only to plead and prove the ground but also that the result of the election insofar as it concerned the returned candidate has been materially affected. The view that we have taken finds support from the three decisions of this Court in (1) *Jabar Singh Vs. Genda Lal – AIR* 1964 SC 1200; (2) *L.R. Shivaramagowda Vs. T.M. Chandrashekhar* – (1999) 1 SCC 666; and (3) *Uma Ballav Rath (Smt.) Vs. Maheshwar Mohanty* – (1999) 3 SCC 357."

23. In an another judgment of the Supreme Court reported as *Resurgence India Vs. Election Commission of India and another* – (2014) 14 SCC 189, certain columns in the affidavit required to be filed alongwith the nomination paper were left blank. It was directed that the nomination papers of a candidate can be rejected at the time of scrutiny on the ground that he has not filled up the proforma prescribed by the Election Commission. The said judgment deals with rejection of a nomination paper before elections, but after elections are conducted and result declared, the test for disqualifying the candidate would be material different then what is contemplated at the time of rejection of the nomination paper.

24. The said principle of interpretation was applied in respect of tender condition to find out what are essential or ancillary conditions. The Hon'ble Supreme Court in a judgment reported as *Poddar Steel Corpn. Vs. Ganesh Engineering Works,* (1991) 3 SCC 273 held that as a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the notice in meticulous detail, and is not entitled to waive even a technical irregularity of little or no significance. The requirements in a tender notice can be classified into two categories — those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance with the condition in appropriate cases. The extract from the judgment read as under:-

"6. It is true that in submitting its tender accompanied by a cheque of the Union Bank of India and not of the State Bank clause 6 of the tender notice was not obeyed literally, but the question is as to whether the said non-compliance deprived the Diesel Locomotive Works of the authority to accept the bid. As a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the notice in meticulous detail, and

is not entitled to waive even a technical irregularity of little or no significance. The requirements in a tender notice can be classified into two categories — those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases. This aspect was examined by this Court in *C.J. Fernandez* v. *State of Karnataka* – (1990) 2 SCC 488 a case dealing with tenders. Although not in an entirely identical situation as the present one, the observations in the judgment support our view. The High Court has, in the impugned decision, relied upon *Ramana Dayaram Shetty* v. *International Airport Authority of India* – (1979) 3 SCC 489 but has failed to appreciate that the reported case belonged to the first category where the strict compliance of the condition could be insisted upon. The authority in that case, by not insisting upon the requirement in the tender notice which was an essential condition of eligibility, bestowed a favour on one of the bidders, which amounted to illegal discrimination. The judgment indicates that the court closely examined the nature of the condition which had been relaxed and its impact before answering the question whether it could have validly condoned the shortcoming in the tender in question. This part of the judgment demonstrates the difference between the two categories of the conditions discussed above. However it remains to be seen as to which of the two clauses, the present case belongs."

25. In another judgment reported as *B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd.,* (2006) 11 SCC 548*,* the principles of law in respect of power of judicial review in contractual matter was again came for consideration. The Court held that if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with. It was held as under:-

"66. We are also not shutting our eyes towards the new principles of judicial review which are being developed; but the law as it stands now having regard to the principles laid down in the aforementioned decisions may be summarised as under:

(i) if there are essential conditions, the same must be adhered to;

(*ii*) if there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully;

(*iii*) if, however, a deviation is made in relation to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be held to be existing;

(iv) the parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance with another part of tender contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction;

(*v*) when a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with;

(*vi*) the contractors cannot form a cartel. If despite the same, their bids are considered and they are given an offer to match with the rates quoted by the lowest tenderer, public interest would be given priority;

(*vii*) where a decision has been taken purely on public interest, the court ordinarily should exercise judicial restraint.

26. We find that the condition of opening bank account is not the essential condition as the object of furnishing of election expenses is not dependent upon opening of bank account. It is only a step to ensure proper maintenance of accounts. The bank account is only a procedure to achieve the objective but not an end in itself. It is at best an ancillary condition. The Hon'ble Supreme Court in the above mentioned judgments has examined the issue as to when a particular condition is

essential or ancillary condition. It is held that essential conditions are required to be satisfied whereas, the ancillary conditions are desirable but on account of non-fulfillment of ancillary conditions, the tender cannot be rejected. Such interpretation is the interpretation in relation to the document. But, such interpretation would hold good even in respect of an Order published under a Statute.

27. The Performa "C" i.e. bank register of election expenditure only requires to contain the date of receipt of an amount, name of the person from whom such amount is received, whether the amount is received in cash or cheque and cheque number. On the payment side, the Performa requires the name of payee, nature of the expenditure and the amount and the balance amount in the account. Thus, the bank register of the expenses is only to give a fair account of receipt an expenditure. We cannot loose the practical side that most of the petty traders conduct business in cash. Still further, in the affidavit which a candidate has to furnish in Performa "D" only stipulates the statement of expenditure, but it does not stipulate that such expenditure has been incurred through the bank account only.

28. Therefore, non-opening of bank account or not spending the election expenses through the bank account cannot be a ground to disqualify a candidate when otherwise, election expenses have not been found to be improperly maintained. The will of the people in electing a candidate cannot be set at naught on the mere technicalities of not opening a bank account when otherwise; the election expenses have been duly furnished and have not been commented upon adversely by the Commission.

29. In view of the above, we hold that though the requirement of furnishing of bank register could be provided by the State Election Commission in terms of sub-section (3) of Section 32-A of the Act, but, production of the bank register is not a mandatory or essential condition. If a candidate is able to satisfy that the election expenses have been properly accounted for, the candidate cannot be disqualified for the reason that the election expenses have not been made through a bank account.

30. The judgment referred to by learned counsel for the appellant before the learned Single Bench pertains to Election Expenses (Maintenance and Lodging of Account) Order, 1997. Such order has no condition of incurring the election expenses through the bank account. Therefore, the said judgments are really not helpful to the arguments raised in the present appeal.

31. In respect of the third question, we find that order passed under Section 32-C is a disqualification of a candidate in terms of Section 35 of the Act. Still further, in terms of provisions of Section 35(r), the disqualification of a candidate for

five years is a disqualification for future elections as well. Though, Section 35 of the Act empowers the Commission to disqualify a candidate for a period not exceeding five years from the date of the order, but to pass an order of disqualification for five years, which may disqualify him to contest the next election as well requires to be supported by cogent reasons and not merely on the basis of technicality of not furnishing of bank account. Therefore, though the appellant could be disqualified for a period up to five years, but we find that such period of disqualification is disproportionate even on the touch stone of Wednesbury principle of reasonableness. The disqualification of five years is wholly disproportionate to the alleged misconduct. In a judgment reported as *Chief Executive Officer, Krishna District Coop. Central Bank Ltd. v. K. Hanumantha Rao,* (2017) 2 SCC 528, the Court held that the limited power of judicial review to interfere with the penalty is based on the doctrine of proportionality which is a concept of judicial review. If the punishment is so disproportionate that it shocks the judicial conscience, the Court would interfere. The relevant extract read 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)

> "*8*. The order of the appellate authority while having a relook at the case would, obviously, examine as to whether the punishment imposed by the disciplinary authority is reasonable or not. If the appellate authority is of the opinion that the case warrants lesser penalty, it can reduce the penalty so imposed by the disciplinary authority. Such a power which vests with the appellate authority departmentally is ordinarily not available to the court or a tribunal. The court while undertaking judicial review of the matter is not supposed to substitute its own opinion on reappraisal of facts. (See *UT of Dadra & Nagar Haveli* v. *Gulabhia M. Lad* – (2010) 5 SCC 775). In exercise of power of judicial review, however, the court can interfere with the punishment imposed when it is found to be totally irrational or is outrageous in defiance of logic. This limited scope of judicial review is permissible and interference is available only when the punishment is shockingly disproportionate, suggesting lack of good faith. Otherwise, merely because in the opinion of the court lesser punishment would have been more appropriate, cannot be a ground to interfere with the discretion of the departmental authorities.
>
> *9*. When the punishment is found to be outrageously disproportionate to the nature of charge, principle of proportionality comes into play. It is, however, to be borne in mind that this principle would be attracted, which is in tune with the doctrine of *Wednesbury (Associated Provincial*

Picture Houses Ltd. v. Wednesbury Corpn. - (1948) 1 KB 223=(1947) 2 All ER 680 (CA) rule of reasonableness, only when in the facts and circumstances of the case, penalty imposed is so disproportionate to the nature of charge that it shocks the conscience of the court and the court is forced to believe that it is totally unreasonable and arbitrary. This principle of proportionality was propounded by Lord Diplock in *Council of Civil Service Unions* v. *Minister for the Civil Service* – 1985 AC 374 = (1984) 3 All ER 935 (HL) in the following words: (AC p. 410 D-E)

'… Judicial review has, I think, developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads, grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality", the second "irrationality" and the third "procedural impropriety". This is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality"….'

10. An imprimatur to the aforesaid principle was accorded by this Court as well in *Ranjit Thakur* v. *Union of India – (1987) 4 SCC 611*. Speaking for the Court, Venkatachaliah, J. (as he then was) emphasising that "all powers have legal limits" invoked the aforesaid doctrine in the following words: (SCC p. 620, para 25)

'*25.* … The question of the choice and quantum of punishment is within the jurisdiction and discretion of the Court Martial. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the Court Martial, if the decision of the court even as to sentence is an

> outrageous defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognised grounds of judicial review."

32. Therefore, the disqualification of a candidate for a period of five years for not opening a bank account for the purpose of election expenses is wholly disproportionate to the alleged misconduct. The removal or disqualification of an elected representative has serious repercussion, therefore, elected representative must not be removed unless a clear-cut case is made out, for the reason that holding and enjoying an office and discharging related duties is a valuable statutory right of not only the elected member but also of his constituency or electoral college. Disqualification of a candidate only for the reason that he has not incurred the election expenses through the bank account is wholly unjustified and is a case of overkill. Therefore, we find that the order passed by the Election Commission for disqualifying an elected candidate solely for that reason is not justified. Consequently, the same is set aside.

33. Consequently, the order passed by the learned Single Bench upholding the order passed by the Election Commission is also set aside. Accordingly, the present writ appeal is **allowed**.

Appeal allowed

I.L.R. [2018] M.P. 38 (DB)
WRIT PETITION

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

W.P. No. 8643/2012 (Gwalior) decided on 4 August, 2017

DEEPAK SPINNERS LIMITED ...Petitioner

Vs.

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

Upkar Adhiniyam, M.P., 1981 (1 of 1982), Section 3(1) and Constitution – Entry 53 of List II of Schedule VII – Imposition of Tax – Validity **– Held – Consumption of electric energy even by one who generates the same may be liable to be taxed by reference to Entry 53 and if State legislature chooses to impose tax on consumption of electricity by one who generate it, such tax would not be deemed to be a tax necessarily on manufacture or production – By virtue of Sanshodhan Adhiniyam, the taxing event being for the supply, sale and consumption of electricity is well within the legislative competence of State Legislature – Further held – After**

generation of electricity which cannot be stored there has to be consumption which is done through distribution thus these three are separate in nature and not inseparable – State under Entry 53 of list II of Schedule VII of the constitution can levy tax on consumption of the electricity so generated – Petition dismissed.

(Paras 15, 16 & 20)

उपकर अधिनियम, म.प्र., 1981 (1982 का 1), धारा 3(1) एवं संविधान – अनुसूची VII की सूची II की प्रविष्टि 53 – कर का अधिरोपण – विधिमान्यता – अभिनिर्धारित–प्रविष्टि 53 के संदर्भ द्वारा विद्युत ऊर्जा का उपभोग, भले ही उसका उत्पादन करने वाले द्वारा ही क्यों न हो, कर लगाये जाने योग्य हो सकता है और यदि राज्य विधान मंडल, विद्युत का उत्पादन करने वाले द्वारा किये गये विद्युत के उपभोग पर कर अधिरोपित करना चुनता है तब उक्त कर को आवश्यक रूप से विनिर्माण या उत्पादन पर कर नहीं समझा जायेगा – संशोधन अधिनियम के आधार पर, विद्युत का प्रदाय, विक्रय एवं उपभोग हेतु कर अधिरोपण होने के नाते, वह राज्य विधानमंडल की विधायी सक्षमता के भली–भांति भीतर है – आगे अभिनिर्धारित – विद्युत, जिसका संचय नही किया जा सकता, उसका उत्पादन होने के पश्चात् उसका उपभोग किया जाना होता है, जो कि वितरण द्वारा किया जाता है, अतः यह तीन पृथक स्वरूप में है एवं अपृथक्करणीय नहीं है – संविधान की अनुसूची VII की सूची II की प्रविष्टि 53 के अंतर्गत, राज्य इस प्रकार उत्पादित विद्युत के उपभोग पर कर अधिरोपित कर सकता है – याचिका खारिज।

Cases referred :

(2004) 2 SCC 249, 2008(II) MPJR 269, AIR 1963 SC 414, AIR 1966 SC 1431, (2002) 5 SCC 203.

Pawan Dwivedi, for the petitioner.
Praveen Newaskar, G.A. for the respondent No.1/State.
Vivek Jain,, for the respondent No. 2.

O R D E R

The Order of the Court was delivered by :
Sanjay Yadav, J. :- Petitioner challenges the legality and validity of Section 3 of Madhya Pradesh Upkar Adhiniyam, 1981 (for short "Act, 1981") substituted vide Madhya Pradesh Upkar (Sanshodhan) Adhiniyam, 2011 (for short "Adhiniyam, 2011"), whereby for sub-section (1) of Section 3, following sub-section has been substituted:-

> "(1) Every Generating Company or any person owning or operating a captive generating plant shall pay to the State

> Government at the prescribed time and in the prescribed manner an energy development cess at the rate of fifteen paise per unit on the total units of electrical energy sold or supplied to a distribution licensee or consumer in the State of Madhya Pradesh or consumed by itself or its employees during prescribed period:
>
> Provided that no cess shall be payable in respect of electrical energy sold or supplied by any Generating Company in which the Government of Madhya Pradesh has fifty one percent or more equity.

2. This legislation, i.e., Madhya Pradesh Upkar Adhiniyam, 1981 has a chequered history.

3. The amendment was initially made by an ordinance promulgated on 29.06.2001 by the State Government titled as the Madhya Pradesh Upkar (Sanshodhan) Adhyadesh, 2001. "By amendment a cess @ 20 paise per unit was imposed on the captive power producer on the total units of electrical energy produced. The Act subsequently replaced the ordinance, known as Madhya Pradesh Upkar (Sanshodhan) Adhiniyam, 2001 (referred to Amending Act, 2001).

4. Amendment Act, 2001 came to be challenged by the Madhya Pradesh Cement Manufactures Association vide Writ Petition No. 3547/2001. A Division Bench of this Court vide order dated 21.11.2001 repelled the challenge and upheld constitutional validity of Amending Act, 2001. That, Act of 1981 further underwent amendment vide Madhya Pradesh Upkar (Dwitiya Sanshodhan) Adhiniyam, 2001, whereby the rate of energy on the distributors of electrical energy under sub-section (1) of Section 3 was increased from 1 paisa to 10 paise.

5. That order in *Madhya Pradesh Cement Manufactures Association* (supra) was challenged in the Supreme Court in *M.P. Cement Manufacturers' Association Vs. Sate of M.P. and others* reported in (2004) 2 SCC 249 wherein it was held:

> "14. A plain reading of Sub-Section (2) of Sub Section 3 by the amendment to the 1981 Adhiniyam makes it clear that the levy of cess was "on the electrical energy produced". The phrase "whether for sale or supply" merely clarified that all electricity produced irrespective of its destination would be liable to cess at the specified rate. The use of the word "whether" after the phrase "energy produced" means that the cess would apply on units produced,

whichever of the alternatives mentioned after the word "whether", namely, sale or supply or consumption is the case. There is no reason to assume that the words used did not reflect the intention of the Legislature. The imposition envisaged was on the production of electricity units. The charge was on generation and not on the sale or consumption of electricity. There is a conscious linguistic departure from the language used in Section 3 of the Electricity Duty Act, 1949 and indeed the language used in Section (1) of the same Act where the cess is levied on the total units of electrical energy sold or supplied by distributors of electrical energy. When dealing with producers under sub- Section (2) of the same section, the cess is required to be paid "on the total units of electrical energy produced". If, as is contended by the respondents, the incidence of levy under sub-Section (1) and sub-section (2) were identical, the same language should have been used in both sub-sections. The deliberate change in language reflects an intention to alter the subject matter of levy as far as producers were concerned.

15. Our interpretation of sub-section (2) of Section 3 is buttressed by and in keeping with the language and effect of the proviso to the said sub-section. It has been held that the normal function of the proviso is to except something out of the enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. The proviso to Section 3(2) excepts "electrical energy produced" from payment of the cess in five cases. This would show that the general application of Section 3(2) to which an exception was being carved by the proviso was in respect of the production of electrical energy. Were it not for the exception in the proviso to Section 3(2), what would be subjected to tax would be electrical energy produced by the five categories mentioned under the proviso. Although in categories (i), (ii), (iii) and (v) the exemption is granted with reference to the utilisation of the electrical energy produced, under exception (iv) significantly, all electrical energy produced by a Rural Electrical Co-operative Society registered under the M.P. Co-operative Societies Act, 1960 is exempted. The difference of language between the proviso to sub-section (2) of Section 3 and the proviso to sub-section (1) of Section 3 is also telling. Under the proviso to sub-section (1), the exception is of electrical energy sold or supplied to specified authorities.

16. That the intention of the Legislature was to levy cess on the production of electricity is also borne out from the Statement of Objects and Reasons which accompanied the Act which replaced the Ordinance. It says:

> "With a view to impose cess on the electricity generated by the producers from their Captive Power Plants/Diesel Generating Sets for self consumption or for sale at the rate of 20 paise per unit on all generated electricity units, it has been decided to amend the Madhya Pradesh Upkar Adhiniyam, 1981 (No. 1 of 1982) suitably." (emphasis supplied)

17. There can, in the circumstances, be no doubt that the levy was sought to be imposed on the generation of electricity by the amendment, a levy which the State admittedly was incompetent to impose.

6. Further taking note of further amendment effected to 1981 Adhiniyam by the Madhya Pradesh Upkar (Sanshodhan) Adhiniyam, 2003, whereby an explanation was added at the end of sub-section (2) of Section 3 in the terms that:

> "Explanation – for the purpose of this sub-section, the cess shall be levied on the units of electrical energy, sold or supplied from the captive power units or diesel generators sets to a consumer or consumed by the producer or his employees.

7. It was held:-

> "(25) The expression used by the Explanation is "for the purpose of sub-section (2) of Section 3, the cess shall be levied on units of electrical energy sold or supplied". Since the purpose of sub-section (2) of Section 3 continues to be a levy on production, the word 'levied' in the context would at the highest mean 'assessment' and not 'imposition'. It is not the respondents' case that any new or additional or alternative cess was sought to be introduced by the Explanation. Thus despite the Explanation, the charge in Section 3(2) continues to be on the production of the electrical energy units and nothing else. The proviso to sub-section (2) of Section 3 continues to except electrical energy produced from the cess in certain cases. The Explanation, if it is read with the main provision, introduces certain contradictions and vagueness. A charging provision should be

explicit, certain and clear in order to bind the subject. The outcome of the introduction of the Explanation to an otherwise unchanged Section 3(2) is a singularly ill drawn provision. The 2003 amendment was obviously introduced for the purpose of rectifying the obvious error in Section 3(2), an object which cannot be achieved by introducing an Explanation since an Explanation cannot be read as changing or as interfering with the incidence of the levy. It is not for us, particularly when legislative clarity is required since the statutory provision imposes a tax, to untangle the legislative confusion.

(26) The legislature could have avoided the controversy, if it had wished to make the incidence of tax explicitly on sale or consumption, by the simple expedient of so providing. The Legislature in its wisdom did not choose to do so. To use the words voiced by Jessel M.R.:

"I must say that whoever is responsible for drafting .. of this Act ... has taken a great deal of trouble to raise a very difficult question, when he might with the greatest ease by using appropriate and well-known terms have avoided any question whatever."

(27) We are, therefore, of the opinion that the cess chargeable at all material times under Section 3(2) is only on the production of electrical energy units as far as producers of electricity for captive consumption are concerned and the Explanation does not serve to change the character of the tax from an impermissible to a permissible levy."

8. Thus, incidence of tax on production was held beyond the competence of the State legislature. The provision was thus declared ultra vires (Paragraph 43 of the report).

9. After the decision in *M.P. Cement Manufactures Association,* the State legislature in order to save the loss caused to the exchequer enacted Madhya Pradesh Upkar (Sanshodhan Tatha Vidhimanyatakaran) Adhiniyam, 2004, the constitutionality whereof came to be challenged in *Prism Cement Ltd. Satna Vs. State of M.P. and others* reported in 2008 (II) MPJR 269**,** in which the validity was upheld and it was held:-

"47. In view of the aforesaid analysis we record our conclusions in seriatim as under:

(a) The stand and stance that the levy is still on production and, therefore, the State Legislature does not have legislative competence is unacceptable as the language of the statute is unambiguous and clear and relates exclusively to sale, supply and consumption and there is no colourable exercise of power.

(b) The proponement that in a captive power plant what is produced and generated is consumed and, therefore, in quintessentiality, it is levy of cess on production or manufacturing is sans substratum as a distinction has been drawn between the terms 'production' on one hand and sale, consumption and supply on the other.

(c) The submission that the Parliament alone could have passed the Validation Act in respect of levy and to remove the base of the decision rendered in *M.P. Cement Manufacturer's Association* (supra) is neither sound nor correct.

(d) The State Legislature has correctly amended the provision contained in Section 2(1) of the Validation Act which is within its domain and, therefore, the ground that it lacks the legislative competence is bereft of any substance.

(e) The assailability to the effect that the Validation Act is not valid as the amount realized still relates to production, the provision being retrospective in nature, has no substantiality and substance and hence, deserves to be rejected, and as a logical and natural corollary it is held that the Validation Act has been validly passed by the State Legislature.

(f) The Validation Act is not hit by Article 14 of the Constitution as the classification is reasonable and further the provisions do not suffer from any arbitrariness. The Validation Act cannot be regarded to be ultra vires because of non-compliance of the conditions precedent as engrafted under Section 12(3) of Vidyut Sudhar Adhiniyam because as both the statutes operate in different spheres and, in any case, a piece of legislation cannot be regarded as invalid because the Regulatory Commission as contemplated under Vidyut Sudhar Adhiniyam has not been consulted.

(g) The assiduous assevaration that there can be passing of a legislation to convert impermissible levy to a permissible levy within the parameters of legislative competence but in the case at hand the conversion or change does not meet the conversion equivalence in an apposite manner, for the amount of energy cess collected on production cannot be adjusted with retrospective effect for the sum payable for sale, consumption and supply there is lot of difference in the amount, is without merit inasmuch as Sub-section 2 of Section 3 takes care of it by providing that sub-section shall be construed as preventing any person - (a) from questioning in accordance with the provisions of principal Act, the imposition of energy development cess for any period; or (b) for claiming refund of the cess paid by him in excess under the principal Act.

(h) Each of the petitioners is entitled to get the differential sum computed as per Sub section 2 of Section 3 in respect of amount of energy cess on production and the amount presently realized under the heads sale, supply and consumption.

(i) The conclusion recorded at Sr. No. (g) above does not necessarily mean that this Court has recorded a finding that there is differential sum in each case as this Court has not dwelled upon this facet the same being not necessary while the constitutional validity has been addressed to.

(j) If any sum after computation falls due, as per law, the same shall carry interest as per the direction given by the Apex Court in *M.P. Cement Manufacturers' Association* (supra)."

10. It is informed that a Special Leave Petition bearing SLP No. 17748/22007 is pending before Supreme Court.

11. When the matter stood thus the State Legislature further amended Section 3 of 1981 Adhiniyam vide Madhya Pradesh Upkar (Sanshodhan) Adhiniyam, 2011 in the following terms:-

"2. In Section 3 of Madhya Pradesh Upkar Adhiniyam, 1981 (No. 1 of 1982), for sub-section (1), the following sub-section shall be substituted, namely:-

"(1) Every Generating Company or any person owning or operating a captive generating plant shall pay to the State

Government at the prescribed time and in the prescribed manner an energy development cess at the rate of fifteen paise per unit on the total units of electrical energy sold or supplied to a distribution licensee or consumer in the State of Madhya Pradesh or consumed by itself or its employees during prescribed period:

Provided that no cess shall be payable in respect of electrical energy sold or supplied by any Generating Company in which the Government of Madhya Pradesh has fifty one percent or more equity.

Explanation: For the purpose of this sub-section "Generating Company", "person", "captive generating plant", "distribution licensee" and "consumer" shall have the same meaning as assigned to them in Section 2 of the Electricity Act, 2003 (No. 36 of 2003)."

12. Subsequently, vide Madhya Pradesh Upkar (Sanshodhan) Adhiniyam, 2012, the State Legislature substituted sub-section (1) of Section 3 of Adhiniyam, 1981 as under:-

"2. In Section 3 of the Madhya Pradesh Upkar Adhiniyam, 1981 (No. 1 of 1982), for sub-section (1), the following sub-section shall be substituted, namely:-

"(1)(a) Every Generating Company shall pay to the State Government at the prescribed time and in the prescribed manner an energy development cess at the rate of fifteen paise per unit on the total units of electrical energy sold or supplied to a distribution licensee or consumer in the State of Madhya Pradesh or consumed by itself or its employees during prescribed period:

Provided that no cess shall be payable in respect of electrical energy sold or supplied by any Generating Company in which the Government of Madhya Pradesh has fifty one percent or more equity.

(b) Every person owning or operating a captive generating plant shall pay to the State Government at the prescribed time and in the prescribed manner an energy development cess at the rate of fifteen paise per unit on the total units of electrical energy sold or supplied to a distribution licensee or consumer in the State of Madhya Pradesh or consumed by its employees during prescribed period.

Provided that no cess shall be payable in respect of electrical energy consumed himself by any person owning or operating a captive generating plant.

Explanation: For the purpose of this sub-section "Generating Company", "person", "captive generating plant", "distribution licensee" and "consumer" shall have the same meaning as assigned to them in Section 2 of the Electricity Act, 2003 (No. 36 of 2003)."

13. The validity of Sanshodhan Adhiniyam, 2012 is not questioned; we are, therefore, presently concerned with the validity of Sanshodhan Adhiniyam, 2011.

14. The amendment is challenged broadly on the following grounds, firstly, that it is beyond legislative competence of the State legislature to levy cess on the utilization of the electricity as the same is inseparable and incidental of the captive generation of electricity and, therefore, the consumption / utilization of electricity is dormant part of manufacturing activity. In essence, it is urged that the impugned levy is on manufacturing / production which is beyond legislative competence of the State legislature. Secondly, that subject of captive electricity generated / produced by captive power generating plants relates to entry 38 of list III of the VII Schedule of the Constitution. It is urged that since source of production of electricity is wholly immaterial and does not alter the real taxing subject; and since the law relating to production of electricity by captive power generating plant is covered by the Act of 2003 and the field of legislation being occupied, it is beyond the competence of the State legislature with taking recourse to Article 254(2) of the Constitution to enact to Sanshodhan Adhiniyam, 2011.

15. The petitioner, however, has confined his submissions only to the extent that it is beyond the legislative competence of the State legislature to levy cess on the utilization of the electricity as the same is inseparable and incidental of the captive generation of electricity which is a dormant part of manufacturing activity. To substantiate the submission, learned counsel for the petitioner has taken pain to explain the process of generation of electricity from captive generation plant. Evidently, after the generation of electricity which cannot be stored there has to be consumption which is done through distribution, thus these three are separate in nature and not inseparable as contended on behalf of the petitioner. That, State under Entry 53 of list II of Schedule VII of the Constitution can levy tax on consumption of the electricity so generated. The taxing event is thus consumption which cannot be separated from the event of supply.

16. In the case at hand the taxing event is the sale, supply and consumption of electricity. Though true it may be that the petitioner is also producing the electricity but is consuming himself. Since the incident of tax is not on production which is separate then the distribution, supply or consumption as can be said to be beyond legislative competence of the State legislature.

17. In *Jiyajeerao Cotton Mills Ltd., Birlanagar, Gwalior Vs. State of Madhya Pradesh* reported in AIR 1963 SC 414, it is held:

> "5. For the purpose of appreciating the first ground it would be useful to reproduce the terms of S. 3 of the Act. The section runs thus:
>
> "Levy of duty on sale or consumption of electrical energy- Subject to the exceptions specified in S. 3-A every distributor of electrical energy and every producer shall pay every month to the State Government at the prescribed time and in the prescribed manner a duty calculated at the rates specified in the Table below on the units of electrical energy sold or supplied to a consumer or consumed by himself or his employees during the preceding month.
>
> Rates of Duty
>
> | | | |
> |---|---|---|
> | (i) | Electrical energy supplied for consumption for lights, fans or any other appliances normally connected to a lighting circuit. | 6 nP per unit of energy. |
> | (ii) | Electrical energy supplied for purposes other than those specified in item (i) above. | 1 nP. per unit of energy." |
>
> This is the charging section. It is not disputed by Mr. Sastri that under this provision a producer of electrical energy is made liable to pay duty for the units of electrical energy consumed by himself. He, however, contends that rates of duty have been prescribed in the Table below S. 3 only with respect to electrical energy "supplied for consumption" to others and that no rates have been prescribed with respect to electrical energy consumed by the producer himself. Section 2(a) of the Act defines "consumer". The definition, so far as relevant, runs thus:

"`Consumer' means any person who consumes electrical energy sold or supplied by a distributor of electrical energy or a producer....."

'Producer' as defined S.2(d-1) of the Act means "a person who generates electrical energy at a voltage exceeding hundred volts for his own consumption or for supplying to others". If we read the two definitions together, omitting the non-essentials, 'consumer' would include "'any person who consumes electrical energy supplied by a person who generates electrical energy for his own consumption". Under S.3 a person who generates electrical energy over hundred volts for his own consumption is liable to pay duty on the units of electrical energy consumed by himself. A producer consuming the electrical energy generated by him is also a consumer, that is to say, he is a person who consumes electrical energy supplied by himself. The Table prescribes rates of duty payable with respect to electrical energy supplied for consumption and, therefore, the levy on the appellant falls squarely within the Table under S. 3 of the Act and M/s. Viswanatha Sastri's argument is devoid of substance.

(6) It is difficult to see how the levy of duty upon consumption of electrical energy can be regarded as duty of excise falling within Entry 84 of List I. Under that Entry what is permitted to Parliament is levy of duty of excise on manufacture or production of goods (other than those excepted expressly by that entry). The taxable event with respect to a duty of excise is "manufacture" or "production". Here the taxable event is not production or generation of electrical energy but its consumption. If a producer generates electrical energy and stores it up, he would not be required to pay any duty under the Act. It is only when he sells, it or consumes it that he would be rendered liable to pay the duty prescribed by the Act. The Central Provinces and Berar Electricity Act was enacted under Entry 48-B of List II of the Government of India Act, 1935. The relevant portion of that Entry read thus:

"Taxes on the consumption or sale of electricity..... "

Entry 53 of List II of the Constitution is to the same effect. The argument of Mr. Sastri is that the word "consumption" should be accorded the meaning which it had under the various Act, including

the Indian Electricity Act, 1910. Under that Act and under the various Provincial and State Acts, consumption of electricity means, according to him, consumption by persons other than producers and that both in the Government of India Act and under the Constitution the word 'consumption' must be deemed to have been used in the Fame sense. The Acts in question deal only with a certain aspect of the topic "'electricity", and not with all of them. Therefore, in those Acts the word "consumption" they may have a limited meaning, as pointed out by learned counsel. But the word "consumption" has a wider meaning. It means also "use up" "spend" etc. The mere fact that a series of laws were concerned only with a certain kind of use of electricity, that is consumption of electricity by persons other than the producer cannot justify the conclusion that the British Parliament in using the word "consumption" in Entry 48B and the Constituent Assembly in Entry 53 of List II wanted to limit the meaning of "consumption" in the same way. The language used in the legislative entries in the Constitution must be interpreted in a broad way so as to give the widest amplitude of power to the legislature to legislate and not in a narrow and pedantic sense. We cannot, therefore, accept either of the two grounds urged by Mr. Viswanatha Sastri challenging the vires of the Act."

18. In *Indian Aluminum Co. etc. Vs. State of Kerala and others* reported in AIR 1996 SC 1431, it is held:

"19. In view of the legal position referred to hereinbefore, it must be held that the words 'sale or consumption' used in Entry 53 of the State List and the Act made in exercise of the power under Article 246(3) of the Constitution, would receive wide interpretation so as to sustain the constitutionality of the Act unless it is affirmatively established that the Act is unconstitutional.

25. It is common knowledge that for HT and EHT industries a sub-station at the place of manufacture or establishment or at its convenient place is set up and electricity is supplied to the sub station and a minimum guarantee of payment is ensured therefor under the contract. But the question is whether the word 'supply' used in Section 3 of the Act would be construed to mean 'consumption' or 'sale' of electricity. From the sub-station, electricity is connected to the industrial units through the meter put up in the factory. Continuity

of supply and consumption starts from the moment the electrical energy passes through the meters and sale simultaneously takes place as soon as meter reading is recorded. All the three steps or phases take place without any hiatus. It is true that from the place of generating electricity, the electricity is supplied to the sub-station installed at the units of the consumers through electrical higher-tension transformers and from there electricity is supplied to the meter. But the moment electricity is supplied through the meter, consumption and sale simultaneously take place. It is true that in the definitions given in the New Encyclopaedia Britanica, Vol. 4, p.842 cited before us, distinction between supply and consumption is stated but adopting a pragmatic and realistic approach, we are of the considered view that as soon as the electrical energy is supplied to the consumers and is transmitted through the meter, consumption takes place simultaneously with the supply. There is no hiatus in its operation. Simultaneously sale also takes place. Charge will be quantified at a later date as per the recorded meter reading or escaped metering, as the case may be. The word 'supply' used in the charging Section 3 should, therefore, receive liberal interpretation to include sale or consumption of electricity as envisaged in Entry 53 of the State List."

19. In *State of A.P. Vs National Thermal Power Corpn. Ltd. and others* reported in (2002) 5 SCC 203, their lordships while dwelling on the scope of entry 53 in list II of the seventh schedule were pleased to hold:-

"22. We now come to the question on the interpretation of Entry 53 in List II of Seventh Schedule. It provides for taxes on the consumption or sale of electricity. The word 'sale' as occurring in Entry 52 came up for the consideration of this Court in *Burmah Shell Oil Storage & Distributing Co. of India Ltd. Vs. The Belgaum Borough Municipality* AIR 1963 SC 906; 1963 Supp.(2) SCR 216. It was held that the act of sale is merely the means for putting the goods in the way of use or consumption. It is an earlier stage, the ultimate destination of the goods being "use or consumption". We feel that the same meaning should be assigned to the word 'sale' in Entry 53. This is for a fortiori reason in the context of electricity as there can be no sale of electricity excepting by its consumption, for it can neither be preserved nor stored. It is this property of electricity

which persuaded this Court in Indian Aluminium Co. case to hold that in the context of electricity, the word 'supply' should be interpreted to include sale or consumption of electricity. Entry 53 should therefore be read as 'taxes on the consumption or sale for consumption of electricity'.

23. With these two things in mind, namely, that electricity is goods, and that sale of electricity has to be construed and read as sale for consumption within the meaning of Entry 53, the conflict, if any, between Entry 53 and Entry 54 ceases to exist and the two can be harmonized and read together. Because electricity is goods, it is covered in Entry 54 also. It is not disputed that duty on electricity is tax. Tax on the sale or purchase of goods including electricity but excluding newspapers shall fall within Entry 54 and shall be subject to provisions of Entry 92-A of List I. Taxes on the consumption or sale for consumption of electricity within the meaning of Entry 53 must be consumption within the State and not beyond the territory of the State. Any other sale of electricity shall continue to be subject to the limits provided by Entry 54. Even purchase of electricity would be available for taxation which it would not be if electricity was not includible in the meaning of term 'goods'. A piece of legislation need not necessarily fall within the scope of one entry alone; more than one entry may overlap to cover the subject-matter of a single piece of legislation. A bare consumption of electric energy even by one who generates the same may be liable to be taxed by reference to Entry 53 and if the State Legislature may choose to impose tax on consumption of electricity by the one who generates it, such tax would not be deemed to be a tax necessarily on manufacture or production or a duty of excise, as held by Constitution Bench in *Jiyajeerao Cotton Mills Ltd., Birlanagar, Gwalior Vs. State of Madhya Pradesh 1962 Supp.(1) SCR 282.* A mere consumption of goods (other than electricity), not accompanied by purchase or sale would not be taxable under Entry 54 because it does not provide for taxes on the consumption and Entry 53 does not speak of goods other than electricity. Thus in substance Entries 53 and 54 can be and must be read together and to the extent of sale of electricity for consumption outside the State, the electricity being goods, shall also be subject to provisions of Entry 92-A of List I. This, in our opinion, is the best way

of reading the two entries. In C.P. Motor Spirit Act, re., Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938, Re, AIR 1939 FC 1, it was held that two entries in the lists may overlap and sometimes may also appear to be in direct conflict with each other. It is then the duty of this Court to reconcile the entries and bring about harmony between them. The Court should strive at searching for reasonable and practical construction to seek reconciliation and give effect to all of them. If reconciliation proves impossible the overriding power of Union Legislature operates and prevails. Gwyer, C.J. Observed:

(AIR p.7)

"A grant of the power in general terms, standing by itself, would no doubt be construed in the wider sense; but it may be qualified by other express provisions in the same enactment, by the implication of the context, and even by considerations arising out of what appears to be the general scheme of the Act."

And again he said: (AIR p.8)

"An endeavour must be made to solve it, as the Judicial Committee have said, by having recourse to the context and scheme of the Act, and a reconciliation attempted between two apparently conflicting jurisdictions by reading the two entries together and by interpreting, and, where necessary, modifying the language of the one by that of the other. If needed such a reconciliation should prove impossible, then and only then, will the non-obstante clause operate and the federal power prevail."

In *Calcutta Gas Co. (Proprietary) Ltd. Vs. The State of West Bengal & Ors.,* 1962 Supp (3) SCR 1, the Constitution Bench has held that the same rules of construction apply for the purpose of harmonizing an apparent conflict between two entries in the same list." (emphasis supplied)

20. While applying the principle of law culled out from pronouncement in *Jiyajeerao Cotton Mills Ltd., Birlanagar, Gwalior Vs. State of Madhya Pradesh* (supra), *Indian Aluminum Co. etc. Vs. State of Kerala and others* (supra), and *State of A.P. Vs National Thermal Power Corpn. Ltd. and others* (supra) in the present context, wherein by virtue of Sanshodhan Adhiniyam, 2011 the taxing event being the supply, sale and consumption of electricity the enactment thereof being

well within the legislative competence of the State legislature, we negative the challenge and uphold the validity of Section 3(1) of Sashodhan Adhiniyam, 2011.

21. No other grounds are raised, subsequently, petition fails and is dismissed. No costs.

Petition dismissed

I.L.R. [2018] M.P. 54 (DB)
WRIT PETITION

Before Mr. Justice S.A. Dharmadhikari & Mr. Justice S.K. Awasthi

W.P. No. 2735/2017 (Gwalior) decided on 27 September 2017

SURENDRA SECURITY GUARD SERVICES (M/s) ...Petitioner

Vs.

UNION OF INDIA & ors. ...Respondents

(Alongwith W.P. No. 3497/2017)

***Constitution – Article 226 and High Court Rules and Orders, M.P., Chapter 3 – Territorial Jurisdiction – Cause of Action* – Held – In order to ascertain the territorial jurisdiction, High Court shall scrutinize the doctrine of forum conveniens and the nature of the cause of action while entertaining a writ petition – Even a small fraction of cause of action accrues within the jurisdiction of the Court, the Court will have the jurisdiction in the matter – In the present case, petition was presented at Gwalior bench of High Court – All proceedings such as opening of technical bid, financial bid and issuance of work order has been carried out at NHDC office at Khandwa and their corporate office is at Bhopal and therefore territorial jurisdiction lies within the principal Seat of this Court at Jabalpur – Registry directed to return the petition to the counsel of petitioner for presentation before the Principal Seat at Jabalpur – Petition disposed of.**

(Para 7, 10 & 14)

संविधान – अनुच्छेद 226 एवं उच्च न्यायालय नियम एवं आदेश, म.प्र., अध्याय 3 – क्षेत्रीय अधिकारिता – वाद हेतुक – अभिनिर्धारित – क्षेत्रीय अधिकारिता सुनिश्चित करने हेतु, उच्च न्यायालय रिट याचिका ग्रहण करते समय फोरम कन्वीनियन्स के सिद्धान्त एवं वाद हेतुक की प्रकृति की संवीक्षा करेगा – यहां तक कि वाद हेतुक का एक अल्प अंश/भाग न्यायालय की अधिकारिता के भीतर प्रोद्भूत है, तो न्यायालय को मामले में अधिकारिता होगी – वर्तमान प्रकरण में, याचिका उच्च न्यायालय की ग्वालियर खंडपीठ में प्रस्तुत की गयी थी – समस्त कार्यवाहियाँ, जैसे कि तकनीकी बोली, वित्तीय बोली का प्रारंभ एवं कार्य

आदेश का जारी किया जाना खंडवा में एन.एच.डी.सी. के कार्यालय पर की गई है एवं उनका निगमित कार्यालय भोपाल में है तथा इसलिए क्षेत्रीय अधिकारिता इस न्यायालय की मुख्यपीठ, जबलपुर की होगी – मुख्यपीठ जबलपुर के समक्ष प्रस्तुत करने हेतु याची के अधिवक्ता को याचिका वापस करने के लिए रजिस्ट्री को निदेशित किया – याचिका निराकृत।

Cases referred :

AIR 2007 SC 1812, (2002) 1 SCC 567, 2007 (213) ELT 323 (SC), AIR 2011 Del. 174.

Ankur Mody, for the petitioner.
Vivek Khedkar, Assistant Solicitor General for the respondent No.1/U.O.I..
Deepak Awasthi, for the respondent Nos. 2 to 5.

O R D E R

The Order of the Court was delivered by :
S.A. Dharmadhikari, J. :- The genesis of the point in issue being common to both these petitions, they are being decided by this common order.

2. In W.P. No. 2735/2017, petitioner has assailed the supplementary show-cause notice dated 15/4/17 (Annexure P-1C) and e-mail communications dated 19/4/17 and 20/4/17 (Annexures P-1 and P-1A), whereby petitioner has been informed by respondent no.4 that his bid for the tender in question is rejected on technical evaluation by the Tender Evaluation Committee since he did not fulfill the tender criteria.

In W.P. No. 3497/2017, petitioner has questioned the validity of the subsequent orders dated 24/4/17 (Annexure P/1), 24/5/17 (Annexure P/1-A) and 18/5/17 (Annexure P/1- B), whereby the competent Authority has suspended business dealings with the petitioner and after granting opportunity of hearing debarred the petitioner from participating in any of the tender proceedings of NHDC Ltd. for a period of two years w.e.f. 4/12/15.

3. Brief facts leading to filing of these cases are that petitioner is a registered partnership firm engaged in the business of supply of manpower (Security Guards) to Government departments. The petitioner had been a successful bidder in many of the tenders floated by the respondents for supply of manpower since 1997. For the year 2015-2016 also, a tender for supply of manpower was floated by the respondents vide tender notice dated 25/6/15. In reply to the said NIT, petitioner submitted its bid along with copy of experience certificate issued by THDC India Ltd. After passage of some time, petitioner received a notice dated 1/10/15 asking to

show-cause as to why action be not taken against the petitioner-firm for submitting fake experience certificate. In response, to the aforesaid show-cause notice, petitioner submitted its reply on 13/10/15 *inter alia* stating that experience certificate has been issued by THDC India Ltd. in lieu of work done by the petitioner for which payments had also been received by it from THDC. After considering the reply, respondents came to the conclusion that petitioner had violated "FRAUD" policy by submitting fake certificate and resultantly debarred the petitioner from participating in the tender process for a period of 2 years w.e.f. 4/12/15. Respondents issued a subsequent letter dated 15/1/16, whereby the period of debarrment was reduced from 2 years to 6 months. Again vide letter dated 28/6/16, the petitioner was informed that it was debarred for a period of 2 years w.e.f. 4/12/15 and the earnest money of Rs.2,01,000/- had been forfeited for violating the FRAUD policy.

Being aggrieved by the order dated 28/6/16, petitioner preferred W.P. No.4654/16 before this Court and the same was disposed of vide order dated 27/9/16 in the following terms:-

> "This petition under Article 226 of the Constitution of India seeking the following relief :
>
> > "That the order Annexure -P/1, P/2 & P/3 quashed in entirety and the factum of debarment of the petitioner be expunged for the record of petitioner and the forfeited amount be refunded to the petitioner."
>
> This Court as per order dated 11.07.2016 has issued a show cause notice to the respondents and after considering the submissions and the facts, by way of interim relief it is directed that operation and effect of the impugned order 28.06.2016 shall remain stayed.
>
> After service of the notice, the respondents No.2 &3 who passed the order tendered the appearance through Shri Deepak Awasthi, who has fairly stated across the bar that keeping the question of territorial jurisdiction open, as the appeal is provided under Clause 10 of the policy which is known as Banning Business Dealings and its procedure; it is urged that the Chief Executive Officer is the appellate authority as per Clause 3(b) of the said policy. However, the issue as raised by the petitioner before this court may be adjudicated by the Appellate Authority within a time frame.

Counsel appearing on behalf of the other respondents urged that at present they have nothing to say in the present case and therefore,appropriate orders to adjudicate the issue by the appellate authority may be passed.

Learned counsel for the petitioner has strenuously urged that in the present case the procedure of banning the business dealings has not been followed, however, the petition is maintainable which may be decided on merits.

After hearing both the parties and on consideration of the fact that the issue as raised by the petitioner may be adjudicated by the appellate authority in the facts and circumstances of the case, including the issue of no fault on his part. However, all the points may be dealt with and decided by the appellate authority including the issue of non observance of the procedure. However, in our considered opinion, it would be appropriate to direct that if petitioner files an appeal within two weeks from today before the Appellate Authority, then new appeal be decided within two months from the date of filing. It is further directed that till then the interim order passed by this Court shall remain in operation. It is made clear here the question of territorial jurisdiction would remain open to be raised at subsequent stage, if occasion so arises.

With the aforesaid directions, this petition stands disposed of.

In pursuance to the aforesaid order, petitioner filed an appeal before the Appellate Authority, which was dismissed vide order dated 2/12/16 on the ground that there was no provision for personal hearing and the order of debarrment was upheld. Being aggrieved, a second writ petition was filed by the petitioner before this Court which came to be registered as W.P. No. 8897/16 and this Court vide order dated 3/4/17, having found that respondents had issued the notice dated 1/10/15 to the petitioner to take action in terms of the FRAUD policy but what action would be taken had not been clearly enumerated therein and though the policy contemplated personal hearing if required yet the same had been declined for the reason that it was not provided in the policy, set aside the order dated 2/12/16 with liberty to the respondents to supplement the show-cause notice dated 1.10.15, if any, within two weeks. The petitioner was set at liberty to file fresh reply, if any, within another two weeks and respondents were directed to take decision on merits within two months. In pursuance to the liberty so granted, respondents have issued a supplementary

show-cause notice dated 15/4/17 and orders dated 19/4/17 and 20/4/17 whereby bid of the petitioner was rejected on technical evaluation, which is subject matter of challenge in W.P. No. 2735/17, wherein this Court, vide order dated 28/4/17, as an interim measure, has directed that the tender process in question be concluded, but third party rights shall not be created in favour of anyone. However, during the pendency of this writ petition, respondents issued another order dated 18/5/17, black-listing the petitioner which is subject matter of challenge in W.P. No. 3497/17.

4. On notice, respondents have entered appearance and respondent nos. 2 to 5 have filed counter affidavit. Drawing strength from the fact that in the first round of litigation in W.P. No. 4654/2016 the question of territorial jurisdiction was left open to be raised at subsequent stage if occasion so arises, in the counter-affidavit filed in W.P No.3497/2017, a preliminary objection has been raised in relation to territorial jurisdiction of this Bench at Gwalior on the underneath premise:

(a) Respondent nos. 2 to 5 are having their Corporate Office at Bhopal and Resettlement and Rehabilitation Office at Khandwa. The two projects namely Indira Sagar Power Station and Omkareshwar Power Station are also situated in district Khandwa, for which the petitioner had filed the bid. Thus the Corporate Office of respondent nos. 2 to 5, as well as, the project in question lie within the jurisdiction of Principal Seat at Jabalpur.

(b) The petitioner has not pleaded in his petition that cause of action arose within the territorial jurisdiction of this Bench.

(c) The NIT dated 25/6/17 was issued online from the Office situated at Khandwa. Petitioner submitted the bid on-line and all the proceedings such as opening of technical bid, financial bid & issuance of work order are from the Office at Khandwa.

With the aforesaid submissions, learned counsel for respondent nos. 2 to 5 contended that since the entire process right from floating of NIT till issuance of orders impugned has been carried out at NHDC Office, Khandwa which falls within the jurisdiction of Principal Seat of this Court at Jabalpur, therefore, merely having a registered Office at Gwalior will not give any cause of action to the petitioner to file this petition before the Gwalior Bench. He submits that the High Court has framed rules regulating practice and procedure known as M.P. High Court Rules & Orders, Chapter 3 whereof, deals with territorial jurisdiction of the Prinicipal Seat and Benches and Rule 4 therein provides that where a Bench, in the Principal Seat at Jabalpur or the Benches at Indore or Gwalior, on an objection taken by the Registry or otherwise, is of the opinion that a main case posted before it, had arisen from a

revenue district falling within the territorial jurisdiction of some other Bench or the Principal Seat, it may record its opinion and return the main case for its presentation at proper place for orders, after retaining one complete set of the main case. He submits that in view of the above, this petition is not liable to be entertained at this Bench.

5. The petitioner has chosen not to file any rejoinder in W.P. No. 3497/17 and, therefore, the averments contained in the aforesaid counter-affidavit remain uncontroverted. Further, the rejoinder filed in W.P. No. 2735/17 is silent on the question of territorial jursidiction.

6. Before adverting to the contentions on merits, it would be worthwhile to deal with the question of territorial jurisdiction in the backdrop of objections as raised by counsel for respondent nos. 2.to 5 in pursuance of the liberty granted by this Court in the first round of litigation (W.P. No.4654/17).

7. Indisputably, the Notice Inviting E-tender has been floated on 25/6/15 by the Manager (Contracts), NHDC Ltd., R&R, Khandwa, wherein the description of work reads thus:-

> "Providing Manpower services such as Stenographer, Computer operator, Asstt. Secretarial/Technical Electrician, Diver, Cook, Plumber, Helper for Electrician, Helper, Gardenre and Sweeeper etc. **for R&R Project, of NHDC Ltd., Khandwa (MP)**"
>
> *(Emphasis supplied)*

Thus, it is apparent that the work order was issued for Khandwa project of NHDC. It is also not in dispute that respondent nos. 2 to 5 are having their Corporate Office at Bhopal and Resettlement and Rehabilitation Office at Khandwa. Further the contract form (Annexure P/3) has been issued by Manager (Contracts), NHDC, R&R Office, Khandwa; the impugned communications (Annexures P/1 & P/2 in W.P. No.2735/17) whereby bid of the petitioner has been rejected on technical evaluation have been issued bythe Office of Chief Engineer, NHDC Ltd., Khandwa and the orders impugned in W.P. No.3497/17 including the order of black-listing the petitioner-firm for a period of 2 years, have all been issued by Sr. Manager (Contracts), NHDC, R&R, Khandwa. In addition to it, there is no rebuttal to the contention of the respondents that all the proceedings such as opening of technical bid, financial bid & issuance of work order have been from the Office at Khandwa. In the aforesaid facts and circumstances of the case, it can safely be presumed that the genesis of cause of action is Khandwa, which, indisputably, lies within the territorial jurisdiciton of Principal Seat of this Court at Jabalpur.

In similar circumstances, while addressing the issue of territorial jurisdiction, the Apex Court in the case of *Alchemist Limited & another Vs. State Bank of Sikkim and others* (AIR 2007 SC 1812) after referring to catena of precedents on the point, has summarized thus:-

> "21. The legislative history of the constitutional provisions, therefore, make it clear that after 1963, cause of action is relevant and germane and a writ petition can be instituted in a High Court within the territorial jurisdiction of which cause of action in whole or in part arises."
>
> *(Emphasis supplied)*

9. Further, on the question of ascertaining the accrual of cause of action at a particular place, the Apex Court in the aforesaid case, held thus:-

> "40. In National Textile Corporation. , (2004) 9 SCC 786 : JT 2004 (4) SCLtd. & Ors. v. Haribox Swalram & Ors 508, referring to earlier cases, the Apex Court held that:
>
> "the mere fact that the writ petitioner carries on business at Calcutta or that the reply to the correspondence made by it was received at Calcutta is not an integral part of the cause of action and, therefore, the Calcutta High Court had no jurisdiction to entertain the writ petition and the view to the contrary taken by the Division Bench cannot be sustained."
>
> From the aforesaid discussion and keeping in view the ratio laid down in catena of decisions by this Court, it is clear that for the purpose of deciding whether facts averred by the petitioner/appellant, would or would not constitute a part of cause of action, one has to consider whether such fact constitutes a material, essential, or integral part of the cause of action. It is no doubt true that even if a small fraction of the cause of action arises within the jurisdiction of the Court, the Court would have territorial jurisdiction to entertain the suit/petition. Nevertheless it must be a 'part of cause of action', nothing less than than."
>
> *(Emphasis supplied)*

10. However, before concluding, it would be worthwhile to analyze the point in issue in the light of doctrine of *forum conveniens*, as petitioner claims to have his registered Office in Gwalior.

11. In the case of *Union of India v. Adani Exports Ltd.,* (2002) 1 SCC 567 , the Apex Court has held as under:-

> "17. It is seen from the above that in order to confer jurisdiction on a High Court to entertain a writ petition or a special civil application as in this case, the High Court must be satisfied from the entire facts pleaded in support of the cause of action that those facts do constitute a cause so as to empower to court to decide a dispute which has, at least in part, arisen within its jurisdiction. It is clear from the above judgment that each and every fact pleaded by the respondents in their application does not ipso facto lead to the conclusion that those facts give rise to a cause of action within the court's territorial jurisdiction unless those facts pleaded are such which have a nexus or relevance with the lis that is involved in the case. Facts which have no bearing with the lis or the dispute involved in the case, do not give rise to a cause of action so as to confer territorial jurisdiction on the court concerned. If we apply this principle then we see that none of the facts pleaded in Paragraph 16 of the petition, in our opinion, fall into the category of bundle of facts which would constitute a cause of action giving rise to a dispute which could confer territorial jurisdiction on the courts at Ahmedabad."
>
> *(Emphasis supplied)*

12. In *Ambica Industries v. Commissioner of Central Excise,* 2007 (213) ELT 323(SC)

> "41. Keeping in view the expression "cause of action" used in Clause (2) of Article 226 of the Constitution of India, indisputably even if a small fraction thereof accrues within the jurisdiction of the Court, the Court will have jurisdiction in the matter though the doctrine of forum conveniens may also have to be considered."

13. A special Bench (5 Judges) of Delhi High Court in *M/s Sterling Agro Industries Ltd. Vs. Union of India and Ors* (AIR 2011 Del. 174) has considered this principle and in the said judgment Hon'ble Justice Dipak Misra (C.J. As His Lordship then was) opined as under:-

> "31. The concept of forum conveniens fundamentally means that it is obligatory on the part of the court to see the convenience of all the parties before it. The convenience in its ambit and sweep would include the existence of more appropriate forum, expenses involved,

the law relating to the lis, verification of certain facts which are necessitous for just adjudication of the controversy and such other ancillary aspects. The balance of convenience is also to be taken note of. Be it noted, the Apex Court has clearly stated in the cases of *Kusum Ingots* (supra), *Mosaraf Hossain Khan* (supra) and *Ambica Industries* (supra) about the applicability of the doctrine of forum conveniens while opining that arising of a part of cause of action would entitle the High Court to entertain the writ petition as maintainable.

32. The principle of forum conveniens in its ambit and sweep encapsulates the concept that a cause of action arising within the jurisdiction of the Court would not itself constitute to be the determining factor compelling the Court to entertain the matter. While exercising jurisdiction under Articles 226 and 227 of the Constitution of India, the Court cannot be totally oblivious of the concept of forum conveniens. The Full Bench in *New India Assurance Co. Ltd.* (supra) has not kept in view the concept of forum conveniens and has expressed the view that if the appellate authority who has passed the order is situated in Delhi, then the Delhi High Court should be treated as the forum conveniens. We are unable to subscribe to the said view.

33. In view of the aforesaid analysis, we are inclined to modify the findings and conclusions of the Full Bench in *New India Assurance Company Limited* (supra) and proceed to state our conclusions in seriatim as follows:

(a) The finding recorded by the Full Bench that the sole cause of action emerges at the place or location where the tribunal/appellate authority/revisional authority is situate and the said High Court (i.e., Delhi High Court) cannot decline to entertain the writ petition as that would amount to failure of the duty of the Court cannot be accepted inasmuch as such a finding is totally based on the situs of the tribunal/appellate authority/revisional authority totally ignoring the concept of forum conveniens.

(b) Even if a miniscule part of cause of action arises within the jurisdiction of this court, a writ petition would be maintainable before this Court, however, the cause of action has to be understood as per the ratio laid down in the case of *Alchemist Ltd.* (supra).

(c) An order of the appellate authority constitutes a part of cause of action to make the writ petition maintainable in the High Court within whose jurisdiction the appellate authority is situated. Yet, the same may not be the singular factor to compel the High Court to decide the matter on merits. The High Court may refuse to exercise its discretionary jurisdiction by invoking the doctrine of forum conveniens.

(d) The conclusion that where the appellate or revisional authority is located constitutes the place of forum conveniens as stated in absolute terms by the Full Bench is not correct as it will vary from case to case and depend upon the lis in question.

(e) The finding that the court may refuse to exercise jurisdiction under Article 226 if only the jurisdiction is invoked in a malafide manner is too restricted / constricted as the exercise of power under Article 226 being discretionary cannot be limited or restricted to the ground of malafide alone.

(f) While entertaining a writ petition, the doctrine of forum conveniens and the nature of cause of action are required to be scrutinized by the High Court depending upon the factual matrix of each case in view of what has been stated in Ambica Industries (supra) and Adani Exports Ltd. (supra).

(g) The conclusion of the earlier decision of the Full Bench in New India Assurance Company Limited (supra) "that since the original order merges into the appellate order, the place where the appellate authority is located is also forum conveniens" is not correct.

(h) Any decision of this Court contrary to the conclusions enumerated hereinabove stands overruled."

(Emphasis supplied)

14. Regard being had to the discussion made hereinabove, there cannot be any doubt that the question whether or not cause of action wholly or in part for filing a writ petition has arisen within the territorial limit of any High Court has to be decided in the light of the nature and character of the proceedings under Article 226 of the Constitution. In order to maintain a writ petition, the petitioner has to establish that a legal right claimed by him has been infringed by the respondents within the territorial

limit of the Court's jurisdiction. In the instant case, the petitioner has not at all been able to establish that cause of action in whole, or in part, has arisen within the territorial jurisdiction of this Bench at Gwalior. Further, merely because the petitioner has its registered office at Gwalior, it cannot be said that it constitutes the place of forum conveniens, moreso in view of the fact that entire proceedings have culminated at Khandwa, wherefrom the impugned orders have been issued which also happens to be *situs* of the projects in question. The petitioner has maintained a blissful silence in this regard. Therefore, in view of the aforesaid settled position of law and in the backdrop of the factual matrix traced above, it is held that this Bench lacks the territorial jurisdiction to entertain the present petitions and the cause of action is found to have arisen within the territorial jurisdiction of the Principal Seat at Jabalpur.

15. In view of the aforesaid, Registry is directed to return the petitions to counsel for the petitioner in accordance with Rule 4 of Chapter 3 of M.P. High Court Rules, 2008, for their presentation before the Principal Seat at Jabalpur.

16. With the aforesaid, the petitions stand disposed of.

Petition disposed of

I.L.R. [2018] M.P. 64
WRIT PETITION

Before Ms. Justice Vandana Kasrekar

W.P. No. 13722/2014 (Jabalpur) decided on 12 October, 2017

RAJU GANESH KAMLE ...Petitioner

Vs.

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

***A. Constitution – Article 226 – Writ of Quo-Warranto – Maintainability of Petition – Locus Standi* – Petitioner is an employee of Municipal Council working as sub-engineer – Respondent No. 5 who was Assistant Grade III was arrested for offence u/S 302 IPC and was subsequently suspended – In appeal, his sentence was stayed and on this basis, suspension of respondent no.5 was revoked and he was reinstated – Petitioner filed this petition – Challenge to maintainability – Held – Writ of quo-warranto is available in case when a person is holding the post contrary to the statute – Petition filed by the present petitioner is maintainable.**

(Para 7 & 8)

क. *संविधान – अनुच्छेद 226 – अधिकार पृच्छा की रिट – याचिका की पोषणीयता – सुने जाने का अधिकार* – याची नगरपालिका परिषद् का एक कर्मचारी है जो कि सब–इंजीनियर के रूप में कार्यरत है – प्रत्यर्थी क्र. 5 जो कि सहायक ग्रेड **III** था, को भारतीय दण्ड संहिता की धारा 302 के अन्तर्गत अपराध के लिए गिरफ्तार किया गया था एवं तत्पश्चात् निलंबित किया गया था – अपील में, उसका दण्डादेश रोका गया था एवं इस आधार पर, प्रत्यर्थी क्र. 5 का निलंबन प्रतिसंहृत किया गया था तथा उसको पुनः बहाल किया गया था – याची ने यह याचिका प्रस्तुत की – पोषणीयता को चुनौती – अभिनिर्धारित – अधिकार पृच्छा की रिट ऐसे प्रकरण में उपलब्ध है जब एक व्यक्ति कानून के विरूद्ध पद धारण किये हुये है – वर्तमान याची द्वारा प्रस्तुत याचिका पोषणीय है।

***B. Municipal Employees (Recruitment and Conditions of Service) Rules, M.P. 1968, Rule 10(2)(b) – Disqualification – Stay of Sentence/Stay of Conviction* – Held – As per Rule 10(2)(b), if a person has been convicted of an offence which involves moral turpitude then he is disqualified for appointment to Municipal services – In the present case, execution of sentence is stayed but the conviction continues to operate – Neither the order of conviction has been stayed nor conviction has been set aside by the High Court – Respondent no. 5 not entitled to continue on the post – Writ of quo-warranto issued against respondent no.5 directing the respondents to place him under suspension.**

(Paras 9, 10, 11 & 13)

ख. नगरपालिका कर्मचारी (भर्ती तथा सेवा की शर्तें) नियम, म.प्र., 1968, नियम 10(2)(बी) – निरर्हता – दण्डादेश का रोका जाना/दोषसिद्धि का रोका जाना – अभिनिर्धारित – नियम 10(2)(बी) के अनुसार, यदि किसी व्यक्ति को किसी अपराध के लिए दोषसिद्ध किया गया है जिसमें नैतिक अधमता शामिल है, तो वह नगरपालिका सेवाओं की नियुक्ति हेतु निरर्हित है – वर्तमान प्रकरण में, दण्डादेश का निष्पादन रोका गया है परन्तु दोषसिद्धि का प्रवर्तन जारी रहेगा – न तो दोषसिद्धि का आदेश रोका गया है और न उच्च न्यायालय द्वारा दोषसिद्धि अपास्त की गई है – प्रत्यर्थी क्र. 5 पद पर बने रहने का हकदार नहीं – प्रत्यर्थीगण को यह निदेशित करते हुये कि वे प्रत्यर्थी क्र. 5 को निलंबन के अधीन रखें, उसके विरूद्ध अधिकार पृच्छा की रिट जारी की गई।

Cases referred :

2009 (1) MPLJ 138, 2007 (1) SCC (L&S) 548 (II), (2007) 1 SCC 673.

Atul Nema, for the petitioner.
Ashish Shroti, for the respondent no. 4.
C.L. Sethi, for the respondent no. 5.

J U D G M E N T

Vandana Kasrekar, J. :- The petitioner has filed the present petition in the nature of quo warranto against respondent No.5.

2. Brief facts of the case are that the petitioner is an employee of Municipal Council, Nepa Nagar. He was appointed as Sub Engineer in the services of Municipal Council Nepa Nagar. Respondent No.5 was appointed on the post of Assistant Grade-III vide order dated 26/07/2015. Thereafter, respondent No.5 has been arrested by the police for the offences under Sections 302, 201 read with 34 of the IPC. The Chief Municipal Officer seek guidance from the Divisional Deputy Director, Urban Administration. The Deputy Director wrote that action under Rule 53 of the M.P. Municipal Services (Recruitment & Conditions of Services) Rules, 1968 be taken against the petitioner. Accordingly, the CMO has passed the order dated 23/08/2005 thereby placing respondent No.5 under suspension. Thereafter respondent No.5 was convicted by the Additional Sessions Judge, Burhanpur vide judgment dated 26/08/2008 with imprisonment of life. Against the said judgment, respondent No.5 filed a criminal appeal No. 1931/2008 and in the said appeal this Court vide order dated 18/02/2009 has enlarged her on bail. Thereafter, she made an application on 12/05/2012 for revocation of the order of suspension and reinstatement. On the basis of legal opinion, Municipal Council has reinstated respondent No.5 in the services. Against the said order, the petitioner has filed the present petition before this Court.

3. Learned counsel for the petitioner submits that respondent No.5 was discharging the public duty without any legal authority. He submits that respondent No.5 was convicted by the competent criminal Court and her conviction has not been stayed or set aside by this Court in the criminal appeal. She has only been released on bail and, therefore, looking to her conviction, she could not be reinstated. He further submits that Rule 10 of the said Rules provides disqualification for appointment on the post and as per sub-rule (2)(b) of the said Rules, she has not entitled to continue on the post. He further relied on a judgment passed by this Court in the case of *Lalan Thakur vs. State of M. P. & others,* 2009 (1) MPLJ 138 as well as the judgment passed by the Apex Court in the case of *B. Srinivasa Reddy vs. Karnataka Urban Water Supply & Drainage Board Employees' Assn. & others,* 2007 (1) SCC (L&S) 548 (II)**.**

4. Respondent No.4 has filed reply and in the said reply, it has stated that respondent No.5 was appointed on the post of Assistant Grade-III. On the basis of police report dated 26/07/2005 respondent No.5 has been arrested by the police for

committing the offence under Sections 302, 201 read with 34 of the IPC and has been placed under suspension on 23/08/2005. Thereafter, respondent No.5 was convicted by the Sessions Court vide judgment dated 26/08/2008 with imprisonment of life for committing the offence under Section 302 of the IPC. Against the said judgment, she filed an appeal before the High Court and she has been enlarged on bail by this Court. Thereafter, she submitted an application for subsistence allowance before the labour Court and vide order dated 18/02/2009 directed to payment the allowance to her. Thereafter, she submitted an application for reinstatement and revocation of the order of suspension on 12/05/2012. In pursuance to the application submitted by respondent No.5, Chief Municipal Officer has referred the matter to the Advocate for legal opinion. The Advocate has given his opinion that the order of suspension can be revoked. Accordingly, the matter was placed before President-in-Council for consideration. The President-in-Council directed that necessary guidance may be sought from the Government. The Deputy Director thereafter wrote to the Commissioner, Urban Administration and Development, Bhopal for guidance vide memo dated 11/10/2012. The Director wrote to the CMO dated 19/03/2013 that President-in-Council is competent to take a decision in accordance with Rule 51 of the said Rules of 1968 and decide the matter on merits. Thereafter legal opinion was sought and the lawyer was of the opinion that she could be reinstated in service until decision of the criminal appeal. Consequently, on the basis of the decision taken by the President-in-Council, the Chief Municipal Officer vide order dated 06/06/2013 directing her reinstatement. Thus, CMO of the Municipal Council has acted in accordance with the legal opinion, decision of the President-in-Council and service rules.

5. Respondent No.5 had filed her reply. In the reply she submits that petitioner has no locus to file the present petition. Learned counsel further submits that the petitioner cannot challenge the reinstatement of respondent No.5. He further submits that by way of filing of this petition, petitioner sought a direction to issue an appropriate writ of quo-warranto against respondent No.5, who has been reinstated. He further submits that the petitioner himself was a daily wager employee sub engineer who has been removed from the services on various charges of the financial irregularities. Even Lokayukt case is pending against him of money corruption in department. It is submitted that reinstatement of respondent No.5 has been made by her department in accordance with law taking consent administrative order from the State Government and writ of quo warranto is not maintainable in the case of respondent No.5. It has further been submitted that she has been reinstated in the service in accordance with the Rule 51 of the Rules.

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

7. So far as the maintainability of the writ petition is concerned, the Apex Court in the case of *B. Srinivasa Reddy vs. Karnataka Urban Water Supply & Drainage Board Employees' Assn.* (supra) in paragraph 43, 49, 55, 56 & 57 has held as under :-

> **"Writ of Quo Warranto:**
>
> **43.** Whether a Writ of Quo Warranto lies to challenge an appointment made "until further orders" on the ground that it is not a regular appointment ? Whether the High Court failed to follow the settled law that a Writ of Quo Warranto cannot be issued unless there is a clear violation of law? The order appointing the appellant clearly stated that the appointment is until further orders. The terms and conditions of appointment made it clear that the appointment is temporary and is until further orders. In such a situation, the High Court, in our view, erred in law in issuing a Writ of Quo Warranto the rights under Article 226 can be enforced only by an aggrieved person except in the case where the writ prayed for is for Habeas Corpus.
>
> **49.** The law is well settled. The High Court in exercise of its writ jurisdiction in a matter of this nature is required to determine, at the outset, as to whether a case has been made out for issuance of a Writ of Quo Warranto. The jurisdiction of the High Court to issue a Writ of Quo Warranto is a limited one which can only be issued when the appointment is contrary to the statutory rules.
>
> **55.** It is useful to refer to *University of Mysore vs. C.D.Govinda Rao,* SCR at p.p. 580-81
>
> "As Halsbury has observed":
>
> "An information in the nature of a quo warranto took the place of the obsolete writ of quo warranto which lay against a person who claimed or usurped an office, franchise, or liberty, to inquire by what authority he supported his claim, in order that the right to the office or franchise might be determined."
>
> Broadly stated, the quo warranto proceeding affords a judicial remedy by which any person, who holds an independent substantive public office or franchise or liberty, is called upon to show by what

right he holds the said office, franchise or liberty, so that his title to it may be duly determined, and in case the finding is that the holder of the office has no title, he would be ousted from that office by judicial order. In other words, the procedure of quo warranto gives the Judiciary a weapon to control the Executive from making appointment to public office against law and to protect a citizen from being deprived of public office to which he has a right. These proceedings also tend to protect the public from usurpers of public office, who might be allowed to continue either with the connivance of the Executive or by reason of its apathy. It will, thus, be seen that before a person can effectively claim a writ of quo warranto, he has to satisfy the Court that the office in question is a public office and is held by a usurper without legal authority, and that inevitably would lead to the enquiry as to whether the appointment of the alleged usurper has been made in accordance with law or not."

56. It is also beneficial to refer to the decision of this Court in *Ghulam Qadir vs. Special Tribunal,* SCC p. 54, para 38 which reads thus:-

"38.There is no dispute regarding the legal proposition that the rights under Article 226 of the Constitution of India can be enforced only by an aggrieved person except in the case where the writ prayed is for habeas corpus or quo warranto. Another exception in the general rule is the filing of a writ petition in public interest. The existence of the legal right of the petitioner which is alleged to have been violated is the foundation for invoking the jurisdiction of the High Court under the aforesaid Article. The orthodox rule of interpretation regarding the locus standi of a person to reach the court has undergone a sea-change with the development of constitutional law in our country and the constitutional courts have been adopting a liberal approach in dealing with the cases or dis-lodging the claim of a litigant merely on hyper-technical grounds. If a person approaching the court can satisfy that the impugned action is likely to adversely affect his right which is shown to be having source in some statutory provision, the petition filed by such a person cannot be rejected on the ground of his not having the locus standi. In other words, if the person is found to be not merely a stranger having no right whatsoever to any post or property, he cannot be non-suited on the ground of his not having the locus standi.

57. It is settled law that Writ of quo warranto does not lie if the alleged violation is not of a statutory nature. Three judgments relied on by Mr. P.P. Rao can be usefully referred to in the present context."

As per the judgment of Supreme Court, writ of quo warranto is available in case when the person is holding the post contrary to the statute.

8. This Court also in the case of *Lalan Thakur vs. State of MP* (supra) in para 15 has held as under :-

"15. The petition was opposed by the respondent /State on the ground of maintainability, however, the Apex Court in the case of *Calcutta Gas Company (Proprietary) Ltd. (supra)* has held that Article 226 of the Constitution confers a very wide power on the High Court to issue directions and writs of the nature mentioned therein for the enforcement of the rights conferred by Part_III or for any other purpose. It has also been held that in case of some of the writs like habeas corpus or quo warranto, a person who is not the person aggrieved can also prefer a writ petition in the matter. A similar view was expressed by the Apex Court in the other judgments cited by the learned counsel appearing for the petitioner."

Thus, the writ petition filed on behalf of the petitioner is maintainable.

9. Rule 10 of the said Rules of 1968, provides disqualification for appointment on the post. Sub-rule 2 of Rule 10 reads as under :-

"10. Disqualifications ….....

(2) No candidate shall be appointed to the Municipal Service or post-

(a) if he has been dismissed from the service of the Government or local authority for misconduct;

(b) if he has been convicted of an offence which involves moral turpitude;

(c) if he is not eligible for employment under sub-section (1) of section 98 of the Act.

As per clause (b) of sub-rule 2, if a person has been convicted of an offence which involves moral turpitude then he is disqualified for being appointment to the Municipal Services.

10. The Hon'ble Apex Court in the case of *Ravikant S. Patil vs. Sarvabhouma S. Bagali,* 2007(1) SCC 673**.** in para 15 has held as under :-

> "15. It deserves to be clarified that an order granting stay of conviction is not the rule but is an exception to be restored to in rare cases depending upon the facts of a case. Where the execution of the sentence is stayed, the conviction continues to operate. But where the conviction itself is stayed, the effect is that the conviction will not be operative from the date of stay. An order of stay, of course, does not render the conviction non-existent, but only non-operative. Be that as it may. Insofar as the present case is concerned, an application was filed specifically seeking stay of the order of conviction specifying the consequences if conviction was not stayed, that is, the appellant would incur disqualification to contest the election. The High Court after considering the special reason, granted the order staying the conviction. As the conviction itself is stayed in contrast to a stay of execution of the sentence, it is not possible to accept the contention of the respondent that the disqualification arising out of conviction continues to operate even after stay of conviction."

In the present case, the execution of the sentence is stayed by this Court but the conviction continues to operate, therefore, respondent No.5 is not entitled to continue on the post.

11. In the present case admittedly respondent No.5 is convicted by the competent criminal Court for committing an offence under Sections 302, 201 read with Section 34 of the IPC with imprisonment for life. Against the said order, she has preferred an appeal before this Court and this Court has enlarged her on bail in a criminal appeal, however, neither the order of conviction has been stayed nor conviction has been set aside by this Court.

12. In the note sheet dated 14/12/2012 the Deputy Secretary also noted that the action should be taken against respondent No.5 in accordance with the Rule 19(1) of the Madhya Pradesh Civil (Services, Classification and Control) Rules, 1966. The relevant extract of said note sheet is reads as under :-

"3/ इस संबंध में सामान्य प्रशासन विभाग के परिपत्र दिनांक 26 मई 1998 के अनुसार आपराधिक प्रकरण में दोष सिद्ध पाये जाने पर मध्यप्रदेश सिविल सेवा (वर्गीकरण, नियंत्रण तथा अपील) नियम 1966 के नियम 19(1) के अंतर्गत उचित शास्ति अधिरोपित किये जाने का प्रावधान है। इस बात के लिए कोई प्रतिबंध नही रहेगा कि उस शासकीय सेवक ने दोष सिद्धि के विरूद्ध अपील दायर कर दी है, इसलिए शास्ति अधिरोपित नही की जा सकती है। इस स्थिति में भी शास्ति अधिरोपित की जा सकती है। यदि अपील में निर्दोष पाये जाने पर निचले न्यायालय के निर्णय को अपास्त कर दिया जाता है तो पूर्व पारित शास्ति आदेश निरस्त किया जा सकता है।"

The Rule 19 of the Madhya Pradesh Civil (Services, Classification and Control) Rules, 1966 also provides that if an employee is convicted in a criminal case then his service should be terminated. In such circumstances, if respondent No.5 is acquitted by this Court then she can be reinstated in the services.

13. The statutory rules provides that if a person is convicted in criminal offence then he is not entitled to continue in services. In the present case, respondent No.5 is also convicted by the competent court and her conviction is not yet set aside by the higher forum, therefore, her suspension could not have been revoked. In such circumstances, I allowed this writ petition and the writ of quo warranto is issued against respondent No.5 thereby directing the respondents to place respondent No.5 under suspension.

Petition allowed

I.L.R. [2018] M.P. 72
WRIT PETITION

Before Ms. Justice Vandana Kasrekar

W.P. No. 8569/2016 (Jabalpur) decided on 12 October, 2017

SUNIL KUMAR JAIN ...Petitioner

Vs.

STATE OF M. P. ...Respondent

***A. Constitution – Article 320(3) and Public Service Commission (MP) (Limitation of functions) Regulations, 1957, Regulation 6* – Petition against order imposing punishment of withholding two increments as well as recovery of money – Held – As per Article 320(3), it is the duty of the Public Service Commission to advice the matter so referred but the said advice is not binding in nature – PSC also framed Regulations of 1957 under the said Article 320(3) of the Constitution – Regulation 6 provides that before imposition of any penalty under Rule 15 of CCA Rules, the approval of the**

PSC is necessary – In the present case, no approval from PSC was obtained before imposing major punishment on the petitioner and further the report obtained from PSC is required to be supplied to the delinquent – Punishment order set aside – Resondents directed to send the enquiry report to PSC for obtaining necessary approval and thereafter pass appropriate order – Petition allowed.

(Para 10 & 15)

क. संविधान – अनुच्छेद 320(3) एवं लोक सेवा आयोग (म.प्र.) (कृत्यों का परिसीमन) विनियम, 1957, विनियम 6 – दो वेतनवृद्धि रोके जाने साथ–साथ रकम की वसूली का दंड अधिरोपित करने वाले आदेश के विरूद्ध याचिका – अभिनिर्धारित – अनुच्छेद 320(3) के अनुसार, यह लोक सेवा आयोग का कर्त्तव्य है कि निर्दिष्ट किये गये मामले पर सलाह दे परन्तु कथित सलाह बाध्यकारी प्रकृति की नहीं है/होगी – लोक सेवा आयोग ने संविधान के कथित अनुच्छेद 320(3) के अन्तर्गत 1957 के विनियमों को भी विरचित किया है – विनियम 6 यह उपबंधित करता है कि सी.सी.ए. नियमों के नियम 15 के अन्तर्गत किसी शास्ति का अधिरोपण करने से पूर्व, लोक सेवा आयोग का अनुमोदन आवश्यक है – वर्तमान प्रकरण में, याची पर मुख्य दंड अधिरोपित करने से पूर्व लोक सेवा आयोग से कोई अनुमोदन प्राप्त नहीं किया गया था एवं आगे लोक सेवा आयोग से प्राप्त किए गये प्रतिवेदन का अपचारी को प्रदाय किया जाना अपेक्षित है – दंड का आदेश अपास्त – प्रत्यर्थीगण को, आवश्यक अनुमोदन प्राप्त करने के लिए लोक सेवा आयोग को जांच प्रतिवेदन भेजने हेतु एवं तत्पश्चात् समुचित आदेश पारित करने हेतु निदेशित किया गया – याचिका मंजूर।

***B. Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rule 15(3)* – It deals with the action on enquiry report – In every case where it is necessary to consult the Commission, the record of the enquiry shall be forwarded by the disciplinary authority to the Commission for its advice and such advice shall be taken into consideration before making any order imposing any penalty on the government servant.**

(Para 8)

ख. सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 15(3) – यह जांच प्रतिवेदन पर कार्रवाई से संबंधित है – प्रत्येक प्रकरण में, जहाँ आयोग से परामर्श करना आवश्यक है, जांच का अभिलेख अनुशासनिक प्राधिकारी द्वारा आयोग को उसकी सलाह हेतु अग्रेषित किया जायेगा एवं ऐसी सलाह को, शासकीय सेवक पर कोई शास्ति अधिरोपित करने वाले किसी आदेश को करने से पूर्व विचार में लिया जायेगा।

Cases referred :

(2014) 7 SCC 340, AIR 1957 SC 912.

D.K. Tripathi, for the petitioner.

J. Pandit, G.A. for the respondent/State.

J U D G M E N T

Vandana Kasrekar J. :- The petitioner has filed the present petition challenging the order dated 12/04/2016 passed by the respondent No.1 thereby imposing the punishment of withholding two increments with cumulative effect as well as recovery of Rs.86,400/-.

2. Brief facts of the case are that the petitioner is holding the substantive post of Forest Range Officer which is Class-II (Gazetted Post). While the petitioner was posted as Range Officer, Sehore, the petitioner was served with a charge sheet alleging two charges. Charge No.1 related to the verification and certification of fact vouchers of Rs.43,511/- and charge No.2 related to forcibly withdrawal of Rs.1,29,000/- from the Secretary of Society and illegally possessed the amount. The petitioner has filed W. P. No.2564/2010 challenging the said charge sheet. However, the said writ petition was subsequently withdrawn vide order dated 11/12/2012. While disposing of the said writ petition, this Court has directed the respondents to conclude the enquiry within a period of 8 months. As the respondents have failed to conclude the enquiry against the petitioner within a period of 8 months, the Inquiry Officer proceed with the enquiry and submits his report. In the said enquiry report, the Inquiry Officer has found both the charges proved against the petitioner. The said enquiry report was served on the petitioner vide letter dated 20/05/2015. The petitioner submitted his reply to the said enquiry report on 06/07/2015, but the disciplinary authority has failed to take proper decision on the reply submitted by the petitioner, instead sent a proposal to respondent No.1 for imposing major penalty. However, as the petitioner is due for promotion, he therefore, again submitted a representation to respondent No.1 on 07/12/2015. Thereafter, respondent No.1 had passed an order dated 12/04/2016 thereby imposing the punishment of withholding two increments with cumulative effect as well as for recovery of amount of Rs.86,400/- on the petitioner. Being aggrieved by that order, the petitioner has filed the present petition.

3. Learned counsel for the petitioner argues that entire enquiry conducted against the petitioner is illegal and arbitrary. He submits that opportunity of hearing was not given to the petitioner, he was not permitted to examine the defence witnesses. He further submits that the order was passed without obtaining consent from the PSC as required under Rule 15(3) of the CCA Rules and Regulation 6 of MPPSC (limitation of function) Regulation 1957 which has been framed by the State Government under Article 320(3) of the Constitution of India. He further submits that the petitioner has obtained certain note sheets under RTI Act from the department regarding this departmental enquiry which also shows that the matter has not been sent to the PSC for approval. Learned counsel for the petitioner relied on a judgment passed by the

Hon'ble Apex Court in the case of *Union of India & others vs. R. P. Singh,* 2014 (7) SCC, 340.

4. The respondents have filed their reply and in the reply, respondents have submitted that the petitioner was served with the charge sheet dated 06/02/2010. The petitioner does not file any reply to the said charge sheet and, therefore, Inquiry Officer as well as Presiding Officer were appointed. During course of the enquiry, the petitioner present himself and was given full opportunity of haring and the principles of natural justice were complied with. The petitioner was permitted to cross-examine the prosecution witnesses. A preliminary objection has also been taken against the said order of punishment, the petitioner has a remedy for filing an appeal.

5. Regarding the contention of the petitioner that approval/consent of the M.P. Public Service Commission was not taken before passing the impugned order of penalty, she submits that as per Article 320(3) of the Constitution of India, it is the duty of a Public Service Commission to advice on any matter so referred but the said advise is not binding in nature. She further relied on a judgment passed by the Hon'ble Apex Court in the case of *State of U.P. vs. Manbodhan Lal Shrivastava,* AIR 1957, 912.

6. Heard learned counsel for the parties and perused the record as well as the impugned order.

7. In the present case, charge sheet was issued to the petitioner on 06/02/2010 alleging two charges. Thereafter, departmental enquiry was initiated against the petitioner and Inquiry Officer has submitted his report. On the basis of enquiry report, the disciplinary authority has passed the order dated 12/04/2016 thereby imposing the punishment of withholding two increments with cumulative effect as well as recovery of amount of Rs.86,400/-. The said order has been challenged by the petitioner on the ground that the approval /consent of MPPSC was not obtained before passing of the impugned order and without following the procedure prescribed under the CCA Rules, 1966 as well as Article 320(3)(c) of the Constitution of India and Regulation 6 of the M.P. Public Service Commission (Limitation of Function) Regulation, 1957. The Rule 15(3) of the CCA Rules, 1966 provides for the action on the enquiry report, which reads as under :-

> "15(3). If the disciplinary authority having regard to its findings on all or any of the articles of charge is of the opinion that any of the penalties specified in Rule 10 should be imposed on the Government servants, it shall, notwithstanding anything contained in rule 16, make an order imposing such penalty [but in doing so it shall record reasons in writing]:

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

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

9. Article 320(3) of the Constitution of India provides for consultation with the PSC before imposing punishment. The relevant extract of said article reads as under :-

"Article 320 (3) :The Union Public Service Commission or the State Public Service Commission as the case may be, shall be consulted -

(a) .....

(b) .....

(c) On all disciplinary matter affecting a person serving under the Government of India or the Government of a State in a civil capacity, including memorials or petitioner relating to such matters. And it shall be duty of a Public Service Commission to advise on any matter so referred to them and on any other matter which the President, or, as the case may be, the Governor of the State, may refer to them."

10. From perusal of the aforesaid Article it shows that it is the duty of the Public Service Commission to advice the matter so referred, but the said advise is not binding in nature. The PSC has also framed the Rules, Regulations under Article 320(3) of the Constitution of India. The Regulation 6 of the said Regulations reads as under :-

"6(1) किसी अनुशासनिक मामले में ऐसा आदेश करने के बारे में जो निम्नलिखित से भिन्न हो, आयोग से परामर्श करना आवश्यक नहीं होगा–

(क) राज्य सरकार द्वारा दिया गया मूल आदेश जो म0प्र0 सिविल सेवा (वर्गीकरण, नियंत्रण तथा अपील) नियम, 1966 (जो इसमें इसके पश्चात उक्त नियमों के नाम से निर्दिष्ट है) के नियम 10 में विनिर्दिष्ट शास्तियों में से कोई शास्ति अधिरोपित करता हो;"

As per the said Regulation, before imposition of any penalty under Rule 10 of the CCA Rules, the approval of the PSC is necessary.

11. From perusal of the record, it appears that in the present case, the order sheet produced by the petitioner along with IA No.11167/2016 shows that no such approval of the PSC was obtained in the present case before imposing the punishment on the petitioner.

12. The Hon'ble Apex Court in the case of *Union of India & others* (supra) in para 12, 14, 23, has held as under :-

> **"12.** We will be failing in our duty if we do not take note of the submission of Mr.W.A.Qadri that the decision in *N. S. Narula's case* is not an authority because the tribunal had set aside the order of the disciplinary authority on the ground that it was a non-speaking order. Be that as it may, when the issue was raised before this Court and there has been an advertence to the same, we are unable to accept the submission of Mr. Qadri. The said decision in *N. S. Narula's* case is an authority for the proposition that the advice of UPSC, if sought and accepted, the same, regard being had to the principles of natural justice, is to be communicated before imposition of punishment.
>
> **14.** Learned counsel for the appellant would contend that the two- Judge Bench in *S.K. Kapoor's* case could not have opined that the decision in *T.V. Patel's* case is per incuriam. We have already noticed two facts pertaining to *S.N. Narula* (supra), (i) it was rendered on 31.1.2004 and (ii) it squarely dealt with the issue and expressed an opinion. It seems to us that the judgment in *S.N. Narula's* case was not brought to the notice of their Lordships deciding the lis in *T.V. Patel* (supra). There cannot be a shadow of doubt that the judgment in *S.N. Narula* (supra) is a binding precedent to be followed by the later Division Bench. In this context, we may fruitfully refer to the decision in *Union of India v. Raghubir Singh,* wherein the Constitution Bench has held as follows :
>
> (SCC p.778, para 28)
>
> > "28. We are of the opinion that a pronouncement of law by a Division Bench of this Court is binding on a Division Bench of the same or a smaller number of Judges, and in order that such decision be binding, it is not necessary that it should be a decision rendered by the Full Court or a Constitution Bench of the Court"

> **23.** We have referred to the aforesaid decision in *B. Karunakar* case in extenso as we find that in the said case it has been opined by the Constitution Bench that non-supply of the enquiry report is a breach of the principle of natural justice. Advice from the UPSC, needless to say, when utilized as a material against the delinquent officer, it should be supplied in advance. As it seems to us, Rule 32 provides for supply of copy of advice to the government servant at the time of making an order. The said stage was in prevalence before the decision of the Constitution Bench. After the said decision, in our considered opinion, the authority should have clarified the Rule regarding development in the service jurisprudence."

As per the said judgment, if the advice is taken from the PSC before imposition of the punishment then the report should be supplied to the concerned employee.

13. Learned counsel appearing on behalf of the respondents relied on a judgment passed in the case of *State of U.P. vs. Manbodhan Lal Shrivastava (supra)*. Relying on this judgment, she submits that advice or approval of the PSC is not mandatory in nature and, therefore, it is not necessary to rely on the approval given by the PSC. As per this judgment also the respondents are bound to take advice from the PSC although the said advice isnot binding on the respondents.

14. Learned Government Advocate further relied on Rule 15 and argues that when the Commission is consulted before imposition of penalty, the advice of Commission may be taken into consideration by the disciplinary authority before passing the final order. However, the said rules also shows that the advice of the Commission is not binding on the authorities and, therefore, non-consultation with the Commission before passing the order imposing the penalty would not have the effect of vitiating the departmental enquiry or imposing penalty.

15. Thus, as per her contention, the advice of the PSC is not binding, however, as per the CCA Rules as well as Regulations framed by the PSC, the advice of the PSC is required to be taken before passing the punishment as given under Article 15 of the CCA Rules. In the present case, it reveals that before passing the major punishment on the petitioner, no advice of the PSC is obtained. The judgment cited by learned counsel for the respondents/State has been considered by the Hon'ble Apex Court in the case of *Union of India vs. R. P. Singh* (supra) and after considering the said judgment, the Apex Court has held that before imposing any punishment on the employee, report obtained from the PSC is required to be supplied to the delinquent.

16. Thus, in light of the aforesaid discussion, the writ petition filed by the petitioner is allowed. The order of punishment dated 12/04/2016 is hereby set aside and respondents are directed to sent the entire record relating to the enquiry against the petitioner with the PSC for obtaining necessary approval and thereafter pass an appropriate order in the matter of departmental enquiry against the petitioner. The said exercise be carried out within three months from the date of receipt of certified copy of the order passed today.

17. With the aforesaid observations, the petition stands allowed and disposed of.

Petition allowed

I.L.R. [2018] M.P. 79 (DB)
WRIT PETITION

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

W.P. No. 17710/2017 (Jabalpur) decided on 9 November, 2017

PUSPRAJ SINGH BAGHEL ...Petitioner

Vs.

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

Motoryan Karadhan Adhiniyam, M.P., (25 of 1991), Section 3(1) & (2) and Motor Vehicles Act (59 of 1988), Section 56 – Contradictory Provisions – Registration Certificate, Fitness Certificate and Imposition of Tax **– Held – As per Section 3 of the State Act, levy of tax is not only on a vehicle which is used but also on a vehicle which is kept for use – Section 3(2) raises a statutory presumption that if certificate of registration is valid then the transport vehicle is presumed to be in use or kept for use notwithstanding the expiry of the certificate of fitness – For want of fitness certificate, liability of the owner of vehicle cannot be absolved to pay tax under the State Act – Further held – Issuance of registration certificate is dependent upon fitness certificate but once the vehicle is registered, Section 56 of the Central Act does not lead to the consequence that registration certificate is deemed to be cancelled or it becomes ineffective for the reason that fitness certificate ceased to be valid for any reason – Once the vehicle is registered, the registration certificate can be suspended in terms of Section 53 or cancelled u/S 55 of the Central Act but there is no deemed cancellation of registration for not possessing fitness certificate.**

(Para 6)

मोटरयान कराधान अधिनियम, म.प्र. (1991 का 25), धारा 3(1) व (2) एवं मोटर यान अधिनियम (1988 का 59), धारा 56 – विरोधाभासी उपबंध – रजिस्ट्रीकरण प्रमाण–पत्र, ठीक हालत में होने का प्रमाण पत्र एवं कर का अधिरोपण – अभिनिर्धारित – राज्य के अधिनियम की धारा 3 के अनुसार, कर का उद्ग्रहण न केवल उस वाहन पर होता है जिसका उपयोग किया जाता है, परन्तु उस वाहन पर भी जिसे उपयोग हेतु रखा गया है – धारा 3(2) एक कानूनी उपधारणा उत्पन्न करती है कि यदि रजिस्ट्रीकरण का प्रमाण–पत्र विधिमान्य है तो ठीक हालत में होने का प्रमाण–पत्र का अवसान होते हुए भी, परिवहन वाहन उपयोग में माना जायेगा या उपयोग हेतु रखा गया माना जायेगा – ठीक हालत में होने के प्रमाणपत्र के अभाव में वाहन के स्वामी की, राज्य के अधिनियम के अन्तर्गत कर का भुगतान करने के दायित्व से मुक्ति नहीं हो सकती – आगे अभिनिर्धारित– रजिस्ट्रीकरण प्रमाण–पत्र का जारी किया जाना, ठीक हालत में होने के प्रमाण–पत्र पर निर्भर है, परन्तु एक बार वाहन रजिस्ट्रीकृत हो जाने पर केन्द्रीय अधिनियम की धारा 56 इस परिणाम पर नहीं पहुँचाती कि रजिस्ट्रीकरण प्रमाण–पत्र को रद्द माना जायेगा या वह निष्प्रभावी बन जायेगा इस कारण से कि किसी कारण से ठीक हालत में होने का प्रमाण–पत्र विधिमान्य नहीं रहा – एक बार वाहन रजिस्ट्रीकृत हो जाने पर केन्द्रीय अधिनियम की धारा 53 के अनुसार रजिस्ट्रीकरण प्रमाण–पत्र का निलंबन या धारा 55 के अनुसार रद्दकरण किया जा सकता है, परन्तु ठीक हालत में होने का प्रमाण–पत्र धारण नहीं करने के कारण रजिस्ट्रीकरण का रद्दकरण नहीं समझा गया है।

Cases referred :

(2006) 8 SCC 613 & W.P. No. 14557/2017 decided on 03.10.17 (DB).

Brajesh Kumar Dubey, for the petitioner.
Amit Seth, G.A. for the respondents/State.

O R D E R

The Order of the Court was delivered by :
Hemant Gupta, C.J. :- The challenge in the present writ petition is to the legality of Sub-sections (1) and (2) of Section 3 of the Madhya Pradesh Motoryan Karadhan Adhiniyam, 1991 (for short "the State Act") on the ground that they are contrary to the provisions of Section 56 of the Motor Vehicles Act, 1988 (for short "the Central Act"). The impugned Sub-sections (1) and (2) of Section 3 of the State Act, read as under:-

> "3. **Levy of tax on Motor Vehicles**. - (1) A tax shall be levied on every motor vehicle used or kept for use in the State at the rate specified in the First Schedule:
>
> Provided that the lifetime tax on every motor vehicle shall be levied at the rates specified in the second Schedule:

Provided further that in respect of a motor vehicle passing through the State from a manufacturer to a dealer under a temporary certificate of registration for a period not exceeding one month, the rate of tax shall be one third of the tax payable for a quarter.

(2) A Transport vehicle of which the certificate of registration is current, shall, for the purposes of this Act, be presumed to have been in use or kept for use, notwithstanding the expiry of the certificate of fitness in case of such transport vehicle."

2. The argument of the learned counsel for the petitioner is that a vehicle, which does not have a valid certificate of fitness, cannot be taxed at the rates specified in the second Schedule of the State Act, as such vehicle cannot be plied on the road in absence of a fitness certificate. Reliance is placed upon the judgment of the Supreme Court reported as (2006) 8 SCC 613 *(Hardev Motor Transport vs. State of M.P. and others)* wherein it has been held as under:-

"**16**. Tax imposed on motor vehicles in terms of the provisions of the 1991 Act is a regulatory one. It was so held in *Bolani Ores Ltd. v. State of Orissa* (1974) 2 SCC 777 (SCC p. 794, para 29) stating:

"If the vehicles do not use the roads, notwithstanding that they are registered under the Act, they cannot be taxed."

17. We may, however, hasten to add that even if a vehicle is roadworthy and can be plied on a road, a tax may be imposed, but if a vehicle is not capable of being plied on the road, no tax would be leviable."

3. Before we consider the argument raised by the learned counsel for the petitioner, certain provisions of the Central Act, are required to be taken into consideration, which read as under:-

"**53. Suspension of registration. -** (1) If any registering authority or other prescribed authority has reason to believe that any motor vehicle within its jurisdiction—

(a) is in such a condition that its use in a public place would constitute a danger to the public, or that it fails to comply with the requirements of this Act or of the rules made there under, or

(b) has been, or is being, used for hire or reward without a valid permit for being used as such,

the authority may, after giving the owner an opportunity of making any representation he may wish to make (by sending to the owner a notice by registered post acknowledgment due at his address entered in the certificate of registration), for reasons to be recorded in writing, suspend the certificate of registration of the vehicle—

(i) in any case falling under clause (a), until the defects are rectified to its satisfaction; and

(ii) in any case falling under clause (b), for a period not exceeding four months.

*** *** ***

55. **Cancellation of registration**. - (1) If a motor vehicle has been destroyed or has been rendered permanently incapable of use, the owner shall, within fourteen days or as soon as may be, report the fact to the registering authority within whose jurisdiction he has the residence or place of business where the vehicle is normally kept, as the case may be, and shall forward to that authority the certificate of registration of the vehicle.

*** *** ***

56. Certificate of fitness of transport vehicles. - (1) Subject to the provisions of sections 59 and 60, a transport vehicle shall not be deemed to be validly registered for the purposes of section 39, unless it carries a certificate of fitness in such form containing such particulars and information as may be prescribed by the Central Government, issued by the prescribed authority, or by an authorized testing station mentioned in sub-section (2), to the effect that the vehicle complies for the time being with all the requirements of this Act and the rules made thereunder:

Provided that where the prescribed authority or the "authorized testing station" refuses to issue such certificate, it shall supply the owner of the vehicle with its reasons in writing for such refusal.

*** *** ***

> **65. Power of the State Government to make rules**. - (1) A State Government may make rules for the purpose of carrying into effect the provisions of this Chapter other than the matters specified in section 64.
>
> (2) Without prejudice to the generality of the foregoing power, such rules may provide for –
>
> *** *** ***
>
> (d) the issue or renewal of certificates of registration and fitness and duplicates of such certificates to replace the certificates lost, destroyed or mutilated;
>
> (e) the production of certificates of registration before the registering authority for the revision of entries therein of particulars relating to the gross vehicle weight;
>
> *** *** ***
>
> (l) the extension of the validity of certificate of fitness pending consideration of applications for their renewal;
>
> *** *** ***

4. The question: as to whether in absence of fitness certificate, the levy of tax under the State Act is legal and valid has been considered by a Division Bench of this Court in Writ Petition No.14557/2017 *(Rajesh Kumar Miglani and another vs. State of M.P. and others)* decided on 03.10.2017 wherein challenge was to Sub-Rule (2) of Rule 48 of the M.P. Motor Vehicles Rules, 1994. Such Rule contemplated that a fitness application for vehicle shall be accompanied with a tax clearance certificate. Considering the provisions of Section 65 of the Central Act, it was held as under:-

> "**12**. Section 65(2)(d) of the Act of 1988 (Central Act) empowers the State Government to frame the Rules regarding grant of fitness certificate. In exercise of such power, the State Government has notified the Rules of 1994, which deal with the procedure of issuance of fitness certificate. The payment of tax is made conditional for issuance of the fitness certificate for the reason that a defaulter of payment of tax should not be issued fitness certificate in respect of every vehicle so as to ensure due compliance of the statutory provisions. We find that the issue of fitness certificate and payment

of tax falls within the legislative competence of the State in terms of Section 65(2)(d) of the Act of 1988 and under Section 3 of the 1991 Act. Therefore, Sub-Rule (2) of Rule 48 of the Rules of 1994 contemplating that no dues certificate shall be required for grant of fitness certificate, cannot be said to be beyond the legislative competence of the State Government. The Central Legislation does not contemplate the grant of fitness certificate or the condition thereof. They have been left to be framed by the State Government; therefore, condition imposed of payment of tax before grant of fitness certificate is in larger public interest to ensure that tax dues are paid by the transporters.

15. In view of the foregoing analysis of the provisions of the Act and the Rules made thereunder and the law laid down by the Supreme Court, the condition that an application for issue or renewal of certificate of fitness shall be accompanied with a tax clearance certificate in Form M.P.M.V.R. - 23 (TCC) is not inconsistent with any provision of the Central Act (Act of 1988), therefore, the offending clause i.e. Sub-Rule (2) of Rule 48 of the Rules of 1994 cannot be said to be illegal or beyond the legislative competence of the State."

5. In *Hardev Motor Transport's* case (supra), the challenge was to the detention of the vehicles for the reason that the same were being plied as stage carriages without any permit. It was held as under:-

"**29**. Section 3 of the 1991 Act is the charging section. It provides that the tax shall be levied on every motor vehicle used or kept for use in the State at the rates specified in the First Schedule. The levy of tax, therefore, is on the motor vehicles. Its rate may vary keeping in view its use or the nature thereof. However, the use of a motor vehicle so far as public service vehicles are concerned would depend upon the nature of permit held by it. It is not in dispute that appellants herein have been granted permit for plying their buses as contract carriage. Allegation against this is that they have been violating the terms and conditions of the permit by plying their vehicles as stage carriage. It is, however, not in dispute that the rate of tax of a contract carriage permit is more than the stage carriage permit. Clause (g) of Entry IV specifies the rate of tax of motor vehicle plying without permit at the rate of Rs.1500/- per seat per month.

> **32**. We have noticed that the Constitution Bench categorically states that compensatory tax cannot be progressive. We have furthermore noticed that, according to the Constitution Bench, imposition of tax cannot be a term or condition of a licence. If a permit has been granted, the holder of a permit is liable to comply with the conditions of permit. If he violates the terms and conditions of permit, law will take its own course. A permit is granted under the 1988 Act. If there is violation of the terms of permit, the consequences therefor, shall ensue as contained in Section 192-A of the 1988 Act. A distinction must be borne in mind that a tax cannot be imposed by way of penalty although penalty can be imposed for non-payment of tax or evasion of tax. The State may make suitable legislations in this behalf. But the same would not mean that while specifying a rate of tax, the executive Government of the State can indirectly levy a penalty which it cannot do directly."

6. The said judgment is not helpful to the arguments raised by the learned counsel for the petitioner as it was a case of claim of penalty for the reason that the vehicles were being plied without any permit. But, in the present case, the argument is that in absence of fitness certificate, the vehicle cannot be plied, therefore, there cannot be any liability to pay tax under the State Act. Section 56 of the Central Act contemplates that a transport vehicle shall not be deemed to be validly registered for the purposes of Section 39 unless it carries a certificate of fitness in such form containing such particulars and information as may be prescribed by the Central Government. The issuance of registration certificate is dependent upon fitness certificate to be issued in respect of the vehicle in question but once the vehicle is registered, Section 56 does not lead to the consequence that the registration certificate is deemed to be cancelled or it becomes ineffective for the reason that the fitness certificate ceased to be valid for any reason. Once the vehicle is registered, the registration certificate can be suspended in terms of Section 53 or cancelled under Section 55 of the Central Act but there is no deemed cancellation of registration for not possessing the fitness certificate.

7. The levy of tax is not only on a vehicle, which is used but also on a vehicle which is kept for use in terms of Section 3 of the State Act. Therefore, in absence of fitness certificate even if the vehicle cannot be put to use for want of fitness certificate but that does not absolve the liability of an owner of the vehicle to pay tax under the State Act, as it is kept for use. Sub-section (2) of Section 3 of the State Act raises a statutory presumption that if the certificate of registration is valid then the transport vehicle is presumed to be in use or kept for use notwithstanding the expiry

of the certificate of fitness. Therefore, once a statutory presumption has been raised in respect of a transport vehicle in use or kept for use, the same cannot be disputed only for the reason that in absence of fitness certificate, the owner of the vehicle is absolved to pay the tax under the State Act.

8. In view of the above, we do not find any merit in the present writ petition. The same is **dismissed**.

Petition dismissed

I.L.R. [2018] M.P. 86
WRIT PETITION

Before Mr. Justice Sujoy Paul

W.P. No. 20961/2017 (Jabalpur) decided on 6 December, 2017

SUNDARLAL ...Petitioner

Vs.

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

***A. Medical Termination of Pregnancy Act (34 of 1971), Section 3 & 5 – Rape Victim – Termination of Pregnancy* – Pregnancy of 16 weeks – Father of a rape victim seeking direction for termination of pregnancy – Held – In the present facts, pregnancy can be terminated if conditions mentions in Section 3 and 5 of the Act of 1971 are satisfied and fulfilled – Victim of rape cannot be compelled to give birth to a child of the rapist – Victim/guardian has a valuable right to take a decision regarding termination of pregnancy and such right is flowing from article 21 of the Constitution – In the present case, victim was not subjected to medical examination by two or more registered medical practitioners which is a statutory requirement as per Section 3(2)(b) of the Act – Considering the seriousness and urgency of the matter, directions issued to respondents to constitute a committee with this regard, of three registered medical practitioners within 24 hours from the date of receipt of this order – Petition disposed of.**

(Para 13 & 18)

क. गर्भ का चिकित्सीय समापन अधिनियम, (1971 का 34), धारा 3 व 5 – बलात्संग पीड़िता – गर्भ का समापन – 16 हफ्ते का गर्भ – बलात्संग पीड़िता के पिता ने गर्भ का समापन करने हेतु निदेश चाहा – अभिनिर्धारित – वर्तमान तथ्यों में, गर्भ का समापन किया जा सकता है यदि 1971 के अधिनियम की धारा 3 व 5 में उल्लिखित शर्तो को संतुष्ट एवं पूरा किया गया है – बलात्संग पीड़िता को बलात्कारी की संतान को जन्म देने के लिए विवश नहीं किया जा सकता – पीड़िता/संरक्षक को गर्भ का समापन करने के संबंध में निर्णय लेने का मूल्यवान अधिकार है और उक्त अधिकार, संविधान के अनुच्छेद 21 से

उत्पन्न हो रहा है – वर्तमान प्रकरण में, पीड़िता का दो या अधिक पंजीकृत चिकित्सा व्यवसायियों द्वारा चिकित्सीय परीक्षण नहीं कराया गया है जो कि अधिनियम की धारा 3(2)(बी) के अनुसार एक कानूनी अपेक्षा है – मामले की गंभीरता एवं जरूरत को विचार में लेते हुए, प्रत्यर्थीगण को इस आदेश प्राप्ति की तिथि से 24 घन्टे के भीतर इस संबंध में पंजीकृत चिकित्सा व्यवसायियों की समिति गठित करने के निदेश जारी किये गये – याचिका निराकृत।

***B. Medical Termination of Pregnancy Act (34 of 1971), Section 3(4)(a) & 5(1) - Consent of victim/pregnant woman* – Section 3(4)(a) and Section 5(1) of the Act creates exceptions to the rule of pregnant woman's consent, when pregnant woman is below 18 years – In the present case, victim is a minor and therefore if petitioner/father gives consent for termination of pregnancy, there shall be no need to obtain the willingness of victim.**

(Para 14 & 18)

ख. गर्भ का चिकित्सीय समापन अधिनियम, (1971 का 34), धारा 3(4) (a) व 5(1) – पीड़िता/गर्भवती महिला की सहमति – अधिनियम की धारा 3 *(4) (a)* व धारा 5(1), गर्भवती महिला की सहमति के नियम के लिए अपवाद सृजित करती है जब गर्भवती महिला 18 वर्ष से कम हो – वर्तमान प्रकरण में पीड़िता अप्राप्तवय है और इसलिए यदि याची/पिता, गर्भ के समापन हेतु सहमति देता है, पीड़िता की रजामन्दी अभिप्राप्त करने की आवश्यकता नहीं होगी।

Cases referred :

(2015) 8 SCC 721, 2013(1) MPHT 451, 2009 (9) SCC, 2017 (3) SC 462, 2017 (3) SCC 458.

Parag S. Chaturvedi, for the petitioner.
Pushpendra Yadav, Dy. A.G. for the respondent/State.

O R D E R

Sujoy Paul, J. :- In this petition filed under Article 226 of the Constitution of India, the petitioner has prayed for a direction to the respondents for terminating the pregnancy of his minor daughter who is allegedly a rape victim. In addition, petitioner has prayed for grant of suitable compensation.

2. The case of the petitioner is that he lodged a report before Police Station Mundi, District Khandwa on 15.10.2017 stating that his minor daughter has been kidnapped. The respondent No.6, in turn, investigated the matter and arrested the

accused. The offences under Section 363, 366, 376 of IPC read with Section 4 & 6 of POCOS Act were alleged against the accused. The police authority secured custody of the minor daughter (herein after called as "victim") of petitioner from the accused and she was handed-over to the petitioner by Supurdginama dated 31.10.2017 (Annexure-P/2). The police authority by communication dated 31.10.2017 informed the petitioner that the victim is having pregnancy of about 16 weeks.

3. The petitioner contended that the victim is a minor. The petitioner being guardian has given his consent for terminating the pregnancy. If such pregnancy is forced upon the victim, it will violate her right of "personal liberty" as enshrined under Article 21 of the Constitution of India. Mr. Chaturvedi, learned counsel for the petitioner in support of this contention relied on Section 3 of the Medical Termination of Pregnancy Act, 1971 (the Act of 1971) and the judgment of Supreme Court reported in 2015 (8) SCC 721, *[Chandrakant Jayantilal Suthar & another vs. State of Gujarat]*.

4. *Per-contra*, Mr. Yadav, learned Deputy A.G. produced the documents dated 04.12.2017, 05.12.2017 and the consent letter of petitioner whereby he has given consent for examining the victim relating to pregnancy. By letter dated 04.12.2017 the SHO, P.S. Mundi, District Khandwa requested the Gynaecologist, District Hospital Khandwa to examine and give report on following points: (i) the duration of pregnancy of the victim; (ii) whether the victim's pregnancy can be terminated; and (iii) any other opinion which is justifiable. In the bottom of this letter, the Gynaecologist, Dr. Laxmi (the complete name of doctor is not legible in the document) has given her opinion: viz (i) that the victim is having pregnancy of a period of five months; (ii) upto five months (20 weeks), the pregnancy can be terminated; & (iii) NIL.

5. Mr. Pushpendra Yadav, learned Deputy AG also placed reliance on Section 3 of the Act of 1971. He assisted the Court by placing reliance on 2013 (1) MPHT 451, *[Hallo Bi @ Halima vs. State of MP & others]*.

6. No other point has been pressed by the learned counsel for the parties.

7. I have heard the parties at length and perused the record.

8. Before dealing with the rival contentions of the parties, it is apposite to refer the relevant provision of the Act. Section 3 reads as under :

> *"3. When pregnancies may be terminated by registered medical practitioners.- (1) Notwithstanding anything contained in the Indian Penal Code (45 of 1860), a registered medical practitioner shall not be guilty of any offence under that Code*

or under any other law for the time being in force, if any pregnancy is terminated by him in accordance with the provisions of this Act.

(2) Subject to the provisions of sub-section (4), a pregnancy may be terminated by a registered medical practitioner,-

(a) where the length of the pregnancy does not exceed twelve weeks, if such medical practitioner is, or "

(b) where the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks, if not less than two registered medical practitioners are, of opinion, formed in good faith, that-

(i) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health; or

(ii) there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.

Explanation 1.-Where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.

Explanation 2.-Where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.

(3) In determining whether the continuance of a pregnancy would involve such risk of injury to the health as is mentioned in sub-section (2), account may be taken to the pregnant woman's actual or reasonable foreseeable environment.

(4) (a) No pregnancy of a woman, who has not attained the age of eighteen years, or, who, having attained the age of eighteen years, is a [mentally ill person], shall be terminated except with the consent in writing of her guardian.

(b) Save as otherwise provided in clause (a), no pregnancy shall be terminated except with the consent of the pregnant woman."

[Emphasis Supplied]

9. Section 5 provides that pregnancy can be terminated, if as per the opinion of two registered medical practitioners, formed in good faith, termination of pregnancy is immediately necessary to save the life of the pregnant woman.

10. It is apposite to remember that the Indian Penal Code was enacted in the year 1860 and abortion was a crime punishable by imprisonment upto 7 years and also with a fine. The Exception provided was in order to save life of the women. Large number of women died attempting illegal abortions and finally the Government of India constituted a Committee known as "Abortion Committee" and the Committee submitted its report in December, 1966. Based upon the report of the Abortion Study Committee and after inviting objections and suggestions, the Medical Termination of Pregnancy Act, 1971 was enacted in 1971. The Medical Termination of Pregnancy Act, 1971 provides for abortion, in case of woman whose physical/ mental health are endangered by the pregnancy, woman facing birth of a potentially handicapped or malform child, rape, pregnancy in unmarried girls under the age of 18, with the consent of guardian, pregnancies in lunatics, with the consent of a guardian, pregnancies which are result of failure in sterilisation. This Act provides for termination of pregnancy in case of rape which is in fact, forced sex with the victim who was led into prostitution by use of force and, therefore, in the peculiar facts and circumstances of the case, keeping in view, the statement of the petitioner, the Act of 1971 does permit abortion in the peculiar facts and circumstances of the present case also. The Act of 1971 provides for a legal method of abortion in respect of cases mentioned in the Act. It is really shocking that in our country every year almost 11 million abortions take place and 20000 women die every year due to abortion related complications. Most abortion related maternal deaths are attributable to illegal abortions and, therefore, the Medical Termination of Pregnancy Act, 1971 has authorised a procedure for abortion in respect of cases mentioned in the Act. It certainly provides for a safeguard to women to abort a child keeping in view the statutory provisions as contained under the Act. Pre-natal Test for determining the sex of the foetus, is a crime under the Indian Laws and a punishment is also provided under various statutory provisions for termination of pregnancy and for determining the sex of foetus. The Medical Termination of Pregnancy Act, 1971 was enacted by the Parliament in 22nd year of the Republic of India and it came into force on 1-4-1972. Earlier under the Indian Penal Code abortion was made a crime for which mother as well as the abortionist could be punished except where it had to be induced in order to save life of the mother.Provisions relating to abortion under the Indian Penal Code were enacted about a century ago, keeping in view the then British Law on the subject. The Medical Termination of Pregnancy Act, 1971 provides for termination of pregnancy on health grounds and in those cases where

there is a danger to life or risk to physical or mental health of a woman and also on humanitarian ground where the pregnancy arises from sex crimes like rape or intercourse with lunatic woman etc.

11. A careful reading of Section 3 of the Act of 1971 makes it clear that where length of pregnancy does not exceed 20 weeks and not less then two registered medical practitioners have formed an opinion in good faith that the continuance of pregnancy would involve a risk to the life of pregnant woman or of grave injury to her physical or mental health, the pregnancy can be terminated by a registered medical practitioner. This act of medical practitioner, if aforesaid conditions are satisfied, will not attract the penal provisions mentioned in Indian Penal Code. In other words, such registered medical practitioner shall not be guilty of any offence under the IPC or under any other law for the time being enforce if conditions mentioned in Section 3 or Section 5 of the Act are satisfied.

12. In Explanation I, the law makers made it clear that where pregnancy is alleged by victim because of rape, a presumption can be drawn that such pregnancy constitute a grave injury to the mental health of pregnant woman. In the present case, this is not in dispute that victim is a minor and petitioner is praying for termination of pregnancy because her daughter is a rape victim. This court in *Hallo Bi* (supra) opined that we cannot force a victim of violent rape/forced sex to give birth to a child of a rapist. The anguish and the humiliation which the victim is suffering daily, will certainly cause a grave injury to her mental health. Not only this, the child will also suffer mental anguish in case the lady gives birth to a child.

13. In the present case, the victim was not subjected to medical examination by two or more registered medical practitioners which is a statutory requirement as per Section 3(2)(b) of the Act of 1971. In absence of fulfilling this statutory requirement, permission cannot be granted for terminating the pregnancy.

14. The Apex court in 2009 (9) SCC (*Suchita Srivastava and another vs. Chandigarh Administration*) opined that Section 3(4)(a) and 5(1) of the Act of 1971 creates exceptions to the rule of pregnant woman's consent, namely, when pregnant woman is below 18 years. Thus, in the present case, consent of victim is not required. More so when petitioner/guardian is willing to furnish such consent. In the said judgment, it was further held that the language of the MTP Act clearly respects the personal autonomy of mentally retarded persons who are above the age of majority. Since none of the other statutory conditions have been met in this case, it is amply clear that we cannot permit a dilution of the requirement of consent for

proceeding with a termination of pregnancy. We have also reason that proceeding with an abortion at such a late stage (19-20 weeks of gestation period) poses significant risks to the physical health of the victim.

15. The judgment of *Suchita Srivastava* (supra) was consistently followed by Supreme Court. In 2017 (3) SC 462 (*Meera Santosh Pal and others vs. Union of India and others*), the Apex court followed the said principles. In the case of *Meera Santosh Pal* (supra), the Supreme Court permitted to woman to undergo medical examination under the Act of 1971 and directed the doctors of the hospital to take appropriate action for termination of pregnancy of petitioner No.1. In 2017 (3) SCC 458 (*X and others vs. Union of India and others*), the Apex Court reiterated the principles laid down in *Suchita Srivastava* (supra) and held that a woman's right to make reproductive choices is also a dimension of "personal liberty" as understood under Article 21 of the Constitution of India.

16. In the present case, as noticed, the victim was not medically examined by two or more registered medical practitioners. Thus, conditions mentioned in Section 3 are not fulfilled. At the same time, it cannot be forgotten that the singular opinion of gynecologist shows that pregnancy is about 20 weeks. Thus, there is a great urgency in this matter. This court cannot shut its eyes from the statutory limit for terminating a pregnancy [see para 45 of the judgment of *Suchita Shrivastava* (supra)].

17. Apart from this, Section 5 permits termination of pregnancy in relation to length of pregnancy mentioned in sub-section (2) of Section 3 of the Act of 1971 if as per the medical opinion termination of such pregnancy is necessary to save the life of pregnant woman. As noticed, these aspects require medical examination by the medical practitioner.

18. Considering the seriousness and urgency of this matter, this petition is dispose of with following directions:

> **(i)** The victim is a minor and; therefore, if petitioner gives consent for terminating the pregnancy of victim, there shall be no need to obtain the willingness of the victim;
>
> ***(ii)*** The victim/guardian has a valuable right to take a decision regarding termination of pregnancy and such right is flowing from Article 21 of the Constitution;
>
> ***(iii)*** A victim of rape cannot be compelled to give berth to a child of rapist. Thus, if conditions of the Act of 1971 are fulfilled, the pregnancy of victim can be terminated;

(iv) The respondents shall constitute a Committee of three registered medical practitioners as per the Act of 1971 and such Committee/practitioners shall form opinion in good faith relating to termination of pregnancy of the victim. Needless to mention that Committee has to form its opinion as per the mandate of Act of 1971. The Committee shall be constituted within 24 hours from the date of receipt of this order and shall examine the victim within 24 hours therefrom. Needless to emphasis that in the event of difference of opinion amongst medical practitioners, the majority view will prevail;

(v) If the Committee comes to the conclusion that pregnancy of the victim can be terminated in consonance with Section 3 or Section 5 of the Act, the respondents shall undertake the exercise of terminating the pregnancy as per law forthwith. Needless to emphasize that victim shall be provided with all medical assistance and care after pregnancy is terminated. She will be provided with medical assistance by the respondent-State;

(vi) The respondents are directed that in the event pregnancy is terminated, they will keep DNA sample of the foetus and shall also keep the same in a sealed cover as per procedure prescribed;

(vii) Since counsel for the petitioner has not pressed the relief regarding compensation, this question is left open and liberty is reserved to the petitioner to file appropriate proceedings in this regard;

(viii) At the cost of repetition, in my opinion, there is a great urgency in this matter, considering the duration of pregnancy. Thus, it shall be the duty of the respondents to ensure strict compliance of this order within stipulated time;

(ix) Respondent No.2 and 3 shall personally monitor and ensure that this order has been complied with.

(x) A typed copy of this order be given to Shri Pushpendra Yadav, learned Deputy Advocate General forthwith for official use. Shri Yadav is requested to communicate this order to all the respondents immediately.

19. With the aforesaid directions, the **petition is disposed of.**

Petition disposed of

I.L.R. [2018] M.P. 94
WRIT PETITION

Before Mr. Justice Prakash Shrivastava

W.P. No. 1907/2016 (Indore) decided on 8 December, 2017

MAKHANLAL ...Petitioner
Vs.
BALARAM & ors. ...Respondents

***Evidence Act (1 of 1872), Section 65 & 66 – Secondary Evidence– Admissibility* – Petition against dismissal of application filed by petitioner/ plaintiff seeking to file photocopy of the lease agreement as secondary evidence with the plea that original is with the defendant – Held – When a photocopy of document is produced, then in order to get benefit of Section 65, party is required to explain the circumstances under which the photocopy was prepared and who was in possession of the original at the time of preparing the same – Secondary evidence must be authenticated by foundational evidence that copy sought to be produced is infact the true copy of the original – Further held, permitting a party to lead secondary evidence is an exception and not the rule – In the present case, the photocopy of the lease agreement is neither the certified copy nor they are the copies prepared from original by mechanical process and compared with the original which ensures the accuracy of document – No factual foundation was laid by the petitioner/ plaintiff in respect of preparation of photocopy from original – No error committed by trial Court – Petition dismissed.**

(Paras 6, 10 & 14)

साक्ष्य अधिनियम (1872 का 1), धारा 65 व 66 – द्वितीयक साक्ष्य – ग्राह्यता – याची/वादी द्वारा इस अभिवाक् के साथ कि मूलप्रति परिवादी के पास है, पट्टा करार की छायाप्रति की द्वितीयक साक्ष्य के रूप में प्रस्तुति चाहते हुये प्रस्तुत किये गये आवेदन की खारिजी के विरूद्व याचिका – अभिनिर्धारित – जब दस्तावेज की छायाप्रति प्रस्तुत की गई है, तो धारा 65 का लाभ प्राप्त करने हेतु पक्षकार द्वारा उन परिस्थितियों का स्पष्ट किया जाना अपेक्षित है जिनमें छायाप्रति तैयार की गई थी एवं उक्त को तैयार करते समय मूलप्रति किसके कब्जे में थी – द्वितीयक साक्ष्य बुनियादी साक्ष्य द्वारा अधिप्रमाणित होना चाहिए कि जिस प्रतिलिपि की प्रस्तुति चाही गई है वास्तव में वह मूल की सत्य प्रतिलिपि है – आगे अभिनिर्धारित किया गया, किसी पक्षकार को द्वितीयक साक्ष्य प्रस्तुत करने हेतु अनुमति देना एक अपवाद है एवं न कि नियम – वर्तमान प्रकरण में, पट्टा करार की छायाप्रति न तो प्रमाणित प्रतिलिपि है और न ही वे यांत्रिक प्रक्रिया द्वारा मूल प्रति से तैयार की गई प्रतियां है एवं मूलप्रति से मिलान की गई हैं जो दस्तावेज की शुद्धता सुनिश्चित करती है –

याची/वादी द्वारा मूल प्रति से छायाप्रति तैयार करने के संबंध में कोई तथ्यात्मक आधार प्रस्तुत नहीं किया गया था – विचारण न्यायालय द्वारा कोई त्रुटि नहीं की गई – याचिका खारिज।

Cases referred :

(2011) 4 SCC 240, (2013) 2 SCC 114, AIR 2011 MP 195, (2012) 4 MPLJ 56, (2016) 16 SCC 483, AIR 1999 SC 1668, 2001 (1) MPWN 31, (2010) 9 SCC 385.

Nitin Phadke, for the petitioner.
Romesh Dave, for the respondent/State.

O R D E R

Prakash Shrivastava, J. :- By this writ petition under Article 227 of the Constitution the petitioner has approached this court challenging the order of the trial court dated 26/2/2016 whereby the petitioner's application u/S.65 and 66 of the Evidence Act has been rejected.

2. The brief facts are that the petitioner has filed the suit for declaration and permanent injunction with a prayer to declare the sale deed dated 20th June, 2011 as null and void and deliver the possession of the suit property. Pending the suit petitioner had earlier filed an application u/S.65 of the Evidence Act which was rejected by the trial court by order dated 30th September, 2015 on the technical ground of non service of notice to produce the document in terms of Sec.66. This Court by order dated 19/10/2015 passed in WP No.7294/2015 had set aside the order of the trial court with a direction to the trial court to reconsider the petitioner's prayer in accordance with law. The petitioner thereafter had filed the fresh application u/Ss.65 and 66 of the Evidence Act which has been rejected by the trial court by the impugned order.

3. Learned counsel for petitioner submits that the petitioner has produced photocopy of the lease agreement and the trial court has committed an error of law in refusing the petitioner's prayer to accept it as secondary evidence.

4. As against this, learned counsel for respondents has supported the impugned order.

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

6. By way of application u/Ss.65 and 66 of the Evidence Act the petitioner is seeking to file the photocopy of lease agreement dated 23/4/2011 as secondary evidence with the plea that the original of the lease agreement is with the defendant Suresh.

7. Section 63 of the Evidence Act contains the inclusive definition of secondary evidence and sub section (2) covers the copies made from the original by mechanical process which in themselves insure the accuracy of the copy, and the copies compared with such copies and sub-section (3) includes copies made from or compared with the original.

8. Sec.65 of the Evidence Act provides for the cases in which secondary evidence relating to document may be given. Sub section (a) thereof covers the cases where the original is shown or appear to be in possession or power of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the court, or of any person legally bound to produce it, and when, after the notice mentioned in Sec.66, such person does not produce it. In respect of the cases covered by this sub section, in secondary evidence of the contents of the document is admissible.

9. Section 66 relates to the Rule as to notice to produce. Under this rule a previous notice is required to the party in whose possession or power the documents sought to be produced in secondary evidence is. The proviso enumerates the situations when the notice can be dispensed with.

10. When a photocopy of the document is produced, then in order to get the benefit of the Section 65, the party concerned is required to lay a factual foundation for giving the secondary evidence. The party concerned may be required to explain the circumstances under which the photocopy was prepared and who was in possession of the original at the time of preparing the same. The secondary evidence must be authenticated by the foundational evidence that copy sought to be produced is in fact true copy of the original. Permitting a party to lead secondary evidence is an exception and not the rule.

11. The supreme court in the matter of *H.Siddiqui (Dead) by Lrs Vs. A. Ramalingam* (2011) 4 SCC 240 while considering the issue of admissibility of photocopy of the power of attorney in evidence and in the light of scope of Sec 65 of the Evidence Act has held :-

> "12— The Provisions of Section 65 of the Act 1872 provide for permitting the parties to adduce secondary evidence. However, such a course is subject to a large number of limitations. In a case where original documents are not produced at any time, nor, any factual foundation has been led for giving secondary evidence, it is not permissible for the court to allow a party to adduce secondary evidence. Thus, secondary evidence relating to the contents of a

document is inadmissible, until the non production of the original is accounted for, so as to bring it within one or other of the cases provided for in the section. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. Mere admission of a document in evidence does not amount to its proof. Therefore, the documentary evidence is required to be proved in accordance with law. The court has an obligation to decide the question of admissibility of a document in secondary evidence before making endorsement thereon. (Vide *Roman Catholic Mission vs. The State of Madras, State of Rajasthan & Ors. v. Khemraj., Life Insurance Corporation of India v. Ram Pal Singh Bisen, and M.Chandra v. M. Thangamuthu."*

12. In the matter of *U. Sree Vs. U. Srinivas* (2013) 2 SCC 114 while considering the issue of admissibility of the photocopy of the letter allegedly written by the wife to her father has noted the earlier judgments on the point and has held as under:-

"14— In this context, we may usefully refer to the decision in *Ashok Dulichand v. Madahavlal Dube* wherein it has been held that: (SCC p.666, para 7)

"7.....According to clause (a) of Section 65 of the Indian Evidence Act, secondary evidence may be given of the existence, condition or contents of a document when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the court, or of any person legally bound to produce it, and when, after the notice mentioned in Section 66, such person does not produce it.

Thereafter, the Court addressed to the facts of the case and opined thus: -

"7.....In order to bring his case within the purview of clause (a) of Section 65, the appellant filed applications on 4-7-1973, before Respondent 1 was examined as a witness, praying that the said

> respondent be ordered to produce the original manuscript of which, according to the appellant, he had filed photostat copy. Prayer was also made by the appellant that in case Respondent 1 denied that the said manuscript had been written by him, the photostat copy might be got examined from a handwriting expert. The appellant also filed affidavit in support of his applications. It was, however, nowhere stated in the affidavit that the original document of which the photostat copy had been filed by the appellant was in the possession of Respondent 1. There was also no other material on the record to indicate that the original document was in the possession of Respondent 1. The appellant further failed to explain as to what were the circumstances under which the photostat copy was prepared and who was in possession of the original document at the time its photograph was taken. Respondent 1 in his affidavit denied being in possession of or having anything to do with such a document." Be it noted, in this backdrop, the High Court had recorded a conclusion that no foundation had been laid by the appellant forleading secondary evidence in the shape of the photostat copy and this Court did not perceive any error in the said analysis.

15. In *J. Yashoda v. K. Shobha Rani*, after analyzing the language employed in Sections 63 and 65(a), a two-Judge Bench held as follows (SCC p.733, para 9):-

> "9.....Section 65, however permits secondary evidence to be given of the existence, condition or contents of documents under the circumstances mentioned. The conditions laid down in the said section must be fulfilled before secondary evidence can be admitted. Secondary evidence of the contents of a document cannot be admitted without non-production of the original being first accounted for in such a manner as to bring it within one or other of the cases provided for in the section."

16. In *M. Chandra v. M. Thangamuthu*, It has been held as follows; SCC pp. 735-36, para 47:-

> "47.....It is true that a party who wishes to rely upon the contents of a document must adduce primary evidence of the contents, and only in the exceptional cases will secondary evidence be admissible. However, if secondary evidence is admissible, it may be adduced in any form in which it may be available, whether by production of a copy, duplicate copy of a copy, by oral evidence of the contents or in another form. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. It should be emphasised that the exceptions to the rule requiring primary evidence are designed to provide relief in a case where a party is genuinely unable to produce the original through no fault of that party."

17. Recently, in *H. Siddiqui v. A. Ramalingam*, while dealing with Section 65 of the Evidence Act, this Court opined though the said provision permits the parties to adduce secondary evidence, yet such a course is subject to a large number of limitations.

> "12.....In a case where the original documents are not produced at any time, nor has any factual foundation been laid for giving secondary evidence, it is not permissible for the court to allow a party to adduce secondary evidence. Thus, secondary evidence relating to the contents of a document is inadmissible, until the non-production of the original is accounted for, so as to bring it within one or other of the cases provided for in the section. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original." *(H. Siddiqui case,* SCC pp.244-45, para 12).

It has been further held that mere admission of a document in evidence does not amount to its proof. Therefore, it is the obligation of the Court to decide the question of admissibility of a document in secondary evidence before making endorsement thereon.

> 18. In the case at hand, the learned Family Judge has really not discussed anything relating to foundational evidence. The High Court has only mentioned that when the letter was summoned and there was a denial, the secondary evidence is admissible. In our considered opinion, such a view is neither legally sound nor in consonance with the pronouncements of this Court and, accordingly, we have no hesitation in dislodging the finding on that score."

13. Same is the view taken by this court in the matter of *Ramrao Karuji Baghale v. Natthu son of Karuji Baghale and Or AIR* 2011 MP 195. This Court in the matter of *Aneeta w/o Ramkesh Rajpoot Vs. Saraswati w/o Chhatradhari Gupta* (2012) 4 MPLJ 56 has held that for admitting the document as secondary evidence not only the satisfaction of Sec.65 is required, but it is also required that photocopy was compared with the original in terms of Sec.63(3).

14. Having examined the present case in the light of the aforesaid judgment, it is noticed that the trial court has rejected the petitioner's application on the ground that the photocopy of the lease agreement sought to be produced in secondary evidence is neither the certified copy of the original nor they are the copies prepared from original by mechanical process and compared with the original. The application filed by the petitioner reveals that no factual foundation was laid by the petitioner in respect of the preparation of the photo copy from the original, comparing the copy with the original or its preparation by such mechanical process which ensures the accuracy of the copy.

15. Counsel for petitioner has placed reliance upon the judgment of the supreme court in the matter of *Rakesh Mohindra Vs. Anita Beri and others* (2016) 16 SCC 483 but in that case the permission was sought to prove the letter of disclaimer by way of secondary evidence and for that purpose the record of GLR from the office of DEO, Ambala who is said to be the custodian of the record was summoned and the person concerned who had produced the original record was examined and on the basis of the evidence of the witness who had produced the record and the evidence of the defendant, the trial court had allowed the application and admitted the letter of disclaimer to be used as secondary evidence, but the present case stands on different factual footing.

16. Counsel for petitioner has also placed reliance upon the judgment of the supreme court in the matter of *Nawab Singh Vs. Inderjit Kaur AIR* 1999 SC 1668 but in that case the prayer was rejected by the trial court on untenable ground. He has also placed reliance upon the judgment of this court in the matter of *Jethalal Vs. Jinendra Kumar* 2001 (1) MPWN 31, but in that case the plaintiff had contended that the original document was in favour of one Samratmal and this court

had opined that after Samratmal had refused to produce the original for some reason or the other, the plaintiff would be entitled to produce the document in his possession as secondary evidence. Since these judgments stand on different factual footing, therefore, no benefit can be derived by the petitioner from them.

17. Having regard to the aforesaid, I am of the opinion that no error has been committed by the trial court in rejecting the petitioner's application.

18. Even otherwise the scope of interference in exercise of jurisdiction under Article 227 of the Constitution is limited. Supreme Court in the matter of *Jai Singh and others Vs. Municipal Corporation of Delhi and Another* reported in 2010(9) SCC 385 while considering the scope of interference under Article 227 of the Constitution, has held that the jurisdiction under Article 227 cannot be exercised to correct all errors of judgment of a court, or tribunal acting within the limits of its jurisdiction. Correctional jurisdiction can be exercised in cases where orders have been passed in grave dereliction of duty or in flagrant abuse of fundamental principles of law or justice.

19. Having regard to the aforesaid and considering the fact that no patent illegality has been committed by the trial court in passing the impugned order, I am of the opinion that no case for interference is made out. The writ petition is accordingly dismissed.

Petition dismissed

I.L.R. [2018] M.P. 101 (DB)
APPELLATE CIVIL

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

M.A. No. 77/2017 (Jabalpur) decided on 9 November, 2017

BRANCH MANAGER, THE ORIENTAL INSURANCE CO. LTD., SATNA ...Appellant

Vs.

SMT. RANJU YADAV & ors. ..Respondents

A. Determination of Income towards Future Prospects **– Held – In view of the law laid down by the Apex Court in *SLP (Civil) No. 25590/2014 National Insurance company v/s Pranay Sethi, decided on 31.10.17* and looking to the facts of the present case, it is clear that in a case of deceased being self employed or on a fixed salary and below the age of 40 years, his heirs shall be entitled for 40% of the established income instead of 50% as awarded in the present case – With above modification, appeal disposed of.**

(Para 6 & 7)

क. भविष्य की संभावनाओं की ओर आय का निर्धारण – अभिनिर्धारित – सर्वोच्च न्यायालय द्वारा, *31–10–17 को निर्णित विशेष अनुमति याचिका (सिविल) क्र. 25590/2014 नेशनल इंशुरेन्स कम्पनी वि. प्रणय सेठी,* में प्रतिपादित विधि को दृष्टिगत रखते हुए और वर्तमान प्रकरण के तथ्यों को देखते हुए यह स्पष्ट है कि मृतक के स्वनियोजित या निश्चित वेतन पर तथा 40 वर्ष से कम आयु का होने की स्थिति में, उसके वारिस, स्थापित आय के 50% की बजाए 40% के लिए हकदार होंगे जैसा कि वर्तमान प्रकरण में अधिनिर्णित किया गया है – उपरोक्त परिवर्तन के साथ, अपील का निपटारा किया गया।

***B. Doctrine of "pay and recover" – Practice* – Held – In view of the law laid down by the apex Court in *Manager v/s Saju P. Paul, (2013) 2 SCC 41*, the doctrine of "pay and recover" shall continue to be applied during the pendency of the reference, pending before the Larger Bench.**

(Para 14)

ख. 'संदाय और वसूली'' का सिद्धांत – पद्धति – अभिनिर्धारित – सर्वोच्च न्यायालय द्वारा *मैनेजर वि. सजू पी. पॉल (2013) 2 SCC 41,* में प्रतिपादित विधि को दृष्टिगत रखते हुए, ''संदाय और वसूली'' के सिद्धांत का प्रयोग वृहद् न्यायपीठ के समक्ष लंबित संदर्भ के लंबित रहने के दौरान जारी रहेगा।

Cases referred :

S.L.P. (Civil) No. 25590/2014 decided on 31.10.2017, (2015) 9 SCC 166, (2013) 9 SCC 65, (2013) 9 SCC 54, AIR 1962 SC 1, 2017 (2) MPLJ 65, (2009) 8 SCC 785, (2013) 2 SCC 41, (2004) 2 SCC 1, (2004) 8 SCC 517.

Jayant Neekhra, for the appellant.
None, for the respondents-claimants.
Dhruv Verma, for the respondent No. 7.
Shailendra Singh, for the respondent No. 9.

O R D E R

The Order of the Court was delivered by :
Vijay Kumar Shukla, J. :- This appeal has been filed under Section 173(1) of the Motor Vehicles Act, 1988 [hereinafter referred to as 'the Act'] challenging the legality and validity of the award dated 5-8-2016 passed by the II Additional Motor Accident Claims Tribunal, Anuppur [for short 'the Tribunal'] in Claim Case No.22/2015, whereby the claim filed by the respondents for compensation on account of death of the husband of the respondent No.1/claimant, namely, Shatrughan Yadav has been allowed.

2. The facts of the case adumbrated in a nutshell, are that the respondents-claimants filed a claim case before the Tribunal claiming compensation on account of death of Late Shatrughan Yadav, who was travelling in a Safari car which was dashed by the offending vehicle – truck bearing registration No.MP-20-HB-0919 from behind while overtaking the car, as a consequence of which the deceased along with other travellers in the car died on account of injuries sustained by them in the accident.

3. An FIR was registered by the police against the driver of the offending vehicle and after conducting necessary investigation, charge-sheet was filed before the court of competent jurisdiction. The issue regarding the death of the deceased on account of the negligent driving by the offending vehicle – the truck was found to be proved which was being rashly and negligently driven by the respondent No.8.

4. The Tribunal also recorded the finding that the vehicle in question was being driven in contravention of the insurance policy and held that there was no contributory negligence on the part of the driver of the Safari car bearing registration No. CG-16B-3729 which was dashed by the offending vehicle. The Tribunal found that there was breach of the insurance policy, therefore, the Insurance Company is not liable to pay compensation. However, following the principle of "*pay and recover",* the Insurance Company was directed to deposit the awarded sum and thereafter to recover the same from the owner of the offending vehicle.

5. Challenging the award passed by the Tribunal, counsel for the appellant raised the following two contentions :

> (i) That the Tribunal has erred while awarding 50% of the established income towards future prospects, as the deceased was working only as an insurance agent and there was no fixed salary and he was self employed. He contended that in the case of a claimant, who is not engaged in a permanent job, the award of future prospects is not permissible.
>
> (ii) That the issue regarding the principle of "*pay and recover"* has been referred to the Larger Bench and since the Insurance Company has no liability to pay compensation, therefore it cannot be compelled to pay compensation amount and later to recover it from the owner of the vehicle.

6. At the time of the argument, it was informed that the issue regarding payment of *"future prospects"* in the case of the deceased who was self employed or in a fixed salary and the issue of *"pay and recover"* have been referred to the Larger Bench. The case was heard and reserved. The first issue has been answered

by the Constitution Bench on 31st October, 2017 in S.L.P.(Civil) No.25590/2014 *[National Insurance Co. Ltd. vs. Pranay Sethi and others]*. The first issue was referred by a two-Judge Bench of the Apex Court in the case of *National Inasurance Co. Ltd. vs. Pushpa and others,* (2015) 9 SCC 166 considering the cleavage of opinion in the cases of *Reshma Kumari and others* vs. *Madan Mohan and another,* (2013) 9 SCC 65 and *Rajesh and others vs. Rajbir Singh and others,* (2013) 9 SCC 54, for an authoritative pronouncement in respect of award of *"future prospects"* in the case of a deceased having a permanent job or self-employed or working in a fixed salary. The Constitution Bench has decided the said issue and crystallized the same in para 61 as under:

> "(i) The two-Judge Bench in *Santosh Devi* should have been well advised to refer the matter to a larger Bench as it was taking a different view than what has been stated in *Sarla Verma*, a judgment by a coordinate Bench. It is because a coordinate Bench of the same strength cannot take a contrary view than what has been held by another coordinate Bench.
>
> (ii) As *Rajesh* has not taken note of the decision in *Reshma Kumari*, which was delivered at earlier point of time, the decision in *Rajesh* is not a binding precedent.
>
> (iii) While determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the age of the deceased was between 40 to 50 years. In case the deceased was between the age of 50 to 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax.
>
> (iv) In case the deceased was self-employed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years. An addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the deceased was between the age of 50 to 60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component.
>
> (v) For determination of the multiplicand, the deduction for personal and living expenses, the tribunals and the courts shall be guided by paragraphs 30 to 32 of *Sarla Verma* which we have reproduced hereinbefore.

(vi) The selection of multiplier shall be as indicated in the Table in *Sarla Verma* read with paragraph 42 of that judgment.

(vii) The age of the deceased should be the basis for applying the multiplier.

(viii) Reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively. The aforesaid amounts should be enhanced at the rate of 10% in every three years. "

7. In the present case the age of the deceased has been found to be between 26 to 30 years in paras 12 and 19 of the award passed by the Tribunal. Thus, the deceased was less than 40 years at the time of the accident and, therefore, as per para 61(iv) of the judgment passed by the Apex Court in *Pranay Sethi and others* (supra), the deceased being a self-employed, shall be entitled to 40% of the established income instead of 50%, as awarded.

8. So far as award of compensation on other heads is concerned, the same has not been challenged. However, in the case of *Gobald Motor Service Ltd. and another vs. R.M.K. Veluswami and others,* AIR 1962 SC 1 a three-Judge Bench of the Apex Court culled out the factors which are to be taken into consideration in calculating the pecuniary loss to the dependent. The relevant portion of para 7 of the judgment is extracted hereunder:

"In calculating the pecuniary loss to the dependants many imponderables enter into the calculation. Therefore, the actual extent of the pecuniary loss to the dependants may depend upon data which cannot be ascertained accurately, but must necessarily be an estimate, or even partly a conjecture. Shortly stated, the general principle is that the pecuniary loss can be ascertained only by balancing on the one hand the loss to the claimants of the future pecuniary benefit and on the other any pecuniary advantage which from whatever source comes to them by reason of the death, that is, the balance of loss and gain to a dependant by the death must be ascertained. The burden is certainly on the plaintiffs to establish the extent of their loss. When the Courts below have, on relevant material placed before them, ascertained the said amount as damages the Supreme Court cannot in second appeal disturb the said finding except for compelling reasons. [(1942) AC 601 & (1951)]."

In the present case, there is no challenge to the award of compensation in other heads by the appellant - Insurance Company, therefore, the amount of compensation under other heads are not required to be examined.

9. The next issue raised by the appellant that since the Tribunal has found breach of the insurance policy, as the offending vehicle was being driven in a rash and negligent manner in contravention of the terms and conditions of the insurance policy, and the driver was not having a valid driving licence for heavy vehicles, therefore, the insurance company could not have compelled to pay the compensation amount and to recover it from the owner of the vehicle. He relied on a judgment passed by this Court in the case of *Shankar Lal vs. Sanjay Kumar and others,* 2017 (2) MPLJ 65.

10. The issue regarding *"pay and recover"* is also referred to the Larger Bench. It is not in dispute that the issue is still pending adjudication. In the case of *National Insurance Co. Ltd. Parvathneni,* (2009) 8 SCC 785, the following two questions were referred to the Larger Bench for consideration :

> **"7…**.. (I) If an insurance company can prove that it does not have any liability to pay any amount in law to the claimants under the Motor Vehicles Act or any other enactment, can the Court yet compel it to pay the amount in question giving it liberty to later on recover the same from the owner of the vehicle ?
>
> (2) Can such a direction be given under Article 142 of the Constitution, and what is the scope of Article 142 ? Does Article 142 permit the Court to create a liability where there is none ?"

11. In the case of *Manager, National Insurance Co. Ltd. Vs. Saju P. Paul and another,* (2013) 2 SCC 41 the Apex Court has clarified that during the pendency of consideration of the above questions by a Larger Bench, the course of *"pay and recover"* followed in *National Insurance Co. Ltd. vs. Baljit Kaur,* (2004) 2 SCC 1 and *National Insurance Co. Ltd. vs. Challa Upendra Rao,* (2004) 8 SCC 517 will be continued to be followed. It is pertinent to reproduce para 26 of the judgment :

> "25. The pendency of consideration of the above questions by a larger Bench does not mean that the course that was followed in *Baljit Kaur* and *Challa Bharathamma* should not be followed, more so in a peculiar fact situation of this case. In the present case, the accident occurred in 1993. At that time, claimant was 28 years' old. He is now about 48 years. The claimant was a driver on heavy

> vehicle and due to the accident he has been rendered permanently disabled. He has not been able to get compensation so far due to stay order passed by this Court. He cannot be compelled to struggle further for recovery of the amount. The insurance company has already deposited the entire awarded amount pursuant to the order of this Court passed on 01.08.2011 and the said amount has been invested in a fixed deposit account. Having regard to these peculiar facts of the case in hand, we are satisfied that the claimant (Respondent No. 1) may be allowed to withdraw the amount deposited by the insurance company before this Court along-with accrued interest. The insurance company (appellant) thereafter may recover the amount so paid from the owner (Respondent No. 2 herein). The recovery of the amount by the insurance company from the owner shall be made by following the procedure as laid down by this Court in the case of *Challa Bharathamma*."

12. So far as contention of the appellant is concerned, there is no dispute to the proposition of law that in the case of contravention and breach of the terms and conditions of the insurance policy, the insurance company cannot be held to be liable to pay compensation. In the present case also, the Tribunal has not held that the insurance company is liable to pay compensation, but has directed to pay compensation amount to the claimants and later to recover it from the owner of the vehicle in question under the principles of 'pay and recover'. In the case of *Shankar Lal* (supra) para 26 of the judgment passed by the Apex Court in the case of *Saju P. Paul and another* (supra) has not been considered, hence the said judgment is *per incuriam* on the issue of "pay and recover".

13. In view of the authoritative pronouncement of law, as discussed hereinabove, we consider it fit and proper to direct payment of additional 40% of the established income of the deceased, being below the age of 40 years at the time of the accident in the light of para 61(iv) of the judgment of the Apex Court rendered in *Pranay Sethi and others* (supra), instead of 50% towards *"future prospects"*.

14. In view of the aforesaid, the award amount of compensation is calculated and quantified as under:

Annual income of the deceased assessed by the Tribunal is Rs.128076/-; 40% future prospects – Rs.51230/-; [Total Rs.128076 + 51230 = Rs.179300/-]. Rs.179300 – 1/3rd dependency (Rs.59768) = Rs.119538/-. Thus, compensation is assessed to Rs.119538 x 17 [(multiplier, applied as per judgment passed in *Sarla*

Verma (supra)]. Thus, the total award amount comes : Rs.2032146 + Rs.100000 (towards loss of consortium) + Rs.25000/- (funeral expenses) = Rs.2157146/-. Thus, the amount of compensation is quantified to **Rs.2157146/-** *(Rs.Twenty one lakh fifty seven thousand one hundred forty six)* only, which shall carry interest at the rate 6% p.a. from the date of filing of the claim application.

15. With the aforesaid observation and modification in the impugned award passed by the Tribunal, the appeal stands **disposed of**. There shall be no order as to costs.

Order accordingly

I.L.R. [2018] M.P. 108
APPELLATE CIVIL

Before Mr. Justice Rohit Arya

M.A. No. 1154/2017 (Indore) decided on 27 November, 2017

TELE WORLD MARKETING (M/s) ...Appellant
Vs.
THE JOINT COMMISSIONER (DRUGS),
FOOD & DRUGS ADMINISTRATION & ors. ...Respondents

Drugs and Magic Remedies (Objectionable Advertisements) Act, (21 of 1954) – Civil Suit – Jurisdiction of Court **– Telecast of advertisement of an Ayurvedic product '*Asthijivak*' in Indore – Respondent at Mumbai issued notice to stop telecasting the advertisement – Plaintiff filed suit at Indore seeking declaration of such notices as illegal, null and void and without jurisdiction and also prayed for permanent injunction restraining the respondents from taking any steps to stop telecasting the advertisement – Trial Court returned the plaint to plaintiff on the ground of jurisdiction – Challenge to – Held – Trial Court committed patent illegality and jurisdictional error in holding that the Court at Indore lacked jurisdiction merely because the notices were issued in Mumbai – In respect of the point of territorial jurisdiction, Court must take all the facts pleaded in support of cause of action, without entering into an inquiry as to the correctness or otherwise of the said facts – Plaintiff, a sole distributor of the said ayurvedic product is having the office at Indore, advertisement was telecasted at Indore and stoppage of telecast had adversely effected the business of plaintiff at Indore – A part of cause of action has arisen at Indore – Suit filed at Indore is maintainable – Appeal allowed.**

(Paras 11, 15 & 16)

औषधि और चमत्कारिक उपचार (आक्षेपणीय विज्ञापन) अधिनियम (1954 का 21) – *सिविल वाद – न्यायालय की अधिकारिता* – इंदौर में आयुर्वेदिक उत्पाद *'अस्थिजीवक'* के विज्ञापन का प्रसारण – मुम्बई में प्रत्यर्थी ने विज्ञापन का प्रसारण रोकने हेतु नोटिस जारी किया – वादी ने उक्त नोटिस अवैध अकृत एवं शून्य तथा बिना अधिकारिता के होने की घोषणा चाहते हुए इंदौर में वाद प्रस्तुत किया और साथ ही प्रत्यर्थीगण को विज्ञापन का प्रसारण रोकने के लिए कोई कदम उठाने से अवरूद्ध करते हुए स्थायी व्यादेश हेतु निवेदन भी किया – विचारण न्यायालय ने अधिकारिता के आधार पर वादी को वादपत्र लौटाया – इसे चुनौती – अभिनिर्धारित – विचारण न्यायालय ने यह अभिनिर्धारित करने में प्रकट अवैधता और अधिकारिता की त्रुटि कारित की, कि इंदौर के न्यायालय की अधिकारिता नहीं, मात्र इसलिए कि नोटिस मुम्बई में जारी किये गये थे – क्षेत्रीय अधिकारिता के बिन्दु के संबंध में, न्यायालय को वाद हेतुक के समर्थन में अभिवाक् किये गये सभी तथ्यों को उक्त तथ्यों की शुद्धता या अन्यथा के बारे में बिना जांच किये लिया जाना चाहिए – वादी, उक्त आयुर्वेदिक उत्पाद का एकमात्र वितरक, जिसका कार्यालय इंदौर में है, विज्ञापन का प्रसारण इंदौर में किया गया तथा प्रसारण पर रोक ने इंदौर में वादी के कारोबार को प्रतिकूल रूप से प्रभावित किया – वाद हेतुक का एक भाग इंदौर में उत्पन्न हुआ है – इंदौर मे प्रस्तुत वाद पोषणीय है – अपील मंजूर।

Cases referred :

(1994) 4 SCC 711, (2002) 1 SCC 567, (2004) 6 SCC 254, (2014) 9 SCC 329, (2010) 2 SCC 535, (1989) 2 SCC 163, (2007) 11 SCC 335.

A.K. Chitle with *Vijay Tulsiyan,* for the appellant.
Umesh Gajankush and *Milind Phadke,* for the respondent Nos.1 & 2.
None, for the other respondents.

O R D E R

Rohit Arya, J. :- This appeal under Order 43 rule 1(a) CPC by plaintiff is directed against the order dated 18/05/2017 passed by Twelth Additional District Judge, Indore in C.O.S.No.377-A/2017.

2. The trial Judge while dismissing the application under Order 7 rule 11 CPC filed by the defendants No.1 and 2, further held that as the cause of action has not arisen within the jurisdiction of this Court while seeking relief against the defendants No.1 and 2, the plaint has been returned to the plaintiff to be presented before the Court of competent jurisdiction.

3. Facts relevant and necessary as pleaded in paragraphs 1,3, 4, 5, 6, 7, 22 (1) to (3) and 28 of the plaint are to the effect that the plaintiff is a direct-response

telemarketing firm with Pan-India reach through media advertisement telecast and tele-shows on various television channels. It is the sole distributor of an ayurvedic product called 'Asthijivak' at Indore. Through various TV channels of defendants No. 3 to 6, the advertisement of the aforesaid product is being telecasted and the said defendants are also located at Indore.

For the purpose of booking of advertisement and time slots with the aforesaid TV channels the plaintiff has hired the services of defendants No.7; a company engaged in the business of advertisement, etc; located at Indore.

4. The office of defendant No.2 purporting to act under the provisions of the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 (for short the Act of 1954) at Mumbai had issued common notices to defendants No.3 to 6 asking them to stop telecasting the advertisement of 'Asthijivak' with immediate effect under the pretext that the advertisement was contrary to the provisions under the aforesaid Act and the Rules framed thereunder.

5. It is the case of the plaintiff that the territorial jurisdiction of the defendant No.2 is limited to three zones out of eight zones in Mumbai city, therefore, lacked jurisdiction to exercise such powers as regards different television channels across India. Besides, other grounds of challenge have been made to the action of the defendants No.1 and 2 while issuing the impugned notices, Annexure-P/1 (colly) and the impugned order, Annexure- P/12 dated 20.02.2017. As a result of stoppage of telecast of the advertisement of the product 'Asthijivak', the plaintiff's business has come to a grinding halt, therefore, the suit has been filed seeking declaration that the notices Annexure-P/1 (colly) and the impugned order Annexure-P/12 are illegal, *null* and *void* and without jurisdiction and not binding upon the plaintiff and also permanent injunction restraining the defendants No.1 and 2 from taking any steps to stop telecasting the advertisement of the plaintiff's product 'Asthijivak' by all the TV channels including TV channels 3 to 6 and compensation to the tune of Rs.5, 00,50,0000/-.

6. It appears that the defendants No.1 and 2 have filed an application under Order 7 Rule 11 CPC *inter alia* contending that the defendants No.1 and 2 are having their offices at Mumbai, therefore, no cause of action has arisen at Indore. The suit also suffers from misjoinder of the parties and the Court lacks territorial jurisdiction.

7. The trial Judge though rejected the application under Order 7 Rule 11 CPC but has also ordered for returning the plaint holding that the Court lacked territorial jurisdiction.

8. Learned Senior Counsel Shri Chitale appearing for the plaintiff taking exception to the aforesaid action contends that the plaint averments are well explicit that the plaintiff being the sole distributor of the ayurvedic product, 'Asthijivak', runs its business through advertisement is situated at Indore. The business of advertisement including booking of time slots with TV channels (defendants No.3 to 6) is done by defendant No.7. The offices of the defendants No.3 to 6 and 7 are also situated at Indore.

9. The effect of the notices Annexure-P/1 (colly) and the order dated 20.02.2017 Annexure-P/12 issued purporting to be under the provisions of the Act of 1954 are twofold, namely; (i) it has adversely effected the business of the plaintiff causing recurring business and financial loss; and (ii) the telecast of the advertisement of the plaintiff's ayurvedic product 'Asthijivak' for which the plaintiff is the sole distributor has been stopped by the defendants No.3 to 6. Under the circumstances, part of cause of action has arisen at Indore and then, it is submitted that as such, the case is covered under section 20(c) CPC. Hence, the trial Court has committed patent error of law and facts while returning the plaint under the pretext of lack of territorial jurisdiction.

10. Learned Senior Counsel for the plaintiff, therefore, contends that the facts pleaded in the plaint are such which have a nexus or relevancy with the *lis* that is involved in the suit giving rise to the cause of action to file the suit at Indore.

11. Relying upon the judgments of the Hon'ble Supreme Court reported in (1994) 4 SCC 711 Oil and *Natural Gas Commission vs. Utpal Kumar Basu,* (2002) 1 SCC 567 *Union of India vs. Adani Exports Limited,* (2004) 6 SCC 254 *Kusum Ingods & Alloys Limited vs. Union of India,* (2014) 9 SCC 329 *Nawal Kishore Sharma vs. Union of India and others,* learned senior counsel contends that while addressing the objection of lack of territorial jurisdiction the Court must take all the facts pleaded for cause of action into consideration without embarking upon an enquiry as to the correctness or otherwise of the said facts and thereafter, the trial Court is required to address the relevancy of facts so pleaded with the dispute/*lis* involved in the case and consequential loss or threats thereof. No such exercise has been done by the trial Court.

Merely for the reason that the impugned notices and the order (supra) in the suit since are passed in Mumbai the Court lacked territorial jurisdiction, the trial Court has committed patent illegality and jurisdictional error warranting interference by this Court by allowing the appeal.

12. *Per contra*, Shri Umesh Gajankush learned counsel appearing for the defendants No.1 and 2 supports the order impugned reiterating the reasonings given by the trial Court relying upon the judgment of the Hon'ble Supreme Court reported in (2010) 2 SCC 535 *Godrej Sara Lee Limited vs Reckitt Benckiser Australia PTY limited and another.*

13. Heard.

14. The crux of the controversy, therefore, revolves around the concept, meaning and dimensions of words "**cause of action, wholly or in part**".

The expression "cause of action" has not been defined either in the Constitution of India or in the Code of Civil Procedure. The **cause of action** is often described as a bundle of essential facts necessary for plaintiff to prove if disputed or traversed by defendant to succeed in the suit. Failure to prove such facts shall entitle the defendant a right to judgment in his favour, therefore, cause of action gives occasion for and forms the foundation of the suit.

In the case reported in (1989) 2 SCC 163, *A.B.C. Laminart (P) Ltd. V. A.P. Agencies,* the Hon'ble Supreme Court has made the following observations:-

> *"12. A cause of action means every fact, which if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the Court. In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue. It is not limited to the actual infringement of the right sued on but includes all the material facts on which it is founded. It does not comprise evidence necessary to prove such facts, but every fact necessary for the plaintiff to prove to enable him to obtain a decree. Everything which if not proved would give the defendant a right to immediate judgment must be part of the cause of action. But it has no relation whatever to the defence which may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff."*

Further, In the case reported in *(2007) 11 SCC 335* of *Alchemist Ltd. And another vs. State Bank of Sikkim and others,* wherein upon critical evaluation of ratio of various judgments, the Hon'ble Supreme Court lucidly laid down the following principle of law in the context of meaning of words "part of cause of action", which reads as under:-

> "From the aforesaid discussion and keeping in view the ratio laid down in a catena of decisions by this Court, it is clear that for the purpose of deciding whether facts averred by the appellant-petitioner would or would not constitute a part of cause of action, one has to consider whether such fact constitutes **a material**, **essential, or integral part of the cause of action**. It is no doubt true that even if a small fraction of the cause of action arises within the jurisdiction of the Court, the Court would have territorial jurisdiction to entertain the suit/petition. Nevertheless it must be a 'part of cause of action', nothing less than that."
>
> *(Emphasis supplied)*

15. In the light of the aforesaid enunciation of law by the Hon'ble Apex Court, there is substantial force in the submission made by learned Senior Counsel for the plaintiff that while addressing on the objection of lack of territorial jurisdiction, the Court must take all the facts pleaded in support of the cause of action without entering into an inquiry as to the correctness or otherwise of the said facts to ascertain the facts pleaded have relevancy or nexus that is involved in the case and there is a consequential injury or threat thereof.

16. The plaintiff a sole distributor of the ayurvedic product 'Asthivijik' is having the office at Indore. The defendant No.7, a company engaged in the business of booking advertisements on behalf of plaintiff for time slots with the TV channels and the TV channels, defendants No.3 to 6 advertising the ayurvedic product of the plaintiff 'Asthivijik' situated and telecasted at Indore has been stopped. As such, the stoppage of telecasting the ayurvedic product 'Asthivijik' through the notices and order of defendants No.1 and 2 have adversely effected the business causing recurring financial loss to the appellant/plaintiff and defendants No.3 to 6 as well as defendant No.7 at Indore. Hence, a part of cause of action has arisen at Indore *albeit* the notices and the impugned order have been issued at Mumbai. As such, the trial Court has committed grave illegality having concluded that the Court situated at Indore lacked territorial jurisdiction to decide the suit. In view of the facts pleaded in the plaint as discussed in the preceding paragraphs of the order. In the opinion of this Court, the suit filed in the District Court at Indore by the plaintiff/appellant is maintainable.

17. The judgment of the Hon'ble Supreme Court relied upon by the trial Court in the case of *Godrej Sara Lee Limited* (supra) is misplaced and has no bearing to the controversy involved in the instant case, as in the said case the Hon'ble Supreme

Court while drawing distinction between the action taken for cancellation of designs under Section 51- A of the Designs Act, 1911 and Section 19 of the Designs Act, 2000 ruled that while under Section 51-A of 1911 Act, allowed a person to move for cancellation directly before the High Court in its original jurisdiction whereas under Section 19 of the 2000 Act, an application for cancellation could only be made to the Controller of Designs, Kolkata. Against the order of Controller of Designs, Kolkata, cancelling the application for design under Section 19 of 2000 Act, an appeal shall lie to the Calcutta High Court and not to the Delhi High Court, as the jurisdiction to entertain a statutory appeal had to be determined on the basis of statutory provisions and not on the basis of *dominus litus or* the *situs* of the Appellate Tribunal or the cause of action.

18. Consequently, the appeal is allowed and disposed of.

Appeal allowed

I.L.R. [2018] M.P. 114 (DB)
APPELLATE CRIMINAL

Before Ms. Justice Vandana Kasrekar & Smt. Justice Anjuli Palo

Cr.A. No. 699/2008 (Jabalpur) decided on 11 October, 2017

ANIL PANDRE ...Appellant

Vs.

STATE OF M.P. ...Respondent

***A. Penal Code (45 of 1860), Section 302 & 201 – Murder of own daughter aged about 8 months – Conviction – Circumstantial Evidence* – Held – Motive of crime and desire for killing the infant was proved by oral and documentary evidence that accused suspected fidelity of Anita Bai (mother of deceased) and declined the deceased to be his own daughter – Deceased was last seen with the accused – Accused was present in the house when the infant was sleeping – Cloth piece in burnt condition showing a circular noose is suggestive of strangulation – Dead body was secretly cremated without intimating others – Finger prints of accused was found on the kerosene Bottle which was seized on the memorandum of accused himself– It was also proved that bones which were sent by the police were of a child aged about 6-8 months – No contradiction between *marg* intimation report and testimony of Anita Bai – Independent witness also corroborated the testimony of Anita Bai which was not been rebutted in cross-examination– Circumstantial evidence proves beyond reasonable doubt the involvement**

of accused with the offence– No reason or evidence on record to disbelieve the testimony of Anita Bai – Trial Court rightly convicted the accused – Appeal dismissed.

(Paras 12, 14, 15 &16)

क. दण्ड संहिता (1860 का 45), धारा 302 व 201 – करीब 8 माह की उम्र की स्वयं की पुत्री की हत्या – दोषसिद्धि – परिस्थितिजन्य साक्ष्य – अभिनिर्धारित – मौखिक एवं दस्तावेजी साक्ष्य द्वारा अपराध का हेतुक व बच्ची को जान से मारने की इच्छा साबित की गई थी कि अभियुक्त, अनिता बाई मृतिका की माँ की निष्ठा पर संदेह करता था और मृतिका को स्वयं की पुत्री होने से इन्कार करता था – मृतिका को अंतिम बार अभियुक्त के साथ देखा गया था – अभियुक्त मकान में उपस्थित था जब बच्ची सो रही थी – जली हुई स्थिति में गोलाकार फंदा दर्शाते हुए कपड़े का टुकड़ा, गला घोंटा जाने का सूचक है – शव का अंतिम संस्कार गुप्त रूप से अन्य व्यक्तियों को सूचित किये बिना किया गया – केरोसीन बोतल जिसे स्वयं अभियुक्त के मेमोरेण्डम पर जब्त किया गया था, पर अभियुक्त की उँगली के निशान पाये गये थे – यह भी साबित किया गया था कि अस्थियां जिन्हें पुलिस द्वारा भेजा गया था, वह करीब 6–8 माह की आयु की बच्ची की थी – मर्ग सूचना प्रतिवेदन एवं अनिता बाई के परिसाक्ष्य में कोई विरोधाभास नहीं – स्वतंत्र साक्षी ने भी अनिता बाई के परिसाक्ष्य की संपुष्टि की, जिसे प्रतिपरीक्षण में खंडित नहीं किया गया – परिस्थितिजन्य साक्ष्य, अपराध में अभियुक्त के शामिल होने को युक्तियुक्त संदेह से परे साबित करता है– अनिता बाई के परिसाक्ष्य पर अविश्वास करने के लिए अभिलेख पर कोई कारण या साक्ष्य नहीं – विचारण न्यायालय ने उचित रूप से अभियुक्त को दोषसिद्ध किया – अपील खारिज।

***B. Extra Judicial Confession* – Held – There was an extra judicial confession by the accused before his near relative – Confession is absolutely voluntary and without any compulsion or pressure – Extra judicial confession, if voluntary and true and made in fit case of mind, can be relied upon by the Court.**

(Para 10 & 11)

ख. न्यायिकेत्तर संस्वीकृति – अभिनिर्धारित – अभियुक्त द्वारा अपने नजदीकी रिश्तेदार के समक्ष न्यायिकेत्तर संस्वीकृति की गई थी – संस्वीकृति पूर्णतः स्वेच्छापूर्वक एवं बिना किसी विवशता या दबाव के है – न्यायिकेत्तर संस्वीकृति यदि स्वेच्छापूर्वक एवं सत्य है और ठीक मनःस्थिति में की गई है, न्यायालय द्वारा विश्वास किया जा सकता है।

Cases referred :

(2003) 8 SCC 180, AIR 1981 SC 765, (2003) 3 SCC 353.

Pradeep Sharma with *Durgesh Gupta,* for the appellant.
Gitesh Thakur, G.A. for the respondent/State.

J U D G M E N T

The Judgment of the Court was Delivered by :
Anjuli Palo, J. :- This appeal has been preferred by the appellant/accused under Section 374(2) of the Code of Criminal Procedure being aggrieved by the judgment of conviction dated 22.01.2008 passed by the Session Judge, Seoni in Session Trial No.51/2007, whereby the appellant was convicted under Section 302 of Indian Penal Code and sentenced for life imprisonment and under Section 201 of Indian Penal Code and sentenced for 5 years R.I.

2. In brief the prosecution story is that the appellant is a near relative of the complainant Anita Bai. An illicit relationship developed between the appellant/ accused and complainant Anita Bai (PW-1) due to which she became pregnant. Later, when her parents came to know that she was with a child, Panchayat was called. The fact and responsibility of the pregnancy was admitted by the appellant and at that time he had agreed to marry the complainant but later on the appellant fled away to Nagpur before the date of marriage. Anita Bai came to the house of the appellant and started living with his parents as they had accepted her as their daughter-in-law. After some time, Anita Bai (PW-1) delivered a daughter namely Preeti Pandre (since deceased).

3. On 17.01.2007 at about 8-9 am, complainant Anita Bai left for washing cloths, leaving her 8 months old baby child Preeti Pandre in the house. The appellant who was present there, is alleged to have committed the murder of Preeti, then took the body to a field and cremated her. The complainant on her return to the house at about 9:00 am enquired about the whereabouts of her daughter from the appellant who told her that he had committed the murder of their daughter (Preeti Pandre) and thereafter, cremated her. The complainant Anita Bai along with Soma (PW-6) went to police station Kurai, Seoni at around 4:00 pm and the *marg* intimation was registered (Ex. P/1). The police reached the spot of cremation where some burnt woods along with residue of bone and skull vault were found. The police seized the residue vide seizure memo (Ex. P/9). Later on, after investigation the *marg* was converted into FIR and offence under Section 302 and 201 of IPC was registered against the appellant. The appellant was arrested on 19.01.2017 and a bottle of kerosene oil was seized near the spot at the instance of the accused. All the seized items were sent to the Medical Institute for examination. The charge-sheet was filed and case was committed to the Trial Court.

4. The learned Trial Court, relying upon the circumstantial evidence and extra judicial confession of the appellant convicted him under Section 302 and 201 of Indian Penal Code and sentenced him as aforementioned.

5. This appeal has been filed by the appellant on the grounds that the appellant has been falsely implicated by the complainant Anita Bai (PW-1). The prosecution has failed to prove its case beyond reasonable doubt and the chain of circumstance to hold the appellant guilty of the offence. There was no eye witness to prove the offence. It is further contended that the learned Trial Court had erroneously relied upon the prosecution case. No case is made out against the appellant under Section 302 and 201 of the Indian Penal Code. Therefore, the appellant had prayed to set aside the impugned judgment, conviction and sentence and acquit him from the charges leveled against him.

6. Heard learned counsel for the parties. Perused the record.

7. The point for determination in this case is, whether the Trial Court wrongly convicted the appellant on the basis of extra-judicial confession.

8. The background of this case is that Anita Bai (PW-1) and the appellant had a love affair due to which Anita Bai became pregnant and gave birth to their daughter Preeti Pandre. At the time of incident, she was residing at the appellant's house with the parents of the appellant along with her daughter who was aged about 8 months. These facts narrated by the Anita (PW-1) are corroborated by the Antram (DW-1) himself in paragraph 4 of his cross-examination as well as by Annu Bai (PW-4) and Balaram (PW-8), who are the sister and father of Anita Bai. Balaram (PW-8) had also deposed that he had called the Panchayat with regard to the relationship between Anita and the appellant where the appellant had admitted that he is the father of the child. Anita started residing with the father of the appellant who took care of Anita as well as her daughter but the appellant left his house and went to Nagpur. Soma (PW-6), village kotwar is an independent witness. He corroborated the testimony of Balaram (PW- 8) with regard to holding Panchayat about the relationship of the appellant and Anita and matter was considered. Holding memo of the Panchayat (Exh. P/10) was seized vide seizure memo (P/18) in which the appellant also admitted that he was the father of the child and also agreed to marry Anita but instead he fled away to Nagpur. As per Soma (PW-6), Preeti was the daughter of the appellant. She was born at the appellant's house. The father of the appellant took care of Anita and her daughter in absence of appellant. As per Anita (PW-1), the appellant had not accepted to have fathered her child.

9. Anita Bai (PW-1) and Balaram (PW-8) both have deposed that the appellant came back to his house 2-3 days prior to the incident during '*sankranti*'. *Sankranti* is observed on 14-15th January of every year and the incident took place on 17th January, 2007. No suggestion has been given by learned counsel for the appellant to

Anita Bai (PW- 1) and Balaram (PW-8) that the appellant had not come from Nagpur to his home during or at the time of incident. Thus, the defence / plea of alibi taken by the appellant cannot be accepted. Further, the deceased was only 8 months old child. No one had enimity or motive to kill her. Testimony of Anita Bai (PW-1) is supported by other independent witness Soma (PW-6) village kotwar. Anita Bai had not only physical relationship with the appellant but also she was residing with his parents in his house. We find that she had no enimity with the appellant to falsely implicate him in the crime with regard to murder of their daughter. Anita Bai has clearly stated that on the date of incident at about 8:00 am she went out to wash cloths. At that time her daughter Preeti was sleeping at home and the appellant was also present there. It is proved that Anita Bai (PW-1) mother of the deceased had lastly seen her daughter with the appellant. When she returned home, she did not find her daughter. She asked the appellant about the whereabouts of her daughter, the appellant replied that, "he took Preeti and burnt her at Kanhar Patti, go and see her". Immediately, Anita (PW-1) went to Kanhar Patti. The place belonged to the appellant. She saw something burning at that place. The appellant told her that Preeti was not his child therefore he burnt her. This is the extra judicial confession of the appellant before his near relative.

10. After considering the entire evidence, we find that this confession is absolutely voluntary and without any compulsion or pressure. It is also found true because we do not find any reason or evidence on record to disbelieve the testimony of Anita Bai (PW-1). She is the mother of deceased and on the other hand she had love affair with the appellant due to which she left her parents' house. Learned counsel for the appellant contended that the extra-judicial confession is a weak type of evidence. In the present case, there is no other corroborating evidence on record against the appellant.

11. The principle laid down by the Hon'ble Supreme Court in the case of *"State of Rajasthan Vs. Rajaram"* (2003) 8 SCC 180 that the extra judicial confession, if voluntary and true and made in fit case of mind, can be relied upon by the Court. The confession will have to be proved like any other threat. The value of the evidence as to confession, like any other evidence, depends upon the veracity of the witnesses to whom it has been made. The Court further expressed view that such confession can be relied upon and conviction can be founded thereon, if the evidence about the confession comes from the mouth of witnesses, who appeared to be unbiased, not even remotely inimical to the accused and in respect of whom nothing is brought out which may tend to indicate that he may have a motive of attributing and untruthful statement of the accused.

12. Therefore, it cannot be accepted that extra judicial confession is a weak type of evidence and finding of conviction cannot be based on it. We do not agree with the contention of learned counsel for the appellant that there is no other evidence against the appellant. Soma (PW-6) who is an independent witness also corroborate the testimony of Anita (PW-1), that just after the incident Anita (PW-1) informed him about the murder of Preeti by the appellant. Thereafter, he also saw the place where some wood was burning. He went to the police station with Anita. His testimony is not rebutted in cross-examination. Learned counsel submitted that the deceased Preeti was ill. She died due to her illness therefore, her body was buried. But this is a case of burning of her body. Further, no oral or documentary evidence has been produced by the appellant to prove that Preeti died due to illness.

13. The appellant took different defence. He took the plea of alibi. On the other hand, a suggestion was given to Anita (PW-1) that she herself killed the deceased which shows that false defence was taken by the appellant. It is pertinent to note that the appellant was arrested on 19.01.2007 from his village Gram Sevan Kanhar, District Seoni and not from Nagpur. He had taken a false plea which was rightly considered by the learned Trial Court as an additional circumstance against the accused by placing reliance upon the case of *Shankarlal Gyasilal Dixit Vs. State of Maharashtra reported* in AIR 1981 SC 765. In the light of the above facts and circumstances, we also come to the conclusion that the appellant failed to establish plea of alibi.

14. S.K.Mishra (PW-12) Investigation Officer deposed that on the same date of incident *marg* report was lodged against the appellant by the Anita (PW-1). There is no contradiction between the *marg* intimation report and the testimony of Anita (PW-1). Such intimation was lodged against the appellant by name. After that, the police seized some bones of the deceased vide seizure memo Exh. P/9. S.K.Mishra (PW-12) also deposed that on the memorandum (Exh. P/5) of the appellant himself, a bottle of kerosene was seized vide seizure memo Exh. P/7, signed by the appellant and supported by Devendra Kumar Thakur (PW-3). R.S.Choudhary (PW-9) Finger Print Expert Inspector found the finger prints of the appellant over the kerosene bottle. No explanation was given by the appellant as to how the bottle was imprinted with his finger prints. Further, that the medico legal institute gave clear-cut finding that the bones which were sent by the police were of a child aged about 6-8 months vide letter Exh. P/16 and report Exh. P/24 which reveal that the burnt bone pieces were of human origin bearing the same individual of aged about 6-8 months. The learned counsel for the appellant placed reliance upon the case of *State of Karnataka vs. M.V.Mahesh* [(2003) 3 SCC 353] wherein it is held as under :

"Penal Code, 1860 – Section 302 – Circumstantial evidence – Disappearance of B, wife of respondent R – Conviction of R and his father by trial court – Acquittal by High Court – Propriety – Circumstances relied on by trial court that : (i) R last seen with his wife, and (ii) false explanation given by R as to her disappearance, held on facts, not established - Recovery of human bones – Identity of the said bones as that of B established on the basis of DNA examination, held, not enough to prove the involvement of R in the murder of B – Absence of motive – Whether statement made by R really led to the discovery of bones, held, as doubtful – Prosecution case not found acceptable – Judgment of High Court upheld."

15. Learned counsel for the appellant contended that without DNA test, it is not proved that the DNA of bones and the appellant were same. There is no issue before us that whether Preeti is the daughter of the appellant or not? Hence, in the absence of DNA Test, the prosecution case is not adversely affected. The cloth piece in burnt condition showing a circular noose is suggestive of strangulation. The aforesaid evidence, without any reasonable double (sic: doubt) involve only the appellant with the offence.

16. The learned Trial Court rightly considered the following circumstantial evidence against the appellant :

That, the deceased was last seen with the accused and accused was present in the house where the infant deceased was sleeping, the fact was proved by the statement of Anita Bai (PW-1).

(ii) The accused have motive and desire for killing the infant. The letter (Ex. P-10) dated 18.06.2006 was seized from Balaram (PW-8) who is the father of Anita Bai (PW-1). In this letter (Ex. P-10), it was accepted by Suman Lal Pandre, father of the accused that on account of physical relationship with the accused, Anita Bai became pregnant. They agreed for marriage but accused fled away. So Anita Bai (PW-1) resided in the house of the accused. This letter was signed by father of the accused Suman Lal and 12 other villagers as an attesting witness. But the accused suspected fidelity of Anita Bai (PW-1) and declined the deceased to be his own daughter, so this was the motive of crime which is proved by oral and documentary evidence.

(iii) Dead body was secretly and clandestinely cremated without intimating others. It is proved that death was not natural then the obvious conclusion has to be that the death was homicidal.

17. We find that all the circumstances point out towards the guilt of the appellant/accused only. He had motive to kill Preeti Pandre as he had never accepted her to be his daughter.

18. In view of the aforesaid, the appeal is liable to be and is hereby dismissed.

19. Copy of this judgment along with the record be sent to the Court below for information.

Appeal dismissed

I.L.R. [2018] M.P. 121 (DB)
APPELLATE CRIMINAL

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

Cr.A. No. 1528/1994 (Jabalpur) decided on 13 October, 2017

STATE OF M.P. ...Appellant
Vs.
SIDDHAMUNI ...Respondent

A. Penal Code (45 of 1860), Section 376 – Rape – Minor Girl – Acquittal – Appreciation of Evidence – Testimony of Prosecutrix **– Trial Court acquitted the accused on the ground that prosecution failed to produce the lady doctor who examined the prosecutrix and her evidence was necessary for corroboration of the testimony of prosecutrix – Held – It is not in dispute that at the time of incident, as per the ossification test conducted by the doctor, (PW-6), prosecutrix was below 15 years – Prosecutrix also stated that she was 12 years old – No question regarding her age was put forth by counsel of accused to the parents of prosecutrix, hence it was established that prosecutrix was a minor and under the age of 15 years and therefore no question of consent arises – Testimony of prosecutrix is in corroboration with FIR, statement of her parents and Investigating officer also and thus is unshaken and found to be trustworthy – No contradictions between her statement and FIR – FIR on the same day, thus no undue delay in FIR – No personal enmity between the family of prosecutrix and the accused – Trial Court wrongly evaluated the prosecution evidence and findings are based on presumptions and surmises – Trial Court's judgment set aside – Accused is found guilty and hereby convicted and sentenced for the offence u/S 376 IPC – Appeal allowed.**

(Paras 6, 7, 8, 13 & 19)

क. दण्ड संहिता (1860 का 45), धारा 376 – बलात्संग – अप्राप्तवय बालिका – दोषमुक्ति – साक्ष्य का मूल्यांकन – अभियोक्त्री का परिसाक्ष्य – विचारण न्यायालय ने अभियुक्त को इस आधार पर *दोषमुक्त* किया कि अभियोजन उस महिला चिकित्सक को प्रस्तुत करने में विफल रहा जिसने अभियोक्त्री का परीक्षण किया था और उसका साक्ष्य, अभियोक्त्री के परिसाक्ष्य की संपुष्टि हेतु आवश्यक थी – अभिनिर्धारित – यह विवादित नहीं कि चिकित्सक (अ.सा.–6) द्वारा किये गये अस्थिपरीक्षण के अनुसार घटना के समय अभियोक्त्री 15 वर्ष से कम की थी – अभियोक्त्री का भी कथन है कि वह 12 वर्ष की आयु की थी – उसकी आयु के संबंध में अभियुक्त के अधिवक्ता द्वारा अभियोक्त्री के माता–पिता से कोई प्रश्न नहीं पूछा गया था, अतः यह स्थापित किया गया था कि अभियोक्त्री अप्राप्तवय एवं 15 वर्ष से कम आयु की थी और इसलिए सम्मति का प्रश्न उत्पन्न नहीं होता – अभियोक्त्री का परिसाक्ष्य, प्रथम सूचना रिपोर्ट, उसके माता–पिता का कथन एवं अन्वेषण अधिकारी के भी कथन की संपुष्टि करता है और इस प्रकार स्थिर एवं विश्वसनीय पाया गया – उसके कथन एवं प्रथम सूचना रिपोर्ट के मध्य विरोधाभास नहीं – उसी दिन प्रथम सूचना रिपोर्ट, अतः प्रथम सूचना रिपोर्ट में अनुचित विलम्ब नहीं – अभियोक्त्री के परिवार एवं अभियुक्त के बीच व्यक्तिगत वैमनस्यता नहीं – विचारण न्यायालय ने अभियोजन साक्ष्य का गलत मूल्यांकन किया और उपधारणाओं एवं अनुमानों पर निष्कर्ष आधारित किया गया है – विचारण न्यायालय का निर्णय अपास्त – अभियुक्त को दोषी पाया गया और एतद् द्वारा भा.द.सं. की धारा 376 के अंतर्गत दोषसिध्द एवं दण्डादिष्ट किया गया – अपील मंजूर।

***B. Ocular Evidence/FSL Report* - Ocular evidence of prosecutrix and her parents is wholly supported by chemical examination of the seized articles which relates the accused with the crime - FSL report also clearly proves the presence of blood and semen on the seized articles for which testimony of prosecutrix alone is proved trustworthy.**

(Para 14)

ख. चाक्षुष साक्ष्य/एफ.एस.एल. रिपोर्ट – अभियोक्त्री एवं उसके माता–पिता का चाक्षुष साक्ष्य का पूर्ण रूप से समर्थन, जब्तशुदा वस्तुओं के रासायनिक परीक्षण द्वारा होता है जो अभियुक्त को अपराध से संबद्ध करता है – न्यायालयिक विज्ञान प्रयोगशाला का प्रतिवेदन भी जब्तशुदा वस्तुओं पर रक्त एवं वीर्य की उपस्थिति स्पष्ट रूप से साबित करता है, जिसके लिए अकेले अभियोक्त्री का परिसाक्ष्य ही विश्वसनीय साबित होता है।

Cases referred :

(2010) 2 SCC 9, 2017 Cri.L.J. 529 SC, 2017 Cri.L.J. 578 (SC), AIR 2011 SC 3753, 2012 Cri.L.J. 672.

S.K. Rai, for the appellant/State.

S.C. Chaturvedi, for the respondent.

J U D G M E N T

The Judgment of the Court was delivered by :
Anjuli Palo, J. :- This appeal has been preferred by the appellant/State challenging the judgment dated 25.01.1993, passed by Sessions Judge in S.T. No. 71/1992, whereby the respondent has been acquitted from the charge under Section 376 of the Indian Penal Code.

2. The brief facts of the prosecution is that the prosecutrix is the resident of village Mal and at the time of incident, she was aged about 12-15 years. On 27.11.1991, at about 12:00 noon, the prosecutrix went to the field belonging to the respondent to collect grass for the animals. The respondent who was present there, called the prosecutrix to help him to collect grass. When the prosecutrix was helping the respondent, he caught hold of her and pushed her to the ground and forcibly raped her. When the prosecutrix screamed for help, the respondent put a gag in her mouth. Later, on the same day the prosecutrix along with her father logded a report. Police station Garh registered an FIR under Section 363 and 376 of the Indian Penal code against the respondent. Charge-sheet was filed before the concerned Court. The case was committed to the trial Court.

3. Thereafter, trial was conducted by the Trial Court. The respondent was charged then acquitted from the charge under Section 376 of the Indian Penal Code on the ground that the prosecution has failed to produce the lady doctor who had examined the prosecutrix. As per the learned trial Court her evidence was necessary for corroboration of the testimony of the prosecutrix. As the prosecutrix was under 16 years of age and was unmarried.

4. The appellant / State has challenged the aforesaid finding and submitted that the learned trial Court wrongly acquitted the respondent. The prosecutrix was a minor. Her age was proved by Dr. A.K.Mishra (PW-6). There are sufficient evidence on record in support of the testimony of the prosecutrix (PW-1). It is alleged that the learned Trial Court refused to accept the application filed by the prosecution for examining the lady doctor, who had examined the prosecutrix. Therefore, the appellant/State prayed to convict and sentence the respondent for committing offence under Section 376 of the IPC with the minor girl.

5. After having heard the rival contentions and on perusal of the record, the question for determination is, "whether the respondent has wrongly been acquitted by learned trial Court from the charge under Section 376 of the Indian Penal Code."

6. It is not in dispute that at the time of incident i.e. on 27.11.1991, as per the ossification test of the prosecutrix conducted by Dr. A.K.Misha (sic: Mishra)

(PW-6), she was below 15 years. Before the trial Court the prosecutrix stated that she was 12 years old. With regard to her age, no question was put forth by the learned counsel for the respondent to her parents. Therefore, it was established that the prosecutrix was minor and under the age of 15 years. Thus, no question of her consent arises.

7. The testimony of the prosecutrix is in corroboration with the FIR and there was no contradiction between her statement and the FIR (Ex. P/1). The FIR was lodged on the same day of the incident at about 10:30 pm after the father of the prosecutrix returned home. There was no personal enmity between the family of the prosecutrix and the respondents. We find that there is no undue delay in filing of the FIR which was named against the respondent. The respondent was arrested on the next day and his undergarments were seized by the police. The prosecutrix (PW-1) stated that during the incident, she was shouting and screaming. To suppress her voice the respondent put a gag in her mouth and threatened to kill her with *tangi* then he forcibly had intercourse with her. Due to this, there was bleeding from her vagina. The testimony of prosecutrix itself is unshaken and found trustworthy.

8. The prosecutrix narrated the entire incident to her mother Savitri (PW-2), immediately as her father was not at home. Savitri (PW-2) fully corroborated her testimony and also stated that she saw the bleeding from the private parts of the prosecutrix. She also provided the blood stained clothes of the prosecutrix to the police after lodging the report. Lalman Patel (PW-3), father of the prosecutrix saw the bleeding from private parts and on the clothes of the prosecutrix. These facts are not challenged by the learned counsel for the respondent in the cross-examination. Gulab Singh, ASI (PW-7) stated that on the next dated i.e. 28.11.1991, he seized blood stained soil from the spot i.e. field of the respondent and his undergarment. In this regard, no explanation has been offered by the respondent. Hence, the testimony of prosecutrix is corroborated by her parents and Investigating officer also.

9. In the present case, it is important to note that the prosecution failed to produce the Dr. Asha Subramaniam, the lady doctor who had examined the prosecutrix on the next day of the incident. After so many opportunities, notice was not served on her. On this ground alone, the learned Trial Court ignored all the above evidence and acquitted the respondent from the charge leveled against him. Learned counsel for the State placed reliance on the case of *Wahid Khan vs. State of Madhya Pradesh* [(2010) 2 SCC 9] wherein it was held that-

> "Thus, in a case of rape, testimony of a prosecutrix stands at par with that of an injured witness. It is really not necessary to insist for corroboration if the evidence of the prosecutrix inspires confidence and appears to be credible.

> However, in the case in hand, even without the examination of doctor, the evidence of prosecutrix stands fully corroborated by the evidence of P.W.3-B.B. Subba Rao, Sub-inspector of the police station who had virtually caught the appellant red-handed. Thus, even if doctor had not been examined it would not throw or completely discard the prosecution story. The evidence of prosecution witnesses is fully trustworthy and there is no reason to doubt genuineness thereof."

10. Learned counsel for the respondent contended that even then the lady doctor had not given any definite opinion with regard to recent intercourse. On the other hand, if we accept the above contention of the learned counsel, in MLC report it was narrated by her that "hymen teard at 6 o' clock position, wound is lacerated." Unfortunately, the prosecution failed to prove such report in accordance with law.

11. It may be that the medical officer had not given any definite opinion in the MLC report of the prosecutrix, but should not give an opinion that no rape had been committed. In case of *Wahid Khan* (supra), the Hon'ble Supreme Court has also observed that :

> *"Rape is crime and not a medical condition. Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is to the effect whether there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one."*

12. The prosecutrix was 14-15 year old girl. Soon after the incident, the prosecutrix had bleeding in her private parts and her parents also proved this fact. Although, there is no evidence with regard to her MLC report. This fact is not challenged in cross-examination of Maniraj (PW-7) but he seized the underwear (Article C) of the respondent and blood stained soil (Article D) from the place of incident. Also the undergwear of the prosecutrix and two slides of her vaginal swap (sic : swab) (Articles A, B and B2, respectively) were seized by the police. This fact is not challenged in the cross-examination of Sangamlal (PW-5). Seized articles were sent for chemical examination. As per the FSL report (Exh. P/9) presence of blood and semen on the above articles was established. We do not agree with the contention of learned counsel for the respondent that the blood was found due to menstruation of the prosecutrix as considered by the learned Trial Court in paragraph 8 of the impugned judgment because this fact has not come in the evidence of prosecutrix and Savitri (PW-2) and Lalman (PW-3) (parents of the prosecutrix) and not even suggested to them by learned counsel for the respondent.

13. Therefore, we come to the conclusion that the learned Trial Court wrongly evaluated the prosecution evidence in favour of the respondent. The findings of the learned Trial Court are based only on presumptions and surmises. Therefore, under the appellate jurisdiction, the interference by this Court is found necessary in the impugned order.

14. The ocular evidence of the prosecutrix and her parents is wholly supported by the chemical examination of the seized articles which relates the respondent with the crime. The FSL report clearly proved the presence of blood and semen on the seized articles for which the testimony of the prosecutrix alone is proved trustworthy. We do not agree with the findings of the learned Trial Court that the father of the prosecutrix had enmity with mudha community and due to this they had falsely implicated the respondent in this case. In our opinion, no one will take such extreme step to use their own children as bait to falsely implicate some person.

15. In case of *"Anjan Das Gupta Vs. State of West Bengal and others* 2017 Cr.L.J. 529 SC", the Supreme Court has held that and it is well settled law that:-

> "If order of acquittal has been made on improper and erroneous appreciation of evidence, can be set aside by the appellate Court."

16. In cases of *"Bhagwan Jagannath Markad Vs. State of Maharashtra,* 2017 Cri.L.J. 578 (SC) and *"Mrinal Das Vs. State of Tripura,* AIR 2011 SC 3753", it is held by the Apex Court that:-

> "It is the duty of the appellate Court to marshal the entire evidence on record and only by giving cogent and adequate reasons set aside the judgment of acquittal. If the order is clearly unreasonable, it is a compelling reason for interference. When the trial Court has ignored the evidence or misread the material evidence or has ignored, the appellate Court is competent to reverse the decision of the trial Court depending on the materials placed."

17. In case of *C. Ronald and Anr. Vs. State of U.T. Of Andaman & Nicobar,* 2012 Cri.L.J. 672, it is held that:-

> "There is no restriction on the powers of the appellate Court to convert an order of acquittal into a conviction."

18. Therefore, on the above discussions and in the light of above principles and also considering the facts and circumstances of the case, we are of the considered opinion that in the present case, the testimony of the prosecutrix is wholly reliable.

We find that the prosecutrix, aged about 14-15 years was forcibly raped by the respondent. The respondent is liable to be convicted under Section 376 of the Indian Penal Code.

19. Accordingly the appeal is allowed. The impugned judgment dated 25.01.1993 is hereby set aside. We find the respondent guilty and convict him for the offence under Section 376 of the Indian Penal Code. **He is sentenced to undergo 10 years RI with fine of Rs. 25,000/- which is to be paid to the prosecutrix**. In default of payment of fine, the respondent shall further undergo 3 years RI.

20. The respondent Siddhamuni is on bail. His bail bond is canceled and he is directed to surrender immediately before the concerned trial Court to undergo the sentence, failing which the trial Court shall take appropriate action under intimation to the registry.

21. Copy of this order be sent to the Court below for information and compliance alongwith its record.

22. With the aforesaid, the appeal stands disposed of.

Appeal allowed

I.L.R. [2018] M.P. 127 (DB)
APPELLATE CRIMINAL

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

Cr.A. No. 1175/2007 (Jabalpur) decided on 2 November, 2017

MUNNA SINGH & anr. ...Appellants
Vs.
STATE OF M.P. ...Respondent

(Alongwith Cr.A. No. 1195/2007 & Cr.A. No. 1287/2007)

***A. Penal Code (45 of 1860), Section 302/149 – Murder – Conviction– Unlawful Assembly – Common Object – Appreciation of Evidence – Eye Witnesses* – Held – Once it is established that unlawful assembly has a common object, it is not necessary that all persons must be shown to have committed some overt act – Principle of constructive liability for being part of unlawful assembly would apply - They can be convicted u/S 149 IPC – Further held, discrepancies in description of use of weapon hitting which part of the body would not make the entire prosecution case unreliable – Evidence of eye witnesses are consistent and coherent and**

showed sufficient facts and circumstances to constitute the common object of the unlawful assembly to murder the deceased persons – Prosecution successfully proved its case beyond reasonable doubt – Appeals dismissed.

(Para 13 & 16)

क. दण्ड संहिता (1860 का 45), धारा 302/149 – हत्या – दोषसिद्धि – विधिविरूद्ध जमाव – सामान्य उद्देश्य – साक्ष्य का मूल्यांकन – चक्षुदर्शी साक्षीगण – अभिनिर्धारित – एक बार यह स्थापित हो गया कि विधिविरूद्ध जमाव का सामान्य उद्देश्य है, यह आवश्यक नहीं है कि सभी व्यक्तियों द्वारा कोई प्रत्यक्ष कृत्य कारित किया जाना दर्शाया जाना चाहिए – विधिविरूद्ध जमाव का हिस्सा होने के कारण आन्वयिक दायित्व का सिद्धान्त लागू होगा – वे भारतीय दण्ड संहिता की धारा 149 के अन्तर्गत दोषसिद्ध किये जा सकते हैं – आगे अभिनिर्धारित किया गया कि शस्त्र के उपयोग के विवरण में विसंगतियाँ कि उससे शरीर के किस अंग पर प्रहार किया गया, संपूर्ण अभियोजन प्रकरण को अविश्वसनीय नहीं बनायेगी – चक्षुदर्शी साक्षीगण के साक्ष्य संगत एवं संबद्ध हैं तथा मृतकगण की हत्या करने के लिये विधिविरूद्ध जमाव का समान्य उद्देश्य गठित करने हेतु पर्याप्त तथ्यों व परिस्थितियों को दर्शाते हैं – अभियोजन ने अपना प्रकरण युक्तियुक्त संदेह से परे सफलतापूर्वक साबित किया – अपीलें खारिज।

***B. Ocular and Medical Evidence – Contradiction – Effect* – Held – Where there is a contradiction between the ocular evidence and medical evidence, the ocular testimony of a witness has greater evidentiary value than medical evidence – When medical evidence makes the ocular evidence improbable, that becomes a relevant factor in the process of evaluation of evidence –In the present case, testimony of the eye witnesses are trustworthy – Entire evaluation of ocular evidence and medical evidence constituted common object to murder the deceased persons.**

(Para 14)

ख. चक्षुदर्शी एवं चिकित्सीय साक्ष्य – विरोधाभास – प्रभाव – अभिनिर्धारित – जहाँ चक्षुदर्शी साक्ष्य एवं चिकित्सीय साक्ष्य के मध्य विरोधाभास है, वहाँ साक्षी के चक्षुदर्शी परिसाक्ष्य का साक्ष्यिक मूल्य, चिकित्सीय साक्ष्य से अधिक होगा – जब चिकित्सीय साक्ष्य, चक्षुदर्शी साक्ष्य को असंभाव्य बना देता है, तो वह साक्ष्य के मूल्यांकन की प्रक्रिया में एक सुसंगत कारक बन जाता है – वर्तमान प्रकरण में, चक्षुदर्शी साक्षीगण की परिसाक्ष्य भरोसेमंद है – चक्षुदर्शी साक्ष्य एवं चिकित्सीय साक्ष्य का संपूर्ण मूल्यांकन मृतकगण की हत्या का सामान्य उद्देश्य गठित करता है।

***C. Non-Recovery of Weapon – Effect* – Held – Mere non recovery of weapon would not falsify the entire prosecution case where there is ample unimpeachable evidence available.**

(Para 15)

ग. शस्त्र की गैर–बरामदगी – प्रभाव – अभिनिर्धारित – मात्र शस्त्र की गैर–बरामदगी, संपूर्ण अभियोजन प्रकरण को जहाँ पर्याप्त अनाधिक्षेपनीय साक्ष्य उपलब्ध है, मिथ्या नहीं बनायेगी।

Cases referred :

(2003) 1 SCC 425, (2013) 4 SCC 607, (2014) 10 SCC 275, (2000) 9 SCC 82, (2011) 9 SCC 115, (2013) 12 SCC 746, 2016 SCC Online SC 1163.

R.S. Shukla, Amicus Curiae, Raman Patel with *Mahesh Singh* & *Ashish Tiwari* for appellants.
A.P. Singh, G.A. for the respondent/State.

J U D G M E N T

The Judgment of the Court was delivered by :
V.K. Shukla, J. :- All these three appeals, as mentioned above, are arising out of the common order of conviction and sentence dated 01-05-2007, passed by Special Judge (Constituted under the provisions of Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act,1989) Chhatarpur, in S.T.No.186/2002, whereby the appellants have been convicted and sentenced as under :

Munna Singh	U/s 148 of IPC to undergo imprisonment for two years
	U/s 302/149 of IPC to undergo imprisonment for life and fine of Rs. 1000/- in default, to suffer further R.I. for six months for causing murder of Balendu
	U/s 302/149 of IPC to undergo imprisonment for life and fine of Rs. 1000/- in default, to suffer further R.I. for six months for causing murder of Mitthu
Ram Manohar Singh	U/s 148 of IPC to undergo imprisonment for two years
	U/s 302/149 of IPC to undergo imprisonment for life and fine of Rs. 1000/- in default, to suffer further R.I. for six months for causing murder of Mitthu

Bharat Chansoriya	U/s 148 of IPC to undergo imprisonment for two years
	U/s 302/149 of IPC to undergo imprisonment for life and fine of Rs. 1000/- in default, to suffer further R.I. for six months for causing murder of Balendu
	U/s 302/149 of IPC to undergo imprisonment for life and fine of Rs. 1000/- in default, to suffer further R.I. for six months for causing murder of Mitthu
Gyaneshwar alias	U/s 148 of IPC to undergo imprisonment for
Gyanendra	two years
	U/s 302/149 of IPC to undergo imprisonment for life and fine of Rs. 1000/- in default, to suffer further R.I. for six months for causing murder of Balendu
	U/s 302/149 of IPC to undergo imprisonment for life and fine of Rs. 1000/- in default, to suffer further R.I. for six months for causing murder of Mitthu
	With the further stipulation to run the same concurrently.

2. The accused persons were initially charged for offences punishable under sections 148, 302 in the alternative u/s 302 read with section 149 and 302 in the alternative u/s 302/149 and 302 in the alternative u/s 302/149 of IPC. The allegation is that on 19-04-2002, at about 12' O clock in the day, the accused persons alongwith other co-accused persons namely: Rajesh, Rakesh, Ramswaroop and Summere formed an unlawful assembly with a common object to cause murder of Balendu son of Rameshwar and Mitthu son of Shivnandan and in furtherance of the said common object, they committed riot and armed with gun/katta, they fired on Balendu and Mitthu, thus committed murder of both the persons.

3. That out of 8 accused persons, 4 absconded namely Rajesh, Rakesh, Ramswaroop and Summere and the trial was conducted in the absence of these 4 accused persons. The criminal case was set at motion on the report lodged by Balkesh (PW-3) informing that on the date of the incident i.e. 19-04-2002 in the afternoon at

about 12' O clock, he alongwith Rajkumar and deceased persons Balendu and Mitthu were coming to their village Mudahara in a tractor after filling it with fodder, the said tractor was being driven by deceased Balendu and Mitthu was sitting on mud-guard, while Rajkumar, Kajra and Balkesh were in the trolley containing fodder. It is alleged that when the said tractor came on the crossing of Garha Ghat of Ajni river, they saw two stones lying on the road, at which deceased Balendu stopped the tractor and asked Mitthu to remove the stones , at that time, it is alleged that from the front side accused Rammanohar appellant no.2 in Criminal Appeal No.1175/07 carrying 315 bore gun and co-accused Ramswaroop (abscond) carrying 12 bore gun came over there and when Mitthu tried to remove the stones, it is alleged that both the accused persons exhorted to kill him, at which, it is alleged that Rammanohar fired from his gun, which hit Mitthu.Thereafter, it is alleged that accused Gyaneshwar with 12 bore gun, accused Bharat with 12 bore gun, co-accused Rakesh carrying 12 bore gun, Summera with 12 bore katta, Rajesh with 315 bore Addhi and accused Munna Singh carrying 12 bore Addhi came out. Accused Gyaneshwar fired with his gun, which hit Balendu, he fell down from the tractor, then accused persons and other co-accused persons fired from their guns/kattas, which hit Balendu and Mitthu. It is further alleged that co-accused Ramswaroop picked up a big stone and hit the same on the waist of Balendu and thereafter Ramswaroop and Munna Singh caught hold of hands and legs of Balendu and dragged him to some distance and thereafter, it is alleged that they threw him on the ground. They run away from the spot shouting that they have to kill some more persons.

4. After hearing shouting raised by Balkesh, Shivcharan Dwivedi and Shivnandan Ahirwar and Lala Ahirwar came over there. The accused persons ran away from the spot. It is further alleged that later on Preetam Sahu, Chunwad, Nandu Kumhar, Prahlad and other persons of the village also came there. They all had taken Balendu and Mitthu to Londi Hospital in a jeep but in between they died. As stated above , initially the intimation was given to the police station Londi and on the basis of which, the offence vide Crime No.0/02 was registered and marg about the death of Balendu and Mitthu was registered vide Marg No.01/02 and o2/02.S The spot panchnama was prepared .The dead bodies were sent for postmortem examination. Since the incident took place within the territorial jurisdiction of police station Prakash Bamhori and on the basis of which offence vide Crime No. 18/02 was registered and the matter was investigated.The appellants were arrested and after due investigation, the charge sheet was filed against the accused persons.

5. Learned counsel for the appellants in Criminal Appeal No.1175/07 submitted that the statements of the eye witnesses and the medical evidence are inconsistent.

He submitted that the ocular evidence is not supported by the medical evidence. He further contended that the appellants have been falsely implicated because there was enmity with them. To bolster his submissions, he referred to para 36 of witness PW-3 Balkesh. The next submission was that the testimony of the eye witnesses are not trustworthy. The reason being that the witnesses have stated in detailed that which accused used which weapon and hit which part of the body, which is not possible when there is firing by 8 persons at the spot. It is also submitted that there was no seizure of weapon from the accused persons and the seizure was only from one accused Munna Singh of Katta, who is appellant no.1 in Criminal Appeal No.1175/07.

6. Learned counsel for the appellant in Criminal Appeal No.1195/07 filed by Bharat Chansoriya referred to the testimony of witness PW-3 Balkesh. He has taken to us to paras 21 and 22 of the evidence and submitted that there are omissions and therefore, the presence of appellant Bharat Chansoriya with weapon is not proved by the prosecution. At the most, the prosecution could prove only his presence at the spot and not with weapon to share any common object with other accused persons to murder Balendu and Mitthu. According to him, the prosecution could not establish its case beyond any reasonable doubt and therefore, the accused is entitled to be given benefits of doubt.

7. Learned counsel for the appellant representing appellant Gyaneshwar alias Gyanendra in Criminal Appeal No.1287/07 does not dispute that Gyaneshwar alias Gyanendra is the same person, whose nick name is also Gyani as referred in evidence and in the judgment. He referred the testimony of PW-3 Balkesh and PW-16 Raj Kumar Chansoriya and submitted that the witness PW-3 Balkesh has said that he had seen Gyani by firing on deceased Balendu and the said bullet has struck in the middle of his head. He submitted that no such injury was found in the postmortem report by Dr. J.K.Nayak PW-18. He referred para-11 of the statement of PW-18. He also submitted that there is omission in para-26 of the testimony PW-3 Balkesh where the witness has said that in Ex.P-5 in report and in Ex.P-14, he had stated that the bullet had struck the middle of the head of Balendu but the same is not mentioned in the said report. Lastly, learned counsel submitted that while awarding the sentence the trial court in para 69 has held that the appellants would not be entitled for any remission and other benefits for the period for which they have remained in jail.

8. Per contra, learned counsel for the State submitted that the testimony of PW-3 Balkesh and PW-16 Raj Kumar Chansoriya, it is noted that they are consistent and coherent that all the accused persons remained with fire arms had

stopped the deceased persons and fired on deceased Balendu and Mitthu. It is contended by him that two big stones were put on the road to stop the tractor and thereafter all the accused persons carrying fire arms came at the spot. They formed unlawful assembly and in furtherance to common object, they started firing on the deceased persons. He contended that once the prosecution has proved that the accused persons were members of unlawful assembly with a common object for causing murder of Balendu and Mitthu, minor discrepancies in the statements of the eye witnesses regarding weapon or part of the body on which the injuries were inflicted would not be fatal in the present case. He also contended that mere non recovery of weapon from all arrested accused persons would also not be fatal to the prosecution case. He supported the order of conviction and sentence.

9. After having heard the learned counsel for the parties, we proceed first to examine the testimony of eye witnesses PW-3 Balkesh and PW-16 Raj Kumar Chansoriya. PW-3 Balkesh has made categorical statement that on 19-04-2002 in the afternoon at about 12' O clock alongwith Rajkumar and deceased Balendu and Mitthu were coming to their village Mudahara, in a tractor after loading fodder, he deposed that deceased Balendu was driving the tractor and Mitthu was sitting on Mud-guard. Alongwith Rajkumar and Kajra he was sitting on the trolley. When the tractor reached at the crossing of Garha Ghat of Ajni River , he saw two stones lying on the road, at which, deceased Balendu stopped the tractor and asked Mitthu to remove the stones. He made categorical statement that Rammanohar carrying 315 bore gun and co-accused Ramswaroop carrying 12 bore gun came over there and fired on Mitthu when he was trying to remove the stones. He further alleged that accused Gyaneshwar with 12 bore gun, accused Bharat with 12 bore gun, co accused Rakesh carrying 12 bore gun , Summere with 12 bore katta , Rajesh with 315 bore Addhi and accused Munna Singh carrying 12 bore Addhi came out. Accused Gyaneshwar fired with his gun , which hit Valendu, he fell down from the tractor. He stated that the accused persons and the other co-accused persons fired from their guns/kattas, which hit Balendu and Mitthu. He said that when the firing was going on, they had hidden themselves behind the rock (Teela) and had witnessed the incident. In para-21 he had stated that if the police has not mentioned in the report Ex.P-5, Ex.P-14 and Ex.D-3 that which accused was carrying which gun and the bullet had struck which place, he does not know the said reason. He has further stated in para-22 that he had disclosed the police in Ex.P-14 and in the police statement Ex.D-3 that Bharat had fired with 12 bore gun, which had hit the side of thigh, if the said fact is not mentioned in the same, he does not know the reason. In the same manner in para-26, he had again stated that he does not know the reason if the police has not mentioned in Ex.P-5 and Ex.P-14 that he had stated that when Gyani aias Gyaneshwar had fired,

the bullet had hit middle of the head of Balendu cutting the hairs. It has also been submitted that there are omission in the statement of PW- 16 Rak Kumar Chansoriya as well. In para-21, this witness has also stated that had disclosed the policy in Ex.D-5 that the fire which was made by Bharat had hit the thigh of Balendu and if this fact is not mentioned, he does not know the reason . In para-27 of the statement he has stated that he had disclosed the police that the fire which was made by Gyani had hit the middle of the head of deceased Balendu. If this fact is not mentioned in the police statement, he cannot assign any reason.

10. The defence has been that both the witnesses PW-3 Balkesh and PW-16 Raj Kumar Chansoriya have falsely implicated the accused persons because there has been one case against them under Section 307 of IPC for causing injuries to one Bhagwana Ahir. On perusal of para-36 of testimoney (sic : testimony) of PW-3 Balkesh , it is to be noted that one case under section 307 of IPC was registered against him for causing marpit with Bhagwana Ahir. He has stated that he was acquitted in the said case by the court and he has no knowledge of about any appeal in the said matter. The defence could not establish that how these witnesses and the appellants are related with the case of Bhagwana Ahir. Even otherwise, PW-3 Balkesh was acquitted in the said case, there cannot be any reason for falsely implicating them after acquittal. On the contrary the same supports the case of the prosecution that the acquittal of a witness of the victim side may be cause constituting the motive to murder the accused persons.

11. To appreciate the contention of the appellants that the present case the ocular evidence is not supported with the medical evidence, we proceed to examine the statement of Dr. J.K.Nayak PW-18. He had conducted the postmortem of Mitthu and Balendu. He had found that there were multiple fire arms injuries. Live cartridge was also found. He had given opinion in its report Ex.P-17 that the cause of death was because of the shock on account of injuries received by fire arms. He also examined the dead body of other deceased Balendu. The injuries were found on the thigh of the deceased, which according to him were caused by fire arms. He proved the postmortem report Ex.P- 17 and Ex.P-18. In para-11, he stated that he did not find the cut and burn hairs on the head of the Balendu.

12. So far the injuries caused by fire arms to both the deceased, he made categorical statement that the injuries were caused by fire arms to both the deceased and the same was cause of the death. The prosecution also examined witness PW-12 Akhilesh Bhargava, who is Scientist in FSL and was posted as Incharge FSL on the said date. In para- 1, he made statement that was 1.5 Inch incised wound on

the head of deceased Balendu and there were other fire arms injuries on the persons of the deceased. He also stated in para-3 that there were fire arms injuries on near ribs on the right side . He said that there was bullet injuries but there was no hole etc. in the shirt.

13. On appreciation of the entire evidence of eye witnesses PW-3 Balkesh and PW-16 Raj Kumar Chansoriya with the medical evidence, we do not find that the testimony of eye witnesses does not inspire confidence of the court. Discrepancies in description of use of weapon hitting which part of the body would not make the entire prosecution case beliable. Both the witnesses PW-3 Balkesh and PW-16 Raj Kumar Chansoriya are consistent and coherent that all the accused persons carrying fire arms stopped the vehicle and started firing. To stop the vehicle, two big stones were put on the road and thereafter the appearance of the accused persons with arms are sufficient facts and circumstances to constitute the common object. Once the prosecution has established that the appellants were members of unlawful assembly with a common object to murder deceased Balendu and Mitthu, what role was played by which the appellants would not be material. It is well settled law that once it is established that unlawful assembly had a common object, it is not necessary that all the persons formed unlawful assembly must be shown to have committed some overt act, rather they can be convicted under Section 149 IPC. The principle of constructive liability for being part of the unlawful assembly would apply. The arguments of the counsel for the appellants that no overt act was imputed to the appellant and they have been convicted only on the basis of Section 149 IPC cannot be accepted in the light of the settled law by the Apex Court in number of cases. In the case of *Yunis Vs. State of M.P.*(2003)1 SCC 425, the Apex Court held in para-9 as under :

> *"9. ..Even if no overt act is imputed to a particular person, when the charge is under section 149 IPC, the presence of the accused as part of an unlawful assembly is sufficient for conviction."(emphasis supplied).*

Thus the court observed that if the accused is a member of unlawful assembly which itself is sufficient to hold him guilty when his presence has not been disputed or presence is established. In the case of *Subal Ghorai Vs. State of W.B.* (2013)4 SCC 607 in para 52, the Apex Court held as under :

> " 52. *...If an offence is committed by a member of the unlawful assembly in prosecution of the common object, any member of the unlawful assmebly who was present at the time of commission*

of offence and who shared the common object of that assembly would be liable for the commission of that offence even if not overt axct was committed by him. If a large crowed of persons armed with weapons assaults intended victims, all may not take part in the actual assault. If weapons carried by some members were not used, that would not absolve them of liability for the offence with the aid of Section 149 of IPC if they shared common object of the unlawful assembly.:

The same view was reiterated by the Apex Court in the case of *Anuppal Yadav and another Vs. State of Bihar,* (2014) 10 SCC 275.

14. The minor omissions or contradictions in a case of direct evidence would not render the entire prosecution case false. The testimony of eye witnesses PW-3 Balkesh and PW-16 Raj Kumar Chansoriya which have been found to be coherent cannot be discarded. The position of law in cases where there is a contradiction between the medical evidence and ocular evidence has been cristilized (sic: crystallized) to the effect that ocular testimony of a witness has greater evidentiary valua (sic: value) vis-a-vis medical evidence, when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence. In the present case the contradictions demonstrated by the counsel for the appellants does not make ocular testimony of witnesses improbable, hence the arguments of the appellants that the testimony of eye witnesses is not trustworthy because of contradiction with the medical evidence cannot be accepted.

15. The next submission that the non seizure of weapon from the other accused persons except one Munna Singh from whom katta has been recovered, the entire case cannot be discarded. It is established proposition of law that mere non recovery of weapon would not falsify the prosecution case where there is ample unimpeachable evidence as held in the case of *Lakhan Sao Vs. State of Bihar* (2000) 9 SCC 82, *State of Rajasthan Vs. Arjun Singh* (2011) 9 SCC 115 and *Manjit Singh Vs. State of Punjab* (2013) 12 SCC 746. The same view has been reiterated by the Apex Court in the latest judgment of 2016 SCC Online SC 1163 *(Yogesh Singh Vs. Mahabeer Singh and others.*

16. On entire evaluation of ocular and medical evidence, we find that all the appellants constituted the common object to murder Balendu and Mitthu as they had appeared on the seen (sic: scene) carrying fire arms and the vehicle was stopped by putting two big stones on the road and thereafter immediate firing was made targeting these two persons. The said testimony is also corroborated with the medical

evidence of PW-18 Dr.J.K. Nayak that the deceased had received fire arms injuries. Their testimony is further corroborated with the testimony of PW-12 Akhilesh Bhargava, Scientist that there was 1.5 inch incised wound on the head of deceased Balendu. We find that the prosecution has successfully proved its case beyond any reasonable doubt against all the appellants.

17. The evidence of prosecution is trustworthy and inspires confidence in the mind of this court and it cannot be believed that the accused persons have been falsely implicated. Thus the appeals fail and are dismissed.

18. However, the order of the trial court that all the appellants would not be entitled for remission and other benefits for the period spent in jail is hereby set aside as the trial court has failed to assign any specific reason for passing such an order.

19. In view of the aforesaid discussion, we do not find any merit in the appeals, as the prosecution has successfully proved the case against the present appellants on the basis of ocular and other evidence. Hence, the appeals san merit and are **dismissed** except observation made in para-18 of the judgment.

20. Before parting, we must put on record our unreserved appreciation for the valuable assistance rendered by the learned *amicus curiae*. The High Court Legal Services Authority shall remit fee of Rs.4000/- (Rs. four thousand) to the *amicus curiae* who assisted this court.

Appeal dismissed.

I.L.R. [2018] M.P. 137 (DB)
APPELLATE CRIMINAL

Before Mr. Justice Alok Verma & Mr. Justice Virender Singh

Cr.A. No. 413/2007 (Indore) decided on 21 November, 2017

BILAVAR & anr. ...Appellants
Vs.
STATE OF M.P. ...Respondent

***A. Criminal Procedure Code, 1973 (2 of 1974), Section 154 – FIR – Ante-time – Effect* – Victim intimated the police after two hours of incident but FIR was registered at 23:50 and incident took place at 23:30 – Held – Victim is an illiterate lady and would have stated an estimated time and such type of variation in the estimated time is natural which does not make the statement doubtful.**

(Para 10)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 154 – प्रथम सूचना प्रतिवेदन – पूर्व समय का – प्रभाव – पीड़ित ने घटना के दो घंटे पश्चात् पुलिस को सूचित किया परन्तु प्रथम सूचना प्रतिवेदन 23:50 पर दर्ज किया गया था एवं घटना 23:30 पर हुई थी – अभिनिर्धारित – पीड़ित एक निरक्षर महिला है तथा अनुमानित समय बताया होगा एवं अनुमानित समय में इस तरह की भिन्नता स्वाभाविक है जो कि कथन को संदेहास्पद नहीं बनाता।

***B. Penal Code (45 of 1860), Section 302 & 304 Part II – Murder – Conviction – Appreciation of Evidence* – Held – Incident took place on a petty issue of scuffle between children – Incident happened in a fit of rage where no sign of preparation, pre-plan or premeditation existed – Only one injury inflicted – Considering the nature of incident and manner of causing the injury and the fact the incident happened in heated spur of moment, the case falls in the purview of Section 304 Part II – Conviction u/S 302 set aside – Ends of justice would serve if appellants are convicted u/S 304 Part II and sentenced for 11 years 6 months the period already undergone – Appeal partly allowed.**

(Paras 12, 13 & 14)

ख. दण्ड संहिता (1860 का 45), धारा 302 व 304 भाग 2 – हत्या – दोषसिद्धि – साक्ष्य का मूल्यांकन – अभिनिर्धारित – घटना बच्चों के बीच हाथापाई के एक छोटे से विवाद/मुद्दे पर हुई थी – घटना गुस्से के आवेश में घटित हुई जहाँ तैयारी, पूर्व–योजना या पूर्वचिन्तन का कोई संकेत मौजूद नहीं – केवल एक चोट पहुँची – घटना की प्रकृति एवं चोटें कारित करने का ढंग एवं यह तथ्य कि घटना अकस्मात क्षण की उत्तेजना में घटित हुई, को विचार में लेते हुये, प्रकरण धारा 304 भाग II की परिधि में आता है – धारा 302 के अन्तर्गत दोषसिद्धि अपास्त – न्याय के उद्देश्य की पूर्ति तब होगी यदि अपीलार्थीगण को धारा 304 भाग II के अन्तर्गत दोषसिद्ध किया जाता है एवं भुगताई जा चुकी 11 वर्ष 6 माह की अवधि का दण्डादेश दिया जाता है – अपील अंशतः मंजूर।

Cases referred :

AIR 2017 SC 3847, 2017 SC 1150, AIR 2011 SC 2816.

Seema Sharma, for the appellants.
Peyush Jain, G.A. for the respondent/State.

J U D G M E N T

The Judgment of the Court was delivered by :

Virender Singh, J. :- Being aggrieved by the judgment and order dated 06.02.2017 passed in Sessions Trial No.211/2006 by 6th Additional Sessions Judge (Fast Track), Ujjain, whereby the appellants have been held guilty for the offence punishable under Section 302 read with Section 34 of IPC and sentenced for life imprisonment with fine of Rs.1000/- each & in default of payment of fine to undergo simple imprisonment for three months each, the appellants have preferred the present appeal.

2. Background facts sans unnecessary details are that on 19.04.2006, at about 11.30 in the night near cement godown at Railway Station, Ujjain the appellants, who are brothers, came at the camp of the complainant Vinodbai and started abusing her husband Ujgariya. They indulged in scuffle. Bilawar stated that he would kill the deceased. Then, Iqbal caught him (deceased Ujgariya) from behind and Bilawar took out a knife and inflicted it on the chest of the deceased. The complainant Vinodbai tried to intervene and save her husband but they pushed her, due to which she also sustained injuries. Her husband fell down and died on spot. The appellants fled away. Stating that due to a petty scuffle in the morning amongst the children, the appellants have committed the incident. The complainant filed FIR. Crime No.6/6 under Sections 302/34 of IPC was registered at Police Station GRP, Ujjain and investigated by the SHO H.S.Verma (PW-6).

3. During investigation the Police prepared spot map Ex.P/10, called the witnesses, prepared panchnama Lash and sent dead body for postmortem. Dr. Anil Sinha, Medical Officer, performed postmortem and opined that the death of Ujgariya was homicidal. The Police took the appellants in custody and interrogated them and seized knife from the possession of appellant Bilawar on the basis of disclosure statement recorded under Section 27 of the Evidence Act. The Police made a query to Dr. Anil Sinha, who opined that injury found on the body of the deceased may be caused by the knife seized from Bilawar. After completing other formalities, the Police filed charge-sheet, which ended in the conviction of the appellants as stated above.

4. The appellants have preferred this appeal on the grounds that the judgment of the learned Trial Court is contrary to the law and facts. Learned Trial Court committed error in appreciating the statement of the witnesses and also not considering the exaggeration and contradictions and omissions appeared in the statement of the witnesses. The complainant has stated that during the scuffle, she

also sustained injuries but no such injury is proved by the prosecution, therefore, presence of the complainant on the spot is suspicious. Another eye witness Awadha Singh is a 10 years boy and his presence is also suspicious in the late night hours. FIR filed in this case is ante-timed. The incident took place in the night at 11:30 p.m. and there was darkness at the place of incident, therefore, it was not possible for anyone to see the incident. It is further argued that Iqbal has not caused any injury to the deceased. The incident was not pre-planned and no evidence of preparation or pre-meditation is there. It happened suddenly. The intention of the appellants was not to cause death of the deceased; therefore, it is prayed to allow the appeal and to set aside the judgment and order of the Trial Court.

5. The prosecution has opposed the appeal. It is stated by the learned Public Prosecutor that the incident is proved by the statement of the complainant Vinodbai which is supported by the statement of child witness Awadha Singh (PW-3) and further corroborated by the statement of Dr. Anil Sinha (PW-7) and postmortem report given by him and also the statement of Investigating Officer H.S.Verma and recovery of the arm/knife used in the incident from the exclusive possession of the appellant Bilawar. The Trial Court has rightly relied upon the evidence and has passed the impugned judgment. The learned Public Prosecutor pressed for dismissal of the appeal.

6. We have considered rival contention of the parties and have gone through the record.

7. At about date, time and place of the incident Ujgariya died due to an injury on his chest. The injury was ante-mortem and death was homicidal and was caused within 12 hours of the post mortem, these facts have not been challenged by the appellants and are well established by the statement of complainant Vinodbai (PW-1), Awadha Singh (PW-3), SHO H.S.Verma (PW-6) and Dr. Anil Sinha (PW-7). The statements are further supported by the FIR (Ex.P/1), notice (Ex.P/6), panchnama Lash (Ex.P/7), requisition of postmortem (Ex.P/9) and postmortem report (Ex.P/15), spot map (Ex.P/10) and seizure of clothes (Ex.P/11). This does not need any detail discussion as the same has already been done by the trial Court.

8. Giving details of the incident, the complainant Vinodbai (PW-1) has stated that on the date of the incident, on the issue of some scuffle between the children, the appellants came at their camp and started abusing her husband. Iqbal caught her husband and Bilawar inflicted knife on the chest of the deceased. When she tried to intervene, they beat her up also. Her husband was died on the spot. Awadha Singh (PW-3) has supported her statement. Nothing contrary could be brought on record,

even after cross-examination of these witnesses and their statements are further supported by SHO H.S.Verma (PW-6) and Dr. Anil Sinha (PW-7). They also found corroboration in the FIR, spot map prepared by the Investigating Officer, panchnama Lash, requisition for postmortem and postmortem report. Learned Trial Court has appreciated all this evidence and has correctly relied upon it. No material contradictions or omissions could be pointed out by the learned counsel appearing for the appellants.

9. The complainant Vinodbai has stated that at the time of the incident the appellants only pushed her or beat her up with kicks and fists, therefore, absence of any mark of injury does not create any doubt. Vinodbai (PW-1) has stated that she informed the Police by telephone while SHO H.S. Verma has stated that he does not receive any information on phone but Vinodbai has never stated that she informed H.S.Verma on telephone, therefore, this is not a contradiction in fact.

10. Learned counsel for the appellant invited our attention towards the statement of Vinodbai (PW-1) in Para 3 where she has stated that she intimated the Police after two hours of the incident but the FIR is registered at 23.50 and the incident took place at 23.30, thus the FIR is ante-time but the witness is an illiterate lady. The complainant has stated only estimated time and such type of variation in the estimated time is natural. This does not make the statement doubtful. Prakash (PW-4) has stated that the scuffle took place at about 9 O'Clock in the night but like Vinodbai he has also only stated estimated time. Otherwise also this witness has never informed the Police. He was neither an eye witness nor his presence is proved on the spot. He is only a witness of seizure of knife; therefore, his statement does not affect the credence of the eye witnesses.

11. The statements of Prakash (PW-4) and Mukesh (PW-5) are contradictory and are not helpful for the prosecution to prove the issue of the knife from the accused/appellant Bilawar, as they both have stated that they have signed the papers on the instigation of Police and they are not sure that from whose possession knife was seized by the Police. But in this regard statement of H.S. Verma (PW-6), who has interrogated the appellants and has seized the knife from the appellant Bilawar on the basis of his disclosure statement are self sufficient and further gets corroboration from memo of arrest (Ex.P/4), memo under Section 27 of the Evidence Act (Ex.P/1) and seizure memo (Ex.P/2). All these evidences could not be rebutted by the defence during the cross-examination of Shri H.S. Verma and this evidence further supports the statement of the eye witnesses. All these evidences are sufficient to hold the offence proved and the learned Trial Court has rightly did so.

12. It is not disputed that both the parties are related to the same community. They are wanderer and have no fixed abode. They belonged to migratory caste. They live in camps. At the time of the incident, their camps were established at the Railway Station. The incident took place on a petty issue of scuffle between children. The appellants had come to complain as to why the deceased had slapped their children on a petty quarrel between them. It appears that the incident had happened in a fit of rage. No sign of preparation, pre-plan or pre-mediation (sic: pre-meditation) is there. No injury is inflicted by the appellant Iqbal. Only one injury is inflicted by the appellant Bilawar which proved fatal.

13. Considering overall facts and circumstances prevailing at the time of the incident and the nature of incident and manner of causing the injury and the fact that the incident had happened in a heated spur of moment suddenly without preparation and meditation, the appellants inflicted injuries to the deceased Ujgariya, therefore, the case falls under the purview of Section 304 Part-II of the IPC.

14. In view of the aforesaid facts and circumstances of the case and the law laid down in *Madhvan and others V/s. State of Tamil Nadu* reported in AIR 2017 SC 3847, *Sikander Kali V/s. State of Maharashtra* reported in 2017 SC 1150, *Elavarasan V/s. State* reported in AIR 2011 SC 2816 the appeal is partly allowed. We hold the appellants guilty for committing offence under Section 304 Part-II of IPC instead of the offence under Section 302 of IPC. The appellants are in jail since 22.04.2006 and have served out imprisonment of almost 11 and half years. Considering the nature of the incident and keeping in view of the facts and circumstances of the case, in our considered opinion the ends of justice would be served if the appellants are awarded punishment for the period of jail sentence already undergone, therefore, we partly allow the appeal. We modify the judgment of the learned Trial Court to the extent that instead of Section 302/34 IPC, we hold the appellants guilty for commission of the offence under Section 304 Part-II of IPC.

15. With the aforesaid modification the appeal filed by the appellant is partly allowed to the extent as stated above. The appellants be set at liberty forthwith if not required in any other case.

16. The order of the Trial Court regarding disposal of the property stands confirmed.

Appeal partly allowed.

I.L.R. [2018] M.P. 143 (DB)
APPELLATE CRIMINAL

Before Mr. Justice S. K. Gangele & Smt. Justice Nandita Dubey

Cr.A. No. 2034/2006 (Jabalpur) decided on 23 November, 2017

SHANKAR & ors. ... Appellants

Vs.

STATE OF M.P. ... Respondent

(Alongwith Cr.A. No. 2135/2006)

***A. Penal Code (45 of 1860), Sections 302/149, 148, 450 & 323/149 – Murder – Conviction – Injured/Interested witnesses* – Held – Evidence of doctor established that PW-1, PW-2, PW-3 and PW-4 received injuries during the incident and they are injured eye witnesses – Although injured eye witness are the relatives of the deceased, their evidence cannot be discarded only because they are the interested eye witnesses – Principle of law is that testimony of injured eye witnesses would generally considered to be reliable.**

(Para 14 & 15)

क. दण्ड संहिता (1860 का 45), धाराएँ 302/149, 148, 450 एवं 323/149 – हत्या – दोषसिद्धि – आहत/हितबद्ध साक्षीगण – अभिनिर्धारित – चिकित्सक के साक्ष्य ने यह सुस्थापित किया कि अ.सा.–1, अ.सा.–2, अ.सा.–3 एवं अ.सा.–4 को घटना के दौरान चोटें पहुँची एवं वे आहत चक्षुदर्शी साक्षीगण हैं – यद्यपि आहत चक्षुदर्शी साक्षीगण मृतक के रिश्तेदार हैं, उनके साक्ष्य को केवल इसलिए अस्वीकार नहीं किया जा सकता क्योंकि वे हितबद्ध चक्षुदर्शी साक्षीगण हैं– विधि का सिद्धान्त यह है कि आहत चक्षुदर्शी साक्षीगण की परिसाक्ष्य को साधारणतः विश्वसनीय माना जाता है।

***B. Ocular and Medical Evidence – Contradiction – Effect – Benefit of Doubt* – Held – It was alleged that accused Ghanshyam and Naresh caused injuries to deceased by using *"Ballam"* but doctor who performed postmortem of deceased deposed that there were no injuries noticed by him which were alleged to be caused by *"Ballam"* – There is no evidence of prosecution witnesses that *Ballam* was used as a blunt weapon – If there is contradiction between medical and ocular evidence and when medical evidence makes ocular evidence improbable, that becomes a relevant factor in evaluation of evidence – Ocular evidence could not be relied over and above medical evidence – Out of all accused persons, accused Ghanshyam and Naresh are entitled to benefit of doubt – Conviction and sentence of rest of accused persons are hereby confirmed.**

(Paras 28, 29, 32, 34 & 35)

ख. चाक्षुष एवं चिकित्सीय साक्ष्य – विरोधाभास – प्रभाव – संदेह का लाभ– अभिनिर्धारित – यह अभिकथित किया गया था कि अभियुक्त घनश्याम एवं नरेश ने ''बल्लम'' का उपयोग करते हुये मृतक को चोटें कारित थी, परन्तु चिकित्सक जिसने मृतक का शव परीक्षण किया था, ने यह कथन किया कि उसके द्वारा कोई चोटें नहीं देखी गईं जिनका ''बल्लम'' द्वारा कारित किया जाना अभिकथित था – अभियोजन साक्षीगण के ऐसे कोई साक्ष्य नहीं हैं कि ''बल्लम'' का उपयोग भोथरे शस्त्र के रूप में किया गया था – यदि चिकित्सीय एवं चाक्षुष साक्ष्य में विरोधाभास है एवं जब चिकित्सीय साक्ष्य, चाक्षुष साक्ष्य को असंभाव्य बनाता है, तो यह साक्ष्य के मूल्यांकन में एक सुसंगत कारक बन जाता है – चाक्षुष साक्ष्य पर चिकित्सीय साक्ष्य से बढ़कर विश्वास नहीं किया जा सकता – सभी अभियुक्तगण में से, अभियुक्त घनश्याम और नरेश संदेह का लाभ पाने के हकदार हैं– शेष अभियुक्तगण की दोषसिद्धि एवं दण्डादेश की एतद् द्वारा पुष्टि।

Cases referred :

AIR 2010 (10) SCC 259, (2015) 11 SCC 102, AIR 1974 SC 1936.

Ajay Kumar Jain and *Sneh Mishra,* for appellants.
B.P. Pandey and *Prakash Gupta,* G. As. for respondent/State.

J U D G M E N T

The Judgment of the Court was delivered by:
S.K. Gangele, J. :- These two appeals have been filed against the common judgment dated 07.10.2006 passed in Sessions Trial No. 160/2004. Both the appeals have been heard together and are being decided by this common judgment.

2. The appellants were prosecuted for commission of offences punishable under Sections 302/149, 148, 450 and 323/149 of the IPC and have been sentenced for life with fine of Rs.100/-, R.I. for one year, R.I. for four years with fine of Rs. 100/- and R.I. for nine months respectively with default stipulations. The trial Court has held the appellants guilty for commission of offences, hence, awarded the punishment under Sections 302/149, 148, 450 and 323/149 of the IPC.

3. The Prosecution story in brief is that the deceased Ramkumar was living adjacent to Shankarlal, who is the elder brother of the deceased. At around 10 O'clock Shankarlal returned back from the house of his daughter Saroj Bai and because she was not sent along with Shankar in the night, Ramkumar all the ladies of the family and Dindayal were talking to each other. At that time the accused persons Shankar, Naresh, Lekhram, Ramdas, Bhagga came there. They were armed with *Gadasi, Farsa, Ballam and Lathi.* They entered the house of Shankar and abused him. They told him that why he had not performed marriage of Saroj with Naresh. Thereafter

they had tied Ramkumar by a nylon cord and had taken him near a tree of *Kanji*. They had beaten the deceased Ramkumar. The family members tried to save him, they had also inflicted injuries on the family members. In that incident Shankar elder brother of the deceased, Hemlata, Sheela Bai, Gulab Bai received injuries. The report of the incident was lodged at the police station. The police conducted investigation and filed charge-sheet against the accused persons. The appellants/accused abjured their guilt during trial. The trial Court after trial held the appellants guilty for commission of offences mentioned above in the judgment.

4. The learned counsel appearing on behalf of the appellants has submitted that the trial Court has committed an error of law in holding the appellants guilty for the commission of offence. It is further submitted by the learned counsel that at the time of incident Ramkumar @ Munna had entered in the house of accused appellant No.1 Shankar and tried to outrage the modesty of his wife Kerabai. She was also assaulted and thereafter villagers gathered there and they had beaten the deceased. It is further submitted by the learned counsel that it is alleged by the prosecution that two accused persons namely Naresh and Ghanshyam were armed with *Ballam,* and as per the evidence of Dr. V.K. Patel PW/8, who performed autopsy of the deceased, there was no injury noticed by him caused by *Ballam.* Hence, the ocular evidence of the witnesses against two accused persons is not reliable.

5. It is further submitted by the learned counsel that accused Dharamdas was present at the time of occurrence at Sankheda, district Hoshangabad. He was working as Gangman in the Railways. Hence, he has been falsely implicated in the case. It is further submitted by the learned counsel that names of two persons Ghanshyam and Hari Singh has not been mentioned in Dehati Nalishi (Ex.P/1), Marg intimation (Ex.P/2) and requisition of postmortem (Ex.P/17-A), hence, they have been falsely implicated by the prosecution.

6. Learned counsel for the State has submitted that there are four injured eye witnesses of the incident. They have deposed that the appellants had caused injuries to the deceased and other family members. The deceased was beaten brutally, it has been proved by the doctor who performed postmortem. The FIR was lodged promptly and the statements of the witnesses under Section 161 of Cr.P.C. were recorded promptly. The trial Court has considered all the evidence properly, hence there is no illegality in the judgment passed by the trial Court.

7. PW/1 Shankarlal, PW/2 Sheela Bai, PW/3 Chanda Bai and PW/4 Hemlata are the injured eye-witnesses. PW/1 is the elder brother of the deceased. Dehati Nalishi was recorded on his information, which is Ex.P/1.

8. PW/1 in his evidence deposed that on the date of incident I had gone to the resident of my daughter Saroj Bai, village Bhadon, district Raisen. I returned back at around 10-10.30 in the night. Saroj Bai was not sent by her in-laws. I, Ramkumar, my children Sheela bai, Chanda bai and Dindayal my brother-in-law were talking to each other while siting (sic : sitting) in courtyard *(angan)* of the house. At that time, Dharamdas, Shankarlal, Lekhram, Naresh, Ghanshyam, Bhagga and Hari Singh armed with *Lathi, Farsa* and cord entered the house, they were abusing in filthy language and told me that why I had not done relation of Saroj Bai with Naresh and tied the deceased Ramkumar by a cord and they had taken him to Tankar road. They had also beaten him badly, when I tried to save him they had also beaten me. At the time of incident my wife Gulab Bai, daughter Sheela bai, Chanda bai, Hemlata and brother-in-law Dindayal also received injuries. The Kotwar reached on the spot thereafter I told him about the incident. At around 2 O'clock in the night police came on the spot and they have enquired about the incident. The report of the incident was lodged by me, which is Ex.P/1 and I signed the same. The deceased was died on the spot. Marg intimation is Ex.P/2. In his cross-examination, he admitted the fact that some accused persons have inflicted injuries on the person of the deceased by *Ballam*. However, he deposed that he could not see that who had inflicted injury by *Ballam*. The accused persons have taken the deceased near a tree of *Kanji*. He further deposed that I was admitted in the hospital for seven days.

9. PW/2 Sheela Bai deposed the same facts that we were taking (sic : talking) to each other in the courtyard *(angan)* of the house, at that time the accused persons armed with *Lathi,* cord and *Farsa* entered the house and they have tied the deceased Ramkumar by a cord. They had taken the deceased near Kanji tree and had beaten him. When the deceased cried to save, the accused persons inflicted injuries on us. Ramkumar was died on the spot.

10. PW/3 Chanda bai deposed the same facts that I and other family members were taking (sic : talking) to each other in the courtyard (*angan*) at that time all the seven accused persons entered the house. They were armed with *Lathi, Ballam, Farsa* and *Gadasi* and dragged the deceased Ramkumar near a tree of Kanji and beaten him. When we tried to save the deceased, my father Shankar, mother Gulab Bai, Sheela Bai and Hemlata were also beaten by the deceased. Deceased was died. I and Shila Bai had gone to call Kotwar. Thereafter he came there and he had gone to inform police because accused persons had threatened my father not to inform the police. In her cross-examination, she deposed that she could not see which of the accused persons was armed with *Ballam*.

11. PW/4 Hemlata is also an injured eye witness. He also deposed the same facts as deposed by PW/1, PW/2, and PW/3.

12. PW/5 Dindayal is another eye-witness. He is the brother-in-law of Shankar. He also deposed that he was talking along with other family members at that time accused persons have entered the house. They have tied the deceased and dragged him near Kanji tree and beaten him. Other persons were also beaten.

13. PW/9 Dr. M.K. Vajpai deposed that on 02.07.2004, I was posted at Civil Hospital, Gadarwara as Medical Officer. On the aforesaid date, I had examined Shankar S/o Jairam and noticed following injuries on his person :

> "1. one bluish abrasion 60x3 cm on the back side of the body.
>
> 2. one bluish abrasion 23x3 cm on right side of the back.
>
> 3. one bluish abrasion 30x 3 cm on left side of the back.
>
> 4. one bluish abrasion 15x2x1/2 cm on left shoulder.
>
> 5. one bluish abrasion 4x2 cm on left shoulder.
>
> 6. one bluish abrasion 5x3 cm on left side of the back.
>
> 7. one bluish abrasion 14x5cm on the sub specular region.
>
> 8. one bluish abrasion 10x3 cm on right shoulder.
>
> 9. one yellowish abrasion 12x3 cm on the right shoulder.
>
> 10. one yellowish abrasion 20x3 cm on right thigh.
>
> 11. swelling on the left elbow for which x-ray was advised.
>
> 12. swelling on left forearms."
>
> All the injuries were caused by hard and blunt object within 24 hours
>
> He further deposed that on the aforesaid date, I examined Gulab Bai W/o Shankar Lodhi, aged about 40 years and noticed following injuries on her person.
>
> "1. One bluish abrasion 10x3cm on left scapula region.
>
> 2. One bluish abrasion 12x3 cm on right scapula region."
>
> All the injuries were caused by hard and blunt object. Injuries were simple in nature.

He further deposed that on the aforesaid date, I also examined Chanda Bai W/o Harnam Lodhi and noticed following injuries on her person.

1. one bluish abrasion 12 x 3 cm on right scapula region.
Injuries were simple in nature.

I examined Sheela Bai and noticed following injuries on her person.

"1. one bluish abrasion 8 x 2 cm on the left side of the back.

All the injuries were caused by hard and blunt object. Injuries were simple in nature.

I examined Hemlata D/o Shankarlal Lodhi and noticed following injuries on her person.

"1. one superficial abrasion 9 x 1/2 cm on the right cheek and temple.

2. One contusion 2 x 2 cm over occipital region."

All the Injuries were caused by hard and blunt object.

14. From the evidence of doctor, this fact has been established that PW/1, PW/2, PW/3 and PW/4 received injuries during the incident and they are the injured eye-witnesses. Although they are the interested witnesses because they are the relatives of the deceased. However, their evidence cannot be discarded only because they are the interested eyewitnesses. The Apex Court in *Abdul Sayeed Vs. State of Madhya Pradesh,* AIR 2010 (10) SCC 259 has held as under in regard to placing reliance on injured witnesses.

> "28. The question of the weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. "Convincing evidence is required to discredit an injured witness". (Vide *Ramlagan Singh & Ors. v. State of Bihar,* AIR 1972 SC 2593; *Malkhan Singh & Anr. v. State of Uttar Pradesh,* AIR 1975 SC 12; *Machhi Singh & Ors. v. State of Punjab,* AIR 1983 SC 957; *Appabhai*

& Anr. v. State of Gujarat, AIR 1988 SC 696; *Bonkya alias Bharat Shivaji Mane & Ors. v. State of Maharashtra,* (1995) 6 SCC 447; *Bhag Singh & Ors.* (supra); *Mohar & Anr. v. State of Uttar Pradesh,* (2002) 7 SCC 606; *Dinesh Kumar v. State of Rajasthan,* (2008) 8 SCC 270; *Vishnu & Ors. v. State of Rajasthan,* (2009) 10 SCC 477; *Annareddy Sambasiva Reddy & Ors. v. State of Andhra Pradesh,* AIR 2009 SC 2261; *Balraje alias Trimbak v. State of Maharashtra, (2010) 6 SCC 673)*."

15. The principle of law is that the testimony of injured eye-witness would generally considered to be reliable.

16. The FIR of the incident (Ex.P/38 and P/40) was lodged by PW/1. In the Dehati Nalishi, on the upper side, names of all the seven persons have been mentioned. However, in the body names of five persons have been mentioned and names of Ghanshyam and Hari Singh have not been mentioned. Dehati Nalishi is Ex.P/1, which was recorded on the information of PW/1. He also signed the same.

17. PW/6 is the Kotwar, he deposed that both the daughters of Shankar had come to my residence at around 12 O'clock and they told me that there was a quarrel and the accused persons have beaten my father and uncle. They did not told me the names of the accused persons. Thereafter I had gone to another Kotwar where Sarpanch was present and along with him, we reached to the place of incident where we found the dead body of the deceased. Police came on the spot and prepared spot map, which is Ex.P/3 and I signed the same.

18. PW/7 is another Kotwar. He deposed that both the daughters of Shankar told him that there was a quarrel and I had reached on the spot. Thereafter I went to the police station to inform the police.

19. PW/8 is the doctor, who performed autopsy of the deceased. He deposed that on 02.07.2004, I was posted as Health Officer at Civil Hospital, Gadarwara and I performed postmortem of deceased Ramkumar S/o Munna and noticed following injuries :

"1. कटा हुआ घाव जिसका आकार 9X4 से.मी. X पेट की गुहा के अन्दर तक। क्लीन कट एवं किनारे नियमित थे, यह चोट ट्रांस्फर (आड़े) आकार मेकथी एवं पेट के दाहिनी तरफ उपरी भाग में थी। इस चोट के साथ दसवीं पसली भी कटी हुई थी।

2. कटा हुआ घाव जिसका आकार 8X4 से.मी. एवं पेट की गुहा के अंदर तक। यह चोट, चोट क्रमांक। के बाजू में बाहर की ओर थी। चोट के किनारे नियमित थे, इस चोट से लीवर का कटा हुआ भाग बाहर आ गया था।

3. कटा हुआ घाव बांये हाथ पर पीछे की ओर छोटी अंगुली के नीचे, लम्बवत आकार में जिसका आकार 3X.5 से.मी. X चमड़ी की गहराई तक था, चोट के किनारे नियमित थे।

4. कटा हुआ घाव सिर के उपर बांये पैराईटल भाग पर तिरछे आकार में जिसका आकार 4X2 से.मी. X हड्डी तक गहरा था।

5. कटा हुआ घाव जिसका आकार 10X3 से.मी. X हड्डी तक गहरा था। यह चोट दाहिने तरफ सिर के पैराईटल हिस्से में थी।

6. कटा हुआ घाव माथे के उपर लम्बे आकार में जिसका आकार 4X.5 से.मी. X चमढ़ी की गहराई तक था।

7. कटा हुआ घाव दाहिने भौंह पर जिसका आकार 2.5X.5 से.मी. X चमड़ी की गहराई तक था।

8. कटा हुआ घाव जिसका आकार 9X3 से.मी. X पेट की गुहा के अंदर तक पीठ पर दाहिनी तरफ मध्य भाग में बाहर की ओर था।

9. कटा हुआ घाव जिसका आकार 4X1 से.मी. X मांसपेशी की गहराई तक पीठ पर चोट क्रमांक 8 से बाहर की ओर थी।

10. कटा हुआ घाव जिसका आकार 10X3 से.मी. X चमड़ी की गहराई तक दाहिने स्कैपूला भाग पर था।

4:– उपरोक्त सभी कटे हुए घावों के किनार नियमित एवं क्लीनकट थे एवं बाहर की ओर थे।

11. ब्रूज(नील गू) जिसका आकार 8X5 से.मी. बांये अग्र भुजा पर पीछे की ओर थी।

12. नील गू निशान जिसका आकार 24X3 से.मी. जो बाई जांघ पर बाहर की ओर था।

13. नील गू निशान जिसका आकार 5X2 से.मी., दाहिना जांघ पर बाहर की ओर था।

14. नील गू निशान जिसका आकार 2X1 से.मी. जो दाहिनी कमर पर सामने की ओर था।

15. नील गू निशान जिसका आकार 8X6 से.मी. जो दाहिनी उपरी भुजा पर सामने की ओर था जिसकी दाहिनी हयूमरस हड्डी का अस्थि भंग पाया गया था।

नोटः– इस स्थिति में साक्षी ने स्पष्ट किया कि शव परीक्षण प्रतिवेदन में चोट क्रमांक 14 की दो बार लिखा गया, जबकि चोट क्रमांक 14 के बाद जाँच 14 लिखा गया है, उसे 15 नम्बर होना चाहिये था। अतः आगे चोट क्रमांक में सुधार करके लिखा जा रहा है।

16. खरोंच बांये घुटने पर सामने की ओर जिसका आकार 4X5 से.मी. था।

17. मृतक की पूरी पीठ पर बहुत संख्या में खरोंच के निशान थे जो अलग–अलग साईज में थे ओर .5X.5 से.मी आकार से लेकर 16X16 से.मी. आकर में थे।''

20. In para 12 of his deposition he deposed that injuries No.1 to 10 were caused by sharp and hard edged weapon, it could be *Farsa* and *Gadasi*. Injuries No.11 to 14 could be caused by *Lathi* and back side of *Ballam,* some part of the wooden stick. In para 14 of his cross-examination he admitted the fact that he did not notice any piercing injury on the person of the deceased.

21. PW/11 deposed that on 02.07.2004, I was posted as Head Constable and on the aforesaid date constable produced the Dehati Nalishi (Ex.P/1) and on the basis of the aforesaid Dehati Nalishi, I recorded FIR, which is Ex.P/38 and signed the same. The carbon copy of the FIR has been sent to the Judicial Magistrate, Gadarwara.

22. PW/12 is the Investigating Officer, he deposed that on 01.07.2004, I was posted as Station House Officer in Gadarwara. On 02.07.2004 when I was on patrolling in the night at around 2 o'clock I received information on wireless that a serious incident had taken place at village Amgaon. As per the report of Kotwar I recorded the information in the Sanha No.76 (Ex.P/42). Thereafter I enquired about the same from Raghuveer and Chhotelal, who were the Kotwar and I reached at the place of incident at around 3 O'clock in the night. I enquired about the incident from Shankarlal.

He informed me about the death.Thereafter I registered Marg No. 0/04, which is (Ex.P/2). Thereafter on the basis of the report of Shankarlal, I recorded Dehati Nalishi (Ex.P/1) and signed the same. The dead body of the deceased was lying in the courtyard (*angan*), his both legs were tied by a nylon cord and other parts of the body were also tied by nylon cord. I sent the dead body for postmortem. On 02.07.2004 I seized blood stained earth and plain earth vide seizure memo (Ex.P/16) from the spot and prepared spot map of the incident which is Ex.P/3 and signed the same. On the same date, I recorded statements of Shankarlal S/o Jairam, Chanda Bai, Sheela Bai, Hemlata and Gulabi Bai.On 03.07.2004 on the memorandum of Shankarlal (Ex.P/4), *Farsa* was seized on his information from the house. The seizure memo is (Ex.P/5) and I signed the same. Accused Shankarlal was arrested by arrest memo (Ex.P/48).

23. On the memorandum of Naresh S/o Shankarlal (Ex.P/6) *Ballam* was seized on his instruction from his house vide seizure memo (Ex.P/7) and I signed the same. He was arrested vide arrest memo (Ex.P/49). On the same date on the memorandum of accused Hari Singh, which is (Ex.P/8) a *Lathi* was seized from his instruction from his house, which is (Ex.P/9) and I signed the same. Hari Singh was arrested by arrest memo (Ex.P/50). On 05.07.2004 on the memorandum of Ghanshyam S/o Shankarlal Lodhi a *Ballam*, which is Ex.P/10 was seized vide seizure memo (Ex.P/11) from his house on his instruction. On the same date, the appellant/accused Ghanshyam was arrested vide arrest memo Ex.P/52.

24. On 05.07.2004, on the memorandum of accused/appellant Lekhram which is (Ex.P/12), a *Gadasa* was seized vide seizure memo (Ex.P/13) from his residence on his instruction. The accused was arrested. On 26.07.2004, on the memorandum of Bhagga (Ex.P/54) a Lathi was seized from his residence on his instruction vide seizure memo Ex.P/55 and the accused was arrested on the same date. On 22.08.2004, on the memorandum of accused Dharamdas, which is (Ex.P/14) a *Lathi* was seized vide seizure memo Ex.P/15, I signed both the documents. He was arrested on the same date. On 01.09.2004 all the seized articles were sent to Forensic Laboratory.

25. The appellants examined defence witnesses in support of their defence. DW/1 deposed that Bhaggu had come to see me 8 to 10 days before the death of Munna. His evidence is not reliable. DW/2 issued a certificate (Ex.D/5) in the capacity of Sarpanch. She deposed that the accused Dharamdas was singing *Bhajan* at her residence upto 9 O'clock in the night. He was working as Gangman. DW/3 deposed that I was working in the Railway Department and accused Dharamdas was working as Gangman. The appellant Dharamdas was working as Gangman and he was on duty upto 6 O'clock and was performing certain work. DW/4 Kes Bai deposed that at around 10-11 O' clock in the night on the date of incident accused Ram kumar

entered my house and he tried to outrage my modesty, in that event I received some injuries. DW/5. Dr. V.K. Patel, deposed that on 02.07.2004, I was posted as doctor and I examined Kera Bai D/o Shankarlal Lodhi and noticed one lacerated wound on the right hand 1.5 x 1/2 cm muscle deep. The injury was simple in nature. It was caused by hard and blunt object.

26. The arguments of the learned counsel for the appellants that names of Ghanshyam and Hari Singh were not mentioned in the middle of the Dehati Nalishi and the Marg intimation and requisition of postmortem, hence, they have been falsely implicated could not be accepted because the names of these two persons have been mentioned at the top of Dehati Nalishi and Marg. It was registered by the Investigating Officer when he reached on the spot. The injured eye-witnesses deposed about the appellants. The second argument of the learned counsel for the appellants that appellant Dharamdas was present on the date of evidence at the place of his working and this fact has been proved by the defence witnesses, hence he has been falsely implicated, in our opinion, could not be accepted. The Apex Court in *Vutukuru Lakshmaiah Vs. State of Andhra Pradesh,* (2015) 11 SCC 102 has held as under in regard to alibi:

> "24. The next plank of submission of the learned counsel for the appellant, Vutukuru Lakshmaiah, appellant in Criminal Appeal No. 2047 of 2008, pertains to non-acceptance of the plea of alibi. As is manifest, both the courts below have elaborately dealt with it. As the judgment of the High Court would reveal, a finding has been returned that there is no evidence to the effect what is the distance between municipal office where the Committee meeting was held and the place where the offence had been committed; nothing has been brought on record to show that it was impossible for one to reach the place of offence; that the authenticity of the minutes book prepared under the signatures obtained have not been maintained in discharge of public function because the Water Committee constituted is not a statutory committee. That apart, the law clearly stipulates how a plea of alibi is to be established. In this context, we may profitably reproduce a few passages from *Binay Kumar Singh v. State of Bihar* (1997) 1 SCC 283.

"22. We must bear in mind that an alibi is not an exception (special or general) envisaged in the Indian Penal Code or any other law. It is only a rule of evidence recognized in Section 11 of the Evidence Act that facts which are inconsistent with the fact in issue are relevant. Illustration (a) given under the provision is worth reproducing in this context:

'(a) The question is whether A committed a crime at Calcutta on a certain date; the fact that on that date, A was at Lahore is relevant.'

23. The Latin word alibi means ' elsewhere' and that word is used for convenience when an accused takes recourse to a defence line that when the occurrence took place he was so far away from the place of occurrence that it is extremely improbable that the would have participated in the crime. It is a basic law that in a criminal case, in which the accused is alleged to have inflicted physical injury to another person, the burden is on the prosecution to prove that the accused was present at the scene and has participated in the crime. The burden would not be lessened by the mere fact that the accused has adopted the defence of alibi. The plea of the accused in such cases need be considered only when the burden has been discharged by the prosecution satisfactorily. But once the prosecution succeeds in discharging the burden it is incumbent on the accused, who adopts the plea of alibi, to prove it with absolute certainty so as to exclude the possibility of his presence at the place of occurrence. When the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally the court would be slow to believe any counter-evidence to the effect that he was elsewhere when the occurrence happened. But if the evidence adduced by the accused is of such a quality and of such a standard that the court may entertain some reasonable doubt regarding his presence at the scene when the occurrence took place, the accused would, no doubt, be entitled to the benefit of that reasonable doubt. For that purpose, it would

> be a sound proposition to be laid down that, in such circumstances, the burden on the accused is rather heavy. It follows, therefore, that strict proof is required for establishing the plea of alibi."
>
> (emphasis supplied).

27. In the aforesaid judgment, the Apex Court has specifically held that onus is on the prosecution to prove by reliable evidence about the *alibi*. It is also the burden on the accused to prove the fact that the accused was at a sufficient distance so he could not reach the place of occurrence. In the evidence on record, this fact has not been proved by the accused that up to how much distance he was present at the relevant time so it can be held that it was not possible for him to reach at the place of occurrence.

28. We find force in the arguments of the learned counsel for the appellants that the accused Ghanshyam and Naresh alleged to cause injuries by *Ballam* on the person of the deceased and no such injuries were noticed by the doctor PW/8, who performed postmortem of the deceased. Hence, the evidence of the witnesses against these accused persons is not reliable.

29. Doctor PW/8 specifically deposed in para 14 of his deposition that he did not notice any piercing injury on the person of the deceased. Hence, this fact has been proved that there was no injury on the person of the deceased caused by *Ballam*.

30. The counsel for the State has submitted that the accused persons had used blunt side of the *Ballam*, hence, their participation is established. This argument, in our opinion has no force, in view of the judgment of the Apex Court reported in *Hallu and others v. State of Madhya Pradesh,* AIR 1974 SC 1936, where the Apex Court has held as under:

> "Normally when a witness says that an axe or a spear is used there is no warrant for supposing that what the witness means is that the blunt side of the weapon was used. If that be the implication it is the duty of the prosecution to obtain a clarification from the witness as to whether a sharp-edged or a piercing instrument was used as a blunt weapon."

31. The Apex Court in the aforesaid judgment has specifically held that when a witness says that a spear is used there is no warrant for supposing that what the witness means is that the blunt side of the weapon was used. If that be the implication, it is the duty of the prosecution to obtain a clarification from the witness as to whether sharp edged or a piercing instrument was used as a blunt weapon.

32. In the present case, there is no evidence of prosecution witnesses that the *Ballam* was used as a blunt weapon. Contrary to this, the witness has clearly deposed that the injuries were caused by *Ballam*.

33. The Apex Court in *Abdul Sayeed* (supra) held as under in regard to appreciation of evidence i.e. medical evidence vis-a-vis ocular evidence.

> 32. In *Ram Narain Singh v. State of Punjab,* AIR 1975 SC 1727, this Court held that where the evidence of the witnesses for the prosecution is totally inconsistent with the medical evidence or the evidence of the ballistics expert, it amounts to a fundamental defect in the prosecution case and unless reasonably explained it is sufficient to discredit the entire case.
>
> 33. In *State of Haryana v. Bhagirath & Ors.,* (1999) 5 SCC 96, it was held as follows:-
>
> "The opinion given by a medical witness need not be the last word on the subject. Such an opinion shall be tested by the court. If the opinion is bereft of logic or objectivity, the court is not obliged to go by that opinion. After all opinion is what is formed in the mind of a person regarding a fact situation. If one doctor forms one opinion and another doctor forms a different opinion on the same facts it is open to the Judge to adopt the view which is more objective or probable. Similarly if the opinion given by one doctor is not consistent with probability the court has no liability to go by that opinion merely because it is said by the doctor. Of course, due weight must be given to opinions given by persons who are experts in the particular subject."
>
> [Emphasis added]
>
> 34. Drawing on *Bhagirath's case* (supra), this Court has held that where the medical evidence is at variance with ocular evidence,
>
> "it has to be noted that it would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eyewitnesses' account which had to be tested independently and not treated as the "variable" keeping the medical evidence as the "constant".

35. Where the eyewitnesses' account is found credible and trustworthy, a medical opinion pointing to alternative possibilities can not be accepted as conclusive. The eyewitnesses' account requires a careful independent assessment and evaluation for its credibility, which should not be adversely prejudged on the basis of any other evidence, including medical evidence, as the sole touchstone for the test of such credibility.

"21.....The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be creditworthy; consistency with the undisputed facts, the 'credit' of the witnesses; their performance in the witness box; their power of observation, etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation."

(Vide *Thaman Kumar v. State of Union Territory of Chandigarh,* (2003) 6 SCC 380; *and Krishnan v. State,* (2003) 7 SCC 56).

36. In *Solanki Chimanbhai Ukabhai v. State of Gujarat,* AIR 1983 SC 484*,* this Court observed:

"13. Ordinarily, the value of medical evidence is only corroborative. It proves that the injuries could have been caused in the manner alleged and nothing more. The use which the defence can make of the medical evidence is to prove that the injuries could not possibly have been caused in the manner alleged and thereby discredit the eye-witnesses. Unless, however the medical evidence in its turn goes so far that it completely rules out all possibilities whatsoever of injuries taking place in the manner alleged by eye-witnesses, the testimony of the eye-witnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence."

[Emphasis added]

> 37. A similar view has been taken in *Mani Ram & Ors. v. State of U.P.,* 1994 Supp (2) SCC 289; *Khambam Raja Reddy & Anr. v. Public Prosecutor, High Court of A.P.,* (2006) 11 SCC 239; *and State of U.P. v. Dinesh,* (2009) 11 SCC 566.
>
> 38. In *State of U.P. v. Hari Chand,* (2009) 13 SCC 542, this Court reiterated the aforementioned position of law and stated that:
>
> "13. … In any event unless the oral evidence is totally irreconcilable with the medical evidence, it has primacy."
>
> 39. Thus, the position of law in cases where there is a contradiction between medical evidence and ocular evidence can be crystallized to the effect that though the ocular testimony of a witness has greater evidentiary value vis-a-vis medical evidence, when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence. However, where the medical evidence goes so far that it completely rules out all possibility of the ocular evidence being true, the ocular evidence may be disbelieved."

34. The principle of law laid down by the Hon'ble Apex Court is that if there is contradiction between medical and ocular evidence and when medical evidence makes ocular testimony improbable, that becomes a relevant factor in the process of evaluation of evidence.

35. In the present case, the prosecution witnesses have deposed that accused Ghanshyam and Naresh were armed with *Ballam* and they had caused injuries on the person of the deceased by *Ballam*. *Ballam* was seized from the possession of the aforesaid accused persons. However, the doctor PW/8, who performed autopsy specifically deposed that he did not notice any piercing injury on the person of the body of the deceased. In this arena, the ocular evidence could not be relied on in view of the medical evidence. Hence, the accused appellants Naresh and Ghanshyam are entitled to the benefit of doubt.

36. The next submission made by the learned counsel for the appellants that the trial Court has committed an error by convicting the appellants for commission of offence punishable under Section 450 of the IPC because there was no house trespass.

We are not in agreement with the arguments advanced by the learned counsel for the appellants. All the witnesses have deposed that they were talking to each other in the courtyard (angan) and as per the spot map Ex.P/3, which was prepared by PW/6, courtyard is at the back side of the house. It was surrounded by the walls. It was not an open place. Hence, the trial Court has rightly held that the appellants had entered the house of the deceased. The trial Court has also held the appellants guilty for commission of offence punishable under Sections 323 and 149 of the IPC. The injured witnesses received injuries, hence, in our opinion, the conviction of the appellants for commission of offence punishable under Section 323/149 of IPC is as per law because even two accused persons be acquitted then the appellants were five in number, hence, their conviction under Section 149 of the IPC is upheld. Hence, the appeal filed by the appellants is partly allowed. The appeal of appellant No. 2 Naresh and appellant No. 5 Ghanshyam is allowed. They have been acquitted from the charges. The appellant Naresh is in jail, he be released forthwith, if not required in any other case. Appellant Ghanshyam is on bail, his bail bonds are hereby discharged. Criminal Appeal No. 2034/2006 filed by appellants Shankar, Hari Singh, Lekhram and Dharamdas is hereby dismissed. Appellants Dharamdas and Hari Singh are on bail, they are directed to surrender before the trial Court to undergo remaining part of the jail sentence as awarded. Their conviction and jail sentence as awarded by the trial Court is upheld. Appellant Bhagga is in jail, his conviction and jail sentence as awarded by the trial Court is upheld.

37. A copy of this judgment be also placed in the record of connected criminal appeal No. 2135/2006.

Order accordingly.

I.L.R.[2018] M.P. 159 (DB)
APPELLATE CRIMINAL
Before Mr. Justice Alok Verma & Mr. Justice Virender Singh
Cr.A. No. 764/2007 (Indore) decided on 27 November, 2017

GAGRIYA & ors. ...Appellants
Vs.
STATE OF M.P. ...Respondent

***A. Penal Code (45 of 1860), Section 396 & 397 – Dacoity and Murder – Conviction – Child Witness* – Statement of the child witness is supported by medical evidence and also the fact in the spot map where it was shown that wall of the house was broken and from that space, accused persons entered into the house – Looking to his statement u/s 161 Cr.P.C. and medical evidence, his statement cannot be discarded as unreliable – Oral evidence is**

fully supported by medical evidence, FIR was promptly lodged specifically mentioning the name of accused persons, duly identified by witnesses – No interference is called for – Appeal dismissed.

(Para 9 & 12)

क. दण्ड संहिता (1860 का 45), धारा 396 व 397 – डकैती एवं हत्या – दोषसिद्धि – बाल साक्षी – बाल साक्षी के कथन चिकित्सकीय साक्ष्य द्वारा समर्थित है एवं घटना स्थल के नक्शे में तथ्य भी जहाँ यह दर्शाया गया था कि मकान की दीवार टूटी थी एवं उस जगह से, अभियुक्तगण ने मकान के अन्दर प्रवेश किया – दण्ड प्रक्रिया संहिता की धारा 161 के अन्तर्गत उसके कथनों एवं चिकित्सकीय साक्ष्य को देखते हुये, उसके कथनों को अविश्वसनीय रूप से अस्वीकार नहीं किया जा सकता है – मौखिक साक्ष्य, चिकित्सकीय साक्ष्य द्वारा पूरी तरह समर्थित है, प्रथम सूचना प्रतिवेदन विनिर्दिष्ट रूप से अभियुक्तगण के नाम उल्लिखित करते हुये तत्परता से दर्ज किया गया, जिनकी साक्षीगण द्वारा सम्यक् रूप से पहचान की गई – कोई हस्तक्षेप की आवश्यकता नहीं – अपील खारिज।

***B. Evidence Act (1 of 1872), Section 9 – Identification of Accused persons* – Held – Three persons who were the resident of the same village and known to the family members of deceased, were duly identified – Their names were specifically mentioned in the FIR which was promptly lodged – No doubt about the identification of accused.**

(Para 12)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 9 – अभियुक्तगण की पहचान – अभिनिर्धारित – तीन व्यक्ति, जो एक ही गाँव के निवासी थे एवं मृतक के परिवार के सदस्यों से परिचित थे, की सम्यक् रूप से पहचान की गई थी – उनके नाम प्रथम सूचना प्रतिवेदन में विनिर्दिष्ट रूप से उल्लिखित थे, जो कि तत्परता से दर्ज किया गया था – अभियुक्त की पहचान के बारे में कोई संदेह नहीं।

Mukesh Sinjonia, for the appellants.
Peyush Jain, for the respondent/State.

J U D G M E N T

The Judgment of the Court was delivered by:
Alok Verma, J. :- This Criminal Appeal is directed against the judgment of conviction and sentence passed by learned Additional Sessions Judge, Sendhwa, District-Barwani, in Sessions Trial No 339/2003 dated 14.07.2006, whereby the learned Additional Sessions Judge found the appellant guilty under Section 396, 397 of IPC and sentenced them to life imprisonment each and fine of Rs. 250/- each under Section 396 of IPC and 7 years rigorous imprisonment each and fine of Rs. 250/- each.

2. According to prosecution story, the incident took place on 12.09.2003 in the night at about 10.00 pm. The deceased Dinesh, his wife Kiran, their daughter Rani and sons Chetan and Ashwin were sleeping in their house. There the appellant Gathu and Sakha entered into the house by breaking wall of the house. They gave blow by *kushla* on injured Chetan and opened the door from inside, and thereafter, five to six more persons entered into the house, in which, one of the accused Gagriya was identified by the prosecution witnesses. After entering into the house, they gave severe beating to the deceased Dinesh, injured Kiran and other injured persons. They also committed dacoity and took television, VCD, tape recorder and other provisions with them. Due to the injuries caused by them, Dinesh succumbed next day while he was being shifted to the hospital.

3. The trial Court framed charges under Section 396 and 397 of IPC, recorded evidence of both the sides, recorded statement of accused persons and passed the impugned judgment.

4. Only three persons faced trial, as the remaining accused were not identified and could not be traced.

5. Aggrieved by the judgment of conviction and sentence, this appeal is filed on the ground *inter alia* that case of the prosecution heavily rests on statement of Chetan (P.W.-1), who was the child- witness. His statement was full of contradiction and also he admitted that he was tutored by a counsel sitting outside the Court that what should he say before the Court, and therefore, his statement is not reliable. As he informed about the incident to other prosecution witness, their statements are also not reliable.

6. The trial Court appreciated the evidence produced by the prosecution in detail and after finding the statement of Chetan (P.W-1) reliable, convicted the accused persons.

7. Learned counsel for the State support the impugned judgment and prays that the same should may be affirmed.

8. The prosecution examined Chetan (P.W.-1), who was a child of nine years old. When his statement was recorded on 21.04.2004, he said that at about 11.00 pm in the night, tv show was over, all went to sleep and he was awake. With his father, his sister Rani was sleeping. Mother was sleeping on separate cot alone. While he was sleeping with his brother Ashvin (P.W.-3) accused Sakha @ Sakharam, and Gathu broke the wall of the house and entered into the house. Gathu inflicted injuries (supplied : by) *kushla* on him. He also inflicted injuries by *kushla* on head of his mother. Injury was caused to this (sic:his) sister by accused Gagriya. Due to beating given by the accused persons, one of the eye of his father came out and he also inflicted injuries on his head and face. The accused persons took tv and VCD. They also took some cash.

He informed the complainant Mukesh, who was his paternal uncle. He came to their house, and thereafter, lodged the report. In para-5 of his statement, he admitted that before recording of his statement, he met an advocate and he explained what he should state before the Court and on the basis of this admission to him, it is prayed by the defence counsel that his statement should not be relied upon.

9. However, so far as this witness is concerned his statement is supported by medical evidence and also the fact that in the spot map, it was shown that wall of the house was broken and from that space, the accused persons entered into the house and taking his statement under Section 161 of Cr.P.C. and medical evidence, his statement cannot be discarded as unreliable.

10. Second witness is Kiranbai (P,.W-2), wife of the deceased Dinesh. She supported the statement given by Chetan (P.W.-1) and all material aspect of her statement is also supported by medical evidence. There is no admission on her part that nobody explained to her that what she should say before the Court. Her statement was also supported by medical evidence, and therefore, cannot be unreliable.

10. Similarly, Ashvin (P.W.-3) also supported the prosecution case.

11. Other witnesses are such witnesses, who were told about the incident by the family members of the deceased, and therefore, since the statement of the prosecution witnesses were totally reliable, finding given by the trial Court appears to be based on proper appreciation of evidence.

12. So far as the identification of the accused persons are concerned, the other persons cannot be traced and identified, however, three persons who were resident of the same village and known to the family members of the deceased, were duly identified, therefore, their names were mentioned in the F.I.R. F.I.R. (Ex-P/1) was lodged promptly at 7.30 am in the morning by paternal uncle of the prosecution witness Chetan (P.W.-1). In the F.I.R., names of the present appellants were mentioned. In such situation, when oral evidence is fully supported by medical evidence and the F.I.R. is promptly lodged, there is no doubt about identification of the accused.

After taking into consideration all the evidence available on record and in considered opinion of this Court, no interference is called for.

Accordingly, this appeal is dismissed. The judgment of conviction and sentence passed by the trial Court is hereby affirmed.

Certified copy as per rules.

Appeal dismissed.

I.L.R.[2018] M.P. 163
APPELLATE CRIMINAL
Before Mr. Justice Rohit Arya
Cr.A. No. 4668/2017 (Indore) order passed on 5 December, 2017

RAMU @ RAMLAL ...Appellant
Vs.
STATE OF M.P. ...Respondent

***Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), Section 14(A)(2) – Second Appeal – Maintainability – Principle of Res-Judicata* – Respondent/State took an objection that in the present case, once appeal has already been dismissed and therefore second appeal is not maintainable – Held – Nomenclature of 'appeal' used in Section 14(A)(2) of the Act is not an appeal in strict sense but a provision enabling a person before the High Court against granting or refusing bail by the Special Court or the Exclusive Special Court specified therein – It is settled law that principles of *res-judicata* or constructive *res-judicata* does not apply to a bail application – A fresh appeal is maintainable after rejection of first appeal u/S 14(A)(2) of the Act of 1989 – Objection of the respondent/State is overruled. (Para 12 & 13)**

अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 14(ए)(2) – द्वितीय अपील – पोषणीयता – पूर्व न्याय का सिद्धांत – प्रत्यर्थी/राज्य ने आक्षेप लिया कि वर्तमान प्रकरण में अपील को एक बार पहले ही खारिज किया जा चुका है और इसलिए द्वितीय अपील पोषणीय नहीं – अभिनिर्धारित – अधिनियम की धारा 14(ए)(2) में प्रयुक्त पारिभाषिक शब्द 'अपील', कड़े अर्थ में एक अपील नहीं बल्कि इसमें विनिर्दिष्टित विशेष न्यायालय अथवा अनन्य विशेष न्यायालय द्वारा जमानत प्रदान या नामंजूर किये जाने के विरूद्ध उच्च न्यायालय के समक्ष एक व्यक्ति को समर्थ बनाने का एक उपबंध है – यह सुस्थापित विधि है कि *पूर्व न्याय* या आन्वयिक *पूर्व न्याय* के सिद्धांत जमानत आवेदन को लागू नहीं होते – 1989 के अधिनियम की धारा 14(ए)(2) के अंतर्गत प्रथम अपील की अस्वीकृति के पश्चात् नई अपील पोषणीय है – प्रत्यर्थी/राज्य का आक्षेप नामंजूर किया गया।

Cases referred :

(2003) 12 SCC 615, (2008) 6 SCC 789.

Akash Rathi, for the appellant.
Swapnil Sharma, P.P. for the respondent/State.

O R D E R

Rohit Arya, J. :- During the course of arguments on 21/11/2017, an objection was raised on behalf of the respondent/State against maintainability of the appeal with the contention that appeal under section 14(A)(2) of the Scheduled Castes and Tribes (Prevention of Atrocities) Act, 1989 once dismissed (Cr. Appeal No.1169 of 2017 on 11/09/2017), second appeal is not maintainable.

2. This Court granted time to the learned counsel for the parties to address on the aforesaid issue. The matter is listed today, accordingly.

3. Heard learned counsel for the parties at length for and against maintainability of further appeal under the provisions of Scheduled Castes and Tribes (Prevention of Atrocities) Act, 1989.

4. The Parliament originally enacted the Act called, Scheduled Castes and Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as 'the Act of 1989) as despite various measures to improve the socio-economic conditions of the Scheduled Castes and Tribes community of people, they remain vulnerable. They are not only denied number of civil rights but also subjected to various offences, indignities, humiliations and harassment. They were denied fundamental right to live with dignity and property having been subjected to serious crimes.

5. The aforesaid enactment has been made to achieve the object of spreading education, awareness and resistance against untouchability, protection of minimum wages, elimination of forced labour. Likewise, exploitative activities intended towards the suppressed and backward class of Scheduled Castes and Scheduled Tribe community of people. Hence, special enactment was inevitable as the normal provisions of the existing laws like the Protection of Civil Rights Act, 1955 and the Indian Penal Code were found to be inadequate to check such atrocities and excessive barbaric activities towards underprivileged community of people.

6. Chapter IV of the Act of 1989 provides for Special Courts. By Amendment Act 1 of 2016, Section 14 was inserted with effect from 26/01/2016 for constitution of Special Court and Exclusive Special Court. Section 14A was also inserted providing for 'appeals' from any judgment, sentence or order, not being an interlocutory order, of a Special Court or an Exclusive Special Court, to the High Court both on facts and on law under sub-section (1) and under sub-section (2) thereof, against the order of Special Court or Exclusive Special Court granting or refusing bail notwithstanding anything contained under sub-section (3) of section 378 Cr.P.C.

7. Vide section 18 of the Act of 1989, there was express bar of applicability of section 438 Cr.P.C., in the context of cases involved arrest of any person on an acquisition of having committed offence under this Act and section 20 of the Act has overriding effect over other laws.

8. The word "bail" remains an undefined term in Cr.P.C., But, the 'law of bail' has its own philosophy and definite legal connotation in the administration of justice addressing the issues emerging from the conflict between the police power to restrict liberty of a man with the allegation of having committed a crime and a presumption of innocence in favour of the accused.

9. Chapter XXXIII of Cr.P.C., provides for bail and bonds. Sections 436 to 450 deal with various dimensions. Sections 436 and 437 provides for bail before trial and conviction. For the purpose of bail, offences are classified into two categories; (i) bailable and (ii) non-bailable. Section 436 deals with bail in bailable offences and section 437 deals with bail in case of non-bailable offences.

Section 439 deals with Special Powers of High Court or Court of Session regarding bail.

If the bail is rejected under section 439 Cr.P.C., fresh bail application is maintainable in the same Court and is not a bar as the principles of *res judicata* or constructive *res judicata* has no application. Relied upon the judgments of the Hon'ble Supreme Court reported in (2003) 12 SCC 615 *Parvinder Singh Vs. State of Punjab* and (2008) 6 SCC 789 *Fatma Bibi Ahmed Patel Vs. State of Gujarat* and another.

10. Further, the 'law of bail' is an integral part of Article 21 of the Constitution of India which provides that no person shall be deprived of life and liberty except by due process of law. It is often said that 'bail' is the right and refusal thereof is an exception thereto.

11. In the backdrop of the aforesaid, the provision for 'appeal' under section 14(A)(2) of the Act of 1989 in effect is an application for regular bail against rejection order by the Special Court or the Exclusive Special Court under section 439 Cr.P.C., for the reason that section 14(A)(2) opens up non-obstinate clause providing; notwithstanding anything contained in sub-section (3) of section 378 of the Code of Criminal Procedure, 1973 (2 of 1974), an appeal shall lie to the High Court against an order of the Special Court or the Exclusive Special Court granting or refusing bail.

12. Section 378 deals with appeal in case of acquittal, sub-section (3) of section 378 Cr.P.C., provides that no appeal to the High Court under sub-section (1) or sub-section (2) shall be entertained except with the leave of the High Court.

As such, the nomenclature of 'appeal' used in section 14A of the Act of 1989 is not an appeal in strict sense but, a provision enabling a person before the High Court against granting or refusing bail by the Special Court or the Exclusive Special Court specified therein.

If an appeal under section 14(A)(2) of the Act of 1989 for grant of bail is refused by the High Court and the accused prefers a fresh appeal for grant of bail then if interpreted the word 'appeal' in its strict sense as an appeal under section 378 Cr.P.C., then the provision shall be in direct conflict with the settled law as the principles of *res judicata* or constructive *res judicata* does not apply to a bail application and also in conflict with the personal liberty enshrined under Article 21 of the Constitution of India.

13. In view of the discussion in the preceding paragraphs of the order, the objection on behalf of the respondent/State is overruled. It is held that a fresh appeal is maintainable after rejection of first appeal under section 14(A)(2) of the Act of 1989.

14. Post the appeal for consideration next week and the learned State's counsel is directed to produce the case diary on the next date of hearing.

Order accordingly.

I.L.R. [2018] M.P. 166
ARBITRATION APPEAL
Before Mr. Justice Prakash Shrivastava
A.A. No. 3/2016 (Indore) decided on 18 December, 2017

M.P. PASCHIM KSHETRA VIDYUT VITRAN CO. LTD. ...Appellant
Vs.
SERCO BPO PVT. LTD. ...Respondent

(Alongwith A.A. No.4/2016, A.A. No.5/2016 & A.A. No.6/2016)

A. Arbitration and Conciliation Act (26 of 1996), Section 7 & 9 – Arbitration Agreement – Existence of – **Appellant cancelled the contract awarded to Respondent and forfeited the earnest money and was further black listed for three years – Respondent approached the civil Court u/S 9 of the Act, whereby the order passed by Appellant was stayed – Challenge to, on the ground that no contract was executed between parties – Held – In terms of Section 7, even in absence of duly signed agreement by the parties, agreement can be inferred from other written communications exchanged between them – Though no written agreement was signed between parties but bid of respondent was duly accepted and rate contract award was issued thus appellant itself has treated it to be a concluded contract on the basis of which subsequent communications were made.**

(Paras 6, 11 & 17)

क. माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 7 व 9 – माध्यस्थम् करार – का अस्तित्व – अपीलार्थी ने प्रत्यर्थी को दी गई संविदा रद्द की एवं अग्रिम राशि समपहृत की और आगे तीन वर्षों के लिए काली सूची में डाल दिया – प्रत्यर्थी अधिनियम की धारा 9 के अन्तर्गत सिविल न्यायालय में गया जिससे अपीलार्थी द्वारा पारित आदेश रोका गया था – चुनौती, इस आधार पर कि पक्षकारों के मध्य कोई संविदा निष्पादित नहीं हुई थी – अभिनिर्धारित – धारा 7 के संबंध में, पक्षकारों द्वारा सम्यक् रूप हस्ताक्षरित करार की अनुपस्थिति में भी, उनके मध्य आदान–प्रदान की गई अन्य लिखित संसूचनाओं से करार अनुमानित किया जा सकता है – यद्यपि पक्षकारों के मध्य कोई लिखित करार हस्ताक्षरित नहीं किया गया था परन्तु प्रत्यर्थी की बोली सम्यक् रूप से स्वीकार की गई थी एवं दी गई संविदा दर जारी की गई थी, अतः अपीलार्थी ने स्वयं उसे समाप्त संविदा माना है जिसके आधार पर पश्चात्वर्ती संसूचनाएँ की गई थी।

***B. Constitution – Article 14 – Principle of Natural Justice* – Respondent was black listed without issuing any show cause notice and without giving any opportunity of hearing – Black listing a contractor has serious civil and penal consequence, therefore before taking such a decision, it is necessary to give clear show cause notice and comply with the principle of natural justice – No error committed by the trial Court in staying the order of black listing – Appeal dismissed.**

(Para 34 & 38)

ख. संविधान – अनुच्छेद 14 – नैसर्गिक न्याय का सिद्धान्त – प्रत्यर्थी को किसी कारण दर्शाओ नोटिस के जारी किये बिना एवं सुनवाई का अवसर प्रदान किये बिना काली सूची में डाला गया – एक ठेकेदार को काली सूची में डालने के गंभीर सिविल एवं दाण्डिक परिणाम होते हैं, अतः इस प्रकार का निर्णय लेने से पूर्व यह आवश्यक है कि स्पष्ट कारण दर्शाओ नोटिस दिया जाए एवं नैसर्गिक न्याय के सिद्धान्त का अनुपालन किया जाए – काली सूची में डालने के आदेश को रोके जाने में विचारण न्यायालय ने कोई त्रुटि नहीं की है – अपील खारिज।

***C. Words & Phrases – Word 'Arbitrator' & 'Adjudicator'* – Held – In place of 'arbitrator' the parties have used the word 'adjudicator' to convey the same meaning – Clause makes it clear the intention of the parties, to resolve the dispute through adjudicatory process in case of failure of consultation process – Hence the said clause is not a clause relating to one sided decision by the departmental authority or the expert but it is an arbitration clause.**

(Para 32)

ग. शब्द एवं वाक्यांश – शब्द 'मध्यस्थ' एवं 'न्यायनिर्णायक' – अभिनिर्धारित – 'मध्यस्थ' के स्थान पर पक्षकारों ने 'न्यायनिर्णायक' शब्द का उपयोग वही अर्थ व्यक्त करने हेतु किया है – खंड, परामर्श प्रक्रिया की विफलता के प्रकरण में न्यायनिर्णयन प्रक्रिया के माध्यम से विवाद को सुलझाने के लिए पक्षकारों के आशय को स्पष्ट करता है – इसलिए कथित खंड विभागीय प्राधिकारी या विशेषज्ञ द्वारा दिये गये एकतरफा निर्णय से संबंधित खंड नहीं है परन्तु एक माध्यस्थम् खंड है।

Cases referred :

2010 (3) SCC 1, (1996) 2 SCC 667, 2017 SCC Online 454, (1980) 2 SCC 341, (1996) 2 SCC 216, (1998) 3 SCC 573, AIR 1999 SC 899, 2005 (11) SCC 197, JT 2007 (6) SC 375, (2015) 12 SCC 677, 2012 (1) MPLJ 269, AIR 2008 Patna 143, AIR 2008 Allahabad 107, (1975) 1 SCC 70, (2014) 9 SCC 105.

Prasanna Prasad, for the appellant
R.S. Chhabra, for the respondent.

O R D E R

Prakash Shrivastava, J. :- This order will govern disposal of A.A. No. 3/2016, AA No. 4/2016, AA No. 5/2016 & AA No. 6/2016 since it is jointly stated by counsel for the parties that all these appeals are between the same parties involving same issue in identical facts situation and similar orders of court below are under challenge.

2. For convenience the facts have been noted from AA No. 3/2016.

3. This appeal under Section 37 of Arbitration and Conciliation Act, 1996 is directed against the order of 6th Additional District Judge Indore dated 27/2/2016 allowing the respondent's application under Section 9 of the Act and staying decision of the appellant contained in communication dated 17/11/2014 about blacklisting the respondent for three years.

4. The respondent had filed an application under Section 9 of the Act with the plea that rate contract tender was floated by appellant for unskilled labour in which respondent had participated. Tender and price bids were opened on 11/4/14 and 29/5/14 respectively and on the basis of consent letter of respondent dated 6/6/14 the rate contract dated 9/6/14 was awarded to respondent. The respondent had deposited Rs. 50,000/- as earnest money. Vide letter dated 16/6/14 respondent had sought clarification in respect of liability under the Bonus Act, paid leaves/minimum leaves etc/. Since no reply was received therefore respondent had sent the reminders dated 19/6/14, 24/6/14, 7/7/14 but instead of giving reply, appellant vide communication

dated 4/7/14 had cancelled the rate contract award and had informed about the forfeiture of earnest money. The respondent vide communication dated 7/7/14 had conveyed that it had never refused to perform the contract and asked for review of the decision but on 17/11/14 the communication was issued by appellant blacklisting the respondent for 3 years. On 18/2/15 the respondent had sent the letter for appointment of arbitrator in terms of clause 15 of General Terms and Condition of award and when no reply was received, the respondent had filed an application under Section 9 of the Act seeking interim measure.

5. Appellant by filing reply had taken the plea that rate contract awarded to respondent was cancelled and looking to urgency, the work was awarded to M/s Deccan Techno Solutions, Pvt. Ltd. hence the said company was also a necessary party. It was further pleaded that no contract was executed between the parties therefore, Section 9 of the Act cannot be invoked. It was also pleaded that respondent had not participated in pre-auction meeting dated 7/4/14 and vide letter dated 5/6/14 the respondent was informed to give consent as per tender specification clause 9(2) on L-01 rate and the respondent had given the consent letter dated 6/6/14. Thereafter the rate contract award dated 9/6/14 was issued and subsequently the respondent had made a representation for making changes in respect of bonus payment and paid leave. The notice dated 23/6/14 was issued to respondent to start the work failing which the action for blacklisting and confiscation was to be taken but on 24/6/14 the respondent had again asked for review of the condition and therefore, after obtaining the legal opinion dated 28/6/14 the work was awarded to another company i.e. M/s Deccan Techno Solutions, Pvt. Ltd. on 2/7/2014.

6. The court below after examining the respective plea of the parties and considering the material on record in the impugned order has found that a contract was entered into between the parties and there was a dispute about the liability under the Bonus Act etc and that appellant after terminating the rate contract award had forfeited the earnest money and had also blacklisted the respondent without giving an opportunity of hearing. Hence considering the above relevant circumstances, the court below has stayed the communication of appellant dated 17/11/2014 blacklisting the respondent for a period of 3 years, till the dispute between the parties is resolved.

7. Learned counsel for appellant submits that no concluded contract exists between the parties and no arbitration agreement was signed therefore, Section 9 of the Act cannot be invoked. He further submits that the dispute resolution clause under agreement is not an arbitration clause and no case for issuing any interim measure under Section 9 of Act is made out.

8. As against this learned counsel for respondent submits that the contract was entered into between the parties in terms of the Section 7 of the Act and execution of agreement was a mere formality. He further submits that arbitration clause exists and the respondent is taking steps to move under Section11 of the Act for appointment of arbitrator and that since the blacklisting was done without following the principle of natural justice therefore, the court below has rightly issued the interim measure.

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

10. The core issue involved in this appeal is about existence of the arbitration agreement.

11. Section 7 of the Arbitration and Conciliation Act, 1996 (for short the Act) defines arbitration agreement and in terms of subsection 4 thereof, the arbitration agreement can be contained in a document signed by the parties or exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement or even an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other. Hence in terms of Section 7 even in the absence of duly signed agreement by the parties, agreement can be inferred from other written communication exchanged between them.

12. The Supreme Court in the matter of *Trimex International FZE Limited, Dubai Vs. Vedanta Aluminium Limited, India* reported in 2010(3) SCC 1 has considered the earlier judgment on the point and has ruled that signed agreement between the parties is not a must but from the other documents approved and signed by the parties in the formal exchange of e-mail, letters, telex, telegrams etc., the arbitration agreement can be inferred, by holding as under:-

> 52. The Court of Appeal in the case of *Pagnan SPA vs. Feed Products Ltd.,* [1987] Vol. 2, Lloyd's Law Reports at p. 619 observed as follows:
>
> > "It is sometimes said that the parties must agree on the essential terms and that it is only matters of detail which can be left over. This may be misleading, since the word 'essential' in that context is ambiguous. If by 'essential' one means a term without which the contract cannot be enforced then the statement is true: the law cannot enforce an incomplete contract. If by 'essential' one means a term which the parties have agreed to be essential for the formation of a binding contract, then the statement is tautologous. If by 'essential' one means only a term which

> the Court regards as important as opposed to a term which the Court regards as less important or a matter of detail, the statement is untrue. It is for the parties to decide whether they wish to be bound and, if so, by what terms, whether important or unimportant. It is the parties who are, in the memorable phrase coined by the Judge, "the masters of their contractual fate". Of course, the more important the term is the less likely it is that the parties will have left it for future decision. But there is no legal obstacle which stands in the way of the parties agreeing to be bound now while deferring important matters to be agreed later. It happens every day when parties enter into so-called 'heads of agreement'."
>
> The above principle has been consistently followed by the English Courts in *Mamidoil-Jetoil Greek Petroleum Co. S.A. v. Okta Crude Oil Refinery AD,* (2001) Vol. 2 Lloyd's Law Reports 76 at p. 89; *Wilson Smithett & Cape (Sugar) Ltd. vs. Bangladesh Sugar and Food Industries Corporation,* (1986) Vol. 1 Lloyd's Law Reports 378 at p. 386. In addition, Indian law has not evolved a contrary position. The celebrated judgment of Lord Du Parcq in *Shankarlal Narayandas Mundade v. The New Mofussil Co. Ltd. & Ors.* AIR 1946 PC 97 makes it clear that unless an inference can be drawn from the facts that the parties intended to be bound only when a formal agreement had been executed, the validity of the agreement would not be affected by its lack of formality.

53. In the present case, where the Commercial Offer carries no clause making the conclusion of the contract incumbent upon the Purchase Order, it is clear that the basic and essential terms have been accepted by the respondent, without any option but to treat the same as a concluded contract.

54. Though Mr. C.A. Sundaram, learned senior counsel heavily relied on the judgment of this Court in *Dresser Rand S.A. v. Bindal Agro Chem Ltd.,* (2006) 1 SCC 751*,* the same is distinguishable because in that case only general conditions of purchase were agreed upon and no order was placed. On the other hand, in the case on

hand, specific order for 5 shipments was placed and only some minor details were to be finalized through further agreement.

55. This Court in Dresser Rand S.A. rejected the contention that the acceptance of a modification to the General Conditions would not constitute the conclusion of the contract itself. On the other hand, in the present case, after the suggested modifications had crystallized over several emails. Further in para 32 (at SCC p. 770) in Dresser Rand S.A. this Court held that "parties agreeing upon the terms subject to which a contract will be governed, when made, is not the same as entering into the contract itself" whereas in the case on hand, the moment the commercial offer was accepted by the respondent, the contract came into existence. Though in para 44 of the Dresser Rand S.A. it is recorded that neither the Letter of Intent nor the General Conditions contained any arbitration agreement, in the case on hand, the arbitration agreement is found in clause 6 of the Commercial Offer. In view of the same, reliance placed by the respondent on Dresser Rand S.A. is wholly misplaced and cannot be applied to the case on hand where the parties have arrived at a concluded contract.

56. **********

57. **********

58. *Smita Conductors Ltd. vs. Euro Alloys Ltd.* (2001) 7 SCC 728 was a case where a contract containing an arbitration clause was between the parties but no agreement was signed between the paties. The Bombay High Court held that the arbitration clause in the agreement was binding. Finally, this Court upholding the judgment of the Bombay High Court held that the arbitration clause in the agreement that was exchanged between the parties was binding.

59. In *Shakti Bhog Foods Limited vs. Kola Shipping Limited,* (2009) 2 SCC 134, this Court held that from the provisions made under Section 7 of the Arbitration and Conciliation Act, 1996 that

> "the existence of an arbitration agreement can be inferred from a document signed by the parties, or an exchange of letters, telex, telegrams or other means of telecommunication, which provide a record of the agreement" (SCC p.142, para 14).

> 60. It is clear that in the absence of signed agreement between the parties, it would be possible to infer from various documents duly approved and signed by the parties in the form of exchange of e-mails, letter, telex, telegrams and other means of telecommunication."

13. Counsel for the respondent has placed reliance upon the judgment of the Supreme Court in the matter of *U.P. Rajkiya Nirman Nigam Ltd. Vs. Indure Pvt. Ltd. and others* reported in (1996) 2 SCC 667 but the said judgment in strict terms is not attracted in the present case because it was rendered keeping in view the provisions of the Arbitration Act, 1940 whereas in the present case the existence of the agreement is to be seen in the light of the provisions contained in Arbitration Act, 1996 and especially Section 7 thereof, which defines the arbitration agreement. Counsel for the respondent has placed reliance upon the judgment of the Supreme Court in the matter of *M/s Vedanta Limited (Formerly known as Sesa Sterlite Limited and successor in interest of erstwhile Sterlite Industries (India) Ltd) Vs. M/s Emirates Trading Agency LLC* Reported in 2017 SCC Online 454 but in that case there was proposal and counter proposal but no concluded contract had come into existence, whereas the present case stands on a different footing.

14. In the present case the bid was submitted by respondent for rate contract award for outsourcing of skilled manpower required for ministerial office work and clerical work. The bid of respondent was accepted and vide communication dated 9/6/14 rate contract award was issued. The contract was for a period of 24 months and clause 4 of rate contract award makes it clear that extension was to be governed by terms and condition as specified in the bid document.

15. Clause 8 of the rate contract award dated 9/6/14 contains the requirement of security deposit/contract performance guarantee and clause 8.3 reads as under:

> "8.3 Failure by the successful bidder to furnish the prescribed security deposit/contract performance guarantee or to execute the agreement within the period specified in bid document after his/her bid has been accepted or notice to start the work within such time as is determined by the Engineer-in- Chief/Controlling officer after notification of the acceptance of the bid shall entail action as deemed appropriate by the purchaser/service recipient shall be initiated (including forfeiture of the earnest money deposit (EMD), cancellation of the contract, blacklisting of bidder, etc."

16. The above clause by its very nature comes into operation on acceptance of bid and if the formalities as mentioned in this clause are not completed, then action including cancellation of contract, blacklisting etc. is contemplated.

17. The order of the court below as well as the documents on record reveal that though no written agreement was signed between the parties but bid of respondent was duly accepted and rate contract award was issued. Not only this the appellant itself had treated it to be a concluded contract therefore, they had subsequently sent the communication dated 4/7/14 cancelling the rate contract award and forfeiting the EMD. Even the blacklisting vide communication dated 17/11/14 has been done on the ground of non compliance of rate contract award.

18. Having regard to the aforesaid, I am of the opinion that an agreement and concluded contract had come into existence between the parties.

19. The connected issue is if there was an arbitration clause in the agreement.

20. The objection of counsel for the respondent is that the clause 15 contained in the general conditions of contract is not an arbitration clause but it is a clause relating to the binding nature of the decision by the departmental authority relating to resolution of dispute.

21. Under Section 7 of the Act what is contemplated between the parties is "arbitration agreement" and not mere agreement, hence for attracting the provisions of Arbitration Act, 1996 the existence of the valid arbitration clause in the agreement is necessary.

22. There is a distinction between arbitration clause and the clause empowering an expert or departmental authority to give a decision of binding nature. In the adjudicatory process the arbitrator is required to act judicially and impartially, where both the parties are given opportunity to put forth their claim. As against this, an agreement may contain a clause giving power to the departmental or other experts or authorities to give their decision in respect of supervision, drawing, design etc. of the work without following any adjudicatory process and attach finality to such a decision but such a clause relating to decision by the expert or the authority cannot be termed as arbitration clause in view of missing elements of judicious decision making process.

23. The intention of the parties as regards the resolution of dispute by the arbitration can be inferred by the reading of the clause as a whole. The agreement should either expressly or by clear implication provide for referring the dispute to the arbitrator, distinct and different from mere one sided decision by the departmental authority.

24. Hon'ble J. Murtaza Fazal Ali in the matter of *State of U.P. Vs. Tipper Chand* reported in (1980) 2 SCC 341 while considering the clause of the agreement which provides for giving finality to the decision of the Superintending Engineer as to the quality of workmenship, material used or any other question, claim, right, matter arising out of or relating to the contract without any element of adjudication has held that the clause does not contain any arbitration agreement and it merely vests the Superintending Engineer with the supervision of execution of the work and administrative control over it from time to time. In the matter of *Tipper Chand* (supra) it has been held:-

> "2. The suit out of which this appeal has arisen was filed by the respondent before us for recovery of Rs. 2,000/- on account of dues recoverable from the Irrigation Department of the petitioner State for work done by the plaintiff in pursuance of an agreement, Clause 22 of which runs thus :
>
> Except where otherwise specified in the contract the decision of the Superintending Engineer for the time being shall be final, conclusive and binding on all parties to the contract upon all questions relating to the meaning of the specifications, design, drawing and instructions herein before mentioned. The decision of such Engineer as to the quality of workmanship, or materials used on the work, or as to any other question, claim, right, matter or things whatsoever, in any way arising out of or relating to the contract, designs, drawing specifications, estimates, instructions, orders, or these conditions, or otherwise concerning the works, or the execution or failure to execute the same, whether arising during the progress of the work, or after the completion or abandonment of the contract by the contractor, shall also be final, conclusive and binding on the contractor.
>
> 3. The defendant respondent made an application under Section 34 of the Arbitration Act to the trial Court on the plea that the above extracted Clause 22 amounted to an arbitration agreement. The plea found favour with the trial Court as well of the appellate Court but was rejected by the High Court in revision on the ground that it merely conferred power on the Superintending Engineer to take decisions on his own and that it did not authorise the partis-to refer any matter to his arbitration. In this connection the High Court particularly adverted to the marginal note to the said clause which was to the following effect:

Direction of work.

4. After perusing the contents of the said clause and hearing learned Counsel for the parties we find ourselves a complete agreement with the view taken by the High Court Admittedly the clause does not contain any express arbitration agreement. Nor can such an agreement be spelled out from its terms by implication, there being no mention in it of any dispute, much less of a reference thereof. On the other hand, the purpose of the clause clearly appears to be to vest the Superintending Engineer with supervision of the execution of the work as administrative control over it from time to time.

5. Mr. Dixit relied on *Governor-General v. Simla Banking and Industrial Company Ltd.* AIR 1947 Lah 215, *Dewan Chand v. State of Jammu and Kashmir* AIR 1961 J & K 58 and *Ram Lal v. Punjab State* . In the first of these authorities the clause appearing in the contract of the parties which was held by Abdur Rahmaa, J., to amount to an arbitration agreement was practically, word for word, the same with which we are concerned here but we are of the opinion that the interpretation put thereupon was not correct. As pointed out by the High Court such a clause can be interpreted only as one conferring power on the Superintending Engineer to take decisions all by himself and not by reason of any reference which the parties might make to him.

6. In the Jammu and Kashmir case the relevant clause was couched in these terms:

> For any dispute between the contractor and the Department the decision of the Chief Engineer PWD Jammu and Kashmir, will be final and binding upon the contractor.

The language of this clause is materially different from the clause in the present case and in our opinion was correctly interpreted as amounting to an arbitration agreement, In this connection the use of the words “any dispute between the contractor and the Department” are significant. The same is true of the clause in Ram Lal’s case (supra) which ran thus :

In matter of dispute the case shall be referred to the Superintending Engineer of the Circle, whose order shall be final.

> We need hardly say that this clause refers not only to a dispute between the parties to the contract but also specifically mentions a reference to the Superintending Engineer and must therefore be held to have been rightly interpreted as an arbitration agreement.
>
> 7. Holding, in conformity with the judgment of the High Court, that Clause 22 above extracted does not amount to an arbitration agreement, we find no force in this appeal which is dismissed with the costs."

25. In the matter of *State of Orissa and another Vs. Damodar Das* reported in (1996) 2 SCC 216 in a case where clause 25 of the agreement gives finality to the decision of the Public Health Engineering, it is held that the agreement must provide expressly or by necessary implication, a reference to an arbitrator named therein or otherwise of any dispute or difference and in its absence it is difficult to spell out existence of such an agreement for reference to an arbitration to resolve the dispute or difference contracted between the parties.

26. In (1998) 3 SCC 573 in the matter of *K.K. Modi Vs. K.N. Modi and others,* the Hon'ble Supreme Court taking note of the earlier judgment on the point, has held that since the clause under consideration did not contemplate any judicial determination by the Chairman of IFCI therefore, it was not an arbitration clause.

27. In the matter of *Bharat Bhushan Bansal Vs. U.P. Small Industries Corporation Ltd., Kanpur* reported in AIR 1999 SC 899 in a case where the clause did not mention that the dispute could be referred to arbitration of Managing Director, nor did it spelt any duty on him to record evidence or hear both parties before deciding the question before him, it is held that the Managing Director was more in the category of an expert for deciding the matters pertaining to contract and the intention appear to be to avoid dispute than to decide the formal dispute in quasi judicial manner, hence the clause was not held to be an arbitration clause. Similarly in the matter of *State of Rajasthan Vs. Nav Bharat Construction Co.* reported in 2005(11) SCC 197 in a case where the contractual clause was in respect of the settlement of question relating to specification, design, quality and workmanship and other technical aspects by officer of one party, it has been held that such a clause is not an arbitration clause. In the matter of *Jagdish Chander Vs. Ramesh Chander and others* reported in JT 2007(6) SC 375 the principle in this regard have been culled out as under:-

> "8. This Court had occasion to refer to the attributes or essential elements of an arbitration agreement in *K K Modi v. K N Modi* [1998 (3) SCC 573], *Bharat Bhushan Bansal vs. U.P. Small Industries Corporation Ltd.* [1999 (2)

SCC 166] *and Bihar State Mineral Development Corporation v. Encon Builders (I)(P) Ltd.* [2003 (7) SCC 418]. *In State of Orissa v. Damodar Das* [1996 (2) SCC 216], this Court held that a clause in a contract can be construed as an 'arbitration agreement' only if an agreement to refer disputes or differences to arbitration is expressly or impliedly spelt out from the clause. We may at this juncture set out the well settled principles in regard to what constitutes an arbitration agreement :

(i) The intention of the parties to enter into an arbitration agreement shall have to be gathered from the terms of the agreement. If the terms of the agreement clearly indicate an intention on the part of the parties to the agreement to refer their disputes to a private tribunal for adjudication and an willingness to be bound by the decision of such tribunal on such disputes, it is arbitration agreement. While there is no specific form of an arbitration agreement, the words used should disclose a determination and obligation to go to arbitration and not merely contemplate the possibility of going for arbitration. Where there is merely a possibility of the parties agreeing to arbitration in future, as contrasted from an obligation to refer disputes to arbitration, there is no valid and binding arbitration agreement.

(ii) Even if the words 'arbitration' and 'arbitral tribunal (or arbitrator)' are not used with reference to the process of settlement or with reference to the private tribunal which has to adjudicate upon the disputes, in a clause relating to settlement of disputes, it does not detract from the clause being an arbitration agreement if it has the attributes or elements of an arbitration agreement. They are : (a) The agreement should be in writing. (b) The parties should have agreed to refer any disputes (present or future) between them to the decision of a private tribunal. (c) The private tribunal should be empowered to adjudicate upon the disputes in an impartial manner, giving due opportunity to the parties to put forth their case before it. (d) The parties should have agreed that the decision of the Private Tribunal in respect of the disputes will be binding on them.

(iii) Where the clause provides that in the event of disputes arising between the parties, the disputes shall be referred to Arbitration, it is an arbitration agreement. Where there is a specific and direct expression of intent to have the disputes settled by arbitration, it is not necessary to set out the attributes of an arbitration agreement to make it an arbitration agreement. But where the clause relating to settlement of disputes, contains words which specifically excludes any of the attributes of an arbitration agreement or contains anything that detracts from an arbitration agreement, it will not be an arbitration agreement. For example, where an agreement requires or permits an authority to decide a claim or dispute without hearing, or requires the authority to act in the interests of only one of the parties, or provides that the decision of the Authority will not be final and binding on the parties, or that if either party is not satisfied with the decision of the Authority, he may file a civil suit seeking relief, it cannot be termed as an arbitration agreement.

(iv) But mere use of the word 'arbitration' or 'arbitrator' in a clause will not make it an arbitration agreement, if it requires or contemplates a further or fresh consent of the parties for reference to arbitration. For example, use of words such as "parties can, if they so desire, refer their disputes to arbitration" or "in the event of any dispute, the parties may also agree to refer the same to arbitration" or "if any disputes arise between the parties, they should consider settlement by arbitration" in a clause relating to settlement of disputes, indicate that the clause is not intended to be an arbitration agreement. Similarly, a clause which states that "if the parties so decide, the disputes shall be referred to arbitration" or "any disputes between parties, if they so agree, shall be referred to arbitration" is not an arbitration agreement. Such clauses merely indicate a desire or hope to have the disputes settled by arbitration, or a tentative arrangement to explore arbitration as a mode of settlement if and when a dispute arises. Such clauses require the parties to arrive at a further agreement to go

> to arbitration, as and when the disputes arise. Any agreement or clause in an agreement requiring or contemplating a further consent or consensus before a reference to arbitration, is not an arbitration agreement, but an agreement to enter into an arbitration agreement in future."

28. From the aforesaid principles it is clear that for ascertaining the nature of the arbitration agreement, the intention of the parties is relevant which is to be ascertained from the terms of the agreement and that the use or absence of the word 'Arbitrator', 'Arbitration' or 'Arbitration Tribunal' in the clause is immaterial but the clause should have the necessary ingredients to term as the arbitration clause and that the intention of the parties to refer the dispute to the arbitrator should be clear from the clause itself, without there being any requirement of further or fresh consent of the parties for reference to the arbitrator.

29. What is culled out from the above pronouncements is that one of the distinguishing feature between the decision by the departmental expert or authority and the arbitrator is that the process before the arbitrator is adjudicatory process wherein the parties can put forth their respective claim, lead evidence in support thereof and the award is passed in independent and impartial manner. In the case of missing adjudicatory process before the departmental authorities or experts, proceedings by them are not held to be arbitral proceedings.

30. Counsel for appellant has placed reliance upon division bench judgment of this court in the matter of *State of MP and another Vs. Dewas Udyog Indore and others* reported in 2012(1) MPLJ 269 but the said judgment is distinguishable on facts because in that case it was found that the order was passed in wrong notion that there was a written arbitration clause for reference to the arbitrator. He has also placed reliance upon judgment of the Supreme court in the matter of *International Amusement Ltd. Vs. Indian Trade Promotion Organization* reported in (2015) 12 SCC 677 and Full Bench judgment of Patna High Court in the matter of *State of Bihar and others Vs. M/s. Shiv Shankar Construction Co.(P) Ltd.* reported in AIR 2008 Patna 143 and Allahabad High Court in the matter of *M/s Ganga Plumbering Works Vs. Kanpur Development Authority Moti Jheel Kanpur and others* Reported in AIR 2008 Allahabad 107 and has argued that dispute resolution clause cannot be termed as arbitration clause. But in the present case clause 15 under consideration is very differently worded.

31. In the present case clause 15 of the General Condition of Contract provides for settlement of dispute and reads as under:

"15. Settlement of disputes

15.1 If any dispute or difference of any kind whatsoever arises between the purchaser/service recipient and the service provider in connection with or arising out of the contract, the parties will make every effort to resolve amicably such dispute or difference by mutual consultation. After seven (7) days from the date the dispute is first brought to the notice of either party, if the parties have failed to resolve their dispute or difference by such mutual consultation, then the dispute shall be referred in writing by either party to the adjudicator, with a copy to the other party.

15.2 In the event of any dispute between the parties, resolution shall be done in following manner:

15.2.1 **First Stage-** The Superintending Engineer of the concerned circle shall be the dispute resolution authority.

15.2.2 **Second stage-** If dispute is not resolved in first stage then Chief Engineer (concerned region) shall be dispute resolution authority at second stage.

15.2.3 **Third stage-** If dispute is not resolved in second stage the corporate level authority (as decided by the Managing Director of authority designated by him) shall be the dispute resolution authority.

Section V of General Condition of Contract as contained in the tender document also provides that:-

"15.3 Notwithstanding any disputes with reference to the contract pending for arbitration, the contractor shall continue to perform his obligations in accordance with the purchaser/service recipient's decision or instruction, and purchaser/service recipient shall also continue to perform his obligations under the contract including payment of any undisputed monies due to the contractor."

32. The aforesaid clause clearly reveals that at the first instance the parties are required to make an effort to resolve the dispute amicably through mutual consultation in three stages with dispute resolution authorities, failing which the dispute is to be referred

to the 'adjudicator'. In place of "arbitrator" the parties have used the word "adjudicator" to convey the same meaning. The aforesaid clause makes it clear the intention of the parties is to resolve the dispute through the adjudicatory process in case of failure of consultation process. Clause 15.3 noted above makes the said intention further clear, hence the Clause 15 is not a clause relating to the one sided decision by the departmental authority or the expert but it is in fact an arbitration clause.

33. Counsel for the respondent has also raised an issue that the agreement between the parties has not been executed in terms of Article 299 of the Constitution but he has not disputed the fact that the respondent is not covered within the meaning of State for the purposes of Article 299 and therefore, he has not carried this argument any further.

34. Learned counsel for appellant has also raised a ground that interim measure has wrongly been issued in the facts of the present case. But such a contention cannot be accepted in view of the undisputed position that respondent has been blacklisted without issuing any show cause notice and without giving any opportunity of hearing. Blacklisting has serious civil and penal consequences as it takes away the right of a party to participate in future tenders, therefore, before taking such an action compliance of principle of natural justice and giving clear showcause notice disclosing the proposed acts is necessary.

35. Supreme court in the matter of *M/s Erusian Equipment & Chemicals Ltd. Vs. State of West Bengal and another* reported in (1975) 1 SCC 70 has held that blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the government for purposes of gains, therefore, fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is put on the black list.

36. In the matter of *Gorkha Security Services Vs. Government (NCT of Delhi) and others* reported in (2014) 9 SCC 105 it has been held that blacklisting has to be preceded by a show-cause notice since blacklisting has many civil and/or evil consequences and it is also described as civil death of a person who is foisted with the order of blacklisting.

37. In the matter of *Gorkha Security Services* (supra) it has been held that:

> "16. It is a common case of the parties that the blacklisting has to be preceded by a show cause notice. Law in this regard is firmly grounded and does not even demand much amplification. The necessity of compliance with the principles of natural justice by giving the opportunity to the person against whom action of

blacklisting is sought to be taken has a valid and solid rationale behind it. With blacklisting many civil and/ or evil consequences follow. It is described as "civil death" of a person who is foisted with the order of blacklisting. Such an order is stigmatic in nature and debars such a person from participating in Government Tenders which means precluding him from the award of Government contracts.

17. Way back in the year 1975, this court in the case of . *Erusian Equipment & Chemicals Ltd. v. State of West Bengal* highlighted the necessity of giving an opportunity to such a person by serving a show cause notice thereby giving him opportunity to meet the allegations which were in the mind of the authority contemplating blacklisting of such a person. This is clear from the reading of Para Nos. 12 and 20 of the said judgment. Necessitating this requirement, the court observed thus:

"12. Under Article 298 of the Constitution the executive power of the Union and the State shall extend to the carrying on of any trade and to the acquisition, holding and disposal of property and the making of contracts for any purpose. The State can carry on executive function by making a law or without making a law. The exercise of such powers and functions in trade by the State is subject to Part III of the Constitution. Article 14 speaks of equality before the law and equal protection of the laws. Equality of opportunity should apply to matters of public contracts. The State has the right to trade. The State has there the duty to observe equality. An ordinary individual can choose not to deal with any person. The Government cannot choose to exclude persons by discrimination. The order of blacklisting has the effect of depriving a person of equality of opportunity in the matter of public contract. A person who is on the approved list is unable to enter into advantageous relations with the Government because of the order of blacklisting. A person who has been dealing with the Government in the matter of sale and purchase of materials has a legitimate interest or expectation. When the State acts to the prejudice of a person it has to be supported by legality.

20. Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gains. The fact that a disability is created

by the order of blacklisting indicates that the relevant authority is to have an objective satisfaction. Fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is put on the blacklist".

18. Again, in *Raghunath Thakur v. State of Bihar and Ors.;*(1989) 1 SCC 229 the aforesaid principle was reiterated in the following manner:-

"4. Indisputably, no notice had been given to the appellant of the proposal of blacklisting the appellant. It was contended on behalf of the State Government that there was no requirement in the rule of giving any prior notice before blacklisting any person. Insofar as the contention that there is no requirement specifically of giving any notice is concerned, the respondent is right. But it is an implied principle of the rule of law that any order having civil consequence should be passed only after following the principles of natural justice. It has to be realised that blacklisting any person in respect of business ventures has civil consequence for the future business of the person concerned in any event. Even if the rules do not express so, it is an elementary principle of natural justice that parties affected by any order should have right of being heard and making representations against the order. In that view of the matter, the last portion of the order insofar as it directs blacklisting of the appellant in respect of future contracts, cannot be sustained in law. In the premises, that portion of the order directing that the appellant be placed in the blacklist in respect of future contracts under the Collector is set aside. So far as the cancellation of the bid of the appellant is concerned, that is not affected. This order will, however, not prevent the State Government or the appropriate authorities from taking any future steps for blacklisting the appellant if the Government is so entitled to do in accordance with law i.e. after giving the appellant due notice and an opportunity of making representation. After hearing the appellant, the State Government will be at liberty to pass any order in accordance with law indicating the reasons therefor. We, however, make it quite clear that we are not expressing any opinion on the correctness of otherwise of the allegations made against the appellant. The appeal is thus disposed of."

19. Recently, in *Patel Engineering Ltd. v. Union of India and Anr.;* (2012) 11 SCC 257 speaking through one of us (Jasti Chelameswar, J.) this Court emphatically reiterated the principle by explaining the same in the following manner:

"13. The concept of "blacklisting" is explained by this Court in Erusian *Equipment & Chemicals Ltd. v. State of W.B.* as under:

"20. Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gains."

14. The nature of the authority of the State to blacklist the persons was considered by this Court in the abovementioned case and took note of the constitutional provision (Article 298), which authorises both the Union of India and the States to make contracts for any purpose and to carry on any trade or business. It also authorises the acquisition, holding and disposal of property. This Court also took note of the fact that the right to make a contract includes the right not to make a contract. By definition, the said right is inherent in every person capable of entering into a contract. However, such a right either to enter or not to enter into a contract with any person is subject to a constitutional obligation to obey the command of Article 14. Though nobody has any right to compel the State to enter into a contract, everybody has a right to be treated equally when the State seeks to establish contractual relationships. The effect of excluding a person from entering into a contractual relationship with the State would be to deprive such person to be treated equally with those, who are also engaged in similar activity.

15. It follows from the above judgment in Erusian Equipment case that the decision of the State or its instrumentalities not to deal with certain persons or class of persons on account of the undesirability of entering into the contractual relationship with such persons is called blacklisting. The State can decline to enter into a contractual relationship with a person or a class of persons for a legitimate purpose. The authority of the State to blacklist a person is a necessary concomitant to the executive power of the State to carry on the trade or the business and making of contracts for any purpose, etc. There need not be any statutory grant of such power. The only legal limitation upon the exercise of such an authority is

that the State is to act fairly and rationally without in any way being arbitrary – thereby such a decision can be taken for some legitimate purpose. What is the legitimate purpose that is sought to be achieved by the State in a given case can vary depending upon various factors."

20. Thus, there is no dispute about the requirement of serving show cause notice. We may also hasten to add that once the show cause notice is given and opportunity to reply to the show cause notice is afforded, it is not even necessary to give an oral hearing. The High Court has rightly repudiated the appellant's attempt in finding foul with the impugned order on this ground. Such a contention was specifically repelled in Patel Engg."

38. Having regard to the aforesaid settled position in law and the fact that respondent has been blacklisted without issuing any show cause notice and without giving an opportunity of hearing I am of the opinion that no error has been committed by the court below in issuing interim measure and staying the order dated 17/11/14 by which the respondent was blacklisted.

39. The above analysis makes it clear that the order under challenge in these appeals do not suffer from any error and no case for interference is made out. The appeals are accordingly dismissed. The signed order be placed in the record of AA No. 3/2016 and copy whereof be placed in the record of connected appeals.

C.C. as per rules.

Appeal dismissed.

I.L.R. [2018] M.P. 186
CIVIL REVISION
Before Mr. Justice Vivek Rusia
C.R. No. 129/2017 (Indore) decided on 5 October, 2017

OMPRAKASH & ors. ...Applicants
Vs.
PRATAP SINGH & ors. ...Non-applicants

***Civil Procedure Code (5 of 1908), Order 7 Rule 11, Order 1 Rule 3B and Section 80(1) & (4) – Agricultural Land – Notice* – Revision against dismissal of application filed by the petitioner/ defendant under Order 7 Rule 11 CPC – Suit for declaration and permanent injunction against the petitioner – Held – As per State Amendment in Section 80 CPC by way of Sub-section 4, the suit filed for declaration of a title in respect of agricultural land is not**

liable to be dismissed for want of notice u/S 80(1) because as per Order 1 Rule 3B (State Amendment), the State Government is a necessary party in a suit or proceeding for declaration of title or any right over agricultural land – Only requirement is that State Government must be the defendant or non-applicant in the suit and a notice u/S 80(1) CPC is not mandatory – No error in the impugned order – Revision dismissed.

(Para 9 & 10)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 11, आदेश 1 नियम 3बी एवं धारा 80(1) व (4) – कृषि भूमि – नोटिस – याची/प्रतिवादी द्वारा आदेश 7 नियम 11 सि.प्र.सं. के अंतर्गत प्रस्तुत किये गये आवेदन की खारिजी के विरूद्ध पुनरीक्षण– याची के विरूद्ध घोषणा एवं स्थाई व्यादेश हेतु वाद – अभिनिर्धारित – धारा 80 सि.प्र.सं. में उप धारा 4 के जरिए, राज्य के संशोधन द्वारा कृषि भूमि के संबंध में हक की घोषणा हेतु प्रस्तुत वाद, धारा 80 (1) के अंतर्गत नोटिस के अभाव में, खारिज किये जाने योग्य नहीं क्योंकि आदेश 1 नियम 3बी (राज्य का संशोधन) के अनुसार, राज्य सरकार, कृषि भूमि पर हक की घोषणा या किसी अधिकार हेतु वाद अथवा कार्यवाही में एक आवश्यक पक्षकार है – केवल अपेक्षा यह है कि राज्य सरकार, वाद में प्रतिवादी या अनावेदक होनी चाहिए तथा धारा 80 (1) सि.प्र.सं. के अंतर्गत नोटिस आज्ञापक नहीं है – आक्षेपित आदेश में कोई त्रुटि नहीं – पुनरीक्षण खारिज।

Nitin Phadke, for the applicant.

O R D E R

Vivek Rusia, J. :- The petitioner has filed the present revision being aggrieved by the order dated 21.07.2017 by which his application under Order 7 Rule 11 of CPC has been rejected.

2. The respondent No.1 to 11 filed the suit for declaration and permanent injunction against the present petitioner No.1 to 4 and respondent Nos.12 to 24. The plaintiff has sought relief of declaration that they be declared owner and the name of defendant Nos.1, 3, 9 & 13 be removed from the revenue record as owner. They further sought relief in the nature of permanent injunction that the sale deed dated 14.02.2011 and 21.02.2011 executed between the defendants be declared void and defendant Nos.1, 3, 9 and 13 be restrained not to interfere into the possession.

3. After notice, defendant Nos.1, 3, 9 and 13 filed an application under Order 7 Rule 11 read with Section 151 of CPC that the suit is liable to be rejected as the plaintiff has not properly valued the suit and did not paid the proper court fees. As no notice under Section 80 of the CPC was served to the State Government before filing the suit, therefore, the suit is liable to be rejected.

4. The said application was opposed by the plaintiff by filing reply. Learned Trial Court vide order dated 21.07.2017 rejected the application on the ground that the plaintiffs are not the party in the sale deed, therefore, they are not required to pay the court fees as per the market value mentioned in the sale deed and they are also not liable to pay the ad-valorem court fees. The suit has been properly valued for declaration and permanent injunction.

5. Being aggrieved by the aforesaid order, the defendant Nos. 1, 3, 9 and 13 filed the present revision.

6. I have heard Shri Nitin Phadake, learned counsel for the petitioner.

7. Shri Nitin Phadake, learned counsel for the petitioner submits that under Section 80 of the CPC, notice is required to be given to the State Government before filing the suit. The plaintiffs have not filed any application for waiver of the notice in order to obtaining urgent or immediate relief. Learned trial Court has not considered the provisions of Section 80 of the CPC while rejecting the application.

8. The plaintiffs have not sought any relief against the State Government.They have only pleaded that cause of action arose on 02.08.2016 when the defendant No.1, 3, 9, and 13 got mutated their names through Revenue Officer. The plaintiffs sought the main relief of declaration and consequential relief that the names of defendant Nos. 1, 3, 9 and 13 be deleted from the revenue records as owners. Learned trial Court has rightly held that the issue of cause of action is a matter of evidence which is required to be decided by way of evidence. The plaintiffs are mainly aggrieved by the sale of land to defendants Nos. 1, 3, 9 and 13 by other defendants which is not the Act purporting to be done by the Public Officer. The relief of cancellation of order of mutation is a consequential relief.

9. Even otherwise, there is a state amendment by Government of Madhya Pradesh by way of insertion of sub-section 4 in Section 80 of the CPC vide Act No. 29 of 1984 w.e.f. 14.08.1984. According to which, where in a suit or a proceeding referred to in Rule 3B of Order 1, the state is joined as a defendant or non-applicant, such suit of proceeding shall not be dismissed by reasons of omission of plaintiff or applicant to issue notice under sub-section 1 of Section 80, the Rule 3B has been inserted in Order 1 by way of state amendment vide Madhya Pradesh Act 29 of 1984 and according to which no suit or proceeding for declaration or title for any right over an agricultural land is required to be filed without impleading the State Government as defendant or non-applicant. Sub-section 4 of Section 80 is reproduced below:

"Madhya Pradesh-In Section 80,–

(a) in sub-section (1), for the words, brackets and figures "sub-section (2)", substitute the words, brackets and figures "sub-section (2) or sub-section (4)"

(b) after sub-section (3), insert the following sub-section, namely:-

"(4) where in a suit or proceeding referred to in rule 3B of Order 1, the State is joined as a defendant or non-aplicant in exercise of powers under sub rule (2) of rule 10 of Order I such suit or proceeding shall not be dismissed by reason of ommission of the plaintiff or applicant to issue notice under sub-section (1)"

Rule 3-B is reproduced below:

"STATE AMENDMENT

Madhya Pradesh.- In Order 1, after rule 3A, insert the following rule namely:-

"3B. Conditions for entertainment of suits.-(1) No suit or proceeding for-

(a) declaration of title or any right over any agricultural land, with or without any other relief; or

(b) specific performance of any contract for transfer of any agricultural land, with or without any other relief, shall be entertained by any court, unless the plaintiff or applicant, as the case may be, knowing or having reason to believe that a return under section 9 of the Madhya Pradesh Ceiling on Agricultural Holdings Act, 1960 (No. 20 of 1960) in relation to land aforesaid has been or is required to be filed by him or by any other person before competent authority appointed under that Act, has impleaded the State of Madhya Pradesh as one of the defendants or non-applicants, as the case may be, to such suit or proceeding.

(2) No Court shall proceed with pending suit or proceeding referred to in sub-rule (1) unless, as soon as may be, the State Government is so impleaded as a defendant or non-applicant. Explanation.— The expression "suit or proceeding" used in this sub-rule shall include appeal, reference or revision, but shall not include any proceeding for or connected with execution of any decree or final order passed in such suit or proceeding."

[Vide Madhya Pradesh Act 29 of 1984, Sec.5 (w.e.f 14-8-1984).]"

10. Therefore, as per the co-joint reading of sub-section 4 of Section 80 read with Order 1 Rule 3B, the only requirement is that the State Government must be the defendant or non-applicant in a suit for declaration of title over any agricultural land and a notice under Section 80 (1) is not mandatory.

11. Hence, the learned trial Court has not committed any error while passing the impugned order.

12. Revision Petition fails and hereby **dismissed**.

Revision dismissed.

I.L.R. [2018] M.P. 190
CIVIL REVISION
Before Mr. Justice Anurag Shrivastava
C.R. No. 262/2017 (Jabalpur) decided on 6 October, 2017

VINOD KUMAR SHARMA ...Applicant
Vs.
SATYA NARAYAN TIWARI & ors. ...Non-Applicants

Civil Procedure Code (5 of 1908), Order 7 Rule 11 and Court Fees Act (7 of 1870), Article 17(iii) of Second Schedule – Ad-valorem Court Fee – **Revision against dismissal of application filed by Applicant/defendant under Order 7 Rule 11 CPC regarding *ad-valorem* court fee – Plaintiff filed a suit for possession of disputed land and for perpetual injunction against applicant/defendant – Trial Court dismissed the application/objection of the defendant on the ground that Plaintiff is not a party in subsequent sale deed, therefore he is not required to pay *ad-valorem* court fee – Held – For purpose of determination of court fee, only allegation made in the plaint are relevant and the defence raised in the written statement cannot be looked into – Plaintiff has sought a relief of declaration that subsequent sale deed is null and void and not binding on him – Plaintiff is not a party or executant in the said subsequent sale deed - Court fee has to be determined as per Article 17(iii) of Second Schedule of Court Fees Act – Further held – Whether earlier sale deed was cancelled or not binding upon plaintiff is a matter of evidence – No illegality in the impugned order – Revision dismissed.**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 11 एवं न्यायालय फीस अधिनियम (1870 का 7), द्वितीय अनुसूची का अनुच्छेद 17 (iii) – *मूल्यानुसार न्यायालय फीस* – आवेदक/प्रतिवादी द्वारा मूल्यानुसार न्यायालय फीस के संबंध में सि.प्र.सं. के आदेश 7 नियम 11 अंतर्गत प्रस्तुत किये गये आवेदन की खारिजी के विरूद्ध पुनरीक्षण – वादी ने विवादित भूमि के कब्जे एवं शाश्वत व्यादेश हेतु आवेदक/प्रतिवादी के विरूद्ध वाद प्रस्तुत किया – विचारण न्यायालय ने प्रतिवादी का आवेदन/आक्षेप इस आधार पर खारिज किया कि वादी, पश्चात्वर्ती विक्रय विलेख में पक्षकार नहीं है इसलिए उससे मूल्यानुसार न्यायालय फीस का भुगतान अपेक्षित नहीं है – अभिनिर्धारित – न्यायालय फीस के निर्धारण के प्रयोजन हेतु केवल वादपत्र में किया गया अभिकथन सुसंगत है तथा लिखित कथन में उठाया गया प्रतिवाद विचार में नहीं लिया जा सकता – वादी ने घोषणा का अनुतोष चाहा है कि पश्चात्वर्ती विक्रय विलेख शून्य एवं अकृत है तथा उस पर बाध्यकारी नहीं है – वादी उक्त पश्चात्वर्ती विक्रय विलेख का पक्षकार या निष्पादी नहीं है – न्यायालय फीस अधिनियम की द्वितीय अनुसूची के अनुच्छेद 17 (iii) के अनुसार न्यायालय फीस का निर्धारण किया जाना चाहिए – आगे अभिनिर्धारित – क्या पूर्ववर्ती विक्रय विलेख निरस्त किया गया था अथवा वादी पर बाध्यकारी नहीं था, यह साक्ष्य का मामला है – आक्षेपित आदेश में कोई अवैधता नहीं – पुनरीक्षण खारिज।

Cases referred :

2010 M.P.L.J. Online (S.C) 2 = (2010) 12 SCC 112.

Abhay Gupta, for the applicant.
None, for the non-appldicant.

O R D E R

Anurag Shrivastava, J. :- By this revision petition under Section 115 of C.P.C. the applicant questions the legality and validity of impugned order dated 21.02.2017 passed by Second Civil Judge Class- I Hoshangabad in Civil Suit No. 20/2016 by which the applicant/defendant's application under Order VII Rule 11 C.P.C. has been dismissed.

2. The plaintiff filed his suit before the trial Court stating that plaintiff's father Rameshwar had borrowed Rs.10,000/- from Laxmi Prasad and executed a sale-deed dated 07.05.1980 in favour of nephew of Laxmi Prasad namely Vinod in security of loan amount. This sale deed was fictitious and the possession of disputed land remained with plaintiff and his father. Later on, the entire loan was repaid by plaintiff in the year 1995. Laxmi Prasad also executed an agreement dated 11.08.1995 acknowledging the receipt of loan amount and cancelled the sale deed. After the death of Laxmi Prasad in the year 2008, the plaintiff asked defendant No.1 Vinod Kumar to execute sale deed of the disputed

land in favour of plaintiff. He assured to execute the same but on 31.03.2013 he had sold the disputed land to defendant No.2 by executing the registered sale deed dated 31.03.2013. It is averred by the plaintiff that this subsequent sale deed dated 31.03.2013 is null and void, confers no right or title on defendant No.2. Since earlier sale deed dated 07.05.1980 was already cancelled,therefore, defendant No.1 has no right or title over the disputed land. The disputed land is joint family property of plaintiff in which they have got shares. Rameshwar the father alone cannot dispose of the entire land. Therefore, the plaintiff prayed for relief of declaration that the subsequent sale deed dated 31.03.2013 is null and void and not binding upon plaintiffs and also relief of perpetual injunction against the defendants.

3. The defendants filed an objection under Order VII Rule 11 of C.P.C. wherein it is stated that the sale deed dated 07.05.1980 was a valid sale deed executed by father of the plaintiffs which is binding upon them. By virtue of sale, defendant No. 1 Vinod became owner of the property and he had sold the land to defendant No.2 by executing sale deed dated 31.03.2013. Therefore, this sale deed is also binding upon plaintiffs. The plaintiff is indirectly seeking the cancellation of sale deed by way of declaration that the earlier sale deed dated 07.05.1980 is null and void and not binding upon them. Therefore, plaintiffs have to pay ad-valorem court fee.

4. The trial Court by passing impugned order dismissed the objection of defendant on the ground that the plaintiff is not party in subsequent sale deed 31.03.2013, therefore, he is not required to pay ad-valorem Court fee.

5. Heard arguments.

6. It is settled law that for the purpose of determination of Court fee only allegation made in the plaint are relevant and the defense raised in written statement cannot be looked into. In the present case it is not disputed that the plaintiff has sought a relief of declaration that the subsequent sale deed dated 31.03.2013 is null and void and not binding upon him. He is not the party in aforesaid sale deed. The Supreme Court in case of *Suhrid Singh @ Sardool Singh vs. Randhir Singh and Others,* reported in 2010 M.P.L.J Online (S.C) 2 = (2010) 12 SCC 112 has observed in para 7 as under:-.

> "7. Where the executants of a deed wants it to be annulled, he has to seek cancellation of the deed. But if a non-executant seeks annulment of a deed, he has to seek a declaration that the deed is invalid, or non-est, or illegal or that it is not binding on him. The difference between a prayer for cancellation and declaration in regard to a deed of transfer conveyance, can be brought out by the following illustration relating to 'A' and 'B' two brothers. 'A'

executes a sale deed in favour of 'C'. Subsequently 'A' wants to avoid the sale. 'A' has to sue for cancellation of the deed. On the other hand, if 'B', who is not the executants of the deed, wants to avoid it, he has to sue for a declaration that the deed executed by 'A' is invalid/void and non-est/ illegal and he is not bound by it. In essence both may be suing to have the deed set aside or declared as non-binding. But the form is different and Court fee is also different. If 'A', the executants of the deed, seeks cancellation of the deed, he has to pay ad-valorem Court fee on the consideration stated in the sale deed. If 'B', who is a non-executant, is in possession and sues for a declaration that the deed is null or void and does not bind him or his share, he has to merely pay a fixed Court fee of Rs.19.50 under Article 17(iii) of Second Schedule of the Act. But, if 'B', a non-executant, is not in possession, and he seeks not only a declaration that the sale deed is invalid, but also the consequential relief of possession, he has to pay an ad-valorem Court fee as provided under Section 7(iv)(c) of the Act."

7. In present case plaintiff is claiming that he is in possession of the disputed land and prayed for perpetual injunction against the defendant. Therefore, as plaintiff is not a party or executant of disputed sale deed, therefore, he need not pay ad-valorem court fee. The Court fee has to be determined as per Article 17(iii) of Second Schedule of the Court Fees Act. At this stage the defense of defendant cannot be considered. Whether earlier sale deed was cancelled or not binding upon plaintiff is a matter of evidence.

8. Thus, the trial Court has rightly dismissed the objection of defendant/applicant by passing impugned order. There is no illegality in it.

9. Consequently, this revision petition is hereby dismissed.

Revision dismissed.

I.L.R. [2018] M.P. 193
CIVIL REVISION
Before Mr. Justice J. K. Maheshwari

C.R. No. 9/2012 (Jabalpur) decided on 2 November, 2017

SITA BAI (SMT.) & ors. ...Applicants
Vs.
SMT. SADDA BAI ...Non-applicant

***Civil Procedure Code (5 of 1908), Order 7 Rule 11 and Benami Transactions (Prohibition) Act, (45 of 1988), Section 2(a), 2(c) & 4 – Benami Property – Right of such Property* – Revision against dismissal of application**

filed by Petitioner/defendant under Order 7 Rule 11 – Plea of plaintiff in respect of the disputed property is, that the same was purchased in the name of Sheela Bai for which consideration was paid by the husband of plaintiff – Declaration of title and injunction has been sought by the plaintiff while claiming her right in the property – Held – As per Section 2(a) of the Act of 1988, such transaction would fall within the purview of "Benami Transaction" and any such immovable property purchased would be the benami property as specified u/S 2(c) of the Act – Section 4 of the Act of 1988 prohibits the right to recover such benami property – Order passed by Trial Court is set aside – Application filed by petitioner/defendant under Order 7 Rule 11 is allowed and suit by plaintiff is hereby rejected – Revision allowed.

(Para 11 & 12)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 11 एवं बेनामी संव्यवहार (प्रतिषेध) अधिनियम (1988 का 45), धारा 2(ए), 2(सी) व 4 – बेनामी संपत्ति – ऐसी संपत्ति का अधिकार – याची/प्रतिवादी द्वारा आदेश 7 नियम 11 के अन्तर्गत प्रस्तुत आवेदन की खारिजी के विरूद्ध पुनरीक्षण – विवादित संपत्ति के संबंध में वादी का अभिवाक् है कि उक्त संपत्ति शीला बाई के नाम पर क्रय की गई थी जिसके लिए प्रतिफल का भुगतान वादी के पति द्वारा किया गया था – वादी द्वारा संपत्ति पर अपने अधिकार का दावा करते हुये स्वत्व एवं व्यादेश की घोषणा चाही गई है – अभिनिर्धारित– 1988 के अधिनियम की धारा 2(ए) के अनुसार ऐसा संव्यवहार "बेनामी संव्यवहार" की परिधि में आयेगा एवं क्रय की गई ऐसी कोई अचल संपत्ति बेनामी संपत्ति होगी, जो कि अधिनियम की धारा 2(सी) के अंतर्गत विनिर्दिष्ट है – 1988 के अधिनियम की धारा 4 ऐसी बेनामी संपत्ति के प्रत्युद्धरण के अधिकार को प्रतिषिद्ध करती है – विचारण न्यायालय द्वारा पारित आदेश अपास्त – याची/प्रतिवादी द्वारा आदेश 7 नियम 11 के अंतर्गत प्रस्तुत आवेदन मंजूर एवं याची द्वारा वाद एतद् द्वारा नामंजूर – पुनरीक्षण मंजूर।

Case referred :

2012 (3) MPLJ 129.

Z.M. Shah, for the applicants.
Pranay Verma, for the non-applicant.

O R D E R

J.K. Maheshwari, J. :- Being aggrieved by the order dated 24.11.2011 passed in Civil Suit No.16A/2011by the 1st Civil Judge Class-II Gadarwara, District Narsinghpur rejecting the application filed by the petitioners/defendants under Order VII Rule 11 of the Code of Civil Procedure (hereinafter shall be referred to as ''CPC''), this revision has been preferred under Section 115 of the C.P.C.

2. The fact giving rise to file the present revision is that the plaintiff Sadda Bai W/o Late Sardar Singh filed a suit against the defendants interalia pleading that the land of Khasra No.327/2 area 0.271 hectare of Village Tekapar, Tahsil Tendukheda, District Narsinghpur was purchased in the name of her sister Sheela Bai though the amount of consideration was paid by her husband. Sheela Bai died on 18.1.2011 and during her life time, an agreement dated 30.9.1990 was executed mentioning that on receiving the amount of Rs.10000/- paid by the husband of the respondent/plaintiff, the land has been purchased in the name of Sheela Bai for which the amount of consideration was not paid by her. It is said by the said document, the plaintiff was put in possession on the suit land. It is also pleaded, Sheela Bai during her life time executed a sale deed on 6.10.2010 in favour of defendant No.1 at Narsinghpur though the land is situated at Tendukheda and the Sub Registrar Tendukheda may register the sale deed. However, it is urged that the sale deed executed on 6.10.2010 do not confer any right to the defendants and the plaintiff is in possession by virtue of the agreement dated 30.9.1990, therefore, they be declared owner thereof and the defendants be restrained to interfere in their possession.

3. The defendants have filed an application under Order VII Rule 11 of the C.P.C interalia contending that the land of Khasra No.327/2 area 0.271 hectare of Village Tekapar, Tahsil Tendukheda, District Narsinghpur has been said to be the land purchased in the name of sister of the plaintiff on payment of the amount of consideration by the husband of the plaintiff. The said transaction falls within the purview of "Benami Transaction" which is prohibited under the law. However, by taking such plea, title in the suit land cannot be claimed and such property be called as the Benami Property, therefore, the suit for declaration of title is liable to be dismissed.

4. The Trial Court rejected the application Order VII Rule 11 of the C.P.C recording the finding that the property has been purchased in the name of Sheela Bai by the husband of the plaintiff but the said averment itself would not be sufficient, until proved by the evidence. However, the plea in the application is not tenable at this stage and the said plea may be decided after the evidence of both the parties on merits.

5. Learned counsel for the petitioners to buttress his contentions has placed reliance on the judgment of this Court in the case of *Anand Kumar Versus Vijay Kumar & Others* reported in 2012 (3) MPLJ 129 and contended that the suit based on the plea of Benami Transaction and to claim the right over the property on the basis of the said plea is prohibited, therefore, the suit filed by the plaintiff is liable to be rejected as barred by law.

6. On the other hand, learned counsel for the respondent contends that the plaintiff cannot be prohibited to take such plea in the suit and merely on the basis of the

pleading in this regard, the suit itself cannot be dismissed without bringing evidence by the parties to prove it. It is also contended that on the basis of the said plea, the suit seeking injunction cannot be dismissed, hardly it may be an impediment to the suit for declaration of the title over the suit property. In the present suit, the declaration as well as injunction has been sought for, however, at least the suit for injunction can be maintained, therefore, the Trial Court has rightly rejected the application filed by the petitioners/defendants under Order VII Rule 11 of the C.P.C.

7. After having heard learned counsel for the parties and to advert the arguments, first of all the provisions of Benami Transactions (Prohibition) Act, 1988 (hereinafter shall be referred to as "Act of 1988") are required to be perused. Section 2(a) defines the "Benami Transaction" and Section 2(c) defines the "Property" which are being reproduced as under:-

> "2(a) "Benami Transaction" means any transaction in which property is transferred to one person for a consideration paid or provided by another person.
>
> 2(c) "Property" means property of any kind, whether movable or immovable, tangible or intangible, and includes any right or interest in such property."

8. On perusal of the aforesaid, it is apparent that in a transaction wherein the property is transferred by one person for consideration paid or provided by another person would be called as "Benami Transaction". It is also apparent that the "Property" would include the movable or immovable, tangible or intangible including any right or interest in such property. As per Section 3, the person cannot be permitted to enter in the "Benami Transaction" but the transaction in the name of his wife and unmarried daughter is saved until contrary is proved to it. Sub-section (3) of Section 3 makes such transaction punishable under the law though Section 3 of Benami Transactions (Prohibition) Act, 1988 is omitted by Act No.43 of 2016 with effect from 1.1.2016. Section 4 provides prohibition of the right to recover the property held "Benami". The said provision is relevant, however, reproduced as under:-

> "4. Prohibition of the right to recover property held benami – (1) No suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other person shall lie by or on behalf of a person claiming to be the real owner of such property.
>
> (2) No defence based on any right in respect of any property held benami, whether against the person in whose

> name the property is held or against any other person, shall be allowed to be the real owner of such property.
>
> (3) Nothing in this section shall apply–
>
> (a) where the person in whose name the property is held is a coparcener in a Hindu undivided family and the property is held for the benefit of the coparceners in the family; or
>
> (b) where the person in whose name the property is held is a trustee or other person standing in a fiduciary capacity, and the property is held for the benefit of another person for whom he is a trustee or towards whom he stands in such capacity."

9. On perusal of the aforesaid, it is crystal clear that the suit, claim or action, taking a plea to enforce any right in respect of a property held benami would not lie by or on behalf of a person claiming to be the real owner of such property. By sub-section (2), similar plea has been restrained to be taken in a defence as restrained to be taken to claim the right. The exception carved out is with regard to the property held to be the coparcenery in a Hindu undivided family and the property held for the benefit of the coparcener in the family.

10. It is a trite law that to decide the application under Order VII Rule 11 of the C.P.C, the averments of the plaint and the objection taken are required to be seen. However, looking to the foregoing provisions of the Act of 1988, now the plea taken in the plaint by the plaintiff requires consideration to adjudicate the objection raised by the defendants in the application. Paragraph No.3 of the plaint specifies that on persuasion of the plaintiff, her husband has purchased the property of Khasra No.327/2 area 0.271 hectare of Village Tekapar, Tahsil Tendukheda, District Narsinghpur in the name of Sheela Bai her elder sister-in-law and paid the amount of consideration. To acknowledge it, during the life time, Sheela Bai executed an agreement in the shape of a *Sauda Chitthi* in the name of plaintiff in front of the witnesses acknowledging the fact that Rs.10000/- had taken by her from the plaintiff towards consideration of the land and since then plaintiff was put into possession of the property. It is further said, Sheela Bai died on 8.1.2011 but prior to her death, she executed a sale deed in favour of defendant No.1 on 6.10.2010, by which the defendant No.1 does not acquire any right and title because Sheela Bai herself was not having any right in the suit property because the amount of consideration was paid by the husband of the plaintiff, therefore, the real owner was the husband of the plaintiff and Sheela Bai would not be owner thereof merely because of the sale deed in her name. However, the declaration of the ownership on the basis of the agreement mentioning the said fact and the injunction has been sought for in the suit.

11. Thus, looking to the plea taken by the plaintiff in the suit, it is with respect to the immovable property based on the transaction of a property in the name of Sheela Bai to which consideration was paid by the husband of the plaintiff and during the life time Sheela Bai executed an agreement by way of *Sauda Chitthi* in the name of the plaintiff and relying upon the said plea, the right has been claimed in the property. As per Section 2(a), it would fall within the purview of "Benami Transaction" and any immovable property purchased by such transaction would be the benami property as specified in Section 2(c). Section 4 of the Act of 1988 prohibits the right to recover the property held benami, however, the word "held benami" is having some relevance to the finding recorded by the Trial Court. In this respect, it is relevant to mention here, that admission by the parties is best piece of evidence to the plea taken in the proceedings. In the present case, the foundation of the pleading in the suit is based upon the plea of benami transaction seeking declaration of title and injunction acknowledged in the agreement dated 30.9.1990 in contradistinction to the registered sale deed in the name of Sheela Bai, however, the suit on the basis of such plea asking declaration cannot be maintained. By the said pleading itself, the property in question which is purchased in the name of Sheela Bai, claimed by the plaintiff in lieu of payment of consideration by her husband on insistence of the plaintiff itself would be called as''Benami Transaction'' and such property would fall within the purview of property "held benami".

12. In my considered opinion, the aforesaid pleading apparently brings the case of the plaintiff within the purview of property "held benami'' purchased by "Benami Transaction'' and the right to recover the said property has been prohibited, therefore, the objection taken by the defendants in the application under Order VII Rule 11 of the C.P.C dismissing the suit as barred by law is valid and the rejection of such application by the Trial Court is illegal and in excess to the jurisdiction without appreciating the provisions of the law, therefore, it is liable to be set aside. The foregoing discussion fortifies from the judgment of *Anand Kumar* (supra). Therefore, the irresistible conclusion, which can be arrived in the present case is to set aside the impugned order dated 24.11.2011 allowing the application under Order VII Rule 11 of the C.P.C and to direct to reject the suit filed by the plaintiff.

13. Resultantly, this revision petition stands allowed setting aside the impugned order dated 24.11.2011 passed in Civil Suit No.16A/2011 by the 1st Civil Judge Class-II Gadarwara, District Narsinghpur and to reject the plaint filed by the plaintiff allowing the application under Order VII Rule 11 of the C.P.C. In the facts and circumstances of the case, the parties are directed to bear their costs.

Revision allowed.

I.L.R. [2018] M.P. 199

CRIMINAL REVISION

Before Mr. Justice Vivek Agarwal

Cr.R. No. 543/2017 (Gwalior) decided on 1 September, 2017

LAXMI THAKUR (SMT.) & anr. ...Applicants

Vs.

STATE OF M.P. ...Non-applicant

***Penal Code (45 of 1860), Section 420, 467, 468, 471, 120-B and Criminal Procedure Code, 1973 (2 of 1974), Amendment of 2007 – Retrospective Effect* – After taking cognizance by the JMFC, the case was committed to Sessions Court – Challenge to – Held – It is settled principle of law that the statutes dealing merely with matters of procedure are presumed to be retrospective unless such construction is textually inadmissible – Further held, it is also the law that proceedings or trials completed before the change of law in procedure are not reopened for applying the new procedure – In the present case, trial was not completed and therefore committal of case to the Sessions Court in terms of amendment will not render it illegal – No illegality in the impugned order – Revision dismissed.**

(Para 5 & 6)

दण्ड संहिता (1860 का 45), धारा 420, 467, 468, 471, 120–B एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), 2007 का संशोधन – भूतलक्षी प्रभाव – न्यायिक मजिस्ट्रेट प्रथम श्रेणी के द्वारा संज्ञान लेने के पश्चात्, प्रकरण सत्र न्यायालय को उपांतरित किया गया था – को चुनौती – अभिनिर्धारित – यह विधि का सुस्थापित सिद्धान्त है कि मात्र प्रक्रिया के मामलों से संबंधित कानूनों को भूतलक्षी उपधारित किया जाएगा जब तक कि ऐसा अभिप्राय पाठ की दृष्टि से अग्राह्य न हो – आगे अभिनिर्धारित, यह भी विधि है कि प्रक्रिया विधि में परिवर्तन होने से पहले पूर्ण हुई कार्यवाहियों या विचारणों को नई प्रक्रिया लागू करने हेतु फिर से शुरू नहीं किया जाता है – वर्तमान प्रकरण में, विचारण पूर्ण नहीं हुआ था एवं इसलिए संशोधन के रूप में प्रकरण को सत्र न्यायालय को उपांतरित किया जाना, इसे अवैध नहीं बनायेगा – आक्षेपित आदेश में कोई अवैधता नहीं – पुनरीक्षण खारिज।

Cases referred :

AIR 1975 SC 1843, AIR 1990 SC 209, (1966) 1 ALL.E.R. 524, AIR 2001 SC 2472, AIR 1970 SC 1636, ILR 2013 MP 741.

V.K. Saxena with *Jagdish Singh,* for the applicants.

Vivek Mishra, P.P. for the non-applicant/State.

O R D E R

Vivek Agarwal, J:- This Criminal Revision has been filed under Section 397/401 of Cr.P.C. against the order dt.21.04.2017 passed by the Fourth Additional Sessions Judge, Gwalior in Case No.192/2016 deciding the application dt.22.12.2016 filed by the accused persons.

2. In the said application, it is mentioned that the incident in question relates to the year 2005. Cognizance of the offence under Sections 420, 468, 467, 471, 120-B of IPC was taken by the Judicial Magistrate First Class and charges were framed by the concerning JMFC. Thereafter there was an amendment in the Code of Criminal Procedure and the matter was committed to the Sessions Court.

3. It is submitted by the petitioners that since the incident took place in the year 2005 and the amendment has been made subsequently authorizing the Sessions Judge to take cognizance of the offence, as mentioned above, therefore, the matter should not have been committed to the Sessions Court but should have been tried by the JMFC. In view of such submissions, learned senior counsel for the petitioners prays for quashing the impugned order dt.21.4.2017 rejecting their application dt.22.12.2016.

4. Shri Vivek Jain, learned Public Prosecutor for the respondent/State supports the impugned order.

5. It is well settled principle of laws that the statutes dealing merely with matters of procedure are presumed to be retrospective unless such construction is textually inadmissible. Attention is invited to the law laid down by the Hon'ble Supreme Court in the case of *Jose Da Costa and another Vs. Bascora Sadasiva Sinai Narcornim* as reported in AIR 1975 SC 1843 and *Gurbachan Singh Vs. Satpal Singh* as reported in AIR 1990 SC 209. In this regard, LORD DENNING in the case *Blyath Vs. Blyth* (1966) 1 All.E.R.524 has noted that "the rule that an Act of Parliament is not to be given retrospective effect applies only to statutes which affect vested rights. It does not apply to statutes which only alter the form of procedure or the admissibility of evidence, or the effect which the courts give to evidence."

In **Interpretation of Statutes by MAXWELL, 11th Edition, Page 216,** it has been mentioned that "No person has a vested right in any course of procedure. He has only the right of prosecution or defence in the manner prescribed for the time being by or for the court in which the case is pending, and if, by an Act of Parliament the mode of procedure is altered, he has no other right that to proceed according to the altered mode." This has been relied even in the case of *Gurbachan Singh* (supra).

In the case of *Shyam Sunder Vs. Ram Kumar* as reported in AIR 2001 SC 2472, it has been held that law relating to forum and limitation is procedural in nature

whereas law relating to right of action and right of appeal even though remedial is substantive in nature; that a procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished; that a statute which not only changes the procedure but also creates new rights and obligations shall be construed to be prospective, unless otherwise provided either expressly or by necessary implication." Thus, the onus is on the petitioners to show that the procedural amendment will impose new duties in respect of transaction already accomplished and also creates new rights and obligations.

6. It is also the law that the proceedings or trials completed before the change of law in procedure are not reopened for applying the new procedure as has been laid down in the case of *Nani Gopal Mitra Vs. State of Bihar* as reported in AIR 1970 SC 1636 but in the present case the trial was not completed and since trial was not completed, committal of the case to the Sessions court in the terms of amendment will not render it illegal, as has been noted by the learned Additional Sessions Judge placing reliance on the case of *R.K.Soni Vs. State of M.P.* as reported in I.L.R. 2013 M.P. 741 holding that Madhya Pradesh Amendment Act 2007 amending the provisions of Criminal Procedure Code have retrospective effect.

7. In view of such legal position, this court is of the opinion that there is no illegality, shortcoming or imperfection in the impugned order dismissing the application for remitting the matter to the JMFC for trial, merely because JMFC had taken cognizance prior to amendment in the year 2007, and the same does not call for any interference. Thus, the revision fails and is dismissed.

Revision dismissed.

I.L.R. [2018] M.P. 201
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice H.P. Singh

M.Cr.C. No. 14670/2017 (Jabalpur) decided on 4 September, 2017

RAMESH ... Applicant

Vs.

STATE OF M.P. ... Non-applicant

***Wild Life (Protection) Act, (53 of 1972), Section 9, 39, 44, 49-B, 51 & 52 – Consideration of Bail– Grounds* – Skin of leopard was seized from the applicant/accused – Held – Prima facie, applicant/accused is involved in a very grave and serious offence as the wild animal leopard comes under Schedule – I, Part I of the Wild Life (Protection) Act, 1972 – Further held –**

Population of tigers, leopards and other wild animals is rapidly declining in our country and skins, bones and other organs of tiger and leopard are in great demand in international market – At this stage of investigation, bail cannot be granted to applicant/accused – Application dismissed.

(Para 7)

वन्य जीव (संरक्षण) अधिनियम, (1972 का 53), धारा 9, 39, 44, 49–B, 51 व 52 – जमानत पर विचार किया जाना – आधार – आवेदक/अभियुक्त से तेंदुए की खाल जब्त की गई थी – अभिनिर्धारित – प्रथम दृष्टया, आवेदक/अभियुक्त एक घोर एवं गंभीर अपराध में शामिल है क्योंकि वन्य प्राणी तेंदुआ, वन्य जीव (संरक्षण) अधिनियम, 1972 की अनुसूची –I, भाग I के अंतर्गत आता है – आगे अभिनिर्धारित – हमारे देश में बाघों, तेंदुओं और अन्य वन्य प्राणियों की संख्या तेजी से घट रही है तथा बाघ और तेंदुए की खाल, हड्डियां और अन्य अंगों की अंतर्राष्ट्रीय बाजार में अधिक मांग है – अन्वेषण के इस प्रक्रम पर, आवेदक/अभियुक्त को जमानत प्रदान नहीं की जा सकती – आवेदन खारिज।

Pradeep Naveria, for the applicant.
A.S. Pathak, G.A. for the non-applicant/State.

(Supplied Paragraph numbers)

O R D E R

H.P. Singh, J. :- Heard.

2. This is first bail application filed on behalf of the applicant under Section 439 of the Cr.P.C.

3. The applicant is in custody since 14.07.2017, in connection with Crime No. 203/17 registered at Police Station Lanji, District Balaghat (MP), for the offence punishable under Sections 9, 39, 44, 49- B,51 and 52 of the Wild Life (Protection) Act, 1972.

4. As per prosecution, on the information received from the informer that one person is carrying skin of a wild animal, motorcycle bearing registration No. MP-50-MB/5227 was stopped and checked by the Police and found that applicant Ramesh was carrying the skin of Leopard kept in a plastic bag. During investigation, memorandum statement of applicant was taken and in his memorandum statement, he stated that the said skin has been given to him by one Konda, who is resident of Kharadi.

5. Learned counsel for the applicant contends that applicant is innocent. He has been falsely implicated. It is further submitted that offence is triable by Magistrate and conclusion of trial will take time. He is permanent resident of District

Balaghat and there is no chance of his absconding. It is also submitted that applicant has no criminal antecedents and keeping him in jail, will not serve any fruitful purpose. On these grounds, learned counsel for the applicant prays for grant of bail to the applicant.

6. Per-contra, learned G.A. for respondent-State opposes the bail application and submits that this is a serious offence and applicant should not be enlarged on bail at this stage of investigation.

7. I have heard learned counsel for both the parties and perused the case-diary. Prima-facie, the applicant is involved in a very grave and serious offence as the Wild Animal Leopard comes under Schedule-I, Part-I of the Wild Life (Protection) Act. It is a matter of common knowledge that population of tigers, leopards and other wild animals is rapidly declining in our country and the skins of tiger and leopard are in great demand in the international market, even the bones and other organs of the tigers and leopards are in great demand in the countries like China, Taiwan and Thailand. Therefore, at least at this stage of investigation, I am not inclined to grant bail to applicant-**Ramesh**.

Consequently, M.Cr.C. stands dismissed.

Application dismissed.

I.L.R. [2018] M.P. 203
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice C.V. Sirpurkar

M.Cr.C. No. 6960/2015 (Jabalpur) decided on 21 September, 2017

ANANT VIJAY SONI ...Applicant

Vs.

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

(Alongwith Cr.R. No. 2195/2015)

A. Penal Code (45 of 1860), Section 376 and Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, (33 of 1989), Section 3(1)(xii) - Rape - Quashment of FIR **– Held - Though prosecutrix belonged to a scheduled caste, she was a mature and educated lady, worked in different organizations like NGO's and Insurance Companies - In the FIR as well as statements u/S 161 and 164 Cr.P.C., she concealed the fact of her earlier marriage which was in existence from 2007 and continued till 2012 when the decree of divorce was passed - From 2010 to 2012, she was in a live-in-relationship with the petitioner, knowingly that she continued to be a legally wedded wife from her**

earlier marriage and thus her sexual relationship with the petitioner was in nature of adulterous relationship - Due to her subsisting valid marriage, there was no question of any one being in a position to induce her into a physical relationship under an assurance of marriage thus contentions of prosecutrix is *per se false* and unacceptable - It was a relationship between two consenting adults for mutual sexual enjoyment without any commitment to marriage - Allowing the prosecution to continue would amount to abuse of the process of Court - FIR quashed and charges framed are set aside - Petition allowed. (Paras 17, 20 & 21)

क. दण्ड संहिता (1860 का 45), धारा 376 एवं अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 3(1)(xii) – बलात्संग – प्रथम सूचना प्रतिवेदन का अभिखंडन – अभिनिर्धारित – यद्यपि अभियोक्त्री अनुसूचित जाति की थी, वह एक परिपक्व और शिक्षित महिला थी, जो कि विभिन्न संगठनों जैसे गैर–सरकारी संगठनों एवं बीमा कंपनियों में कार्य कर चुकी थी – प्रथम सूचना प्रतिवेदन तथा दण्ड प्रक्रिया संहिता की धारा 161 एवं 164 के अंतर्गत कथनों में, उसने अपने पहले विवाह के तथ्य का छिपाव किया जो कि 2007 से अस्तित्व में था और 2012 तक जारी रहा, जब विवाह विच्छेद की डिक्री पारित हुई थी – 2010 से 2012 तक, वह याची के साथ लिव–इन–रिलेशनशिप में थी, यह जानते हुये भी कि वह अपने पहले विवाह से वैध रूप से विवाहित पत्नी रही एवं इसलिए याची के साथ उसके लैंगिक संबंध जारता संबंध की प्रकृति के थे – उसके विधिमान्य विवाह के अस्तित्व में रहने के कारण, ऐसी स्थिति में किसी का उसे विवाह के आश्वासन के अधीन शारीरिक संबंध बनाने हेतु उत्प्रेरित करने का कोई प्रश्न नहीं था इसलिए अभियोक्त्री के तर्क अपने आप में मिथ्या हैं तथा अस्वीकार किये जाने योग्य हैं – यह दो सहमत वयस्कों के बीच, विवाह की किसी प्रतिबद्धता के बिना आपसी लैंगिक उपभोग हेतु एक संबंध था – अभियोजन को जारी रहने हेतु मंजूरी देना न्यायालय की प्रक्रिया का दुरूपयोग होगा – प्रथम सूचना प्रतिवेदन अभिखंडित तथा विरचित किये गये आरोप अपास्त – याचिका मंजूर।

***B. Criminal Procedure Code, 1973 (2 of 1974), Section 482 and Constitution - Article 226 - Practice and Procedure - Documents for Consideration - Interference after framing of charges - Writ Jurisdiction* – Held - In a proceeding u/S 482 Cr.P.C., the documents filed by the defence, which are not annexed with the charge-sheet can be taken into consideration - Petitioner filed a copy of the joint petition for mutual divorce, judgment and decree thereof and the same were neither disputed by prosecution nor by the complainant - Court can consider such undisputed documents - Further held, petition u/S 482 Cr.P.C. would not be rendered infructuous simply because the charge has been framed by the Trial Court - Further held, Court may in exercise of powers under Article 226 of the Constitution or u/S 482 Cr.P.C. interfere with proceedings relating to cognizable**

offence to prevent abuse of the process of any court or otherwise to secure the ends of justice, however power should be exercised sparingly and that too in rarest of rare cases.

(Paras 12, 16, & 22)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 एवं संविधान – अनुच्छेद 226 – पद्धति एवं प्रक्रिया – विचार हेतु दस्तावेज – आरोपों की विरचना के पश्चात् हस्तक्षेप – रिट अधिकारिता – अभिनिर्धारित – दण्ड प्रक्रिया संहिता की धारा 482 के अन्तर्गत कार्यवाही में, बचाव द्वारा प्रस्तुत दस्तावेजों को जो कि आरोप–पत्र के साथ अनुलग्न नहीं हैं, विचार में लिया जा सकता है – याची ने आपसी विवाह–विच्छेद के लिए संयुक्त याचिका की प्रतिलिपि, उसका निर्णय एवं डिक्री प्रस्तुत की एवं उक्त न तो अभियोजन द्वारा और न ही परिवादी द्वारा विवादित थे – न्यायालय ऐसे अविवादित दस्तावेजों पर विचार कर सकती है – आगे अभिनिर्धारित, दण्ड प्रक्रिया संहिता की धारा 482 के अन्तर्गत याचिका केवल इस कारण से निष्फल नहीं मानी जाएगी, कि आरोप विचारण न्यायालय द्वारा विरचित किया गया है – आगे अभिनिर्धारित, न्यायालय संविधान के अनुच्छेद 226 के अन्तर्गत शक्तियों के प्रयोग में या दण्ड प्रक्रिया संहिता की धारा 482 के अन्तर्गत न्यायालय की प्रक्रिया का दुरूपयोग रोकने हेतु या अन्यथा न्याय के उददे्श्य की सुरक्षा करने हेतु संज्ञेय अपराध से संबंधित कार्यवाहियों के साथ हस्तक्षेप कर सकती है, तथापि शक्ति का प्रयोग मितव्ययी रूप से होना चाहिए एवं वह भी विरलतम से विरल प्रकरणों में।

Cases referred :

AIR 2013 SC (Supp) 1056, AIR 2013 SC 2753, AIR 2013 SC 506, AIR 2011 SC 1090, (2012) 1 SCC 520, AIR 2003 SC 1639, AIR 1992 SC 604.

Sankalp Kochar, for the applicant.
Yogesh Dhande, G.A. for the non-applicant/State.
Abhishek Arjaria, for the complainant.

O R D E R

C.V. Sirpurkar, J. – Miscellaneous Criminal Case No.6960/2015 has been instituted on 28.04.2015 on an application under section 482 of the Code of Criminal Procedure filed on behalf of petitioner/accused Anant Vijay Soni for quashing the first information report no. 33/2015 registered by Mahila Thana, Bhopal on 25.03.2015 under section 376 of the Indian Penal Code and 3(1)(xii) of SC & ST (Prevention of Atrocities) Act, 1989.

2. Criminal Revision No.2195/2015 is directed against the order dated 04.08.2015 passed by the Court of Special Judge, Bhopal appointed under SC & ST (Prevention of Atrocities) Act, 1989 in Case No. SC-ATR/36/2015 registered upon the charge

sheet arising from aforesaid FIR no.33/2015 registered by Mahila Thana, Bhopal against the accused/petitioner.

3. Since both of aforesaid cases have arisen from same crime no.33/2015 registered by Mahila Thana, Bhopal against petitioner Anant, they have been analogously heard and are being decided by this common order.

4. The case of the prosecution before the trial Court may be summarized as hereunder: Prosecutrix is a 27 years old educated lady belonging to a scheduled caste, who runs her own non-governmental organization. In the year 2008, she was Manager in Birla Sun life Insurance Company. Petitioner Anant Vijay Soni was her neighbour. The prosecutrix got the petitioner employed as Adviser Agent in Birla Sun life Insurance Company. Thereafter the petitioner developed closeness with her, which later turned into a romantic relationship. On 10.04.2010, on the birthday of the prosecutrix, the petitioner took her to Salkanpur. When the prosecutrix asked as to when petitioner intends to marry her. The petitioner replied that he would marry only the prosecutrix and if she did not believe him he would marry her immediately. Thereafter, the petitioner put vermilion in her hair and assured her that they had become husband and wife. After their return to Bhopal, the petitioner went along with the prosecutrix to her house and the same night had sexual intercourse with her. Thereafter, the petitioner used to visit Bangalore and Mumbai off and on and stayed at the residence of the prosecutrix, as her husband and continued to exploit her physically. In the year 2012, the prosecutrix and the petitioner told the mother of the prosecutrix that they had married in the temple in the year 2010. During the period of next two years, he promised three or four times to the mother of the prosecutrix that he would marry the prosecutrix. In the year 2013, the petitioner's sister Sarika Soni opened a call centre in the partnership with the petitioner and shifted to her residence after promising the prosecutrix that their relationship would continue. On 07.10.2013, he had taken the prosecutrix for treatment to Dr. Malti Bhugwani. On 16.06.2014, which was birthday of the petitioner, they were sleeping together. At about 03:00 a.m., there was a call on mobile phone of the petitioner. When the prosecutrix picked the phone, she found that there was a girl on the other side. When the prosecutrix accosted the petitioner regarding the girl, he slapped her and instructed her not to receive his mobile phone. Thereafter, he demanded Rs.60-70,000/- from the prosecutrix on the pretext that he was shifting to Pune and needed money to pay to the landlord. However, the prosecutrix refused to give him any money. On 01.10.2014, when the prosecutrix was shifting residence, the petitioner helped her in shifting the household goods. On that occasion also, he promised the mother of the prosecutrix that he would marry the prosecutrix around Makar Sankranti the following year. On 14.12.2014, the petitioner had sexual intercourse with the prosecutrix for the last time and the same day, the

prosecutrix had gone to the Railway Station to see off the petitioner, who was going to Pune. When the prosecutrix reminded the petitioner of his promise to marry her, he declined and taunted her that the people from her caste clean toilets. He humiliated the prosecutrix with reference to her caste. After that, he started to avoid the prosecutrix and would not receive her telephone calls or respond to her messages. On 03.02.2015, when the prosecutrix called the petitioner on telephone, he humiliated her with reference to her caste and instructed her not to bother him on telephone again. Thus, the petitioner had sexually exploited the prosecutrix on false promise of marriage, cheated her off Rs.6-7 lacs, humiliated and insulted her with reference to her caste and thereafter when he had enough of her, refused to have anything to do with her. The prosecutrix lodged the first information report on 25.03.2015. Pursuant to aforesaid first information report lodged by the prosecutrix, Mahila Thana, Bhopal investigated the matter and filed a charge sheet in the Court of Special Judge, Bhopal. The Special Judge, Bhopal framed charge of the offences punishable under sections 376(1) of the Indian Penal Code and 3(2)(v) and 3(1)(xii) of the SC & ST (Prevention of Atrocities) Act,1989.

5. Petitioner Anant had challenged the first information report lodged against him by means of the petition under section 482 of the Code of Criminal Procedure filed on 28.04.2015. During the pendency of aforesaid petition, the charge was framed by the trial Court. Consequently, he filed criminal revision no.2195/2015 on 03.09.2015 for setting aside the charge.

6. Learned counsel for the petitioner has prayed for quashing of the first information report and setting aside of the charge mainly on the grounds that the prosecutrix was in her early thirties when the petitioner is said to have married her in the temple. She was a mature and educated working woman. She had married one Rajesh Bele on 07.07.2007. Rajesh Bele and the prosecutrix filed for divorce by mutual consent in the Court of Principal Judge, Family Court, Bhopal under section 13-B of the Hindu Marriage Act, 1955 on 07.12.2011. Subsequently, a decree of divorce by mutual consent was passed on 28.06.2012. Thus, the marriage between Rajesh Bele and the prosecutrix subsisted from 07.07.2007 till 28.06.2012. As such, on 10.04.2010 when the petitioner is said to have married the prosecutrix in a temple and is said to have had sexual intercourse with her for the first time, she was in the wedlock with aforesaid Rajesh Bele. In these circumstances, there could have been no promise of marriage, false or otherwise. In support of aforesaid contention, the petitioner has filed copies of the petition under S. 13-B of the Hindu Marriage Act filed jointly by Rajesh Bele and the prosecutrix on 07.12.2011 and copy of the judgment and decree of divorce by mutual consent dated 28.06.2012 passed thereon by Principal Judge, Family Court, Bhopal.

7. Learned counsel for the petitioner has contended that even if all allegations made in the first information report against the petitioner are taken at their face value and presumed to be true, it is clear that the consent for repeated instances of intercourse was not granted by the prosecutrix on any misconception of facts but this was a sexual relationship between two consenting adults for mutual enjoyment without any commitment. A consensual sexual intercourse would not become rape simply because the relationship between the parties has become sour subsequently. In this regard, learned counsel for the petitioner has placed reliance upon the case of *Rajiv Thapar and others vs. Madan Lal Kapoor,* AIR 2013 SC (Supp) 1056 and has submitted that for quashing first information report on a petition under section 482 of the Code of Criminal Procedure, the Court can consider the documents filed by the defence provided they are unimpeachable and are of sterling character. Learned counsel for the petitioner has also placed reliance upon the judgment rendered by the Supreme Court in the case of *Prashant Bharti vs. State (NCT of Delhi),* AIR 2013 SC 2753 and has contended that during the subsistence of earlier valid marriage, it cannot be said that the prosecutrix was induced into a physical relationship under an assurance of marriage. In these circumstances, it has been urged that the first information report has obviously been lodged with an ulterior motive to wreck vengeance upon the petitioner; therefore, it deserves to be quashed and the charge framed by the trial Court is liable to be set aside.

8. Learned Government Advocate for the respondent/State and learned counsel for the respondent no.2 have vehemently opposed the petition under section 482 of the Code of Criminal Procedure and criminal revision filed under section 397 of the Code of Criminal Procedure. It has been contended that both of them would not be maintainable.

9. Learned counsel for the prosecutrix has invited attention of the Court to statements made by the prosecutrix under sections 164 and 161 of the Code of Criminal Procedure and the statement made by her mother under section 161 of the Code of Criminal Procedure and has submitted that the prosecutrix is a woman belonging to a scheduled caste. She was sexually exploited for a period of more than 4 years by the petitioner who belonged to a upper caste. The prosecutrix submitted to sexual exploitation due to false promise of marriage repeatedly made by the petitioner to her and her mother. Thus, the consent given by the prosecutrix was based upon misconception of fact and would not convert the rape committed by the petitioner upon the prosecutrix into the act of consent. It has also been submitted that the petitioner had insulted and humiliated the prosecutrix with reference to her scheduled caste at a place in public view; therefore, it has been contended that the first information report is not liable to be quashed; however, the learned counsel for the prosecutrix has not disputed the documents filed by the petitioner with regard to earlier marriage

namely the petition under section 13-B of the Hindu Marriage Act and the judgment and decree dated 28.06.2012 rendered by Family Court, Bhopal.

10. On perusal of record and due consideration of rival contentions, the Court is of the view that the petition under section 482 of the Code of Criminal Procedure must **succeed** for the reasons hereinafter stated.

11. First of all the Court shall consider whether this petition under section 482 of the Code of Criminal Procedure is maintainable even after framing of the charge in the case.

12. It is true that after filing of the petition under section 482 of the Code of Criminal Procedure, the case before the trial Court proceeded and subsequently a charge as stated above, has been framed by the trial Court; however, the Supreme Court has held in the case of *Satish Mehra Vs. State (NCT of Delhi) and another,* AIR 2013 SC 506 that the power under section 482 of the Code of Criminal Procedure for quashing the first information report would be available for exercise not only at the threshold of the criminal proceedings but also at a relatively advance stage thereof, namely after framing of charge against the accused. Thus, it is clear that a petition under section 482 of the Code of Criminal Procedure would not be rendered infructuous simply because the charge has been framed by the trial Court. Thus, the Court would treat the petition under section 482 of the Code of Criminal Procedure as being maintainable and proceed to adjudicate it on merits.

13. The next question that arises for consideration is whether in proceedings under section 482 of the Code of Criminal Procedure for quashing the first information report, the documents filed by the defence, which are not annexed to the charge sheet, can be taken into consideration ?

14. In the case of *Rajiv Thapar* (supra), the Supreme Court had delineated the following steps to determine the veracity of a prayer for quashing, raised by an accused by invoking the power vested in the High Court under section 482 of the Cr.P.C.:

(i) Step one, whether the material relied upon by the accused is sound, reasonable, and indubitable, i.e., the material is of sterling and impeccable quality?

(ii) Step two, whether the material relied upon by the accused, would rule out the assertions contained in the charges levelled against the accused, i.e. the material is sufficient to reject and overrule the factual assertions contained in the complaint, i.e. the material is such, as would persuade a reasonable person to dismiss and condemn the factual basis of the accusations as false.

(iii) Step three, whether the material relied upon by the accused, has not been refuted by the prosecution/ complainant; and /or the material is such, that it cannot be justifiably refuted by the prosecution/complainant

(iv) Step four, whether proceeding with the trial would result in an abuse of process of the Court, and would not serve the ends of justice?

If the answer to all the steps is in the affirmative, judicial conscience of the High Court should persuade it to quash such criminal proceedings, in exercise of power vested in it under Section 482 of the Cr. P. C.

15. The aforesaid principles may also be found to have been adopted by the Supreme Court in the cases of *Harshendra Kumar D. vs. Rebatilata Koley,* AIR 2011 SC 1090 and *Anita Malhotra vs. Apparel Export Promotion Council,* (2012) 1 SCC 520.

16. In the case at hand, we may note that the petitioner/accused has placed reliance upon the joint petition for divorce by mutual consent filed under section 13-B of the Hindu Marriage Act by the prosecutrix and her husband Rajesh Bele in the Court of Principal Judge, Family Court and the judgment and decree dated 28.06.2012 passed by that Court. These documents have not been disputed by the prosecution or the prosecutrix before this Court in any manner. Therefore, the Court shall consider those documents for the purpose of determining whether the first information report is liable to be quashed.

17. A perusal of the petition under section 13-B of the Hindu Marriage Act reveals that on 07.12.2011, the prosecutrix had given her age as 26 years. It is not in dispute that though the prosecutrix belonged to a scheduled caste, she was a mature and educated lady with experience of working in different organizations like non-governmental organization and Insurance Companies. Thus, she was a modern lady having a mind of her own. The prosecutrix has concealed the factum of her previous marriage to aforesaid Rajesh Bele in the first information report and her statements to the police under section 161 and 164 of the Code of Criminal Procedure; however, it is absolutely clear from the documents filed by the petitioner that she had married Rajesh Bele on 07.07.2007 by Hindu Rites. She separated from Rajesh Bele in August, 2007. However, the petition for divorce by mutual consent was filed on 07.12.2011 and the decree of divorce was granted on 28.06.2012. These facts and the documents on which they are based have not been disputed by the prosecutrix. As per the allegations made by the prosecutrix, the petitioner put vermilion in her hair and asserted that they had become husband and wife, on 10.04.2010. As per her allegations, she first had sexual intercourse with the petitioner the same night. Thereafter, they lived as husband and wife continuously till 16.12.2014. Thus, she continued in a live in

relationship with the petitioner for a period of about 4 years and 8 months between 10.04.2010 and 16.12.2014. Out of aforesaid duration, from 10.04.2010 till 12.06.2012 i.e. for a period of about 2 years and 2 months, she continued to be legally wedded to her first husband Rajesh Bele. As such, by her own admission, her sexual relationship with the petitioner for a period of about 2 years and 2 months was in the nature of an adulterous relationship.

18. In the case of *Prashant Bharti* (supra), in similar fact situation, the Supreme Court has held in paragraph no.16 that:

16. The factual position narrated above would enable us to draw some positive inferences on the assertion made by the complainant/prosecutrix against the appellant-accused (in the supplementary statement dated 21.2.2007). It is relevant to notice, that she had alleged, that she was induced into a physical relationship by Prashant Bharti, on the assurance that he would marry her. Obviously, an inducement for marriage is understandable if the same is made to an unmarried person. The judgment and decree dated 23.9.2008 reveals, that the complainant/prosecutrix was married to Lalji Porwal on 14.6.2003. It also reveals, that the aforesaid marriage subsisted till 23.9.2008, when the two divorced one another by mutual consent under Section 13B of the Hindu Marriage Act. In her supplementary statement dated 21.2.2007, the complainant/ prosecutrix accused Prashant Bharti of having had physical relations with her on 23.12.2006, 25.12.2006 and 1.1.2007 at his residence, on the basis of a false promise to marry her. It is apparent from irrefutable evidence, that during the dates under reference and for a period of more than one year and eight months thereafter, she had remained married to Lalji Porwal. In such a fact situation, the assertion made by the complainant/prosecutrix, that the appellant-accused had physical relations with her, on the assurance that he would marry her, is per se false and as such, unacceptable. She, more than anybody else, was clearly aware of the fact that she had a subsisting valid marriage with Lalji Porwal. Accordingly, there was no question of anyone being in a position to induce her into a physical relationship under an assurance of marriage. If the judgment and decree dated 23.9.2008 produced before us by the complainant/ prosecutrix herself is taken into consideration along with the factual position depicted in the supplementary statement dated 21.2.2007, it would clearly emerge, that the complainant/prosecutrix was in a relationship of adultery on 23.12.2006, 25.12.2006 and 1.1.2007 with the appellant-accused, while she was validly married to her previous husband Lalji Porwal. In the aforesaid view of the matter, we are satisfied that the assertion made by the complainant/prosecutrix,

that she was induced to a physical relationship by Prashant Bharti, the appellant-accused, on the basis of a promise to marry her, stands irrefutably falsified.

19. Likewise, in the case of *Uday Vs. State of Karnataka,* AIR 2003 SC 1639, the Supreme Court has held that :

In a case of this nature two conditions must be fulfilled for the application of S. 90, I. P. C. Firstly, it must be shown that the consent was given under a misconception of fact. Secondly, it must be proved that the person who obtained the consent knew, or had reason to believe that the consent was given in consequence of such misconception.

It, therefore, appears that the consensus of judicial opinion is in favour of the view that the consent given by the prosecutrix to sexual intercourse with a person with whom she is deeply in love on a promise that he would marry her on a later date, cannot be said to be given under a misconception of fact. A false promise is not a fact within the meaning of the Code. We are inclined to agree with this view, but we must add that there is no strait jacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact. In the ultimate analysis, the tests laid down by the Courts provide at best guidance to the judicial mind while considering a question of consent, but the Court must, in each case, consider the evidence before it and the surrounding circumstances, before reaching a conclusion, because each case has its own peculiar facts which may have a bearing on the question whether the consent was voluntary, or was given under a misconception of fact. It must also weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredient of the offence, absence of consent being one of them.

20. In the light of aforesaid principles, when we revert back to the facts of the case at hand, we find that the prosecutrix has alleged that she entered into a sexual relationship with the petitioner on assurance that he would marry her; however, she was clearly aware of the fact that she was in a subsisting valid conjugal relationship with Rajesh Bele, yet she repeatedly indulged in sexual intercourse with the petitioner for a period of 2 years and 2 months. Thus, her assertions that she submitted to physical relationship with the petitioner on the assurance that he would marry her, is *per se* false and as such, unacceptable. Due to her subsisting valid marriage, there was no question of any one being in a position to induce her into a physical relationship under an assurance of marriage. Thus, it is clear that the prosecutrix was in an adulterous relationship with the petitioner from 10.04.2010 to 28.06.2012. In these

circumstances, it is clear as day that the assertions made by the prosecutrix that she was induced into a physical relationship by petitioner Anant on the basis of promise to marry, stands irrefutably falsified.

21. It is obvious that the prosecutrix entered into physical relationship with the petitioner with her eyes open during the subsistence of her previous valid marriage. It was a relationship between two consenting adults who knew their respective minds, for mutual sexual enjoyment without any commitment to marry. The conduct of the petitioner as brought forth in the statement of the prosecutrix that he floated in and out of her residence as he pleased, indicate as much. In any case, a woman like prosecutrix well acquainted with of the ways of the world, would not wait for an inordinately long period of four years and eight months to realize that the petitioner had no intention to marry her. Had she entered into physical relationship on the promise of marriage, she would have realized long ago that this relationship had no future and would have walked out of it long ago. This also indicates that there indeed was no commitment to marry.

22. The Supreme Court has held in the case of *State of Haryana Vs. Bhajan Lal,* AIR 1992 SUPREME COURT 604 that in following categories of cases, the Court may, in exercise of powers under Article 226 of the Constitution or under Section 482 of the Cr.P.C., interfere with proceedings relating to cognizable offence to prevent abuse of the process of any Court or otherwise to secure the ends of justice; however, the power should be exercised sparingly and that too in rarest of rare cases.

1) Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

2) Where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers under S.156(1) of the Code except under an order of a Magistrate within the purview of S.155(2) of the Code.

3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

4) Where, the allegations in the F.I.R. do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under S.155(2) of the Code.

5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

23. As already observed hereinabove the present one appears to be a case of consent between the two adults for mutual physical gratification. This is also a case where the false promise of marriage was allegedly made during the subsistence of earlier marriage of the prosecutrix. In these circumstances, it appears that the case has been instituted after intimate relationship between the parties for a period of about 5 years had gone sour; therefore, the case falls in category number 7 enumerated above. In this backdrop, the allegation of the prosecutrix that the petitioner had humiliated and insulted her with reference to scheduled castes on the railway station in public view, can also not be relied upon.

24. In aforesaid view of the matter, allowing the prosecution to continue in the case would amount to abuse of the process of Court; therefore, it is necessary to quash the proceedings in order to serve the ends of justice. As such, the FIR in the instant case is liable to be quashed.

25 Consequently, this miscellaneous criminal case instituted under Section 482 of the Cr.P.C. is allowed. The first information report number 33/2015, registered by Police Station Mahila Thana, Bhopal dated 25.3.2015, is quashed.

26 Criminal Revision No.2195/2015 is also allowed and the charge framing under Section 376 (1) of the I.P.C. and Sections 3 (2)(v) and 3(1)(xii) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1969, is also set aside.

Application allowed.

I.L.R. [2018] M.P. 215
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice Atul Sreedharan
M.Cr.C. No. 9969/2016 (Jabalpur) decided on 3 October, 2017

KUNTAL BARAN CHAKRABORTY & ors. ...Applicants
Vs.
CENTRAL BUREAU OF INVESTIGATION & anr. ...Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Section 156(3) – Exercise of Jurisdiction by Magistrate **– CBI after investigation filed a closure report before Magistrate whereby Magistrate u/S 156(3) Cr.P.C. directed further investigation – Similarly, this continued for three occasions where CBI filed the closure reports and Magistrate repeatedly directed further investigation and ultimately CBI filed a charge sheet against the petitioners – Held – The last order passed u/S 156(3) shows that CBI was directed to further investigate on 5 points which were already investigated by the CBI in its earlier closure reports – It is apparent that CBI filed charge sheet against petitioners out of sheer desperation – It is a case of subliminal coercion of CBI which was the result of persistent orders by the Court below u/S 156(3) on account of which CBI was somewhere compelled to ultimately file a charge sheet against the petitioners despite having filed detailed and reasoned closure reports on three earlier occasions – For exercising powers u/S 156(3) Cr.P.C. by the Magistrate/Court, guidelines framed/issued – Crime registered by CBI and proceedings thereto are quashed – Petition allowed.**

(Paras 32 to 34)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 156(3) – मजिस्ट्रेट द्वारा अधिकारिता का प्रयोग – केन्द्रीय अन्वेषण ब्यूरो ने अन्वेषण के पश्चात् मजिस्ट्रेट के समक्ष एक समाप्ति प्रतिवेदन प्रस्तुत किया जिसके द्वारा मजिस्ट्रेट को दण्ड प्रक्रिया संहिता की धारा 156(3) के अन्तर्गत आगे अन्वेषण हेतु निदेशित किया गया – समान रूप से, यह तीन अवसरों तक जारी रहा जहाँ केन्द्रीय अन्वेषण ब्यूरो ने समाप्ति प्रतिवेदन प्रस्तुत किया तथा मजिस्ट्रेट ने बार–बार आगे अन्वेषण हेतु निदेशित किया एवं अंततः केन्द्रीय अन्वेषण ब्यूरो ने याचीगण के विरूद्ध आरोप पत्र प्रस्तुत किया – अभिनिर्धारित – धारा 156 (3) के अन्तर्गत पारित हुआ अंतिम आदेश यह दर्शाता है कि केन्द्रीय अन्वेषण ब्यूरो को उन पांच बिन्दुओं पर आगे अन्वेषण करने हेतु निदेशित किया गया था जिनका अन्वेषण केन्द्रीय अन्वेषण ब्यूरो द्वारा अपने पूर्व समाप्ति प्रतिवेदन में पहले ही किया जा चुका है – यह स्पष्ट है कि केन्द्रीय अन्वेषण ब्यूरो ने केवल निराशा में याचीगण के विरूद्ध आरोप–पत्र प्रस्तुत किया – यह केन्द्रीय अन्वेषण ब्यूरो के प्रभावशाली/अचेतन प्रपीड़न का प्रकरण है जो कि धारा 156(3)

के अन्तर्गत निचले न्यायालय द्वारा सतत् आदेशों का परिणाम था, जिसके कारण केन्द्रीय अन्वेषण ब्यूरो तीन पूर्वतर अवसरों पर विस्तृत और तर्कसंगत समाप्ति प्रतिवेदन प्रस्तुत करने के बावजूद याचीगण के विरूद्ध अंततः आरोप–पत्र प्रस्तुत करने के लिए विवश हुई थी – मजिस्ट्रेट/न्यायालय द्वारा दण्ड प्रक्रिया संहिता की धारा 156 (3) के अन्तर्गत शक्तियों का प्रयोग करने हेतु दिशा निर्देश विरचित/जारी किये गये – केन्द्रीय अन्वेषण ब्यूरो द्वारा पंजीबद्ध अपराध एवं उसकी कार्यवाही अभिखंडित – याचिका मंजूर।

Cases referred :

AIR 1968 SC 117, (2012) 2 SCC 731.

S.C. Datt with *Som Prakash,* for the applicants.
J.K. Jain, Addl. Solicitor General for the non-applicant No.1. CBI.
Shyam Narayan Vishwakarma, for the non-applicant No. 2.

O R D E R

Atul Sreedharan, J. :- The petition under consideration raises an important question of law with regard to the exercise of jurisdiction u/s. 156(3) by the court upon the filing of a final report for closure of the case u/s. 173(2) Cr.P.C by the investigating agency, and whether the same can be exercised *ad nauseum* compelling the investigating agency to ultimately file a charge-sheet? Also, whether the repeated directions u/s. 156(3) Cr.P.C by the Court of cognizance is violative of the law laid down by the Supreme Court, where the Supreme Court has held that though the court of cognizance can direct further investigation u/s. 156(3) Cr.P.C, it cannot direct the investigating agency to file a charge sheet against the accused.

The petition has been filed by the Petitioners herein before this Court, praying for the exercise of its plenary powers u/s. 482 Cr.P.C seeking the quash of the charge sheet filed by the Respondent No.1, the CBI against the Petitioners, seeking their prosecution for offences u/ss. 218 and 419 r/w 120-B of the Indian Penal Code arising from Crime No. RC 0092007A0012. However, the Ld. Trial Court, vide its order dated 25/04/16 arrived at the finding that the offence u/s. 218 IPC was not prima facie made out and so, cognizance was taken of offences u/ss. 418, 419, 120-B r/w 511 IPC. The Petitioners Mr. Kuntal Baran Chakraborty, Dr. Ravindra Kumar Dikshit and Mr. Anand Bihari Jha are employees of the New India Assurance Co. Ltd.,. The Respondent No. 1 is the Central Bureau of Investigation (hereinafter referred to as the "CBI") which is the investigating agency and the Respondent No.2 Mr. Shivendra Sharma is the de-facto Complainant on whose complaint the case against the Petitioners arose, and the quash of which is sought herein.

2. A short resume of facts are as follows. One Shivendra Sharma lodged a complaint dated 11/10/07 before the CBI, the Respondent No. 1 herein, that he was the proprietor of M/s. Maruti Motors, Bus Stand, Jabalpur, where repair work in respect of vehicles used to be undertaken. Vehicles involved in accidents were also repaired at the said workshop and the Complainant used to assist the vehicle owner/party in settling their claim with the insurance company.

3. In the month of November 2006, one Yashwant Raghuwanshi brought a vehicle involved in an accident, bearing registration number MP 49 D 0183, to the workshop of the Complainant. The vehicle was insured with the New India Assurance Co. Ltd., (hereinafter referred to as the "Insurance Company") and was having a comprehensive insurance cover. The repair of the vehicle incurred an expenditure of Rs. 1, 08, 000/- (rupees one lakh and eight thousand only) which was initially borne by the owner Mr. Yashwant Raghuwanshi.The owner submitted the bills before the Insurance Company at its Branch Office at Rasal Chowk, Jabalpur, for reimbursement.

4. It was alleged that Mr. Anand Bihari Jha, the Petitioner No.3 herein, was posted as the Branch Manager of the Insurance Company at the material point of time. As there was an inordinate delay in settling the claim of Mr. Yashwant Raghuwanshi, in the month of February 2007, the Complainant/ Respondent No.2 is said to have interceded on behalf of Mr. Yashwant Raghuwanshi and approached Mr. Kuntal Baran Chakraborty, the Petitioner No.1 herein, who was posted as the Divisional Manager of the Insurance Company at its Divisional Office during the said period and requested him to expedite the settlement of Mr. Yashwant Raghuwanshi's claim for which, the Petitioner No.1 is alleged to have demanded Rs. 10,000/- (rupees ten thousand) as bribe for issuing the cheque.

5. It is further alleged that on 14/02/07, the owner of the vehicle Mr. Yashwant Raghuwanshi approached the Complainant at his garage and informed him that Petitioner No.1 had demanded Rs. 10,000/- (rupees ten thousand) as bribe for releasing the reimbursement. Upon so being informed, the Complainant went along with the owner of the vehicle to the office of the insurance company where on 15/02/07, co-accused Sandeep Kumar Naidu is alleged to have demanded rupees ten thousand by way of bribe. Mr. Yashwant Raghuwanshi files a complaint against Mr. Sandeep Kumar Naidu before the Chief Regional Manager, New India Assurance Company, Bhopal dated

16/02/07 alleging the charge of demand of bribe by Mr. Sandeep Kumar Naidu. The copy of the complaint was also sent to the office of the Petitioner No.1 and also to the Superintendent of Police, CBI at Jabalpur. However, a day before, i.e., on 15/02/07, Mr. Sandeep Kumar Naidu had registered a FIR against the Complainant and one other person at P.S. Omti for offences punishable u/ss. 294, 323, 506, 186 and 34 IPC, wherein it was alleged that the Complainant and one other person had abused Mr. Sandeep Kumar Naidu and slapped him when he was working at his office.

6. The aforementioned complaint was received by the office of the Superintendent of Police, CBI, ACB at Jabalpur on 01/03/07 and it was forwarded to the Chief Vigilance Officer of New India Assurance Company Ltd., Mumbai on 27/06/07. On 04/09/07, the complaint was received by the Petitioner No.2 herein who was the then Vigilance Officer at the Bhopal office of the Insurance Company. He was directed by Mr. D.N. Mudaliar, the then Chief Manager of the Insurance Company, to enquire into the matter and submit a detailed report in respect of the complaint dated 16/02/07 filed by Mr. Yashwant Raghuwanshi against Mr. Sandeep Kumar Naidu. The Respondent No.2 is alleged to have been met by one Sourabh Sharma who was the then investigator for the Insurance Co., and who allegedly handed over a letter written in Hindi to the Respondent No.2 supposedly under the instruction of the Petitioner No.1. It is the case of the Respondent No.1 that the Respondent No.2 was not willing to sign the said statement but he however kept the same with him.

7. On 09/10/07, the Petitioners are alleged to have gone to the garage of the Respondent No.2. The Petitioner No.1 and 3 were personally known to the Respondent No.2 and they introduced the Petitioner No.2 as a CBI Officer, to the Complainant. The Petitioner No.1 is alleged to have asked the Respondent No.2 to sign a statement favourable to Mr. Sandeep Kumar Naidu which was given earlier to the Respondent No.2 by Mr. Sourabh Sharma. The Respondent No.2 is stated to have refused to sign the said statement upon which the Petitioners are alleged to have pressurised the Respondent No.2 to sign the said statement so that the enquiry against Mr. Sandeep Kumar Naidu could be closed. Upon this the Respondent No.2 is stated to have asked for some time to ponder over the same. The Petitioners are alleged to have asked the Respondent No.2 to meet them on 11/10/07.

8. In the said backdrop of facts, a complaint dated 11/10/07 came to be preferred by the Respondent No.2 to the Respondent No.1. The said complaint is

annexed to the petition as Annexure A/1. On the basis of the complaint, the Respondent No.1 arranged a trap. The letter given to the Respondent No.2 allegedly by the Petitioners herein was treated with phenolphthalein powder. The letter is stated to have been handed over by the Complainant to the Petitioner No.2 from whose possession the Respondent No.1 is stated to have seized the letter. In the course of investigation, the CBI recorded the statements of the witnesses and were unable to gather any independent evidence with regard to the initial demand of Rs. 10,000/- either by the Petitioner No.1 or by Mr. Sandeep Naidu from the Complainant or the owner of the vehicle, except the oral evidence of the Complainant who was considered as an interested witness. In the course of investigation, the CBI found that the claim amount of the owner of the vehicle had been released through cheque payment on 26/02/07 and no evidence was forthcoming that the said amount had been released on account of any bribe that had been paid. The Respondent No.1 also came to the conclusion that even if the pre-written statement is taken as it is, there was nothing to suggest that the attempt by the Petitioners came within the category of an "agreement to commit an offence" and so the Respondent No.1 came to the conclusion post investigation, that no offence punishable u/s. 218 and 419 IPC was made out against the Petitioners and so a closure report was filed before the Special Judge CBI, Jabalpur on 25/06/08. The said closure report has been annexed to the petition as Annexure A/2.

9. Vide order dated 19/02/11, the Special Judge, CBI, Jabalpur, after appreciating the closure report observed that there was a complaint pertaining to demand of bribe against the Petitioners and the co-accused persons at the time when the Petitioners are alleged to have attempted to coerce the Respondent No.2 to execute the letter stating that no such incident happened and so, the Ld. Special Judge ordered that the CBI conduct further investigation and report to the Court as to what happened in relation to the original complaint relating to the demand of bribe by the Petitioners and the co-accused persons. The order dated 19/02/11,which has been annexed has (sic : as) Annexure A/3 to the petition at pages 37 and 38 is in fact the first order u/s. 156(3) in this case.

10. In compliance of the abovesaid order, the Respondent No.1 further investigated the case and once again filed a final report dated 22/01/12, for the closure of the case before the Court of the Ld. Special Judge, CBI, Jabalpur. The said report has been annexed as Annexure A/4 to the petition from page 39 to 43. In the said report, the Respondent No.2 has submitted that further

investigation revealed that the office of the CBI at Jabalpur is said to have received on 01/03/07,a complaint from Mr. Yashwant Singh Raghuwanshi(the owner of the vehicle) dated 16/02/07 alleging that a bribe of Rs. 10,000/- was demanded by Sandeep Naidu on 14/02/07 for clearing his claim amount. The report further submits that the statement of Mr. Yashwant Singh Raghuwanshi was recorded in the course of further investigation and he stated that he never lodged any complaint to any authority including the CBI reporting the alleged bribe demand by Sandeep Naidu or any other officer of the Insurance Company. He also stated that he never informed the Respondent No.2 of the alleged bribe demand. Thus, in the light of the further investigation, the Respondent No.1 opined that the case was not one which was fit for filing a charge sheet since sufficient evidence was not available on record. It further submitted that there was no demand for bribe that was pending investigation as the claim amount of Rs. 1,08,685/- had been paid to Mr. Yashwant Singh Raghuwanshi by the Insurance Company. Under the circumstances, the CBI prayed for the acceptance of the closure report.

11. The abovementioned closure report was partly accepted by the Ld. Special Judge, CBI, Jabalpur vide order dated 24/03/12 which has been annexed to the petition as Annexure A/5 from page 44 to 48. In paragraph 7 of the said order, the Ld. Special Judge arrives at the conclusion that the allegations in the written complaint of the Respondent No.2, dated 11/10/07 constituting offences u/ss. 218, 419 and 120-B IPC require further investigation. However, as the Court of the Special Judge, CBI, did not have the jurisdiction to try the said offense, they being offences triable by the Court of a Magistrate, so it ordered further investigation into the allegations levelled against the Petitioner by the Respondent No.2 in his complaint dated 11/10/07 and file the report before the Competent Court. As regards the offences u/s. 7 of the Prevention of Corruption Act, 1988 (hereinafter referred to as the "PC Act"), the Ld. Special Judge accepted the closure report filed by the Respondent No.1 and closed the case u/s.7 of the PC Act against the Petitioners. This order is significant in two ways. Firstly, it accepted the closure report filed by the CBI so far as it related to the offence u/s. 7 of the P.C. Act and Secondly, this order dated 24/03/12 was the second order by the Court to the CBI to carry out further investigation in the case, though restricted to the allegations levelled against the Petitioner vide complaint dated 11/10/07 of the Respondent No.2 constituting offences under the IPC as mentioned hereinabove.

12 Once again, the Respondent No.1 further investigated into the matter and recorded statements of witnesses and after completion of the investigation came to the conclusion yet again that no case was made out against the Petitioners for offences punishable u/ss. 218, 419 r/w 120-B of the IPC and so, a final report dated 31/07/12 praying for the closure of the case against the Petitioners herein was filed yet again for the third time before the Court of the Ld. Special Magistrate CBI, Jabalpur. The said final report is annexed to the petition as Annexure A/6 from page 49-61 of the petition. The further investigation done by the Respondent No.1 was elaborate and statements of witnesses were recorded who hitherto were not questioned by the CBI. Notable amongst them is the statement of Mr. Khurshid Shah, Prop. of M/s. Khurshid Spray Painting and Denting, reference of which is given in paragraph No. 4 of the report. Khurshid Shah was stated to be at the Garage of the Respondent No.2 when the Petitioners are stated to have reached there. He says in his statement to the CBI that he cannot say if the unknown person who had accompanied the Petitioner No.1 had introduced himself has (sic : as) a CBI officer to the Respondent No.2. In paragraph 7 of the final report, the CBI has concluded that the written portion in the memo dated 11/10/07 was in the handwriting of Saurabh Sharma who is in no way related to the case and that the said memo was handed over to the Respondent No.2 by the said Saurabh Sharma allegedly at the request of the Petitioner No.1. In paragraphs 9 to 11 of the said report, the CBI comes to the finding that the offence u/s. 218 IPC is not made out against the Petitioners as their act could not be said to have the effect of saving any one from punishment or forfeiture of property as, even if the said memo was signed by the Respondent No.2, it would not have had the effect of saving anyone and at the most, the said memo could have been used for the purposes of departmental enquiry against the Petitioners. As regards the offence of cheating by impersonation u/s. 419 IPC, the CBI arrives at the conclusion in paragraph 12 of the report that deception by itself does not amount to cheating unless the person so deceived is induced to do any act specified in that section, which he would otherwise not have done, if he were not so deceived. In paragraph 14 of the report, the CBI asserts that the Petitioner No.2 was introduced as an officer of the CBI to the Respondent No.2 and thereby induced the Respondent No.2 to sign the offending memo in which it was mentioned that no bribe was demanded by the accused persons. The CBI finds that the said statement cannot be said to be property and neither is it a valuable security nor was it a thing which was capable of being converted into a valuable security so as to attract the offence punishable u/s.

419 IPC. Thus, the intent of the Respondent No.1 is clear as daylight in this final report where it categorically and unambiguously held that the Petitioners herein cannot be proceed against for offences u/s. 218 and 419 IPC.

13. The abovementioned final report for closure is considered by the Ld. Trial Court vide its order dated 05/10/13 almost a year after the report was filed by the Respondent No.1. By the said order, the Trial Court says that instead or (sic : of) accepting or rejecting the application of the CBI for closure, it would be in the interest of justice to direct the CBI to further investigate on five points determined by the Ld. Trial Court to be essential for considering the application of the CBI for closure. These five points are (1) to investigate into the authorship of the letter given to the Respondent No.2 by Saurabh Sharma in September 2007, (2) if authorship of the said letter has been investigated into, then the opinion of the hand writing expert be placed before the court, (3) to investigate as to who went as a CBI officer along with K.B.Chakraborthy and S.B.Jha to the garage of Shivendra Sharma on 09/10/07, (4) to investigate as to who all approached Shivendra Sharma and in what manner between September 2007till the date of signing of the letter dated 29/09/07 and (5) in what manner and before whom was the said letter dated 29/09/07 seized and detailed investigation be carried out into the procedural aspects of the case. Thus the Respondent No.1 was directed to further investigate as above for the third time by the order dated 05/10/13.

14. This time around, the CBI files a charge sheet against four persons including the Petitioners herein for offences punishable u/ss. 120-B, r/w Ss. 218 and 419 IPC. The Petitioner No.2 has been arrayed as Accused No.1, the Petitioner No.1 as Accused No.2 and the Petitioner No. 3 as Accused No.4.

SUBMISSION ON BEHALF OF THE PETITIONERS:

15. Mr. S.C. Datt, Ld. Sr. Counsel appearing on behalf of the Petitioners has submitted that the repeated orders by the Ld. Courts below u/s. 156(3) Cr.P.C had led to a situation where the CBI was ultimately compelled to file a charge sheet against the Petitioners, despite having held thrice before that there was no case made out against the Petitioners, only to escape the rigours of repeatedly indulging in further investigation in compliance of the orders by the Ld. Courts below. It has been argued that the first closure report was filed by the CBI in the Court of the Ld. Special Judge (CBI) as offences under the PC Act were also under investigation. The first order for further investigation was passed by the Court of the Ld.Special Judge, CBI on 19/02/11. Thereafter the CBI filed a second closure report after further

investigation and the Court of the Ld. Special Judge, vide order 24/03/12 accepted it in part and closed the case against the Petitioners so far as it related to the offence under the PC Act, but directed the CBI once again to carry out further investigation as far as offences u/s. 218 and 419 IPC were concerned and file the report in the Court of the Special Magistrate, CBI as the said offences were triable by that court. Once again, the CBI carried out further investigation and filed the closure report for the third time before the Court of the Ld. Special Magistrate, CBI, which by its order dated 05/10/13 directed the CBI to carry out further investigation on five points which have already been enumerated in paragraph 13 *supra*. Thereafter, the CBI filed the impugned chargesheet against the Petitioners. The Ld. Counsel for the Petitioners has submitted that the repeated orders of the Court u/s. 156(3) Cr.P.C, have in effect violated the law laid down by the Supreme Court in *Abhinandan Jha &Ors Vs. Dinesh Mishra* – AIR 1968 SC 117, by which the Supreme Court had laid down that the court of cognizance/trial could not direct the investigating agency to file a chargesheet. It was held in that case that when after investigation, the police files a closure report, the Ld. Court of first instance has three options before it. Firstly, it could accept the closure report and close the case after hearing the *de-facto* Complainant. Secondly it could reject the closure report and take cognizance of the offences on the basis of the material forwarded with the closure report and proceed against the accused persons and Thirdly, it could return the closure report to the police directing it to further investigate in to the matter.

16. The Ld. Counsel for the Petitioners has also argued that the repeated directions from the Court for further investigation has resulted in an inordinate delay in the investigation and the same has resulted in the harassment of the accused persons. The Ld. Counsel for the Petitioners has also relied upon the judgement of the Supreme Court in *Vasanti Dubey Vs. State of Madhya Pradesh* – (2012) 2 SCC 731, in Vasanti Dubey's case, the Petitioner before the Supreme Court was a Block Development Officer (hereinafter referred to as the "BDO") in Gotegaon under Narsinghpur district in Madhya Pradesh. She was investigated in a case u/s. 7 and 13(2) r/w 13(1)(d) of the Prevention of Corruption Act, 1988. The case was registered against her on the basis of the Complainant (sic : complaint) of the Sarpanch of the Village who was also the contractor for construction of a road in the village for which the funds were being disbursed by the BDO. It was alleged by the Complainant to the Lok Ayukta Police that Vasanti Dubey was demanding an illegal gratification of Rs. 3000/- for releasing his final payment. The Complainant subsequentlygave

a statement to the police that his complaint was false and that the same was motivated by someone who was inimical to the BDO. The police filed a closure report after investigation and the Ld. Special Judge rejected it and directed the police to file a chargesheet in the case. Vasanti Dubey challenged the order of the Special Judge in a criminal revision before this Court and the order of the Special Judge was set aside following the ratio in *Abhinandan Jha's* case *supra*. This Court however gave the liberty to the Special Judge to either direct further investigation u/s. 156(3) Cr.P.C or take cognizance u/s. 190 Cr.P.C, the closure report of the Lok Ayukta police notwithstanding. The police carried out further investigation in the case and once again filed a closure report stating that there was no evidence against the BDO and also that there was no sanction that was granted by the State for the prosecution of the BDO. The Ld. Special Judge once again rejects the closure report of the Lok Ayukta and directs the police to carry out further investigation and also secure the sanction from the State. The legality of this order of the Special Judge was also challenged before this Court by Vasanti Dubey, which this time upheld the order of the Special Judge and dismissed the revision filed by the BDO. It was aggrieved by this order of the High Court, that Vasanti Dubey approached the Supreme Court. The judgement of the Supreme Court in *Vasanti Dubey's* case is a ratio on **(a)** whether the Special Judge could direct the police to file a charge sheet in a case where a closure report was preferred by the police on the grounds of lack of evidence? and **(b)** whether the Special Judge could order reinvestigation a second time, especially in view of the legal impediment that there was no sanction for prosecution by the State?. As regards the point in issue (a), the Supreme Court relied upon *Abhinandan Jha's* judgement in answering the same in the negative. As regards issue (b), the Supreme Court held in paragraph 32 of the judgement that **"……..we deem it just and appropriate to hold that the Special Judge clearly committed error of jurisdiction by directing reinvestigation of the matter practically for the third time in spite of his noticing that sanction for prosecution was also lacking, apart from the fact that the Special Police Establishment, Lokayukta Office, after reinvestigation had given its report why the matter was not fit to be proceeded with"**. *Vasanti Dubey's* case is not a ratio to answer the question whether the power under section 156(3) of the Court of cognizance and/or trial is unbridled and whether the same can be exercised *ad nauseum*.

17. In order to demonstrate the lack of application of mind by Ld. Magistrate while passing the order dated 05/10/13, the Ld. Counsel for the Petitioners submitted that the specific line of investigation to be adopted by the CBI, as directed by the Ld. Magistrate in direction No.1 & 2 of his order, was already investigated into by the CBI and to that effect, the attention of this Court was drawn to page 134 to 136 of the additional documents filed by the Petitioners which is the report of the hand writing expert dated 18/01/08, given to the Respondent No. 1 in the year 2008 itself. As regards direction No.3 given by the Ld. Trial Court, which was to enquire as to who was the person who masqueraded as a CBI Officer before the Respondent No.2, the Ld. Counsel for the Petitioners has submitted that identity of the person who masqueraded as the CBI officer was already revealed by the Respondent No.1 in its closure report dated 31/07/12 (at page 58 of the petition paragraph No.2 and 4 of the closure report) in which, the Petitioner No.2 is alleged to be the person who is stated to have impersonated the CBI officer. As regards direction No. 4 of the Ld. Trial Court to the CBI to investigate and report as to who all approached the Respondent No.2 between September 2007 and 29/09/07 and in what manner, asking him to sign the statement dated 29/09/07, the Ld. Counsel for the Petitioners has submitted that this direction was also redundant as the statement of the Respondent No.2 recorded on 17/11/07 by the CBI revealed that the Respondent No.2 was approached by one Saurabh Sharma on 29/09/07 who had given the Respondent No.2 the prewritten statement on which he was asked to sign by Mr. Saurabh Sharma in order to help out the Petitioner No.1 in the enquiry that was initiated by the Insurance Company. The relevant part of the statement of the Respondent No.2 is at page 87 of the petition. Direction No.5 issued by the Ld. Trial Court vide its order dated 05/10/13 directing the CBI to explain as to how the statement dated 29/09/07 sought to be signed by the Respondent No.2 under coercion, was seized by the CBI, from whom was it seized and in whose presence was it seized, is also stated to have been answered by Recovery Memorandum dated 11/10/07 (at page 130 of the compilation of additional documents) which reveals that the offending document was taken from the possession of the Petitioner No.2 by and in the presence of Mr. R.K.Kapoor, an independent witness. Under the circumstances, the Ld. Counsel for the Petitioners has submitted that each and every direction given by the Ld. Magistrate vide his order dated 05/10/13 were superfluous and redundant as the CBI had already investigated into each of the aspects earlier and it was only thereafter that the closure report was filed by the CBI. Therefore, the last order of the Ld. Magistrate dated

05/10/13 directing further investigation by the CBI was a subtle direction that the Trial Court would not accept anything other than a charge sheet, and therefore the said order was in gross violation of the law laid down by the Supreme Court in *Abhinandan Jha's* case. He finally prayed that the case against the Petitioners be quashed, predominantly on this ground alone, amongst other stated hereinabove.

SUBMISSIONs OF THE RESPONDENT NO.1:

18. Mr. J.K. Jain, Ld. Assistant Solicitor General appearing for the Respondent No.1 CBI has submitted that there is a prima facie case that has been made out by the Respondent No.1 and that is all that is needed to be seen at this juncture. He has also argued that the Ld. Trial Courts were well within their rights to pass orders u/s. 156(3) Cr.P.C and as the Ld. Courts below did not direct the CBI to file a charge sheet but only to further investigate the case, the ratio of the Supreme Court in *Vasanti Dubey's* case would not be applicable in the fact circumstances of the present case. It has also been argued that neither the Cr.P.C nor any judgement of this Court or the Supreme Court have circumscribed the powers of the Trial Court as to the number of times such an order u/s. 156(3) Cr.P.C can be passed directing the police to further investigate. Lastly, the Ld. ASG has submitted that there is sufficient material on record in the charge sheet, which discloses *prima facie*, the commission of offences by the Petitioners herein and therefore, no interference is called for by this Court in the exercise of its powers u/s. 482 Cr.P.C.

SUBMISSION ON BEHALF OF RESPONDENT NO.2

19. Mr. Shyam Vishwakarma, Ld. Counsel for the Respondent No.2 has strongly opposed the prayer for the quash of proceedings pending against the Petitioners. He has referred to page 90 of the petition which is a part of the statement of the Respondent No.2 u/s. 161 Cr.P.C, recorded by the CBI on 17/11/07, and has alluded to its contents at paragraph 9 of the said statement which according to the Ld. Counsel for the Respondent No.2 clearly encapsulates the entire case against the Petitioners.

20. The Ld. Counsel further submits that there is no evidence or any allegation that there was a pre-existing enmity/animosity between the Petitioners and the Respondent No.2 in order to form an opinion that the proceedings against the Petitioners is retributive in nature and therefore an abuse of process. In order to dispel any doubt that may exist in the mind of this Court that the Respondent No.2 had enough cause to falsely implicate the Petitioners herein

on account of the Cr. Case No. 1840/2007 which was initiated against the Respondent No. 2 on the basis of a complaint preferred by Sandeep Naidu who is stated to be the person who originally demanded the bribe amount from Mr. Yashwant Raghuvanshi, the owner of the insured vehicle, it was submitted that the Respondent No.2 was acquitted by the Ld. Trial Court in the said criminal case vide order dated 07/12/16.

21. As regards the statement of the vehicle owner Mr. Yashwant Raghuvanshi to the CBI that he had never made any complaint relating to the alleged demand for any bribe by Mr. Sandeep Naidu or any of the Petitioners herein, the Ld. Counsel for the Respondent No.2 argued that the same cannot come to the aid of the Petitioners as the said statement was made by Mr. Yashwant Raghuvanshi on the allurement of settlement of his claim being held out by the Petitioners in order to escape the rigours of a Departmental Enquiry. It was to ensure this, that the Respondent No.2 was being coerced by the Petitioners to sign a statement to the effect that there was never any demand for bribe by the Petitioners herein in order to settle the claim of Mr. Yashwant Raghuvanshi.

22. As regards the reliance of the Petitioners on the case of *Vasanti Dubey's* case, the Ld. Counsel for the Respondent No.2 has also submitted that the said case was not applicable in the fact circumstances of the present case as in *Vasanti Dubey's* case, the Supreme Court had looked into the legality of the Ld. Special Judge ordering (a) the police to file a charge sheet against the accused instead of a final report and (b) whether the Ld. Special Judge had the power to pass an order u/s. 156(3) a second time even after being duly informed that there was no sanction u/s. 19 of the PC Act. As both those situations do not exist in the present case, the ratio in the abovesaid judgment will not apply in the present case.

WHETHER THE POWER TO ORDER FURTHER INVESTIGATION UNDER S. 156(3) CR.P.C CAN BE EXERCISED REPEATEDLY? – THE CONCEPT OF "SUBLIMINAL COERCION" AND ITS EFFECT.

23. Heard the Ld. Counsels for the parties and perused the petition, the documents and additional documents annexed therewith. The facts of the case necessitate a finding on the powers of the Magistrate to order further investigation u/s. 156(3) Cr.P.C with regard to the number of times the Magistrate can pass such an order before it is rendered violative of the judgement of the Supreme Court in *Abhinandan Jha's* case **or** whether such orders are valid in the

eyes of law even if they are passed *ad nauseum* as long as it stops short of directing the police to file a charge sheet against the accused?

24. The Supreme Court in *Abhinandan Jha & Ors Vs. Dinesh Mishra* – AIR 1968 SC 117, had given three options to the Magistrate to deal with a closure report filed by the police u/s. 173(2) Cr.P.C. The three options were (1) to reject the closure report and proceed to take cognizance of the offences against the accused on the basis of the evidence on record, u/s. 190(1)(b) Cr.P.C and issue process to the accused, or (2) it could accept the closure report filed by the police and close the case after giving the Complainant an opportunity to protest against the closure report or (3) it could direct the police to conduct further investigation u/s. 156(3) Cr.P.C. What the Supreme Court explicitly forbade and rendered unlawful for the Magistrate, was an order directing the police to file a charge sheet instead of a closure report. In *Vasanti Dubey Vs. State of Madhya Pradesh* – (2012) 2 SCC 731, *the* Supreme Court had quashed the proceeding against the Petitioner therein on the ground that Trial Court was misplaced in exercising jurisdiction u/s. 156(3) Cr.P.C in a case where the investigating agency had informed the Court that there was no sanction u/s. 19 of the PC Act and that the Ld. Special Judge had ordered for further investigation with the direction to the investigating agency to secure a sanction against the accused.

25. The power of the Magistrate to direct the police to further investigate u/s. 156(3), before taking cognizance u/s. 190 Cr.P.C when a final report u/s. 173(2) Cr.P.C is filed,is no longer *res integra.* Such exercise is not restricted only to a situation where a closure report is filed but also in a situation where the charge sheet has been filed against the accused and the Magistrate empowered to take cognizance of the offence is of the view that there are lacunae in the investigation which need to be further investigated and thereby returns the charge sheet to the police with a direction to further investigate into specific areas which require it. However, an order u/s. 156(3) Cr.P.C cannot be passed only because the Magistrate is empowered to do so but only when the Magistrate is satisfied, for reasons to be stated, as to why a further investigation is necessitated in a given case. Though the Supreme Court in *Abhinandan Jhas's* case empowered the Magistrate to direct the police to further investigate in a case where the police files a closure report, by its elucidation of the extent and scope of the Magistrate's powers u/s. 156(3) Cr.P.C, what it has expressly prohibited is the Magistrate directing the police to file a charge sheet instead of a closure report. This prohibition

imposed upon the Magistrate cannot be circumvented by a process of "Subliminal Coercion" viz., a process by which the Magistrate, though does not direct the investigating agency to file a charge sheet and thereby adheres to the law in its letter, violates it in spirit by creating an environment of subconscious pressure on the investigating agency by repeated directions to further investigate the offence u/s. 156(3) where the veiled desire of the Magistrate is that nothing less than filing a charge sheet instead of a closure report would please it. Such subliminal coercion by the Magistrate by resorting to jurisdiction under section 156(3) *ad nauseum,* till the investigating agency, which after having filed closure reports earlier or more than one occasion, ultimately files a charge sheet, would be a violation of the law laid down by the Supreme Court in *Abhinandan Jha's* case. Such a charge sheet can only be considered as a fruit of subliminal coercion by the Magistrate, rendering it unlawful, an abuse of process of the law and a colourable exercise of judicial powers.

26. The power under section 156(3) Cr.P.C ought to be exercised only once by the Magistrate and that too for reasons to be recorded. This power maybe exercised where a closure report is filed by the police or even when a charge sheet is filed, where the Magistrate is of the opinion that the investigation done by the police is incomplete or inadequate and directs it to further investigate along prescribed lines. As the power ought to be exercised only once, the Magistrate would be well advised to seek the assistance of the Public Prosecutor whose avowed function is to ensure that the final report filed by the police is of such quality that it endures judicial scrutiny during the trial. With the assistance of the Pubic (sic : Public) Prosecutor, the Magistrate can direct the police u/s. 156(3) to further investigate along well-defined lines to fulfil the shortcomings of the investigation done earlier.In the event the police files a closure report, or what in common parlance is called a "Khatma", a second time after the order for further investigation by the Magistrate, then the Magistrate is forbidden from directing the investigating agency to further investigate after having already done so once, else that would be in violation of the spirit of the law laid down by the Supreme Court in *Abhinandan Jha's* case as the same would be an act of subliminal coercion on the part of the Magistrate, subconsciously directing the police to file a charge sheet instead of a closure report as already discussed in the preceding paragraph.In such a situation, the Magistrate can resort to taking cognizance of the offences u/s. 190(1)(b) Cr.P.C, the closure report notwithstanding, and summon the accused to stand trial. However, a question does arise if the Magistrate is powerless to carry out a fact-finding enquiry in the light of a second closure report by

the investigating agency, where the Magistrate is of the opinion that the material on record,while raising a suspicion of an offence having been committed, required additional material to be brought on record before it could be said that a *prima facie* case against the accused was made out, justifying the issuance of process to stand trial? The answer is an emphatic NO and the powers vested with the Magistrate under the Cr.P.C to deal with such a situation are elaborated in the succeeding paragraphs.

POWER TO PROCEED UNDER CHAPTER XXIV OF THE CR.P.C

27. The purpose of the procedural law is to aid and assist the Court in the dispensation of justice, a veritable handmaiden. In some cases, the investigation may be influenced by the powers that be and the investigating agency may file a closure report even in a case where evidence may be forthcoming to file a charge sheet. In cases where the *de-facto* Complainant is a private party, he or she may feel aggrieved by the investigating agency filing a closure report in favour of the accused and thus willing to protest against the closure report and why the same ought not to be accepted by the Magistrate. In such a case, nothing prevents the Magistrate from converting the case which was originally initiated under Chapter XII of the Cr.P.C arising from the registration of an FIR to a complaint case under Chapter XV of the Cr.P.C where the *de-facto* Complainant prefers a protest petition against the closure report. In such a case, the Magistrate can take cognizance u/s. 190(1)(a) Cr.P.C and exercise jurisdiction u/s. 202 Cr.P.C and carry out an inquiry, either himself or an investigation through any other person so authorised by him or even the police. The distinction between a further investigation by the police u/s. 156(3) Cr.P.C and of an inquiry conducted by the police on the orders of a Magistrate u/s. 202 Cr.P.C is that further investigation by the police is done u/s. 156(3) at the pre-cognizance stage whereas, the inquiry by the police u/s. 202 Cr.P.C is at the post cognizance stage. There may be a difficulty in a case where previous sanction is required u/s. 197 Cr.P.C or under a special statute like the Prevention of Corruption Act, 1988, in such a case the Magistrate cannot pass an order u/s. 202 Cr.P.C for conducting an inquiry in the absence of a previous sanction, as the power to order an enquiry u/s. 202 Cr.P.C is a power exercised post cognizance. This raises the question if the Magistrate hits a *cul de sac* where he is forbidden from exercising jurisdiction u/s. 156(3) more than once in a case where previous sanction is required for cognizance?

28. Chapter XXIV of the Cr.P.C deals with **General Provisions as to Inquiries and Trials** and section 311 Cr.P.C reads as under;

> **Power to summon material witness, or examine person present.-** Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re- examine any such person if his evidence appears to it to be essential to the just decision of the case.

Before the question whether the power u/s. 311 Cr.P.C can be exercised by the Magistrate where the trial has not even commenced, it will be essential to examine the intent and purpose of the Chapter in which the said provision finds a place, the power to summon and examine witnesses at a stage preceding trial itself and of course, the meaning of the term "Inquiry" as used in the Cr.P.C. From the title of Chapter XXIV, it is clear that the provisions which find a place in the said chapter are applicable at the stage of both, inquiry as well as trial.

29. The term "Inquiry" has been defined in the section 2(g) of the Cr.P.C which reads as **"inquiry" means every inquiry, other than a trial, conducted under this Code by a Magistrate or Court".** Simply put, an inquiry can be defined as a fact finding endeavour undertaken by a Magistrate or a Court which is not a trial. The Code is silent in defining the term "Trial". Black's Law Dictionary, Tenth Edition defines Trial as **"A formal judicial examination of evidence and determination of legal claims in an adversary proceeding".** The system of criminal justice administration in India is *adversarial/accusatorial* viz., that the same is a contest between the prosecution and the defence with the judge donning the mantle of an impartial arbiter. In this system, the Judge does not play a role in the investigation of the offence or the collection of evidence. That is the function of the State through the investigating agency. As opposed to this, an *inquisitorial* system is one where the judge participates actively in the process of collecting evidence against the prospective accused. The Cr.P.C enjoins a trial procedure which is completely *adversarial/accusatorial* in character. However, at the stage before the commencement of trial, certain powers are vested with the Magistrate or the Court which are inquisitorial in nature. The very fact that section 2(g) of the Cr.P.C defines "inquiry" as every inquiry

other than a trial by the Magistrate or a Court, vests the Magistrate or the Court with *inquisitorial* powers which can be exercised before the commencement of the trial. Though inquiry is defined in section 2(g) in the context of the Cr.P.C, we have to resort to the dictionary for the meaning of the word "inquiry". Black's Law Dictionary gives the meaning of the word inquiry as **"1. Int'l law. FACT-FINDING (2). Parliamentary law. A request for information, either procedural or substantive".** The Oxford Advanced Learners Dictionary gives the meaning of Enquiry/Inquiry as **"the official process to find out the cause of something or to find out information about something".** From the above, it is clear that the inquiry u/s. 2(g) Cr.P.C is the power of the Magistrate or the Court to collect facts essential to a stage preceding the trial.

30. Section 311 Cr.P.C which empowers any Court, at any stage of any inquiry, trial or other proceeding under this Code to examine a person as a witness, thus enables the Magistrate before whom a closure report is filed a second time by the investigating agency after it was directed by the Court to further investigate u/s. 156(3) Cr.P.C, to inquire on its own by summoning any person/ persons as witness before it and recording his evidence under section 311Cr.P.C. That coupled with the power u/s. 91 Cr.P.C would adequately empower the Magistrate to conduct an inquiry u/s. 311 Cr.P.C in cases where there is a statutory prohibition in taking cognizance in the absence of a sanction order from the State or a Statutory Authority. After such an inquiry u/s. 311 Cr.P.C, which can be done at a stage before taking cognizance, the Magistrate is of the view that the case against the prospective accused ought to go to trial, it should place the closure report of the police u/s. 173(2) along with the findings of the Court in the inquiry u/s. 311 Cr.P.C before the sanctioning authority and after it receives sanction, the Court can proceed to take cognizance of the offence against the accused and proceed in accordance with law.

31. In those cases where no previous sanction is required for taking cognizance, the closure report of the investigating agency notwithstanding, the Magistrate can proceed under Chapter XV of the Cr.P.C, take cognizance of the offence against the accused and examine the Complainant and his witnesses u/s. 200 Cr.P.C and direct the police to investigate u/s. 202 Cr.P.C. The difference between an order u/s. 156(3) and 202 Cr.P.C is that in compliance of an order u/s. 156(3) Cr.P.C, the same must culminate with the filing of a final report u/s. 173(2) Cr.P.C by the investigating agency. However, an order to

the police to investigate u/s. 202 Cr.P.C, is more in the nature of an inquiry which is conducted by the police to clear the cob webs of doubt the Magistrate may have before he issues process to the accused u/s. 204 Cr.P.C or dismisses the complaint u/s. 203 Cr.P.C.

32. From the discussion in the preceding paragraphs, it becomes amply clear that the option available to the Magistrate, where the investigating agency files a closure report, is not to repeatedly pass orders u/s. 156(3) Cr.P.C and thereby compel the police to ultimately file a charge sheet by "subliminal coercion" and consequently fall foul of the law laid down by the Supreme Court in *Abhinandan Jha's* case which prohibits the Magistrate from directing the police u/s. 156(3) Cr.P.C to file a charge sheet.The power u/s. 156(3) has the hallowed objective of ensuring that an investigation by the police does not suffer from inherent defects which would aid the accused in the course of the trial and at the same time ensure that an innocent person is not wrongly made to suffer the rigours of a criminal trial despite the absence of adequate evidence against him.

33. Under the circumstances, this Court feels it essential to pass the following guidelines for the exercise of power u/s. 156(3) Cr.P.C by the Magistrate/ Court;

(i) Where the police/investigating agency files a closure report or a charge sheet u/s. 173(2) Cr.P.C after the completion of investigation, the Court may, if it is not satisfied by the investigation conducted by the police, direct further investigation u/s. 156(3) Cr.P.C. **Such an order may be passed only once by the Court.** However, before passing such an order, the Magistrate shall study the final report diligently and shall be assisted in this endeavour by the Public Prosecutor, who bears upon his shoulders the responsibility of ensuring that the final report filed by the police is such that the same can be effectively stand the scrutiny of a criminal trial. He must assist the Magistrate in the scrutiny of the charge sheet/closure report, if called upon to do so by the Magistrate. Thereafter, the order u/s. 156(3) passed by the Court shall be precise giving clear cut directions to investigating agency to further investigate into specific areas, hitherto not done by the investigating agency.

(ii) Where the investigating agency in compliance of the order u/s. 156(3) Cr.P.C files a closure report yet again or a charge sheet which is not

to the satisfaction of the Court, it shall not indulge in the subliminal coercion of the investigating agency by passing an order u/s. 156(3) Cr.P.C a second time and instead, where the offence is one for which no previous sanction of the state is required to take cognizance of the offence, proceed under Chapter XV of the Cr.P.C and issue notice the *de-facto* Complainant, take cognizance of the offence u/s. 190(1)(a) Cr.P.C, record the statement of the Complainant and his witnesses and if need be, direct the police or anyone else to investigate u/s. 202 Cr.P.C and file a report and thereafter decide whether a case exists for the issuance of process against the accused u/s. 204 Cr.P.C or whether the case ought to be dismissed u/s. 203 Cr.P.C.

(iii) Where the offence is one which requires previous sanction of a sanctioning authority before cognizance can be taken, the Court may exercise the power of inquiry on its own u/s. 311 Cr.P.C without taking cognizance of the offence and, if necessary summon and examine as witnesses all such persons whose testimony the Court feels would be essential to unravel the truth and also exercise powers u/s. 91 Cr.P.C and direct a person to produce a document or thing which the Court considers desirable for the purposes of the inquiry. Thereafter, if the Court is of the opinion that there lies before it a case fit for trial, it shall place the report of the police u/s. 173(2) Cr.P.C as well as the material collected by it in the course of its inquiry u/s. 311 Cr.P.C before the sanctioning authority (through the investigating agency).

(iv) The sanctioning authority shall, as soon as possible, decide on the question of sanction, preferably within three months from the receipt of material forwarded by the Court through the police. If sanction is granted, the Court shall proceed to take cognizance of the offence u/s. 190(1)(b) Cr.P.C and issue process to the accused person. If sanction is declined, the case shall be closed by the Court.

34. In the light of what this Court has held hereinabove, the case against the Petitioners deserve to be quashed as the facts that have been narrated by the Petitioners and not disputed to by the Respondents, a case of subliminal coercion of the Respondent No.1 has been established as a result of the persistent orders by the Ld. Courts below u/s. 156(3) Cr.P.C on account of which the Respondent No.1 has filed a charge sheet against the Petitioners despite having filed detailed and reasoned closure reports on three earlier occasions. It is

apparent that the charge sheet against the Petitioners has been filed by the Respondent No.1 out of sheer desperation. This is evident from the fact that the last order of the Ld. Court below dated 05/10/13 u/s. 156(3) by which the Respondent No.1 was directed to further investigate on five points, were aspects which had already been investigated by the Respondent No.1 in its earlier closure reports which were missed by the Ld. Court below. Thus, the petition succeeds and all proceedings related to the charge sheet arising from Crime No. RC 0092007A0012 registered by the Respondent No.1 against the Petitioners herein are quashed.

Application allowed.

I.L.R. [2018] M.P. 235 (DB)

MISCELLANEOUS CRIMINAL CASE

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

M.Cr.C. No. 16687/2017 (Jabalpur) decided on 11 October, 2017

MANISH KUMAR THAKUR …Applicant

Vs.

STATE OF M.P. & ors. …Non-applicants

***Penal Code (45 of 1860), Section 409, 420, 467, 468, 471, 120-B and Prevention of Corruption Act (49 of 1988), Section 13(1)(d) and Special Police Establishment Act, M.P. (17 of 1947), Section 3 – Investigation – Jurisdiction of Local Police – Quashment of Charge-sheet* – Held – Once the charge-sheet is filed, merely because the investigating agency has no jurisdiction to investigate the matter, charge-sheet cannot be quashed as it is not possible to say that cognizance on an invalid police report is prohibited and therefore a nullity – There is no provision in the Act requiring that the offences under this Act shall be investigated by Special Police Establishment only and not by the local police – Petition dismissed.**

(Para 5 & 7)

दण्ड संहिता (1860 का 45), धारा 409, 420, 467, 468, 471, 120–B एवं भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 13(1) (d) एवं विशेष पुलिस स्थापना अधिनियम, म.प्र. (1947 का 17), धारा 3 – अन्वेषण – स्थानीय पुलिस की अधिकारिता – आरोप–पत्र का अभिखंडन – अभिनिर्धारित – एक बार आरोप–पत्र प्रस्तुत हो गया हो, मात्र इसलिए कि अन्वेषण एजेन्सी को मामले का अन्वेषण करने की अधिकारिता नहीं है, आरोप–पत्र अभिखंडित नहीं किया जा सकता क्योंकि यह कहना संभव नहीं है कि एक अविधिमान्य पुलिस रिपोर्ट पर संज्ञान प्रतिषिद्ध है एवं इसलिए शून्य है –

अधिनियम में ऐसा कोई उपबंध नहीं है जो कि इस अधिनियम के अंतर्गत अपराधों का अन्वेषण केवल विशेष पुलिस स्थापना द्वारा तथा न कि स्थानीय पुलिस द्वारा किया जाना अपेक्षित करता हो – याचिका खारिज।

Cases referred :

M.Cr.C. 9915/2015 decided on 08.07.2016, SLP (Crl.) No. 6437 of 2016 order passed on 03.05.2017, AIR 1955 SC 196, AIR 2003 SC 2612.

Shriniwas Tiwari, for the applicant.
Ajay Tamrakar, P.L. for the non-applicant No. 1/State.

O R D E R

The Order of the Court was delivered by:
S.K. Seth, J. :- This petition under Section 482 of the Code of Criminal Procedure, 1973 has been filed for quashing the charge-sheet filed against the applicant for offences punishable under Sections 409, 420, 467, 468, 471, 120-B of IPC and under Section 13(1)(d) read with Section 13(2) of Prevention of Corruption Act, 1988 (for short, 'the Act').

2. The only contention raised by the applicant is that the matter has been investigated by the local police and the charge-sheet has also been filed by the local police whereas it has no power or authority to investigate the matter punishable under Section 13 (1)(d) read with Section 13 (2) of the Prevention of Corruption Act, 1988. To buttress his submission, counsel for the applicant has relied on the order of this Court passed in M.Cr.C. No. 9915/2015 dated 08.07.2016 wherein it has been held that in view of Section 3 of the M.P. Special Police Establishment Act, 1947, the local police has no power and authority to investigate the matters in regard to special offences punishable under the Act. On that ground, the charge-sheet filed against the accused in that case was quashed.

3. It is an admitted fact that charge sheet has already been filed and the Special Judge has already taken cognizance in the case and trial has commenced. It would not be out of place to mention that the reliance placed on the order passed in M.Cr.C. No.9915/2015 has been overruled and set aside by the Supreme Court by order dated 03.05.2017 passed in SLP (Crl.) No.6437 of 2016 (*District Central Co-operative Bank Vs. Ravindra Kumar Dubey and anohter (sic: another*), which reads as under:-

> *"1. Heard the learned counsel for the parties.*
>
> *2. Leave granted.*
>
> *3. In our opinion, the High Court misadventured in quashing the proceedings in the manner in which the order has been passed. The High Court should have been little more careful while quashing the proceedings. Be that as it may, as agreed to, the impugned order is set aside.*
>
> *4. The respondents to raise the question about the competency of the officer to investigate the matter before the Trial Court as and when the occasion arises, during the course of the trial.*
>
> *5. Accordingly, the impugned judgment and order is set aside and the appeal is allowed."*

4. That apart, under Section 3 of the M.P. Police Establishment Act, 1947, the State Government may, by notification, specify the offences or classes of offences which are to be investigated by (Madhya Pradesh) Special Police Establishment.

5. Learned counsel for the applicant could not point out any provision in the Act which debars/ousts the jurisdiction of local police to investigate the offences punishable under provisions of the Act. There is no provision in the Act requiring that the offences punishable under this Act shall be investigated by the Special Police Establishment only and not by the local police.

6. Even otherwise, since the charge-sheet has already been filed in the present case, in the considered view of this Court, the charge-sheet cannot be quashed on the ground that the investigating agency was lacking jurisdiction. In this regard, we may profitably refer to the judgment of the Supreme Court in the case of *H.N. Rishbud and another Vs. State of Delhi* AIR 1955 SC 196. Paragraph 9 of the judgment is relevant, which reads as under:-

> ***"9**. The question then requires to be considered whether and to what extent the trial which follows such investigation is vitiated. Now, trial follows cognizance and cognizance is preceded by investigation. This is undoubtedly the basic scheme of the Code in respect of cognizable cases. But it does not necessarily follow that an invalid investigation*

nullifies the cognizance or trial based thereon. Here we are not concerned with the effect of the breach of a mandatory provision regulating the competence or procedure of the Court as regards cognizance or trial. It is only with reference to such a breach that the question as to whether it constitutes an illegality vitiating the proceedings or a mere irregularity arises.

*A defect or illegality in investigation, however serious, has no direct bearing on the competence or the procedure relating to cognizance or trial. No doubt a police report which results from an investigation is provided in section 190 of the Code of Criminal Procedure as the material on which cognizance is taken. But it cannot be maintained that a valid and legal police report is the foundation of the jurisdiction of the Court to take cognizance. Section 190 of the Code of Criminal Procedure is one out of a group of sections under the heading: "Conditions requisite for initiation of proceedings".*The language of this section is in marked contrast with that of the other sections of the group under the same heading, i.e. sections 193 and 195 to 199.

These latter sections regulate the competence of the Court and bar its jurisdiction in certain cases excepting in compliance therewith. But section 190 does not. While no doubt, in one sense, clauses (a), (b) and (c) of section 190(1) are conditions requisite for taking of cognizance, it is not possible to say that cognizance on an invalid police report is prohibited and is therefore a nullity. Such an invalid report may still fall either under clause (a) or (b) of section 190(1), (whether it is the one or the other we need not pause to consider) and in any case cognizance so taken is only in the nature of error in a proceeding antecedent to the trial. To such a situation section 537 of the Code of Criminal Procedure which is in the following terms is attracted:

'Subject to the provisions herein before contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during trial or in any enquiry or other proceedings under this Code, unless such error, omission or irregularity, has infact occasioned a failure of justice'.

If, therefore, cognizance is in fact taken, on a police report vitiated by the breach of a mandatory provision relating to investigation, there can be no doubt that the result of the trial which follows it cannot be set aside unless the illegality in the investigation can be shown to have brought about a miscarriage of justice. That an illegality committed in the course of investigation does not affect the competence and the jurisdiction of the Court for trial is well settled as appears from the cases in - Prabhu v. Emperor, AIR 1944 PC 73(C) and - Lumbhardar Zutshi v. The King, AIR 1950 PC 26(D).

These no doubt relate to the illegality of arrest in the course of investigation while we are concerned in the present case with the illegality with reference to the machinery for the collection of the evidence.

This distinction may have a bearing on the question of prejudice or miscarriage of justice, but both the cases clearly show that invalidity of the investigation has no relation to the competence of the Court. We are, therefore, clearly, also, of the opinion that where the cognizance of the case has in fact been taken and the case has proceeded to termination, the invalidity of the precedent investigation does not vitiate the result, unless miscarriage of justice has been caused thereby."

7. The aforesaid judgment has been followed and relied upon by the Supreme Court in the case of *Union of India Vs. Prakash P. Hinduja and another,* AIR 2003 SC 2612. Thus, it is clear that once the charge-sheet is filed, merely because the investigating agency had no jurisdiction to investigate the matter, the charge-sheet cannot be quashed as it is not possible to say that "cognizance on an invalid police report is prohibited and, is, therefore, a nullity".

8. In view of the foregoing discussions, we do not find any merit and substance in this petition. Petition is accordingly ***dismissed*** summarily.

9. Ordered accordingly.

Application dismissed.

I.L.R. [2018] M.P. 240
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice S.K. Awasthi

M.Cr.C. No. 258/2017 (Gwalior) decided on 24 October, 2017

MANOJ KUMAR JAIN …Applicant

Vs.

STATE OF M.P. ...Non-applicant

***A. Food Safety and Standards Act (34 of 2006), Sections 3(j), 26 & 27 – Definition of "Food"* - Held - As per Section 3(j) of the Act of 2006, "Food" means any substance, whether processed, partially processed or unprocessed, which is intended for human consumption - Definition is clearly wide enough to include "gutkha" which is a substance for human consumption.**

(Para 9)

क. खाद्य सुरक्षा और मानक अधिनियम (2006 का 34), धाराऐं 3(जे), 26 एवं 27 – "खाद्य" की परिभाषा – अभिनिर्धारित – 2006 के अधिनियम की धारा 3 (जे) के अनुसार, "खाद्य" से ऐसा कोई पदार्थ अभिप्रेत है, चाहे वह प्रसंस्कृत है, या आंशिक रूप से प्रसंस्कृत है या अप्रसंस्कृत है, जो मानव उपभोग के लिए आशयित है – परिभाषा "गुटखा" जो कि मानव उपभोग हेतु एक पदार्थ है, को सम्मिलित करने के लिए स्पष्ट रूप से पर्याप्त विस्तृत है।

***B. The Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act (34 of 2003), Sections 7, 8, 9 & 10 – Conflict with the Act of 2006* - Held – Act of 2003 has no conflict with provisions of Act of 2006 - Even though the Act of 2003 specifically deals with Tobacco Products but**

the same is an additional legislation apart from the Act of 2006 which is to be followed by the companies dealing in Tobacco Products used for chewing – In case of adulteration, Act of 2006 will have to be roped in for prosecuting the delinquent companies or individual - In cases of misbranding, stipulations mentioned in both the Acts are to be strictly adhered to - Both Acts have independent penal provisions and shall have concurrent application with respect to tobacco products used for chewing - No illegality committed by the Trial Court – Application dismissed.

(Para 12)

ख. सिगरेट और अन्य तंबाकू उत्पाद (विज्ञापन का प्रतिषेध और व्यापार तथा वाणिज्य, उत्पादन, प्रदाय और वितरण का विनियमन) अधिनियम (2003 का 34), धाराएँ 7, 8, 9 एवं 10 – 2006 के अधिनियम के साथ विरोध – अभिनिर्धारित – 2003 के अधिनियम का 2006 के अधिनियम के उपबंधों के साथ कोई विरोध नहीं है – यद्यपि 2003 का अधिनियम विनिर्दिष्ट रूप से तंबाकू उत्पादों से संबंधित है परन्तु उक्त, 2006 के अधिनियम के अलावा एक अतिरिक्त विधान है जिसका पालन, चबाने के उपयोग में लाये जाने वाले, तंबाकू उत्पादों में व्यवहार करने वाली कंपनियों द्वारा किया जाना है – अपमिश्रण की दशा में, अपचारी कम्पनियों या व्यक्ति को अभियोजित करने के लिए 2006 के अधिनियम का आश्रय लिया जायेगा – मिथ्या छाप के प्रकरणों में, दोनों अधिनियमों में उल्लिखित शर्तों का दृढ़ता से पालन किया जाना चाहिए – दोनों अधिनियमों के स्वतंत्र दाण्डिक उपबंध हैं तथा चबाने के उपयोग में लाए जाने वाले तंबाकू उत्पादों के संबंध में समवर्ती रूप से लागू होंगे – विचारण न्यायालय द्वारा कोई अवैधता कारित नहीं हुई – आवेदन खारिज।

C. Practice – **Held - Judgment of other High Courts are not binding although they have persuasive value and therefore the same are required to be dealt with.**

(Para 7)

ग. *पद्धति* – अभिनिर्धारित – अन्य उच्च न्यायालयों के निर्णय बाध्यकारी नहीं हैं, यद्यपि उनका आग्रह मूल्य है एवं इसलिए उक्त पर विचार किया जाना अपेक्षित है।

Cases referred :

2012 FAJ 78 (Allahabad), (2008) 14 SCC 283, (2004) 7 SCC 68, (1989) 1 SCC 101, (2013) 1 Mah LJ 461.

R.K. Soni, for the applicant.
Kuldeep Singh, P.P. for the non-applicant/State.

O R D E R

S.K. Awasthi, J. :- The sole question which arises for consideration is whether 'gutkha' is a food article or not, under the provisions of Food Safety and Standards Act, 2006 (in short, 'Act of 2006')?

2. The applicant has preferred this application under Section 482 of the Code of Criminal Procedure to challenge the order dated 06.12.2016 passed by the Court of Judicial Magistrate First Class, Guna, in Criminal Case No. 1931/2013, whereby the application preferred under Sections 26, 27 of the Act of 2006 has been rejected by the Trial Court and the Trial Court has proceeded with the prosecution against the present applicant.

3. The facts leading to filing of the present case are that the Food Safety Officer (in short, 'FSO'), District Guna, carried out inspection of a food establishment which is involved in the sale of paan masala, 'gutkha', supari and other allied products. The FSO upon suspecting the quality of the food product to be sub-standard proceeded to purchase of 'Vimal Gutkha' and the same was forwarded to the State Food Testing Laboratory (in short, 'Lab') for its analysis. According to the report issued by the Food Analyst, the sample was found to be sub-standard, unsafe as also the same was misbranded. Consequently, a complaint was filed before the Competent Court and the Competent Court framed charges against the present applicant on 09.07.2015 for commission of offences punishable under Sections 26, 27 and 31 (1) read with Section 58, 59 and 63 of the Act of 2006. Subsequently, the applicant preferred an application under Sections 26, 27 of the Act of 2006 and the bone of contention before the Trial Court was that the article in question is 'gutkha' and the same is not covered by the provisions of the Act of 2006 as there is a Special Act, namely, The Cigarettes And Other Tobacco Products (Prohibition of Advertisement And Regulation of Trade And Commerce, Production, Supply And Distribution) Act, 2003 (in short, 'Act of 2003'), which will prevail over the provisions of the Act of 2006 as the same is a Special Act. Therefore, it was argued before the Trial Court that the prosecution lodged under the Act of 2006 is misconceived and deserves to be dropped.

4. The Trial Court proceeded to observe that the contention about the applicability of the Act of 2003 is misconceived and the fact that once the Criminal Court proceeds to take cognizance in the matter, then there is no provision under the Act of 2006 or under Cr.P.C. for review of such order taking cognizance. Consequently, the application was dismissed and the matter was fixed for recording of Prosecution Evidence.

5. The rejection of the application has been assailed before this Court on the same very ground that the seized article is not a food article under the Act of 2006 and therefore, the prosecution lodged may be quashed. In support of this contention, the learned counsel for the applicant has placed heavy reliance upon the judgment pronounced by the Allahabad High Court in the case of *Himachal Marketing Company v. State of Uttar Pradesh,* 2012 FAJ 78 (Allahabad), wherein according to the applicant, the Allahabad High Court has concluded that 'gutkha' is not a food product.

6. *Per contra,* the learned counsel for the respondent pointed out that if the interpretation suggested by the applicant is accepted, then the same would have drastic consequence on the public health because large number of people indulge in consumption of 'Gutkha' or allied products. Therefore, the application deserves to be dismissed.

7. The most apt manner to deal with the contention canvassed by the learned counsel for the applicant would be to first discuss or dwell into judgment of the Allahabad High Court in *Himachal Marketing Company* (supra). It would be pertinent to mention here that the judgment of other High Courts are not binding although they have persuasive value and therefore, the same are required to be dealt with [See: *Pradeep J. Mehta v. CIT,* (2008) 14 SCC 283]. The placitum of the judgment cited by the learned counsel for the applicant is misleading and does not shade light upon the true purport of the judgment. The Allahabad High Court was dealing with an application for seeking release of seized 'gutkha' and the reasons cited for release of such article was the report of the Public Analyst that the 'gutkha' is not adulterated and the fact that the nature of gutkha is perishable and no fruitful purpose would be served by keeping the entire bulk of consignment containing 18,000 pouches of 'gutkha' seized. While doing so, the Allahabad High Court has referred to the judgment of the Hon'ble Apex Court in the case of *Godavat Pan Masala Product Ltd. v. Union of India,* (2004) 7 SCC 68, and has observed in Para 12 that the Hon'ble Supreme Court did not accept the argument that Pan Masala could not be treated as food, although in the latter part of the judgment, neither there is any discussion on the implication of the judgment in the case of *Godavat* (supra) nor there is a reason assigned for arriving at a finding that 'gutkha' being a Tobacco Product will not be covered under the Prevention of Food Adulteration Act, 1954; rather only in Para 16, a finding has been recorded but no reasoning in this respect has been assigned by the Allahabad High Court. Whereas it is a well-established proposition of law that a mere observation/ passing reference, without reason by citing bare provisions or judgments on the issue, will not be a binding precedent. On this broad principle, the Hon'ble Apex Court in

Municipal Corpn. of Delhi v. Gurnam Kaur, (1989) 1 SCC 101, has held in following terms: -

> *"11. Pronouncements of law, which are not part of the ratio decidendi are classed as obiter dicta and are not authoritative. With all respect to the learned Judge who passed the order in Jamna Das case [Writ Petitions Nos. 981-82 of 1984] and to the learned Judge who agreed with him, we cannot concede that this Court is bound to follow it. It was delivered without argument, without reference to the relevant provisions of the Act conferring express power on the Municipal Corporation to direct removal of encroachments from any public place like pavements or public streets, and without any citation of authority. Accordingly, we do not propose to uphold the decision of the High Court because, it seems to us that it is wrong in principle and cannot be justified by the terms of the relevant provisions. A decision should be treated as given per incuriam when it is given in ignorance of the terms of a statute or of a rule having the force of a statute. So far as the order shows, no argument was addressed to the court on the question whether or not any direction could properly be made compelling the Municipal Corporation to construct a stall at the pitching site of a pavement squatter. Professor P.J. Fitzgerald, editor of the Salmond on Jurisprudence, 12th Edn. explains the concept of sub silentio at p. 153 in these words:*
>
> > *"A decision passes sub silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind. The court may consciously decide in favour of one party because of point A, which it considers and pronounces upon. It may be shown, however, that logically the court should not have decided in favour of the particular party unless it also decided point B in his favour; but point B was not argued*

> *or considered by the court. In such circumstances, although point B was logically involved in the facts and although the case had a specific outcome, the decision is not an authority on point B. Point B is said to pass sub silentio."*

Thus, in the opinion of this Court, the judgment of Allahabad High Court will not aid the contention advanced by the learned counsel for the applicant.

8. Now, adverting to the issue whether 'gutkha' will qualify as food article under the Act of 2006 or not; it would be pertinent to reproduce Section 3 (j) of the Act of 2006, which is as under: -

> *"Food means any substance, whether processed, partially processed or unprocessed, which is intended for human consumption and includes primary food to the extent defined in clause (zk), genetically modified or engineered food or food containing such ingredients, infant food, packaged drinking water, alcoholic drink, chewing gum, and any substance, including water used into the food during its manufacture, preparation or treatment but does not include any animal feed, live animals unless they are prepared or processed for placing on the market for human consumption, plants, prior to harvesting, drugs and medicinal products, cosmetics, narcotic or psychotropic substances:*
>
> *Provided that the Central Government may declare, by notification in the Official Gazette, any other article as food for the purposes of this Act having regards to its use, nature, substance or quality;"*

9. The portion of the definition reproduced hereinabove provides that any substance, whether processed, partially processed or unprocessed, which is intended for human consumption and is clearly wide enough to include 'gutkha' which is a substance intended for human consumption.

10. In somewhat similar circumstances, the Bombay High Court in the case of *Dhariwal Industries Limited and Another v. State of Maharashtra and Others*, (2013) 1 Mah LJ 461, was confronted with the same issue regarding the nature of 'gutkha' and whether the same is covered under the definition of 'food' provided

under the Act of 2006. The Bombay High Court arrived at the conclusion in the following manner: -

> *"19. While the definition in the 1954 Act excluded drugs and water, the definition in the Food Safety Act, 2006 excludes animal feed, live animals, plants prior to harvesting, drugs and medicinal products, cosmetic, narcotic and psychotropic substance. Obviously, gutka and pan masala do not fall in any of these excluded categories. The expression "any substance which is intended for human consumption" in FSS Act, 2006 is also wider than the expression "any article used as food or drink for human consumption" in PFA Act, 1954. It is also pertinent to note that the definition of food in the Act of 2006 specifically includes "chewing-gum" and any substance used into the food during its manufacture, preparation or treatment. Hence, even if gutka or pan masala were not to be ingested inside the digestive system, any substance which goes into the mouth for human consumption is sufficient to be covered by definition of food just as chewing-gum may be kept in the mouth for some time and thereafter thrown out. Similarly gutka containing tobacco may be chewed for some time and then thrown out. Even if it does not enter into the digestive system, it would be covered by the definition of "food" which is in the widest possible terms. The definition of "food" under section 2(v) of the PFA Act was narrower than the definition of food under Food Safety Act, still the Supreme Court in Ghodawat case held that pan masala and gutka were "food" within the meaning of PFA Act. The very fact that the petitioners themselves had obtained licences under the PFA Act and have also obtained licences under the Food Safety Act, 2006 is sufficient to estop them from raising the contention that gutka and pan masala do not fall within the definition of "food" under the Food Safety Act, 2006."*

11. Moving on, the next limb of the argument advanced by the learned counsel for the applicant is that 'gutkha' being a Tobacco Product will be governed by the provisions of the Act of 2003 and thus, by implication, any general law will be necessarily superseded by a special law occupying the same field. This Court does not find any substance in this contention for the reason that the perusal of provisions of the Act of 2003 goes to show that the same deals with regulation of Cigarette or other Tobacco Products, but in no manner whatsoever the Act of 2003 has any conflict with the provisions of the Act of 2006, meaning thereby that the Act of 2006 necessarily deals with adulterated or misbranded food articles whereas the Act of 2003 nowhere deals with adulteration although the same remotely touches upon the question of misbranding.

12. In light of the above and abiding by the established legal proposition that the endeavor of Courts should be to harmonize two Acts seemingly in conflict (although the present is not the case of any conflict between two legislations), it is categorically held that even though the Act of 2003 specifically deals with Tobacco Products but the same is an additional legislation apart from the Act of 2006, which is to be followed by the Companies dealing in Tobacco Products used for chewing. However, there is no iota of doubt that in case of adulteration in Tobacco Products used for chewing, the Act of 2006 will have to be roped in for prosecuting the delinquent Companies or individuals and with respect to misbranding, the stipulations mentioned in both the Acts (Act of 2003 and Act of 2006) are to be strictly adhered to. To put it differently, it is held that the term 'misbranded food' defined under Section 3 (zf) provides for 'acts' which will constitute misbranding of food, but a legal entity or individual, dealing in Tobacco Products used for chewing, will, in addition to compliance under Act of 2006, also have to ensure that the conditions mentioned in Section 7, 8, 9, 10 etc. of the Act of 2003, are not violated. Obviously, it should not be understood that for violation of provisions of the Act of 2003, the penalty under Act of 2006 will be attracted because both the Acts have independent penal provisions, but at the same time these Acts shall have concurrent application with respect to Tobacco Products used for chewing and the Court is not required to choose one over the other for the reasons stated hereinabove.

13. Consequently, the contention raised by learned counsel for the applicant is repelled for the reasons indicated above and it is observed that no illegality has been committed by the Trial Court in rejecting the application under Sections 26, 27 of the Act of 2006.

14. Resultantly, the instant application fails and is hereby dismissed. A copy of this judgment be sent to the Trial Court for information and necessary action.

Application dismissed.

I.L.R. [2018] M.P. 248

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice J.P. Gupta

M.Cr.C. No. 7298/2009 (Jabalpur) decided on 25 October, 2017

JAYANT LAXMIDAS & anr. ...Applicants

Vs.

STATE OF M.P. …Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 221(2) & 300(1) and Mines Act, (35 of 1952), Section 72C(1)(a) and Metalliferous Mines Regulations, 1961, Regulation No. 115(5) & 177(1) – Second Trial – Jurisdiction **– Petitioners were operator and manager of a mine – Some portion of mine took shape of a pond, where eight children drowned and died – On ground of necessary security arrangement lapse, petitioners were tried under the Mines Act and the said Regulations whereby they were convicted and sentenced – In appeal, they got acquitted of the charges – From the same incident, Police also registered an offence u/S 304-A IPC and cognizance was taken by the Magistrate – Challenge to – Held – Second trial cannot be allowed merely on the ground that some more allegations, which were not made earlier in the first trial, have also been made – Such second trial initiated on the same facts comes under purview of Section 300(1) of Cr.P.C – Further held – Scope of Section 300 Cr.P.C. is wider than the protection afforded by Article 20(2) of the Constitution of India – Petitioners cannot be prosecuted and convicted in second trial – Proceeding quashed – Petition allowed.**

(Para 10 & 11)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 221 (2) व 300 (1) एवं खान अधिनियम, (1952 का 35), धारा 72 C(1)(a) एवं धातु खान विनियम, 1961, विनियमन क्र. 115(5) व 177(1) – द्वितीय विचारण – अधिकारिता – याचीगण खदान के संचालक एवं प्रबंधक थे – खदान के कुछ भाग ने तालाब का आकार ले लिया जहां आठ बच्चे डूबकर मर गये – आवश्यक सुरक्षा व्यवस्था की गलती के आधार पर, याचीगण का खान अधिनियम एवं उक्त विनियमों के अंतर्गत विचारण किया गया, जिसमें उन्हें दोषसिद्ध एवं दण्डादिष्ट किया गया – अपील में, उन्हें आरोपों से दोषमुक्त किया गया – उसी घटना से, पुलिस ने भा.द.सं. की धारा 304–ए के अंतर्गत भी अपराध पंजीबद्ध किया और मजिस्ट्रेट द्वारा संज्ञान लिया गया – उसे चुनौती – अभिनिर्धारित – मात्र इस आधार पर कि कुछ और आरोप, जिन्हें पूर्व में प्रथम विचारण में नहीं लगाया गया था, उन्हें भी लगाया गया है द्वितीय विचारण की अनुमति नहीं दी जा सकती – समान तथ्यों पर आरंभ किया गया उक्त द्वितीय विचारण द.प्र.सं. की धारा 300(1) की परिधि में आता है – आगे

अभिनिर्धारित – धारा 300 द.प्र.सं. की व्याप्ति, भारत के संविधान के अनुच्छेद 20(2) द्वारा प्रदत्त संरक्षण से अधिक व्यापक है – याचीगण को द्वितीय विचारण में अभियोजित एवं दोषसिद्ध नहीं किया जा सकता – कार्यवाही अभिखंडित – याचिका मंजूर।

Case referred :

(1999) 5 SCC 253.

Manish Datt with *Rahul Sharma,* for the applicants.
R.N. Yadav, P.L. for the non-applicant/State.

O R D E R

J.P. Gupta, J. :- This petition has been preferred under section 482 of the Cr.P.C taking exception of the impugned order dated 01/07/2009 passed by the Judicial Magistrate First Class, Katni in Criminal Case No. 4390/2007 whereby the application filed under section 300 (1) of the Cr.P.C has been rejected.

2. The brief facts giving rise to this petition are that the applicant no.1 was operating the mine situated at village Tikuri, Tehsil Murwara, District Katni and applicant no.2 was Manager of his mine and some part of the mine took shape of a pond. On 06/09/2003 at about 4 PM in the evening some children visited and eight children drowned and died. On inquiry under the Mines Act, 1952, it was found that necessary security arrangements were not taken place. On account of the aforesaid lapse incident took place, therefore against the applicants by competent person complaint under section 72C(1) (a) of the Mines Act, 1952 for violation of Regulation No.115(5) and 177 (1) of the Metalliferous Mines Regulations 1961 was filed before the Judicial Magistrate First Class, Katni, which was registered as Criminal Case No. 266/2004 in this case applicants were tried, in which charge was framed in following terms:-

> "In Quarry No.5 in village Tikuri of which you Accused No.1 are Mines Owner and Accused No.2 are Manager, you have not provided wire fencing for safety due to which on 06/09/2003, 08 children died due to drowning. Thus, you have committed a crime for offence under section 115(5) and 117 (1) of the Metalliferous Mines Regulations 1961 which is an offence punishable under section 72C (1)(a) of the Mines Act, 1952. Why you accused be not punished under section 72C (1) (a) of the Mines Act, 1952. "

3. Thereafter on completion of the trial, applicants/accused persons were convicted and sentenced to R.I for 2 years and fine of Rs.5000/-each vide judgment dated 25/09/2007. Thereafter in criminal appeal No. 164/2007 vide judgment dated 22/10/2008 passed by the Special Judge, Katni, the applicants were acquitted of the charges.

4. With regard to the aforesaid incident of death of 8 children on account of drowning in the pond a case was registered in police station Madhav Nagar, District Katni at Crime No. 304/2003 under sections 304A read with section 34 of the IPC and after completion of the investigation, charge sheet was filed before the Judicial Magistrate First Class, Katni on 23/12/2003 and cognizance has been taken by the Judicial Magistrate First Class, Katni. Thereafter an application under section 300(1) of the Cr.P.C was filed before the Judicial Magistrate First Class on the ground that the applicants have already been prosecuted and acquitted, therefore on the basis of same facts, they cannot be twicely prosecuted or convicted. Hence the proceeding be closed. But the learned JMFC rejected the aforesaid application on the ground that Magistrate has no jurisdiction to review its order and charge framed by the Magistrate in the case has been approved by this Court in Criminal Revision No.1377/2004 vide order dated 08/11/2004.

5. The legality and propriety of the aforesaid order has been challenged in this petition on the ground that the applicants have already been prosecuted and acquitted of the charge, therefore as per provision of section 300(1) of the Cr.P.C, they cannot be prosecuted twicely on the basis of the same facts. If this is done, it would amount to misuse of the process of law and court and cause grave injustice with the applicants. During arguments it is also contended that so far earlier order of this Court with regard to confirmation of the order of the trial court relating to framing of the charges under section 304A of the IPC is concerned, that order will not preclude this court to consider the applicability of provision of section 300(1) of the Cr.P.C in exercising power under section 482 of the Cr.P.C in this petition. It is not disputed that on the basis of the charge sheet *prima facie* offence punishable under section 304A of IPC is made out or not. The subject matter of this petition is whether the applicants can be twicely prosecuted or convicted on the basis of same facts they were earlier prosecuted. Hence the reasons given by the learned trial court have no substance. Therefore the learned trial court be directed to close the proceeding of the aforesaid criminal case.

6. Learned Panel Lawyer opposed the aforesaid contentions and supported the impugned order and prayed for dismissal of the petition.

7. Having considered the contentions of the learned counsel for the parties and perusal of the record, it is found that the applicants are being prosecuted in the criminal

case No.4390/2007 under section 304 of IPC by the Judicial Magistrate First Class, Katni on the basis of same facts, the applicants were prosecuted and acquitted by the competent court in Criminal Case No. 266/2004. However earlier prosecution and acquittal was for different offences punishable under the Mines Act, 1952.

8. With a view to consider the applicability of the provision of Section 300 (1) of the Cr.P.C, it would be appropriate to reproduced it here, which reads as under:-

> **300. Person once convicted or acquitted not to be tried for same offence.**
>
> (1) A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under sub- section (1) of section 221, or for which he might have been convicted under sub- section (2) thereof.

9. The Three Judges Bench of the Apex Court in the case of *State of Tamil Nadu Vs Nalini & others* (1999)5 SCC 253 in para 236, 237, 238 and 239 held as under:-

> 236.The well-known maxim *"nemo debet bis vexari pro eadem causa"* (no person should be twice vexed for the same offence) embodies the well-established common law rule that no one should be put to peril twice for the same offence. The principle which is sought to be incorporated into Section 300 of the Criminal Procedure Code is that no man should be vexed with more than one trial for offences arising out of identical acts committed by him. When an offence has already been the subject of judicial adjudication, whether it ended in acquittal or conviction, it is negation of criminal justice to allow repetition of the adjudication in a separate trial on the same set of facts.
>
> 237.Though Article 20(2) of the Constitution of India embodies a protection against a second trial after a conviction of the same offence, the ambit of the clause is narrower than the protection afforded by Section 300 of

the Criminal Procedure Code. It was held by this Court in *Manipur Admn.v.Thokchom Bira Singh* [AIR 1965 SC 87 : (1965) 1 Cri LJ 120] that "if there is no punishment for the offence as a result of the prosecution, Article 20(2) has no application". While the clause embodies the principle of autrefois convict Section 300 of the Criminal Procedure Code combines both autrefois convict and autrefois acquit.

238. Section 300 has further widened the protective wings by debarring a second trial against the same accused on the same facts even for a different offence if a different charge against him for such offence could have been made under Section 221(1) of the Code, or he could have been convicted for such other offence under Section 221(2) of the Code. In this context it is useful to extract Section 221 of the Criminal Procedure Code:

"221.*Where it is doubtful what offence has been committed.*—(1) If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences.

(2) If in such a case the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of sub-section (1), he may be convicted of the offence which he is shown to have committed, although he was not charged with it.

239. As the contours of the prohibition are so widely enlarged it cannot be contended that the second trial can escape therefrom on the mere premise that some more allegations were not made in the first trial.''

10. The aforesaid judgment of the Apex Court made it clear that the scope of the provision of section 300 of the Cr.P.C is wider than the protection afforded by Article 20(2) of the Constitution of India as section 300 of Cr.P.C also included the case of

acquittal and also the case in which in earlier trial, the charge for which second trial is proposed, might have been framed under sub-section (2) section 221 of Cr.P.C also covered in the doctrine double jeopardy. The Hon'ble Apex Court also made it clear in the aforesaid case that second trial cannot be allowed merely on the ground that some more allegations, which were not made earlier in the first trial, have also been made.

11. In the present case, earlier prosecution was made because applicants failed to take measure for security of general public with a view to avoid or prevent any mishappening as the mine was situated near the public road and in the second trial also initiated on the same facts stating that the aforesaid act of omission of the applicants came into the purview of negligent act causing death of 8 children and constitute the offence punishable under section 304A of the IPC. In such circumstance in first trial, the applicants may also be prosecuted and charged for offence under section 304A of IPC. Therefore their case come under purview of section 300(1) of the Cr.P.C and they cannot be prosecuted and convicted in second trial.

12. In view of the aforesaid discussion, the applicants' petition deserves to be allowed. Hence it is allowed and the impugned order dated 01/07/2009 is set aside and the proceeding of the Criminal Case No. 4390/2007 is also quashed.

A copy of this order be sent to the learned trial court concerned for information.

Application allowed.

I.L.R. [2018] M.P. 253 (DB)
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice S. C. Sharma & Mr. Justice Alok Verma
M.Cr.C. No. 9354/2017 (Indore) decided on 27 November, 2017

RAJANI DABAR (SMT.) (Dr.) ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

A. Prevention of Corruption Act, (49 of 1988), Section 17 and Special Police Establishment Act, M.P. (17 of 1947), Section 3 & 5-A – Investigation – Jurisdiction of Local Police **– Held – Local police has the jurisdiction to investigate the offence under the provisions of Prevention of Corruption Act – Only lapse on the part of investigating agency appears that no prior sanction was obtained from JMFC as provided u/S 17 of the Act – Such lapse on the part of investigation agency in investigation as a whole is found vitiated.**

(Para 8)

क. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 17 एवं विशेष पुलिस स्थापना अधिनियम म.प्र., (1947 का 17), धारा 3 व 5–A – अन्वेषण – स्थानीय पुलिस की अधिकारिता – अभिनिर्धारित – स्थानीय पुलिस को, भ्रष्टाचार निवारण अधिनियम के उपबंधों के अन्तर्गत अपराध का अन्वेषण करने की अधिकारिता है – मात्र अन्वेषण एजेन्सी की ओर से हुई चूक से यह प्रतीत होता है कि अधिनियम की धारा 17 के अन्तर्गत दिए गये उपबंध अनुसार न्यायिक मजिस्ट्रेट प्रथम श्रेणी से कोई पूर्व मंजूरी प्राप्त नहीं की थी – अन्वेषण एजेन्सी की ओर से अन्वेषण में हुई इस तरह की चूक संपूर्णतः दूषित पाई गई।

***B. Prevention of Corruption Act, (49 of 1988), Section 13 (1)(d) & 13(2) – Unlawful Gain – Criminal Liability* – Report of the committee shows that there were irregularities in payment of vehicles which were engaged as Janani Mobility Express – Applicant only approved the payment after file was scrutinized by two persons below – Applicant has no *mens rea* to gain illegally - Prima facie no evidence of unlawful gain – Further held, there is a presumption in case of financial irregularity and there is also heavy duty on the person approving financial proposal – Person should be more cautious – However any negligence in performing their duty would not incur any criminal liability – Specific unlawful gain has to be indicated – In the present case, as per the statements recorded, no one say that any amount given to them was taken back by applicant for her own use – No case is made out – Order framing charges is set aside – Application allowed.**

(Para 9 & 10)

ख. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 13(1)(d) एवं 13(2) – विधिविरूद्ध अभिलाभ – आपराधिक दायित्व – समिति की रिपोर्ट यह दर्शाती है कि उन वाहनों के भुगतान में अनियमितताएँ थी जो जननी मोबिलिटी/गतिशीलता एक्सप्रेस के रूप में लगी हुई थी – आवेदक ने निचले दो व्यक्तियों द्वारा फाइल की संवीक्षा हो जाने के पश्चात् केवल भुगतान को अनुमोदित किया था – आवेदक की अवैध रूप से लाभ प्राप्त करने की कोई आपराधिक मनःस्थिति नहीं है – प्रथम दृष्ट्या विधिविरूद्ध अभिलाभ का कोई साक्ष्य नहीं – आगे अभिनिर्धारित, किया गया कि वित्तीय अनियमितताओं के प्रकरण में एक उपधारणा है एवं वित्तीय प्रस्ताव अनुमोदित करने वाले व्यक्ति पर एक भारी कर्त्तव्य भी है – व्यक्ति को अधिक सतर्क होना चाहिए – तथापि, उनके कर्तव्यों का निर्वहन करने में किसी भी उपेक्षा से कोई आपराधिक दायित्व नहीं होगा – विनिर्दिष्ट विधिविरूद्ध लाभ दर्शित किया जाना चाहिए – वर्तमान प्रकरण में, अभिलिखित कथनों के अनुसार, कोई भी नहीं कहता कि उन्हें दी गई कोई राशि आवेदक द्वारा उसके स्वयं के उपयोग हेतु वापस ली गई थी – कोई प्रकरण नहीं बनता – आरोप विरचित करने वाला आदेश अपास्त – आवेदन मंजूर।

Case referred :

CR. A. No. 544/2016 order passed on 26.10.2017 (FB)

S.K. Vyas with *L.S. Chandiramani,* for the applicant.
Archana Kher, for the non-applicant/State.

J U D G M E N T

The Judgment of the Court was deliverd by:
Alok Verma, J. :- This application is filed under Section 482 Cr.P.C. for quashment of FIR and the charge-sheet arising out of Crime No.741/2013 registered at Police Station- Jhabua, District- Jhabua.

2. According to the applicant, a charge-sheet was filed by the Police Station Jhabua under Sections 409, 420, 467, 468, 471 r/w Section 120-B IPC and Section 13(1)(d) r/w Section 13(2) of Prevention of Corruption Act arising out of aforesaid crime number.

3. Brief facts of the case are that as per M.P. Government National Rural Health Mission, a manual was created to provide for the use of Janani Mobility Express for the purpose of providing primary care to women during their pre and post delivery stage and also for weak, sick and malnourished children. The rates were provided for engaging vehicles from service providers.

4. To engage vehicles as such the CMHO, Jhabua published an advertisement in the newspaper on 03.12.2011, tenders were invited and after completing the necessary formalities, the service providers were engaged to provide vehicles to function as Janani Mobility Express.

5. On 28.06.2013, an inspection was conducted by Dr. M. Geeta, who was Head of the Divisional Health Mission. She expressed her displeasure over the working of District Accounts Officer, and thereafter, the Mission Director requested the Collector, Jhabua to inspect the account of the scheme. The Collector formed a committee on 03.07.2013. The committee inspected the accounts and found Accounts Officer Ghanshyam Karma, Dr. Kunwar Singh Dodhve and the present applicant Dr. Rajni Dabar responsible for excess payment of Rs.1,72,768/-. It was also alleged that some furniture was purchased, however, no entry was made in the stock register and payment for a sum of Rs.49,400/- was doubtful. Similarly, purchase of stationery items for Rs.56,942/- was also found doubtful.

6. This application is filed on the ground that (i) the investigating agency did not collect any material against the present applicant and by this way or that way, they tried to implicate the present applicant. (ii) The applicant is a public servant and in view of the provisions of M.P. Police Establishment Act 1947, the Special Police Establishement has power and authority to investigate specified offences against the applicant. (iii) The applicant was not responsible for maintaining the account. The Accountant Ghanshyam Karma was mainly responsible and the proposals were scrutinized by Dr. Kunwar Singh Dodhve. After they both approved the proposals, the proposal was placed before the present applicant for final approval.

7. Learned counsel for the respondent/State placing reliance on order passed by the Full Bench of this Court in case of *Arvind Jain vs. State of M.P.* in Cr.A. No. 544/2016 order dated 26.10.2017 argues that the full Bench of this Court held that the local police has the jurisdiction to investigate the offence under the provisions of Prevention of Corruption Act, and therefore, no case is made out for quashment of FIR and the charge-sheet.

8. So far as the investigation by local police is concerned, the present case was investigated by Rachna Mukati Bhadoria, Sub Divisional Officer Police, who is in the rank of Deputy Superintendent of Police. The only lapse on the part of the investigating agency appears to be that no prior sanction from the Judicial Magistrate First Class as provided for under Section 17 of Prevention of Corruption Act was obtained, however, such lapse on the part of investigating agency in the investigation as a whole is found vitiated. As such there appears to be no force in the argument that the investigation in this case is vitiated because the local police had no jurisdiction to investigate the offence.

9. Coming to the merit of the case, the report prepared by the committee, who was given the task to examine the accounts and prepared a detailed report, in which it was mentioned that there were irregularities in payment in respect of vehicles which were engaged as Janani Mobility Express. The charge-sheet shows that the statements of service providers were recorded. Statements of Yugal Kishore Naik is available in the case diary, who was running transport agency in the name of Naik Bandhu Transport Company. He said that he received money by cheque, however, it was not mentioned in the cheque or the cover letter for which vehicle the payment was made, and according to him, complete payment was not received by the agency. However, he did not say that any amount given to him was taken back by the present applicant for her own use. Similarly, statements of Ramanlal Naik, Uday Singh, Jayes Kumar Parihar, Persingh and Gopal Krishna from whom furnitures were purchased were also on record and they did not say that the payment made to them was taken

back by any of the officers involved in this matter, rather they said that the payment was not accompanied by details showing against which vehicle or against which item, the payment was being made. In this situation, it is apparent that so far as the present applicant is concerned, who only approved the payment after the file was scrutinized by two persons below had no *mens-ria* (sic : *mens-rea*) to gain illegally. There was also no *prima facie* evidence of unlawful gain.

10. This Court is well aware that there is presumption in case of financial irregularity and there is also heavy duty on the person approving financial proposal to be more cautious, however, any negligence in performing their duty would not incur any criminal liability and for criminal liability specific unlawful gain has to be indicated.

11. In this view of the matter, looking to the role assigned to the present applicant in the whole matter, no case is made out under Sections 409/120-B, 420/120-B, 467, 468, 471/120-B of IPC and Sections 13(1)(d) r/w Section 13(2) of the Prevention of Corruption Act. Accordingly, this application is allowed. The order framing charges is set aside. The present applicant is discharged from charges under Sections 409/120-B, 420/120-B, 467, 468, 471/120-B of IPC and Sections 13(1)(d) r/w Section 13(2) of the Prevention of Corruption Act.

Application allowed.

I.L.R. [2018] M.P. 257
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice Sheel Nagu

M.Cr.C. No. 24766/2017 (Gwalior) decided on 6 December, 2017

AMAR SINGH KAMRIA & ors. …Applicants
Vs.
STATE OF M.P. & anr. …Non-applicants

***A. Criminal Procedure Code, 1973 (2 of 1974), Section 319 and 91 – Murder Case - Consideration of Evidence collected during Investigation and during Trial* - Petitioners although implicated in the FIR were not been arrayed as accused in the charge-sheet because during investigation their plea of Alibi was found to be correct - During trial, involvement of petitioners were revealed in the testimony of witnesses - Complainant/victim filing application u/s 319 Cr.P.C. – Petitioners filed an application u/s 91 Cr.P.C. seeking production of documents on the basis of which investigating agency found their plea of alibi to be true – Application u/s 91 Cr.P.C. was dismissed – Held – Application u/s 319 is only maintainable when implicative evidence, documentary or oral having probative value more convincing than grave**

suspicion is brought on record during trial - If any evidence is considered during investigation process and is not brought on record between the stage of taking cognizance and commencement of trial, cannot be considered even for corroborative purposes while invoking S. 319 Cr.P.C. – Other evidence which has come on record between the stage of taking cognizance till the commencement of trial can only be used for corroborative purposes - No illegality committed by the trial Court – Petition dismissed.

(Paras 2 & 9)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 319 एवं 91 – हत्या का प्रकरण – अन्वेषण एवं विचारण के दौरान संकलित किये गये साक्ष्य पर विचार – यद्यपि याचीगण प्रथम सूचना प्रतिवेदन में आलिप्त थे, वे आरोप पत्र में अभियुक्त के रूप दोषारोपित नहीं थे क्योंकि अन्वेषण के दौरान उनका अन्यत्र उपस्थित होने का अभिवाक् सही पाया गया था – विचारण के दौरान, साक्षियों के परिसाक्ष्य में याचीगण की संलिप्तता प्रकट हुई थी – परिवादी/पीड़ित द्वारा दण्ड प्रक्रिया संहिता की धारा 319 के अन्तर्गत आवेदन प्रस्तुत किया जाना – याचीगण ने उन दस्तावेजों की, जिसके आधार पर अन्वेषण एजेन्सी ने अन्यत्र उपस्थित होने के अभिवाक् को सत्य पाया था, दण्ड प्रक्रिया संहिता की धारा 91 के अंतर्गत आवेदन प्रस्तुत किया – दण्ड प्रक्रिया संहिता की धारा 91 के अंतर्गत आवेदन खारिज किया गया था – अभिनिर्धारित – धारा 319 के अंतर्गत आवेदन केवल तब पोषणीय है, जब आलिप्त करने वाला साक्ष्य, दस्तावेजी या मौखिक, जिसका प्रमाणिक मूल्य घोर संदेह से अधिक विश्वसनीय है, विचारण के दौरान अभिलेख पर लाया गया हो – यदि कोई साक्ष्य अन्वेषण प्रक्रिया के दौरान विचार में लिया गया है तथा संज्ञान लेने के प्रक्रम एवं विचारण के आरंभ होने के मध्य अभिलेख पर नहीं लाया गया, दण्ड प्रक्रिया संहिता की धारा 319 का अवलंब लेते समय संपुष्टि के प्रयोजनों हेतु भी विचार में नहीं लिया जा सकता – अन्य साक्ष्य जो कि संज्ञान लेने के प्रक्रम से विचारण के आरंभ होने तक के मध्य अभिलेख पर आये हैं, केवल संपुष्टि प्रयोजनों हेतु उपयोग में लाए जा सकते हैं – विचारण न्यायालय द्वारा कोई अवैद्यता कारित नहीं की गई – याचिका खारिज।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 319 – Practice and Procedure – Meaning of expression "Evidence" **- Held - Two conflicting views appears to exist in two Apex Court judgments on the same point of meaning of expression 'Evidence' used in S. 319 Cr.P.C. – Judgment rendered by a Bench of larger composition shall prevail – Law laid down by the five Judge Bench in the case of Hardeep Singh will prevail upon the subsequent judgment rendered by Division Bench in Brijendra Singh's case.**

(Para 8)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 319 – पद्धति एवं प्रक्रिया – अभिव्यक्ति "साक्ष्य" का अर्थ – अभिनिर्धारित – दण्ड प्रक्रिया संहिता की धारा 319 में प्रयुक्त अभिव्यक्ति "साक्ष्य" के अर्थ के एक ही बिन्दु पर सर्वोच्च न्यायालय के दो निर्णयों में दो विरोधी दृष्टिकोण का विद्यमान होना प्रतीत होता है – एक बड़ी संरचना वाली न्यायपीठ द्वारा दिया गया निर्णय अभिभावी होगा – हरदीप सिंह के प्रकरण में पाँच न्यायाधीशों की न्यायपीठ द्वारा प्रतिपादित विधि, खंड न्यायपीठ द्वारा ब्रिजेन्द्र सिंह के प्रकरण में दिये गये पश्चात्वर्ती निर्णय पर अभिभावी होगी।

Cases referred :

(2014) 3 SCC 92, (2017) 7 SCC 706.

Naval Gupta, for the applicants.
Sangeeta Pachauri, P.P. for the non-applicants/State.

O R D E R

Sheel Nagu, J. :- The inherent powers of this Court are invoked u/s 482 Cr.P.C. for assailing the interlocutory order dated 15.11.2017 passed in S.T. No. 112/2015 by which the trial Judge has dismissed an application u/s 91 Cr.P.C. whereby the petitioners-accused sought to bring on record the documents which were considered by the investigating agency for finding the plea of alibi of the petitioners to be correct which led the petitioners being not arrayed as accused in the charge sheet filed by the prosecution, despite petitioners having been implicated in the FIR.

2. Brief facts giving rise to the present case are that against the petitioners and other co-accused offence of murder was alleged in Crime No. 99/2014 wherein the petitioners were specifically named in the FIR but after conduction of investigation, the plea of alibi raised by the petitioners -accused was found to be correct by the investigating agency which led to the charge sheet being filed without petitioners being arrayed as accused. During conduction of trial, the testimony of witnesses were recorded which revealed that the petitioners were involved in the crime of murder which impelled the complainant /victim to file an application u/s 319 Cr.P.C. praying for arraying the petitioners as accused. This application was allowed by interlocutory order dated 03.12.2016 in the said sessions trial which came to be assailed in M.Cr.C.2241/2017. This Court while adjudicating the M.Cr.C.2241/2017 allowed the same by quashing the impugned order solely on the ground that prior to passing of the order of arraying the petitioner as accused, no opportunity of hearing was afforded. While so holding this Court relied upon the decision of the Apex Court in the case of *Brijendra Singh and Ors. Vs. State of Rajasthan* reported in (2017) 7 SCC 706 which was attended with similar circumstances and had taken into account the earlier

Constitutional Bench decision in the case of *Hardeep Singh Vs. State of Punjab and Ors*. reported in (2014) 3 SCC 92. Thereafter when the matter was taken up by the trial court for re-consideration of application u/s 319 Cr.P.C. the petitioners moved an application u/s 91 Cr.P.C. seeking production of those documents on the basis of which the investigating agency had found the plea of the petitioners of alibi to be true. The said application has suffered dismissal by the impugned order on the ground that the evidence made available by the prosecution in the trial does not contain any such documents of which the petitioners have sought production u/s 91 of the Cr.P.C. and therefore, it was impliedly held that if Sec. 91 application is allowed then the court would travel beyond the purview of Sec. 319 Cr.PC.

3. Learned counsel for the rival parties are heard.

4. The Constitution Bench in the case of *Hardeep Singh* (supra) while considering the scope and ambit of Section 319 inter alia framed several question including question No.3 which reads as under :-

> *"Question (iii) – Whether the word "evidence" used in Section 319 (1) Cr.P.C has been used in a comprehensive sense and includes the evidence collected during investigation or the word "evidence" is limited to the evidence recorded during trial?"*

The above said question after due consideration of all the judicial verdicts on the point was answered in the following manner :-

> *"85. In view of the discussion made and the conclusion drawn hereinabove, the answer to the aforesaid question posed is that apart from evidence recorded during trial, any material that has been received by the court after cognizance is taken and before the trial commences, can be utilized only for corroboration and to support the evidence by the court to invoke the power under Section 319 CrPC. The "evidence" is thus limited to the evidence during trial."*

5. From the above, it is evident that for the purpose of deciding application u/s 319 Cr.P.C. the expression "evidence" used in the said provision means the evidence which has come during the trial in shape of oral and documentary evidence and any other piece of evidence which has come on record of the trial court between the stage of taking cognizance and commencement of trial can be utilized for corroborative

purpose. The necessary inference which can be drawn from the above said answer of the said question rendered by the Constitution bench is that any material which formed part of investigating process but was not part of the charge sheet or was not brought on record between the stage of taking cognizance and commencement of trial, cannot be utilized for the purpose of invoking Sec. 319 Cr.PC. However, the Apex Court in the subsequent decision rendered by the Division Bench in the case of *Brijendra Singh* (supra) appears to have slightly enlarged the scope and ambit of Sec. 319 Cr.P.C. laid down by the decision in the case of *Hardeep Singh.*

6. A bare perusal of the decision of Division Bench of the Apex Court in the case of *Brijendra Singh* reveals that though earlier decision of Hardeep Singh was considered, however, the scope, ambit and sweep of the expression "evidence" contained in Section 319 laid down in para 85 of the judgment of Hardeep Singh was not considered by the Apex Court in the case of *Brijendra Singh*.

7. In the case of *Brijendra Singh* a similar plea of alibi was raised which was accepted by the investigating agency which led to filing of charge sheet without arraying the petitioners therein as accused despite the petitioners having been named as one of the assailants in the FIR. When the testimonies were recorded in the trial court, the petitioner was named as one of the assailants. Sec. 319 Cr.P.C. was invoked by the prosecution which led to allowing of the application which was assailed in the High Court unsuccessfully whereafter the matter traveled to the Supreme Court where in the case of Brijendra Singh the challenge raised by the accused therein was upheld by holding that since a detailed enquiry had been conducted by the investigating agency where the plea of alibi was found to be true the trial Court was not correct in allowing the application u/s 319 in perfunctory and cursory manner without applying its mind to the exonerative evidence collected by the investigating officer during investigation.

8. This Court cannot comment upon the decision of the Apex Court in the case of Brijendra Singh but since two conflicting views appear to exist on the same point of meaning of expression "evidence" used in Sec. 319 Cr.P.C, the decision of the Apex Court in the case of Hardeep Singh rendered by a bench of larger composition shall prevail upon Brijendra's decision.

9. In view of the above, this Court has no hesitation to hold that the expression "evidence" found in Sec. 319 Cr.P.C is to be understood to mean the evidence collected during the trial in shape of oral and documentary evidence. However, the other evidence which has come on record between the stage of taking cognizance by the Court till the commencement of the trial can merely be used for corroborative purposes as laid down by the Apex Court in five Judge Bench decision in the case of Hardeep Singh. In other words, an application u/s 319 Cr.P.C. is maintainable only when implicative

evidence of probative value more than strong suspicion comes on record in shape of documentary or oral evidence in trial. While considering such application u/s 319 Cr.P.C. the trial court can take assistance, for corroboration only, of any evidence which is already on record introduced between the stage of taking cognizance and the stage of commencement of trial. However, the trial court is not empowered to invoke Sec. 319 Cr.P.C. merely based on evidence which is part of investigation stage unless the same is already brought on record between the period of taking cognizance and before the trial begins.

10. Consequently, the view taken by the learned trial Judge in the impugned order does not suffer from any illegality or rampant irregularity. In the absence of any failure of justice occasioned, this Court declines interference and present petition stands dismissed.

Application dismissed.