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

Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(a), 13(1) & 13(2) **– Appeal against concurrent decree of eviction u/S 12(1)(a) against Appellant/defendant (tenant) – Held – Where the rate of rent and quantum of arrears of rent are disputed, whole of section 13(1) of the Act becomes inoperative till provisional fixation of monthly rent is done by the Court u/S 13(2) of the Act – Further held – U/S 13(2) of the Act, Court is duty bound only to fix provisional rent and in the instant case, Trial Court fixed the provisional rent but as per the observation made by lower appellate court, tenant has not deposited the rent in accordance with the provisions of Section 13(1) of the Act – It is evident that appellant/tenant has not complied with provisions of Section 13(1) of the Act as he was not regularly depositing the rent on monthly basis – Records further shows that tenant has not even made any application before the Courts below for condonation of defaults committed by him in depositing the rent – Courts below rightly decreed the suit of plaintiff u/S 12(1)(a) of the Act – Second Appeal dismissed. [Virendra Prajapati Vs. Shri K.B. Agarwal] …518**

स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(ए), 13(1) व 13(2) – अपीलार्थी/प्रतिवादी (किरायेदार) के विरूद्ध धारा 12(1)(ए) के अंतर्गत बेदखली की समवर्ती डिक्री के विरूद्ध अपील – अभिनिर्धारित – जहाँ किराये की दर एवं किराये की बकाया राशि की मात्रा विवादित है, अधिनियम की धारा 13(2) के अंतर्गत न्यायालय द्वारा मासिक किराये का अनंतिम नियतन होने तक, अधिनियम की धारा 13(1) संपूर्ण रूप से अप्रवर्तनीय हो जाती है – आगे अभिनिर्धारित – अधिनियम की धारा 13(2) के अंतर्गत, न्यायालय केवल अनंतिम किराया नियत करने हेतु कर्तव्यबद्ध है एवं वर्तमान प्रकरण में, विचारण न्यायालय ने अनंतिम किराया नियत किया परंतु निचले अपीली न्यायालय द्वारा किये गये संप्रेक्षण के अनुसार, किरायेदार ने अधिनियम की धारा 13(1) के उपबंधों के अनुसार किराया जमा नहीं किया – यह सुस्पष्ट है कि अपीलार्थी/किरायेदार ने अधिनियम की धारा 13(1) के उपबंधों का अनुपालन नहीं किया क्योंकि वह नियमित रूप से मासिक आधार पर किराया जमा नहीं कर रहा था – अभिलेख आगे यह दर्शाते हैं कि किरायेदार ने किराया जमा करने में उसके द्वारा कारित व्यतिक्रम की माफी हेतु, निचले न्यायालयों के समक्ष कोई आवेदन तक प्रस्तुत नहीं किया है – निचले न्यायालयों ने अधिनियम की धारा 12(1)(ए) के अंतर्गत वादी का वाद उचित रूप से डिक्रीत किया – द्वितीय अपील खारिज। (वीरेन्द्र प्रजापति वि. श्री के.बी. अग्रवाल) …518

Advocates Act, (25 of 1961), Section 15 & 28, Advocates Welfare Fund Act, M.P., (9 of 1982), Section 16 and Model Bye-Laws for Bar Association, M.P. Clause 26 & 27 – Elections and Internal Affairs of Bar Association – Interference by State Bar Council **– Held – The State Bar Council or its appellate Committee has no power, authority or jurisdiction to interfere with the process of election or to interfere with internal affairs of Bar association**

regarding membership or its suspension etc. – No provision of statute or any Rule has been produced which confers power to State Bar Council to interfere with election process and internal affairs of the Bar Associations – Impugned orders passed by the respondents are quashed – Petition allowed. [Bar Association Lahar, Dist. Bhind Vs. State Bar Council of M.P.] (DB)…667

अधिवक्ता अधिनियम (1961 का 25), धारा 15 व 28, अधिवक्ता कल्याण निधि अधिनियम, म.प्र., (1982 का 9), धारा 16 एवं अधिवक्ता संघ हेतु मॉडल उप विधि, म.प्र. खंड 26 व 27 – अधिवक्ता संघ के निर्वाचन एवं आंतरिक मामले – राज्य अधिवक्ता परिषद द्वारा हस्तक्षेप – अभिनिर्धारित – राज्य अधिवक्ता परिषद या उसकी अपीली समिति को अधिवक्ता संघ की निर्वाचन प्रक्रिया में हस्तक्षेप अथवा सदस्यता या उसके निलंबन इत्यादि के संबंध में आंतरिक मामलों में हस्तक्षेप की कोई शक्ति, प्राधिकार या अधिकारिता नहीं है – कानून या किसी नियम का कोई उपबंध प्रस्तुत नहीं किया गया है जो राज्य अधिवक्ता परिषद को अधिवक्ता संघ की निर्वाचन प्रक्रिया या आंतरिक मामलों में हस्तक्षेप की शक्ति प्रदत्त करता है – प्रत्यर्थीगण द्वारा पारित किये गये आक्षेपित आदेश अभिखंडित किये गये – याचिका मंजूर। (बार एसोसिएशन लहार, डिस्ट्रिक्ट भिण्ड वि. स्टेट बार काउंसिल ऑफ एम.पी.) **(DB)…667**

***Advocates Welfare Fund Act, M.P., (9 of 1982), Section 16 – See – Advocates Act, 1961,* Section 15 & 28 [Bar Association Lahar, Dist. Bhind Vs. State Bar Council of M.P.] (DB)…667**

अधिवक्ता कल्याण निधि अधिनियम, म.प्र., (1982 का 9), धारा 16 – देखें – अधिवक्ता अधिनियम, 1961, धारा 15 व 28 (बार एसोसिएशन लहार, डिस्ट्रिक्ट भिण्ड वि. स्टेट बार काउंसिल ऑफ एम.पी.) **(DB)…667**

***Appointment of Anganwadi Karyakarta – Weighted Marks – Entitlement* – Held – Petitioner does not possess 5 years teaching experience as Didi, hence not entitled for 10 weighted marks – Further, petitioner vide affidavit projected herself to be a deserted woman whereas in the application form, she shown her status to be a married woman and not a deserted woman, hence not entitled for any weighted marks on this ground also – Merely to seek appointment, petitioner has suppressed the fact of residing with her husband and close relatives – Petition dismissed. [Anjul Kushwaha (Smt.) Vs. State of M.P.] …698**

आंगनवाड़ी कार्यकर्ता की नियुक्ति – भारित अंक – हकदारी – अभिनिर्धारित – याची के पास दीदी के रूप में 5 वर्ष का शिक्षण अनुभव नहीं है अतः, 10 भारित अंकों के लिए हकदार नहीं – इसके अतिरिक्त, याची ने स्वयं को शपथपत्र द्वारा एक अभित्यक्त महिला प्रदर्शित किया जबकि आवेदन पत्र में उसने अपनी स्थिति विवाहित महिला दर्शाई और न कि एक अभित्यक्त महिला, अतः इस आधार पर भी किसी भारित अंकों की हकदार नहीं – मात्र नियुक्ति चाहने के लिए, याची ने अपने पति एवं नजदीकी रिश्तेदारों

के साथ निवासरत होने के तथ्य का छिपाव किया है – याचिका खारिज। (अंजुल कुशवाहा (श्रीमती) वि. म.प्र. राज्य)

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***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. [M.P. Paschim Kshetra Vidyut Vitran Co. Ltd. Vs. Serco BPO Pvt. Ltd.]** **...166**

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 गईं थी। (म.प्र. पश्चिम क्षेत्र विद्युत वितरण कं. लि. वि. सेरको बीपीओ प्रा.लि.) **...166**

***Arbitration and Conciliation Act (26 of 1996), Section 11(6) – Order and Review* – Held – Functions performed by the Chief Justice or his designate u/S 11 is a judicial function and thus orders passed must be treated as a judicial orders – Orders passed u/S 11(6) of the Act is an outcome of a judicial function and therefore it cannot be said that said order is administrative in nature and the same is not passed by a Court – Further held – The expression 'review' is used in two distinct senses namely, (i) a procedural review which is either inherent or implied in a Court or Tribunal for the purpose of setting aside a palpable erroneous order passed under a misapprehension and (ii) a review on merits when the error sought to be corrected is one of law and is apparent on face of the record – Review on merits can be sought for only**

when there exist an enabling provision expressly or impliedly – In cases, where power of procedural review is invoked, court cannot enter into merits of the order passed – In the instant case, the error pointed out are not related to procedural part but are related to merits of the case and since no express or implied provision for review exists under the Act of 1996, the present review petition cannot be entertained – Review petition dismissed. [Dinesh Kumar Agrawal Vs. Vyas Kumar Agrawal] …510

माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 11(6) – आदेश एवं पुनर्विलोकन – अभिनिर्धारित – धारा 11 के अंतर्गत मुख्य न्यायमूर्ति या उसके द्वारा पदाभिहित किसी व्यक्ति द्वारा संपादित किये गये कार्य, न्यायिक कार्य हैं एवं इस प्रकार पारित आदेशों को न्यायिक आदेशों के रूप में माना जाना चाहिए – धारा 11(6) के अंतर्गत पारित आदेश न्यायिक कार्य का एक परिणाम हैं एवं इसलिए यह नहीं कहा जा सकता कि उक्त आदेश प्रशासनिक प्रकृति का है एवं उसे न्यायालय द्वारा पारित नहीं किया गया है – आगे अभिनिर्धारित – अभिव्यक्ति 'पुनर्विलोकन' को दो भिन्न अर्थों में प्रयुक्त किया गया है अर्थात्, (i) प्रक्रियात्मक पुनर्विलोकन जो कि दुराशंका के अधीन पारित किये गये स्पष्ट रूप से त्रुटिपूर्ण आदेश को अपास्त किये जाने के प्रयोजन से न्यायालय या अधिकरण में या तो अंतर्निहित है या विवक्षित है एवं (ii) गुणदोषों पर पुनर्विलोकन जब वह त्रुटि जिसका सुधार चाहा गया है वह एक विधि है एवं अभिलेख पर प्रकट होती है – गुणदोषों के आधार पर पुनर्विलोकन केवल तभी चाहा जा सकता है जब एक सामर्थ्यकारी उपबंध अभिव्यक्त रूप से या विवक्षित रूप से मौजूद हो – उन प्रकरणों में, जहाँ प्रक्रियात्मक पुनर्विलोकन की शक्ति का अवलंब लिया गया है, न्यायालय पारित आदेश के गुणदोषों पर नहीं जा सकता – वर्तमान प्रकरण में, निकाली गई त्रुटि प्रक्रियात्मक भाग से संबंधित नहीं है बल्कि प्रकरण के गुणदोषों से संबंधित है एवं चूंकि 1996 के अधिनियम के अंतर्गत पुनर्विलोकन हेतु कोई अभिव्यक्त या विवक्षित उपबंध मौजूद नहीं है, वर्तमान पुनर्विलोकन याचिका ग्रहण नहीं की जा सकती – पुनर्विलोकन याचिका खारिज। (दिनेश कुमार अग्रवाल वि. व्यास कुमार अग्रवाल) **…510**

***Arbitration and Conciliation Act (26 of 1996), Section 11(6) and Limitation Act (36 of 1963), Article 137 & Section 15(2) – Limitation – Period of Notice – Exclusion* – Held – If intervention of court is necessitated then such petition has to be filed within the period of limitation – Since there is no specific period of limitation prescribed for application u/S 11 of the Act of 1996, therefore as per Article 137, period of limitation will be three years from the date right to apply accrues – Limitation does not start from the date of notice but from the date when cause of action arises – Period of notice is to be excluded for computing the period of limitation in terms of Section 15(2) of the Limitation Act, 1963 – In the instant case, date of agreement was 21.12.2010, final payment according to agreement was made in the year 2011, notice for appointment of Arbitrator was issued on 29.05.2013 – Hence, cause of action accrued in the year 2011 and petition was filed before this Court on**

20.09.2016, much beyond the period of three years, which is barred by limitation – Dispute cannot be referred to Arbitration – Petition dismissed. [Uttarakhand Purv Sainik Kalyan Nigam Ltd. (M/s.) Vs. Northern Coal Field Ltd.] …794

माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 11(6) एवं परिसीमा अधिनियम (1963 का 36), अनुच्छेद 137 व धारा 15(2) – परिसीमा – नोटिस की अवधि – अपवर्जन – अभिनिर्धारित – यदि न्यायालय का मध्यक्षेप आवश्यक हो जाता है तब उक्त याचिका को परिसीमा की अवधि के भीतर प्रस्तुत करना होता है – चूंकि 1996 के अधिनियम की धारा 11 के अंतर्गत आवेदन हेतु कोई विनिर्दिष्ट अवधि विहित नहीं है अतः अनुच्छेद 137 के अनुसार परिसीमा की अवधि, आवेदन करने का अधिकार प्रोद्भूत होने की तिथि से तीन वर्ष होगी – परिसीमा की अवधि, नोटिस की तिथि से आरंभ नहीं होगी बल्कि वाद कारण उत्पन्न होने की तिथि से होगी – परिसीमा अधिनियम, 1963 की धारा 15(2) की शर्तों में, परिसीमा की अवधि की गणना हेतु नोटिस की अवधि का अपवर्जन किया जाना चाहिए – वर्तमान प्रकरण में, करार की तिथि 21.12.2010 थी, करार के अनुसार अंतिम भुगतान वर्ष 2011 में किया गया था, मध्यस्थ की नियुक्ति हेतु नोटिस, 29.05.2013 को जारी किया गया था – अतः, वाद कारण वर्ष 2011 में प्रोद्भूत हुआ तथा इस न्यायालय के समक्ष याचिका 20.09.2016 को प्रस्तुत की गई थी, तीन वर्षों की अवधि से काफी परे, जो कि परिसीमा द्वारा वर्जित है – विवाद को माध्यस्थम् हेतु निर्देशित नहीं किया जा सकता – याचिका खारिज। (उत्तराखण्ड पूर्व सैनिक कल्याण निगम लि. (मे.) वि. नार्दन कोल फील्ड लि.) …794

***Arbitration and Conciliation Act (26 of 1996), Section 11(6) & 21 – Appointment of Arbitrator* – Held – Section 21 of the Act of 1996 deals with appointment of Arbitrator without intervention of the Court whereas appointment of Arbitrator with the intervention of the Court is contemplated u/S 11(6) of the Act of 1996. [Uttarakhand Purv Sainik Kalyan Nigam Ltd. (M/s.) Vs. Northern Coal Field Ltd.] …794**

माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 11(6) व 21 – मध्यस्थ की नियुक्ति – अभिनिर्धारित – 1996 के अधिनियम की धारा 21, मध्यस्थ की न्यायालय के मध्यक्षेप के बिना नियुक्ति से संबंधित है जबकि न्यायालय के मध्यक्षेप से मध्यस्थ की नियुक्ति, 1996 के अधिनियम की धारा 11(6) के अंतर्गत अनुध्यात है। (उत्तराखण्ड पूर्व सैनिक कल्याण निगम लि. (मे.) वि. नार्दन कोल फील्ड लि.) …794

***Benami Transactions (Prohibition) Act, (45 of 1988), Section 2(a), 2(c) & 4 – See – Civil Procedure Code, 1908, Order 7 Rule 11* [Sita Bai (Smt.) Vs. Smt. Sadda Bai] …193**

बेनामी संव्यवहार (प्रतिषेध) अधिनियम (1988 का 45), धारा 2(ए), 2(सी) व 4 – देखें – सिविल प्रक्रिया संहिता, 1908, आदेश 7 नियम 11 (सीता बाई (श्रीमती) वि. श्रीमती सद्दा बाई) …193

Bhopal Development Plan 2005, Chapter 3 – See – Nagar Tatha Gram Nivesh Adhiniyam, M.P., 1973, Section 19 **[Munawwar Ali Vs. Union of India] (DB)…449**

भोपाल विकास योजना 2005, अध्याय 3 – देखें – नगर तथा ग्राम निवेश अधिनियम, म.प्र., 1973, धारा 19 (मुनव्वर अली वि. यूनियन ऑफ इंडिया) **(DB)…449**

***BPL Category – Entitlement* – Petitioner's name appearing in the BPL ration card issued to her sister-in-law (nanad) – Held – Petitioner's husband is alive and has not deserted her – By no stretch of imagination, status of sister-in-law as per Hindu Law and customs can be considered to be head of the family of petitioner – Family card showing herself in BPL category will not entitle the petitioner for any weighted marks, especially when her husband is alive. [Anjul Kushwaha (Smt.) Vs. State of M.P.] …698**

गरीबी रेखा से नीचे की श्रेणी – हकदारी – याची का नाम उसकी ननद को जारी किये गये गरीबी रेखा से नीचे के राशन कार्ड पर प्रकट हो रहा है – अभिनिर्धारित – याची का पति जीवित है तथा उसका अभित्यजन नहीं किया है – हिन्दू विधि एवं रूढ़ियों के अनुसार, कल्पना की सीमा से परे, ननद को याची के कुटुम्ब का प्रमुख नहीं माना जा सकता – राशन कार्ड में उसे गरीबी रेखा से नीचे की श्रेणी में दर्शाया जाना, याची को किसी भारित अंकों के लिए हकदार नहीं बनाएगा विशेष रूप से तब जब उसका पति जीवित है। (अंजुल कुशवाहा (श्रीमती) वि. म.प्र. राज्य) …698

***Central Excise Act (1 of 1944), Section 35 (G)(2) and Cenvat Credit Rules, 2004, Rule 12 – Claim of Credit – Registration* – Appellant department held that as respondent company was got registered on 17.10.2008 and was not registered during the period when construction service was received and bills were raised, company is not eligible for Cenvat Credit of tax paid on service rendered prior to the date of registration – Company filed an appeal before the Tribunal whereby the same was allowed – Challenge to – Held – Tribunal was justified in holding that registration with the department is not a pre-requisite for claiming the credit – No substantial question of law arises in the instant appeal for interference – Appeal dismissed. [Commissioner, Customs, Central Excise & Service Tax, Indore Vs. All Cargo Global Logistics, Pithampur] (DB)…*16**

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

किया गया था – को चुनौती – अभिनिर्धारित – अधिकरण द्वारा यह अभिनिर्धारित किया जाना न्यायोचित था कि क्रेडिट का दावा करने हेतु विभाग के साथ रजिस्ट्रीकरण एक पूर्व अपेक्षा नहीं है – वर्तमान अपील में, हस्तक्षेप हेतु विधि का कोई सारवान् प्रश्न उत्पन्न नहीं होता – अपील खारिज। (कमिश्नर, कस्टम्स, सेन्ट्रल एक्साइज एण्ड सर्विस टेक्स, इंदौर वि. ऑल कारगो ग्लोबल लॉजिस्टिक्स, पीथमपुर) **(DB)…*16**

Cenvat Credit Rules, 2004, Rule 12 – See – Central Excise Act, 1944, Section 35(G)(2) **[Commissioner, Customs, Central Excise & Service Tax, Indore Vs. All Cargo Global Logistics, Pithampur] (DB)…*16**

सेनवैट क्रेडिट नियम, 2004, नियम 12 – देखें – केंद्रीय उत्पाद–शुल्क अधिनियम, 1944, धारा 35(जी)(2) (कमिश्नर, कस्टम्स, सेन्ट्रल एक्साइज एण्ड सर्विस टेक्स, इंदौर वि. ऑल कारगो ग्लोबल लॉजिस्टिक्स, पीथमपुर) **(DB)…*16**

***Civil Procedure Code (5 of 1908), Section 11 & Order 21 Rule 89 & 90 – Execution Proceedings – Principle of Res Judicata* – In an execution proceedings, an application/objection was filed under Order 21 Rules 89 & 90, which was rejected by the trial Court – When challenged further, the same was dismissed by the High Court as well as by the Supreme Court – Subsequently, another application was moved by the present applicant under the same provision before the trial Court which was also dismissed – Challenge to – Held – Principle of res judicata would apply in the execution proceedings – Objections raised by the applicants in a subsequent application on same set of facts is barred by the principle of constructive res judicata – Further held – Even if the same objections have not been decided expressly in previous round of litigation, the same shall be deemed to be barred by the principle of constructive res judicata – Revision dismissed. [Bhanu Shankar Raikwar Vs. Vijay Shankar Raikwar] …806**

सिविल प्रक्रिया संहिता (1908 का 5), धारा 11 व आदेश 21 नियम 89 व 90 – निष्पादन कार्यवाहियां – पूर्व न्याय का सिद्धांत – निष्पादन कार्यवाहियों में, आदेश 21 नियम 89 व 90 के अंतर्गत आवेदन/आक्षेप प्रस्तुत किया गया था जिसे विचारण न्यायालय द्वारा अस्वीकार किया गया – जब आगे चुनौती दी गई, उच्च न्यायालय के साथ ही उच्चतम न्यायालय द्वारा उक्त को खारिज किया गया – तत्पश्चात्, वर्तमान आवेदक द्वारा विचारण न्यायालय के समक्ष, उसी उपबंध के अंतर्गत अन्य आवेदन प्रस्तुत किया गया, जिसे भी खारिज किया गया – को चुनौती – अभिनिर्धारित – निष्पादन कार्यवाहियों में पूर्व न्याय का सिद्धांत लागू होगा – आवेदकों द्वारा समान तथ्यों के समूह पर एक पश्चात्वर्ती आवेदन में उठाये गये आक्षेप आन्वयिक पूर्व न्याय के सिद्धांत द्वारा वर्जित हैं – आगे अभिनिर्धारित – यदि पूर्वतर वाद क्रम में समान आक्षेपों को अभिव्यक्त रूप से विनिश्चित नहीं किया गया है, उक्त को आन्वयिक पूर्व न्याय के सिद्धांत द्वारा वर्जित माना जाएगा – पुनरीक्षण खारिज। (भानू शंकर रैकवार वि. विजय शंकर रैकवार) **…806**

***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. [Keshav Prasad (Dead) Through L.Rs. Vs. Shriram Gautam] …*8**

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 विरूद्ध 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 अवरूद्ध 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 विरूद्ध 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। (केशव प्रसाद (मृतक) द्वारा विधिक प्रतिनिधि वि. श्रीराम गौतम) …*8

***Civil Procedure Code (5 of 1908), Section 100 – Second Appeal – Maintainability* – Appeal does not involve substantial question of law and is not maintainable nor the judgments of the courts below suffers from any illegality on merits and even otherwise, it has become infructuous as plaintiff/landlord has obtained the possession of the suit accommodation in execution proceedings – Appeal dismissed in limine. [Virendra Prajapati Vs. Shri K.B. Agarwal] …518**

सिविल प्रक्रिया संहिता (1908 का 5), धारा 100 – द्वितीय अपील – पोषणीयता – अपील विधि का कोई सारवान प्रश्न अंतर्ग्रस्त नहीं करती एवं पोषणीय नहीं है, न ही निचले न्यायालयों के निर्णय गुणदोषों पर किसी अवैधता से ग्रसित है एवं अन्यथा भी, वह निष्फल बन चुके हैं क्योंकि वादी/भू–स्वामी ने निष्पादन कार्यवाहियों में वाद स्थान का कब्जा

अभिप्राप्त कर लिया है – अपील आरंभ में ही खारिज। (वीरेन्द्र प्रजापति वि. श्री के.बी. अग्रवाल) **...518**

***Civil Procedure Code (5 of 1908), Section 100, Order 43 Rule 1(u) & Order 41 Rule 25 – Substantial Question of Law – Additional Evidence* – Suit of plaintiff dismissed by Trial Court – Appellate Court remitted the matter back to record additional evidence on the question of encroachment – Challenge to – Held – In miscellaneous appeal filed under Order 43 Rule 1(u) CPC, there is no need for proposing and framing of substantial question of law which is a requirement in a second appeal u/S 100 CPC – Miscellaneous appeal can be entertained if there exists any substantial question of law – As per the provisions of Order 41 Rule 25, if trial Court has not determined any question of fact, appellate Court may direct the Court below to take additional evidence as required and return the case to appellate court after recording of evidence, where the appellate Court will pronounce its judgment – In the present case, appellate Court committed an error in remitting the matter in wholesale manner – Appellate Court should have exercised powers under Order 41 Rule 25 CPC – Impugned order set aside – Matter remitted back to appellate Court for necessary orders as per Order 41 Rule 25 CPC – Appeal allowed. [Gooha Vs. Smt. Uma Devi]** **...528**

सिविल प्रक्रिया संहिता (1908 का 5), धारा 100, आदेश 43 नियम 1(यू) व आदेश 41 नियम 25 – विधि का सारवान् प्रश्न – अतिरिक्त साक्ष्य – विचारण न्यायालय द्वारा वादी का वाद खारिज किया गया – अपीली न्यायालय ने अतिक्रमण के प्रश्न पर अतिरिक्त साक्ष्य अभिलिखित करने हेतु मामला प्रतिप्रेषित किया – को चुनौती – अभिनिर्धारित – आदेश 43 नियम 1(यू) सि.प्र.सं. के अंतर्गत प्रस्तुत की गई प्रकीर्ण अपील में विधि के सारवान् प्रश्न को प्रस्तावित एवं विरचित करने की आवश्यकता नहीं जो कि धारा 100 सि.प्र.सं. के अंतर्गत द्वितीय अपील में अपेक्षित है – प्रकीर्ण अपील ग्रहण की जा सकती है यदि विधि का कोई सारवान् प्रश्न विद्यमान है – आदेश 41 नियम 25 के उपबंधों के अनुसार यदि विचारण न्यायालय ने तथ्य के किसी प्रश्न का निर्धारण नहीं किया है, अपीली न्यायालय निचले न्यायालय को यथा अपेक्षित अतिरिक्त साक्ष्य लेने के लिए और साक्ष्य अभिलिखित करने के पश्चात् अपीली न्यायालय को वापस करने के लिए निदेशित कर सकता है, जहाँ अपीली न्यायालय अपना निर्णय घोषित करेगा – वर्तमान प्रकरण में, अपीली न्यायालय ने मामले को थोक ढंग से प्रतिप्रेषित करने में त्रुटि कारित की – अपीली न्यायालय को आदेश 41 नियम 25 सि.प्र.सं. के अंतर्गत शक्तियों का प्रयोग करना चाहिए था – आक्षेपित आदेश अपास्त – आदेश 41 नियम 25 सि.प्र.सं. के अनुसार आवश्यक आदेश हेतु अपीली न्यायालय को मामला प्रतिप्रेषित किया गया – अपील मंजूर। (गोहा वि. श्रीमती उमा देवी) **...528**

***Civil Procedure Code (5 of 1908), Section 144 – Restitution of Possession* – Suit for declaration, recovery of possession and mesne profit was decreed in favour of petitioner – Accordingly possession was delivered to petitioner – Meanwhile appeal filed by respondent/defendant was allowed and matter was**

remanded for fresh trial – Petitioner filed a miscellaneous appeal before High Court whereby the same was also dismissed – Defendant filed an application u/S 144 for restitution of possession and mesne profit which was allowed by the trial Court – Appellate Court also confirmed the trial Court's order – Instant revision by the petitioner/plaintiff against order of restitution of possession and to pay mesne profit – Held – Principle of law enunciated u/S 144 CPC is founded on equitable principle that one who has taken advantage of a decree of court should not be permitted to retain it, if the decree is reversed or modified – As per Section 144(1) CPC 'restitution' means restoring to a party on the modification, variation or reversal of a decree what has been lost to him in execution of decree or in direct consequence of decree – Party seeking such restitution is not required to satisfy the Court about its title or right to property except showing its deprivation under a decree and the reversal or variation of decree – Revision dismissed. [Mana @ Ashok Vs. Budabai] …598

सिविल प्रक्रिया संहिता (1908 का 5), धारा 144 – कब्जे का प्रत्यास्थापन – घोषणा, कब्जे की वापसी एवं अंतःकालीन लाभ हेतु वाद, याची के पक्ष में डिक्रीत किया गया था – तद्नुसार याची को कब्जा सौंपा गया था – इस दौरान प्रत्यर्थी/प्रतिवादी द्वारा प्रस्तुत अपील मंजूर की गई तथा मामले को नये सिरे से विचारण हेतु प्रतिप्रेषित किया गया था – याची ने उच्च न्यायालय के समक्ष विविध अपील प्रस्तुत की जिसके द्वारा उक्त को भी खारिज किया गया था – प्रतिवादी ने कब्जे के प्रत्यास्थापन एवं अंतःकालीन लाभ हेतु धारा 144 के अंतर्गत आवेदन प्रस्तुत किया जिसे विचारण न्यायालय द्वारा मंजूर किया गया – अपीली न्यायालय ने भी विचारण न्यायालय के आदेश को पुष्ट किया – कब्जे के प्रत्यास्थापन एवं अंतःकालीन लाभ अदा करने के आदेश के विरूद्ध याची/वादी द्वारा वर्तमान पुनरीक्षण – अभिनिर्धारित – सि.प्र.सं. की धारा 144 के अंतर्गत प्रतिपादित विधि का सिद्धांत, साम्यापूर्ण सिद्धांत पर आधारित है कि जिसने न्यायालय की किसी डिक्री का लाभ लिया है, उसे वह प्रतिधारित करने की अनुमति नहीं दी जानी चाहिए यदि डिक्री उलट दी जाती है अथवा उपांतरित की जाती है – धारा 144(1) सि.प्र.सं. के अनुसार 'प्रत्यास्थापन' का अर्थ है, एक पक्षकार को डिक्री के उपांतरण, परिवर्तन या उलटाव पर वह प्रत्यावर्तित करना है जो उसने डिक्री के निष्पादन में या डिक्री के प्रत्यक्ष परिणाम में खोया है – ऐसा प्रत्यास्थापन चाहने वाले पक्षकार द्वारा डिक्री के अंतर्गत उसके वंचन एवं डिक्री का उलटाव या परिवर्तन दर्शाये जाने के सिवाय, संपत्ति पर उसके हक या अधिकार के बारे में न्यायालय को संतुष्ट किया जाना अपेक्षित नहीं है – पुनरीक्षण खारिज। (माना उर्फ अशोक वि. बुदाबाई) …598

***Civil Procedure Code (5 of 1908), Section 144 & Order 20 Rule 12 – Mesne Profit* – Held – When a decree under which possession has been taken is reversed, mesne profit should be awarded in restitution from the date of dispossession and not merely from the date of decree of reversal and in such case, mesne profit is not what the party excluded would have made but what the party in possession has or might reasonably have made. [Mana @ Ashok Vs. Budabai] …598**

सिविल प्रक्रिया संहिता (1908 का 5), धारा 144 एवं आदेश 20 नियम 12 – अंतःकालीन लाभ – अभिनिर्धारित – जब डिक्री जिसके अंतर्गत कब्जा लिया गया है, उलटा दी जाती है, तब प्रत्यास्थापन में बेकब्जा होने की तिथि से अंतःकालीन लाभ प्रदान किया जाना चाहिए और न केवल डिक्री के उलटाव की तिथि से तथा ऐसे प्रकरण में, अंतःकालीन लाभ वह नहीं है जो बेकब्जा पक्षकार को मिल सकता था बल्कि वह है जो कब्जाधारक पक्षकार को मिला है या युक्तियुक्त रूप से मिल सकता था। (माना उर्फ अशोक वि. बुदाबाई) **...598**

Civil Procedure Code (5 of 1908), Order 6 Rule 17 – Amendment in Written Statement **– Reason for Delay – Petition against rejection of application under Order 6 Rule 17 filed by the petitioner/defendant to amend the written statement – Held – In the instant case, plaintiff's evidence is already complete and closed – Reason assigned by defendant in the application for amendment was that the proposed amended facts came to mind only while preparing affidavit for evidence – Such reason does not qualify the definition of "due diligence" as provided under the proviso of Order 6 Rule 17 CPC – Further held – Even though amendment applications for the plaint and the written statement are to be considered on different yardsticks but still, the rigor of the proviso to Rule 17 of Order 6 CPC cannot be diluted even in those cases where amendment in written statement is being sought and it is necessary to see if the trial has already commenced or that defendant has made out a case that inspite of due diligence, defendant could not have raised the matter before the commencement of trial – No illegality or jurisdictional error in the impugned order – Petition dismissed. [Mohanlal Vs. Smt. Maya] ...717**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 6 नियम 17 – लिखित कथन में संशोधन – विलंब हेतु कारण – लिखित कथन को संशोधित करने के लिए याची/प्रतिवादी द्वारा आदेश 6 नियम 17 के अंर्तगत प्रस्तुत किये गये आवेदन की खारिजी के विरूद्ध याचिका – अभिनिर्धारित – वर्तमान प्रकरण में, वादी का साक्ष्य पहले ही पूर्ण एवं समाप्त हो चुका है – प्रतिवादी द्वारा संशोधन हेतु आवेदन में दिया गया कारण यह था कि प्रस्तावित संशोधित तथ्य, केवल साक्ष्य हेतु शपथपत्र तैयार करते समय ध्यान में आये थे – उक्त कारण, ''सम्यक् तत्परता'' की परिभाषा की अर्हता प्राप्त नहीं करता जैसा कि आदेश 6, नियम 17 सि.प्र.सं. के परंतुक के अंतर्गत उपबंधित है – आगे अभिनिर्धारित – यद्यपि, वाद पत्र एवं लिखित कथन हेतु संशोधन आवेदनों का विचार भिन्न मापदण्ड पर किया जाना होता है किंतु फिर भी आदेश 6 नियम 17 सि.प्र.सं. के परंतुक की कठोरता को कमजोर नहीं किया जा सकता यहां तक कि ऐसे प्रकरणों में भी जहां लिखित कथन में संशोधन चाहा गया है और यह देखना आवश्यक है कि क्या विचारण पहले ही आंरभ हो चुका है या यह कि प्रतिवादी ने प्रकरण साबित किया है कि सम्यक् तत्परता के बावजूद, प्रतिवादी, विचारण आरंभ होने के पूर्व मामले को नहीं उठा सकता था – आक्षेपित आदेश में कोई अवैधता या अधिकारिता की त्रुटि नहीं – याचिका खारिज। (मोहनलाल वि. श्रीमती माया) **...717**

Civil Procedure Code (5 of 1908), Order 7 Rule 11 – Scope and Jurisdiction – **Law regarding scope and jurisdiction of the Court while dealing with application under Order 7 Rule 11 is no more res integra – Court is only required to look into the plaint averments to decide whether suit is barred by law under Order 7 Rule 11 CPC. [Ahilya Vedaant Education Welfare Society Vs. K. Vedaant Education Society] ...726**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 11 – विस्तार एवं अधिकारिता – आदेश 7 नियम 11 के अंतर्गत आवेदन का निपटारा करते समय विस्तार एवं अधिकारिता से संबंधित विधि, अनिर्णीत विषय नहीं रहा – यह विनिश्चित करने के लिए कि क्या वाद, आदेश 7 नियम 11 सि.प्र.सं. के अंतर्गत, विधि द्वारा वर्जित है, न्यायालय द्वारा केवल वादपत्र के प्रकथनों का अवलोकन किया जाना अपेक्षित है। (अहिल्या वेदांत एजुकेशन वेलफेयर सोसायटी वि. के. वेदांत एजुकेशन सोसायटी) **...726**

Civil Procedure Code (5 of 1908), Order 7 Rule 11 – See – Specific Relief Act, 1963, Section 41 **[Ganpat Vs. Ashwani Kumar Singh] ...*6**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 11 – देखें – विनिर्दिष्ट अनुतोष अधिनियम, 1963, धारा 41 (गनपत वि. अश्वनी कुमार सिंह) **...*6**

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. [Sita Bai (Smt.) Vs. Smt. Sadda Bai] ...193**

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। (सीता बाई (श्रीमती) वि. श्रीमती सद्दा बाई) **...193**

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. [Vinod Kumar Sharma Vs. Satya Narayan Tiwari]** **...190**

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। (विनोद कुमार शर्मा वि. सत्य नारायण तिवारी) **...190**

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. [Omprakash Vs. Pratap Singh] …186**

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। (ओमप्रकाश वि. प्रताप सिंह) …186

Civil Procedure Code (5 of 1908), Order 12 Rule 6 – Judgment on Admission of Fact **– Held – If the admission of other party is plain and unambiguous entitling the former to succeed, the provision should apply – Wherever there is a clear admission of fact in the face of which, it is impossible for the party making such admission to succeed, Order 12 Rule 6 can be pressed into service – The expression "otherwise" used in the provision makes it clear that such inference can be drawn from affidavits etc. also – Object of this provision is to enable a party to obtain speedy judgment – Further held – A partial decree based on admission made in written statement can also be passed provided admission is complete and sufficient – Impugned order is set aside – Matter remitted back to Trial Court to reconsider the application – Petition allowed. [Manoj Patel Vs. Smt. Sudha Jaiswal] …801**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 12 नियम 6 – तथ्य की स्वीकृति पर निर्णय – अभिनिर्धारित – यदि अन्य पक्षकार की स्वीकृति, स्पष्ट एवं असंदिग्ध है जो पहले वाले को सफल बनाने हेतु हकदार बनाती है तब उपबंध लागू होना चाहिए – जहां कहीं भी

तथ्य की स्पष्ट स्वीकृति है जिसके सामने उक्त स्वीकृति करने वाले पक्षकार के लिए सफल होना असंभव है, आदेश 12 नियम 6 को लागू किया जा सकता है – उपबंध में प्रयुक्त अभिव्यक्ति ''अन्यथा'', यह स्पष्ट करती है कि उक्त निष्कर्ष को शपथपत्रों इत्यादि से भी निकाला जा सकता है – इस उपबंध का उद्देश्य, पक्षकार को शीघ्र निर्णय अभिप्राप्त करने के लिए समर्थ बनाना है – आगे अभिनिर्धारित – लिखित कथन में की गई स्वीकृति के आधार पर आंशिक डिक्री भी पारित की जा सकती है बशर्ते स्वीकृति पूर्ण एवं पर्याप्त हो – आक्षेपित आदेश अपास्त – मामला विचारण न्यायालय को आवेदन का पुनर्विचार करने हेतु प्रतिप्रेषित किया गया – याचिका मंजूर। (मनोज पटेल वि. श्रीमती सुधा जायसवाल)

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***Civil Procedure Code (5 of 1908), Order 17 Rule 1 – Adjournment – Grounds* – Held – It is true that proviso to Order 17 Rule 1 provides that no adjournments can be granted after three opportunities but in the instant case, the trial court without considering the reasons mentioned in the application and without considering that proviso is directory in nature, dismissed the application – Trial Court is not precluded from taking into consideration the reasons for non-production of witness – Court below ought to have exercised inherent jurisdiction to grant opportunity to party for production of further evidence – In the instant case, case was concluded by the trial Court without recording evidence of the plaintiffs which amounts to miscarriage of justice – Judgment and decree passed by the court below is set aside – Application filed by plaintiff under Order 17 Rule 1 is allowed and plaintiff is allowed to lead further evidence – Matter remanded to trial Court to proceed from that stage – Appeal allowed. [R.K. Traders Vs. Hong Kong Bank] ...522**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 17 नियम 1 – स्थगन – आधार – अभिनिर्धारित – यह सत्य है कि आदेश 17 नियम 1 का परंतुक यह उपबंधित करता है कि तीन अवसरों के पश्चात् कोई स्थगन प्रदान नहीं किया जा सकता परंतु वर्तमान प्रकरण में, विचारण न्यायालय ने आवेदन में उल्लिखित कारणों को विचार में लिये बिना एवं यह विचार किये बिना कि परंतुक निदेशात्मक प्रकृति का है, आवेदन खारिज कर दिया – विचारण न्यायालय साक्षी को प्रस्तुत नहीं किये जाने के कारणों को विचार में लेने से प्रवरित नहीं है – निचले न्यायालय को, पक्षकार को आगे साक्ष्य प्रस्तुत करने हेतु अवसर प्रदान करने के लिए, अंतर्निहित अधिकारिता का प्रयोग करना चाहिए था – वर्तमान प्रकरण में, वादीगण के साक्ष्य अभिलिखित किये बिना विचारण न्यायालय द्वारा प्रकरण समाप्त किया गया था जिससे कि न्यायहानि हुई है – निचले न्यायालय द्वारा पारित निर्णय एवं डिक्री अपास्त – वादी द्वारा आदेश 17 नियम 1 के अंतर्गत प्रस्तुत आवेदन मंजूर एवं वादी को आगे साक्ष्य प्रस्तुत करने की मंजूरी प्रदान की गई – उस प्रक्रम से कार्यवाही करने के लिए मामला विचारण न्यायालय को प्रतिप्रेषित – अपील मंजूर। (आर.के. ट्रेडर्स वि. हांग कांग बैंक)

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Civil Procedure Code (5 of 1908), Order 21 Rule 37 – Execution Case – Issuance of Arrest Warrant – Show Cause Notice **– Trial Court allowed the application under Order 21 Rule 37 CPC filed by the Decree holder whereby arrest warrant was issued against the judgment debtor – Challenge to – Held – Before issuing the warrant of arrest, Court is required to issue show cause notice to the judgment debtor calling upon him to appear before the Court on a date specified in the notice and show cause why he should not be committed to civil prison – Further held – Rule 37 provides that notice shall not be necessary if the Court is satisfied, by affidavit or otherwise, that with the object of delaying the execution of the decree, the judgment debtor is likely to abscond or leave the local limits of the jurisdiction of the Court – In the present case, no such notice was issued before issuance of arrest warrant – Impugned order set aside. [Alok Khanna Vs. M/s. Rajdarshan Hotel Pvt. Ltd.] …709**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 21 नियम 37 – निष्पादन प्रकरण – गिरफ्तारी वारंट जारी किया जाना – कारण बताओ नोटिस – विचारण न्यायालय ने डिक्रीदार द्वारा आदेश 21 नियम 37 सि.प्र.सं. के अंतर्गत प्रस्तुत किये गये आवेदन को मंजूर किया, जिससे निर्णित ऋणी के विरूद्ध गिरफ्तारी वारंट जारी किया गया था – को चुनौती – अभिनिर्धारित – गिरफ्तारी का वारंट जारी करने से पूर्व, न्यायालय द्वारा निर्णित ऋणी को कारण बताओ नोटिस जारी करना अपेक्षित है, उसे नोटिस में विनिर्दिष्ट दिनांक को न्यायालय के समक्ष उपस्थित होने के लिए तथा कारण बताने के लिए कि क्यों न उसे सिविल कारागार के सुपुर्द किया जाए – आगे अभिनिर्धारित – नियम 37 उपबंधित करता है कि नोटिस आवश्यक नहीं यदि न्यायालय, शपथपत्र या अन्यथा द्वारा संतुष्ट होता है कि डिक्री के निष्पादन को विलंबित करने के उद्देश्य से, निर्णित ऋणी, न्यायालय की अधिकारिता की स्थानीय सीमाओं से फरार हो जाने या छोड़ जाने की संभावना है – वर्तमान प्रकरण में, गिरफ्तारी वारंट जारी करने से पूर्व ऐसा कोई नोटिस जारी नहीं किया गया था – आक्षेपित आदेश अपास्त। (आलोक खन्ना वि. मे. राजदर्शन होटल प्रा. लि.) …709

Civil Procedure Code (5 of 1908), Order 21 Rule 40 – Execution Case – Issuance of Arrest Warrant – Enquiry **– Held – After appearance of the judgment debtor in obedience to notice or after arrest, executing Court shall proceed to hear the decree holder and take all such evidences produced by him in support of his application and shall then give the judgment debtor an opportunity of showing cause why he should not be committed to civil prison – In the instant case, procedure prescribed under Order 21 Rule 40 has not been followed – No enquiry has been conducted before passing the impugned order – Procedural illegality is in the impugned order hence hereby set aside – Petition allowed. [Alok Khanna Vs. M/s. Rajdarshan Hotel Pvt. Ltd.]**

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सिविल प्रक्रिया संहिता (1908 का 5), आदेश 21 नियम 40 – निष्पादन प्रकरण – गिरफ्तारी वारंट जारी किया जाना – जांच – अभिनिर्धारित – निर्णित ऋणी के नोटिस के पालन में या गिरफ्तारी के पश्चात्, उपस्थित होने के उपरांत, निष्पादन न्यायालय, डिक्रीदार को सुने जाने की कार्यवाही करे एवं उसके द्वारा उसके आवेदन के समर्थन में प्रस्तुत किये गये ऐसे सभी साक्ष्य लें और तब निर्णित ऋणी को कारण बताने का अवसर दे कि क्यों न उसे सिविल कारागार के सुपुर्द किया जाए – वर्तमान प्रकरण में, आदेश 21 नियम 40 के अंतर्गत विहित प्रक्रिया का पालन नहीं किया गया है – आक्षेपित आदेश पारित करने से पूर्व कोई जांच संचालित नहीं की गई है – आक्षेपित आदेश में प्रक्रियात्मक अवैधता है, अतः एतद् द्वारा अपास्त – याचिका मंजूर। (आलोक खन्ना वि. मे. राजदर्शन होटल प्रा. लि.)

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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. [Charan Singh Kushwah Vs. Smt. Gomati Bai]** **...*4**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 23 नियम 1(3) – वाद का प्रत्याहरण –''प्रारूपिक 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। (चरण सिंह कुशवाह वि. श्रीमती गोमती बाई) **...*4**

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

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 32, नियम 4, 5 व 15 – वादमित्र के द्वारा वाद – हेतु आवेदन – जांच – वादी द्वारा वादमित्र पुत्री के द्वारा वाद प्रस्तुत किया गया – याची/प्रतिवादी द्वारा आदेश 32 नियम 15 के अंतर्गत प्रस्तुत किये गये आवेदन की खारिजी के विरूद्ध रिट याचिका – अभिनिर्धारित – आदेश 32 नियम 1 से 14, नियम 2ए को छोड़कर, जैसा कि अवयस्क के प्रकरण में लागू होता है, विकृत चित्त के व्यक्ति पर भी लागू हेागा जहां वादमित्र द्वारा वाद संस्थित किया गया है – विहित अर्हता यह है कि एक व्यक्ति किसी अवयस्क के वादमित्र या उसके संरक्षक के रूप में कार्य करने के लिए, प्राप्तवय आयु का हो परंतु यह कि उक्त व्यक्ति का हित, अवयस्क के हित के प्रतिकूल न हो और वादमित्र वाद का प्रतिवादी नहीं होना चाहिए – ऐसे प्रकरण में जहां सक्षम प्राधिकारी द्वारा अवयस्क का संरक्षक नियुक्त या घोषित किया गया हो, तब उक्त संरक्षक वाद में कार्यवाही कर सकता है और वह अवयस्क या विकृत चित्त व्यक्ति का वादमित्र होगा जब तक कि न्यायालय किसी अन्य व्यक्ति की नियुक्ति हेतु, कारण अभिलिखित कर उसे बदलने पर विचार न करे – वर्तमान प्रकरण में सुश्री रूखसार, वादी कमरून्निसा की पुत्री है और चिकित्सा बोर्ड के प्रमाणपत्र के अनुसार, कमरून्निसा 55% की सीमा तक विकृत चित्त की पायी गई है, मां की संपत्ति में पुत्री का प्रतिकूल हित नहीं और प्राप्तवय होने के नाते उसे वाद संस्थित करने

और मामले में कार्यवाही करने के लिए वादमित्र घोषित किया जाना न्यायोचित प्रतीत होता है – आदेश 32 नियम 1 सि.प्र.सं. के अनुसार यह आज्ञापक नहीं कि ऐसी नियुक्ति, वाद संस्थित किये जाने के पूर्व, आवेदन पर होनी चाहिए – आगे अभिनिर्धारित – यह न्यायालय के लिए आवश्यक नहीं कि जांच कराये जैसा कि नियम 15 के पश्चात्वर्ती भाग द्वारा अपेक्षित है, परंतु यह तब लागू होगा जब शक्ति का प्रयोग न्यायालय द्वारा किया जाना अपेक्षित है – वादमित्र की नियुक्ति विधि के अनुसार थी – रिट याचिका खारिज। (मेहरून्निशा (श्रीमती) वि. श्रीमती कमरून्निशा द्वारा वादमित्र पुत्री कुमारी रूखसार बेगम) **...501**

***Civil Procedure Code (5 of 1908), Order 41 Rule 27 – Additional Evidence – Hearing of* – Petitioner filed an application under Order 41 Rule 27 CPC and prayed to be disposed of as an preliminary issue – Application was rejected – Challenge to – Held – In the instant case, trial Court has not committed any error while passing the order that application under Order 41 Rule 27 CPC would be decided at the time of final hearing of the appeal – Another application filed under Order 1 Rule 8 CPC by the petitioner which was rejected by the Trial Court is hereby allowed as no objection was forwarded by the counsel for respondents – Petition partly allowed. [Jyoti (Smt.) Vs. Jainarayan]** **...507**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 41 नियम 27 – अतिरिक्त साक्ष्य – की सुनवाई – याची ने आदेश 41 नियम 27 सि.प्र.सं. के अंतर्गत एक आवेदन प्रस्तुत किया और एक प्रारंभिक विवाद्यक के रूप में निपटाने की प्रार्थना की – आवेदन खारिज किया गया था – को चुनौती – अभिनिर्धारित – वर्तमान प्रकरण में, विचारण न्यायालय ने आदेश पारित करने में कोई त्रुटि कारित नहीं की कि आदेश 41 नियम 27 सि.प्र.सं. के अंतर्गत आवेदन का विनिश्चय, अपील की अंतिम सुनवाई के समय किया जायेगा – याची द्वारा आदेश 1 नियम 8 सि.प्र.सं. के अंतर्गत अन्य आवेदन प्रस्तुत किया गया जिसे विचारण न्यायालय द्वारा नामंजूर किया गया था, एतद् द्वारा मंजूर किया जाता है क्योंकि प्रत्यर्थीगण के अधिवक्ता द्वारा कोई आक्षेप प्रस्तुत नहीं किया गया था – याचिका अंशतः मंजूर। (ज्योति (श्रीमती) वि. जयनारायण) **...507**

***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. [Sunil Kumar Jain Vs. State of M.P.]** **...72**

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। (सुनील कुमार जैन वि. म.प्र. राज्य) **...72**

Civil Services (General Conditions of Service) Rules, M.P., 1961, Rule 6 – See – Lower Judicial Service (Recruitment and Conditions of Service) Rules, M.P. 1994, Rule 7, 9 & 10 **[Ashutosh Pawar Vs. High Court of M.P.]**

(FB)...627

सिविल सेवा (सेवा की सामान्य शर्तें) नियम, म.प्र., 1961, नियम 6 – देखें – निम्नतर न्यायिक सेवा (भर्ती तथा सेवा की शर्तें) नियम, म.प्र. 1994, नियम 7, 9 व 10 (अशुतोष पवार वि. हाईकोर्ट ऑफ एम.पी.) **(FB)...627**

Civil Services (Pension) Rules, M.P. 1976, Rule 23 – See – Service Law **[Mohan Pillai Vs. M.P. Housing Board]** **...*18**

सिविल सेवा (पेंशन) नियम, म.प्र. 1976, नियम 23 – देखें – सेवा विधि (मोहन पिल्लई वि. एम.पी. हाउसिंग बोर्ड) **...*18**

Civil Services (Pension) Rules, M.P. 1976, Rule 65 **– Held – Rule 65 of the Rules of 1976 casts duty on the "Retiring" government servant and it has nothing to do with the "Retired" government servant – Rule 65 is not applicable to "Retired" government servant. [Vijay Shankar Trivedi Vs. State of M.P.]** **...682**

सिविल सेवा (पेंशन) नियम, म.प्र. 1976, नियम 65 – अभिनिर्धारित – 1976 के नियमों का नियम 65, ''निवृत्त हो रहे'' शासकीय सेवक पर कर्तव्य डालता है और इसका ''निवृत्त हो चुके'' शासकीय सेवक से कोई लेना देना नहीं – नियम 65, ''निवृत्त हो चुके'' शासकीय सेवक को लागू नहीं है। (विजय शंकर त्रिवेदी वि. म.प्र. राज्य) **...682**

Commercial Tax Act, M.P. 1994 (5 of 1995), Sections 2(c), 2(h) & 9 – Imposition of Export Tax – Municipal Limits **– Held – Mere physical location of branch outside the municipal limits could not have been construed to deem it to be an independent identity since for all accounting purposes, accounts of branch are to be accounted with the dealer i.e principal – Any transaction made by branch was in capacity of agent to principal whose office was located in the municipal limits and hence export will be deemed to have been made from territorial jurisdiction of municipality – Imposition of export tax and bill raised for recovery cannot be said to be illegal and without jurisdiction – Appeal allowed – Impugned judgment and decree set aside. [Nagar Palika Parishad Vs. Anil Kumar]** **...721**

वाणिज्यिक कर अधिनियम, म.प्र. 1994 (1995 का 5), धाराएँ 2(सी), 2(एच) व 9 – निर्यात कर का अधिरोपण – नगरपालिका सीमाऐं – अभिनिर्धारित – मात्र नगरपालिका सीमाओं से बाहर शाखा की भौतिक अवस्थिति से उसे एक स्वतंत्र पहचान के रूप में समझे जाने का अर्थ नहीं लगाया जा सकता था, क्योंकि सभी लेखा प्रयोजनो हेतु, शाखा के

लेखाओं का, डीलर अर्थात् प्रधान के साथ हिसाब होता है – शाखा द्वारा किये गये कोई संव्यवहार, प्रधान के अभिकर्ता की हैसियत में था, जिसका कार्यालय नगरपालिका सीमाओं में स्थित था और इस प्रकार निर्यात को नगरपालिका की क्षेत्रीय अधिकारिता से किया जाना समझा जाएगा – निर्यात कर का अधिरोपण एवं वसूली हेतु प्रस्तुत बिल अवैध एवं अधिकारिता के बिना होना नहीं कहा जा सकता – अपील मंजूर – आक्षेपित निर्णय एवं डिक्री अपास्त। (नगर पालिका परिषद वि. अनिल कुमार) **...721**

Consequential Benefit – Salary **– Appellant, a contractual/temporary employee served more than 11 years before the order of termination – Entitled to 25% of salary as would have otherwise become due if order of termination had not been passed, calculated from date of termination till date. [Malkhan Singh Malviya Vs. State of M.P.] (DB)...660**

परिणामिक लाभ – वेतन – अपीलार्थी, एक संविदात्मक/अस्थाई कर्मचारी ने सेवा समाप्ति के आदेश से पूर्व 11 वर्षों से अधिक सेवा दी है – सेवा समाप्ति की दिनांक से आज दिनांक तक संगणना कर वेतन, जैसा कि अन्यथा देय होता यदि सेवा समाप्ति का आदेश पारित नहीं किया गया होता, के 25% का हकदार है। (मलखान सिंह मालवीय वि. म.प्र. राज्य) **(DB)...660**

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. [M.P. Paschim Kshetra Vidyut Vitran Co. Ltd. Vs. Serco BPO Pvt. Ltd.] ...166**

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। (म.प्र. पश्चिम क्षेत्र विद्युत वितरण कं. लि. वि. सेरको बीपीओ प्रा.लि.) **...166**

Constitution – Article 136 – Jurisdiction **– Held – This Court while exercising jurisdiction under Article 136 of Constitution, generally does not interfere with the impugned judgment unless there is a glaring mistake committed by Court below or there has been an omission to consider vital piece of evidence. [State of M.P. Vs. Nande @ Nandkishore Singh] (SC)...617**

संविधान – अनुच्छेद 136 – अधिकारिता – अभिनिर्धारित – यह न्यायालय संविधान के अनुच्छेद 136 के अंतर्गत अधिकारिता का प्रयोग करते समय, साधारणतः आक्षेपित निर्णय के साथ हस्तक्षेप नहीं करता जब तक कि निचले न्यायालय द्वारा सुस्पष्ट गलती कारित न की गई हो या साक्ष्य के महत्वपूर्ण अंश पर विचार करने में लोप हुआ हो। (म.प्र. राज्य वि. नन्दे उर्फ नंदकिशोर सिंह) **(SC)…617**

Constitution – Article 226 – Allotment of Plot – Cancellation – Grounds **– Held – Plot was allotted to petitioner's husband in the year 1988 agreement was executed, entire consideration amount was deposited and finally possession was delivered – Allotment order was cancelled by the authority on the ground that party failed to pay the revised rates of plots as per the resolution passed in the year 2003 – Held – There was no rational justification as to why petitioner's husband was called upon to pay the revised premium and lease rent – Allotment of plot with concluded contract cannot be reopened after a gap of 18 years under the pretext of revised policy – Authority is stopped from raising such arbitrary demand from petitioner – Once petitioner's husband alongwith other allottees irrespective of the size of their shops, were allotted plots of different dimensions and fixed the premium and lease rent and thereafter singling out the petitioner's husband to revised premium and lease rent, is totally arbitrary and contrary to the concept of Wednesbury principles of reasonableness – Action of the authority shall not be discriminatory and must be in conformity with the principles of Article 14 of Constitution – Impugned communication and subsequent actions of the authority is hereby quashed – Petition allowed. [Manorama Solanki Vs. Indore Development Authority]** **…489**

संविधान – अनुच्छेद 226 – भूखंड का आवंटन – रद्दकरण – आधार – अभिनिर्धारित – याची के पति को वर्ष 1988 में भूखंड आवंटित किया गया था, करार निष्पादित किया गया था, संपूर्ण प्रतिफल राशि जमा की गई थी एवं अंततः कब्जा परिदत्त किया गया था – प्राधिकारी द्वारा इस आधार पर आवंटन आदेश रद्द किया गया था कि पक्षकार वर्ष 2003 में पारित हुए प्रस्ताव के अनुसार भूखंड की पुनरीक्षित दरों का भुगतान करने में विफल रहा – अभिनिर्धारित – ऐसा कोई तर्कसंगत औचित्य नहीं था कि क्यों पुनरीक्षित प्रीमियम एवं पट्टा किराया का भुगतान करने के लिए याची के पति को बुलाया गया था – पुनरीक्षित नीति के बहाने के अधीन 18 वर्षों के अंतराल के पश्चात् अंतिम/समाप्त अनुबंध के साथ भूखंड के आवंटन को फिर से शुरू नहीं किया जा सकता – प्राधिकारी को याची से इस प्रकार की मनमानी मांग बढ़ाने से रोका जाता है – एक बार याची के पति को अन्य आवंटियों के साथ, उनकी दुकानों के आकार पर विचार किये बिना, विभिन्न आयामों के भूखंड आवंटित किये गये थे और प्रीमियम तथा पट्टा किराया तय किया एवं उसके बाद याची के पति को पुनरीक्षित प्रीमियम और पट्टा किराया के लिए अलग करना/चुनना, पूर्णतः वेडनेसबरी के युक्तियुक्तता के सिद्धांत की संकल्पना के विपरीत एवं पूर्णतः मनमाना है – प्राधिकारी की कार्रवाई पक्षपातपूर्ण नहीं होनी चाहिए एवं संविधान के अनुच्छेद 14 के

सिद्धांतों के अनुरूप होनी चाहिए – आक्षेपित संसूचना एवं प्राधिकारी की पश्चात्वर्ती कार्रवाई एतद् द्वारा अभिखंडित – याचिका मंजूर। (मनोरमा सोलंकी वि. इंदौर डव्हेलपमेन्ट अथॉरिटी) **...489**

Constitution – Article 226 – Judicial Review – Scope and Interference – Jurisdiction of High Court **– Held – Power of judicial review under Article 226 is not as Court of appeal but to find out whether the decision making process is in accordance with law and is not arbitrary or irrational – Further held – Even if High Court finds some illegality in the decision of the State Government, jurisdiction of High Court under Article 226 is to remit the matter to authority for reconsideration rather than to substitute the decision of competent authority with that of its own – Decision of the State Government holding that petitioner is not suitable, is just, fair and reasonable keeping in view the nature of the post and the duties to be discharged. [Ashutosh Pawar Vs. High Court of M.P.] (FB)...627**

संविधान – अनुच्छेद 226 – न्यायिक पुनर्विलोकन – व्याप्ति एवं मध्यक्षेप – उच्च न्यायालय की अधिकारिता – अभिनिर्धारित – अनुच्छेद 226 के अंतर्गत न्यायिक पुनर्विलोकन की शक्ति, अपील के न्यायालय के रूप में नहीं है बल्कि यह पता लगाने के लिए है कि क्या निर्णय करने की प्रक्रिया विधि के अनुसरण में है एवं मनमानी या तर्कहीन नहीं है – आगे अभिनिर्धारित – यदि उच्च न्यायालय राज्य सरकार के निर्णय में कुछ अवैधता पाता भी है, अनुच्छेद 226 के अंतर्गत उच्च न्यायालय की अधिकारिता, सक्षम प्राधिकारी के निर्णय को अपने स्वयं के निर्णय से प्रतिस्थापित करने की नहीं बल्कि, मामले को पुनर्विचार हेतु प्राधिकारी को प्रतिप्रेषित करने की है – राज्य सरकार का यह धारणा करते हुए निर्णय कि याची योग्य नहीं है, पद का स्वरूप एवं निर्वहन किये जाने के कर्तव्यों को दृष्टिगत रखते हुए न्यायसंगत, निष्पक्ष एवं युक्तियुक्त है। (अशुतोष पवार वि. हाईकोर्ट ऑफ एम.पी.)

(FB)...627

Constitution – Article 226 – Power of Sub Divisional Officer – Jan Sunwai **– Petition against the order passed by Sub Divisional Officer whereby issue of title and possession was decided and subsequently eviction order has been passed – In appeal, Collector dismissed the same on the ground that order has not been passed under the provisions of MP Land Revenue Code and hence appeal not maintainable – Held – Jan Sunwai is certainly not a court as per any statute – Nowadays, it has become a trend that Revenue Authorities, District Magistrate, Sub Divisional Officer are deciding the title disputes and if such kind of procedure is permitted to continue, the Civil Procedure Code shall come to end and these authorities shall be deciding all the suit and injunction matters – Such a procedure in democratic set up cannot be permitted – Majesty of law has to be protected – Practice of kangaroo courts and Kangaroo justice is against the rule of law and deserves to be deprecated**

– Impugned orders quashed – Authorities directed to place the petitioner in possession – Cost of Rs. 25000 imposed – Petition disposed. [Sumer Singh Vs. Resham Bai] …*28

संविधान – अनुच्छेद 226 – उपखंड अधिकारी की शक्ति – जन सुनवाई – उपखंड अधिकारी द्वारा पारित आदेश, जिसके द्वारा हक एवं कब्जे के विवाद्यक का विनिश्चय किया गया तथा तत्पश्चात्, बेदखली का आदेश पारित किया गया, के विरूद्ध याचिका – अपील में, कलेक्टर ने उक्त को इस आधार पर खारिज किया कि आदेश को, म.प्र. भू–राजस्व संहिता के उपबंधों के अंतर्गत पारित नहीं किया गया है और इसलिए अपील पोषणीय नहीं – अभिनिर्धारित – किसी भी कानून के अनुसार, जन सुनवाई निश्चित रूप से एक न्यायालय नहीं है – आजकल यह चलन बन गया है कि राजस्व प्राधिकारीगण, जिला मजिस्ट्रेट, उप खंड अधिकारी, हक के विवादों का विनिश्चय कर रहे हैं और यदि इस प्रकार की प्रक्रिया को जारी रहने की अनुमति दी गई तो सिविल प्रक्रिया संहिता समाप्त हो जाएगी तथा ये प्राधिकारीगण सभी वाद एवं व्यादेश के मामलों का विनिश्चय करेंगे – लोकतांत्रिक व्यवस्था में ऐसी किसी प्रक्रिया की अनुमति नहीं दी जा सकती – विधि की महिमा का संरक्षण करना होगा – गैर कानूनी न्यायालयों का चलन विधि के नियम के विरूद्ध है एवं निन्दा के योग्य है – आक्षेपित आदेशों को अभिखंडित किया गया – याची को कब्जा दिये जाने के लिए प्राधिकारीगण को निदेशित किया गया – रू. 25000 का व्यय अधिरोपित किया गया – याचिका निराकृत। (सुमेर सिंह वि. रेशम बाई) …*28**

***Constitution – Article 226 – See – Criminal Procedure Code, 1973, Section 482* [Anant Vijay Soni Vs. State of M.P.] …203**

संविधान – अनुच्छेद 226 – देखें – दण्ड प्रक्रिया संहिता, 1973, धारा 482 (अनंत विजय सोनी वि. म.प्र. राज्य) **…203**

***Constitution – Article 226 – See – Nikshepakon Ke Hiton Ka Sanrakshan Adhiniyam, M.P., 2000, Section 4 & 8* [Pushp Vs. State of M.P.] …702**

संविधान – अनुच्छेद 226 – देखें – निक्षेपकों के हितों का संरक्षण अधिनियम, म.प्र., 2000, धारा 4 व 8 (पुष्प वि. म.प्र. राज्य) **…702**

***Constitution – Article 226 – Writ Jurisdiction – Locus* – Held – Merely because a person have a *locus standi* to file writ petition, does not mean that he is entitled to any equitable or legal relief in writ jurisdiction. [Munawwar Ali Vs. Union of India] (DB)…449**

संविधान – अनुच्छेद 226 – रिट अधिकारिता – सुने जाने का अधिकार – अभिनिर्धारित – मात्र इसलिए कि एक व्यक्ति को रिट याचिका प्रस्तुत करने में सुने जाने का अधिकार है, का यह अर्थ नहीं है कि वह रिट अधिकारिता में किसी समानता या विधिक अनुतोष का हकदार होगा। (मुनव्वर अली वि. यूनियन ऑफ इंडिया) **(DB)…449**

***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. [Raju Ganesh Kamle Vs. State of M.P.] …64

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। (राजू गणेश कामले वि. म.प्र. राज्य) **…64**

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. [Surendra Security Guard Services (M/s.) Vs. Union of India] (DB)…54**

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। (सुरेन्द्र सिक्योरिटी गार्ड सर्विसेस (मे.) वि. यूनियन ऑफ इडिया) **(DB)…54**

***Constitution – Article 226/227 – Election Petition – Reasoned/Speaking Order – Natural Justice* – Petition against dismissal of application filed by petitioner in an Election Petition under Order 14 Rule 2 CPC – Held – Application has been dismissed by the SDO without assigning any reason and conclusion arrived at – In the earlier round of litigation while dealing with the same issue, this Court specifically directed to pass a reasoned order and remanded back the matter, even then the SDO (same person) repeatedly passed the same order, without any alphabetical alteration even, which is arbitrary, illegal and reflects casualness, negligence and/or defiance and is in the nature of disobedience to the orders passed by this Court – It is against the fair play and transparency which is a part of the principle of natural justice – Administrative authorities are duty bound to assign reasons while deciding the case either functioning as quasi judicial authority or as administrative authority – They must record reasons for arriving to a conclusion so that it facilitates the process of judicial review by superior Court or authority – Directions given by this Court are to be complied with by the authorities especially when the order of this Court attains finality – Impugned order set aside – Matter remanded back to authority for decision of application afresh – Further, Principal Secretary, Government of MP is directed to hold enquiry against the SDO regarding such casualness and negligence – Petition allowed. [Tarabai (Smt.) Vs. Smt. Shanti Bai] …390**

संविधान – अनुच्छेद 226/227 – निर्वाचन याचिका – तर्कसंगत/सकारण आदेश – नैसर्गिक न्याय – याची द्वारा एक निर्वाचन याचिका में, सिविल प्रक्रिया संहिता के आदेश 14 नियम 2 के अंतर्गत प्रस्तुत आवेदन की खारिजी के विरूद्ध याचिका – अभिनिर्धारित – उपखंड अधिकारी द्वारा बिना कोई कारण दिये एवं बिना किसी निष्कर्ष पर पहुंचे आवेदन खारिज किया गया – पूर्वतर मुकदमे में, समान विवाद्यक का निराकरण करते समय इस न्यायालय ने सकारण आदेश पारित करने के लिए विनिर्दिष्ट रूप से निदेशित किया एवं मामला प्रतिप्रेषित किया, तब भी उपखंड अधिकारी (उसी व्यक्ति) ने बार–बार वही आदेश पारित किया, वो भी बिना किसी वर्णक्रम परिर्वतन के, जो कि मनमाना व अवैध है एवं नैमित्तिकता, उपेक्षा एवं/या अवज्ञा दर्शाता है एवं इस न्यायालय द्वारा पारित आदेशों की अवज्ञा की प्रकृति का है – यह न्यायपूर्ण व्यवहार एवं पारदर्शिता के विरूद्ध है जो कि नैसर्गिक न्याय के सिद्धांत का भाग है – प्रशासनिक प्राधिकारी प्रकरण विनिश्चित करते समय कारण बताने हेतु कर्तव्य बाध्य हैं, चाहे वे न्यायिककल्प प्राधिकारी के रूप में या प्रशासनिक प्राधिकारी के रूप में कार्य कर रहे हों – उन्हें निष्कर्ष पर पहुँचने के कारणों को अभिलिखित करना चाहिए ताकि यह वरिष्ठ न्यायालय या प्राधिकारी द्वारा न्यायिक

पुनर्विलोकन की प्रक्रिया में सहायक हो सके – इस न्यायालय द्वारा दिये गये निदेशों का पालन प्राधिकारियों द्वारा किया जाए, विशेष रूप से तब जब कि इस न्यायालय के आदेश अंतिमता प्राप्त कर ले – आक्षेपित आदेश अपास्त – मामले को नये सिरे से, आवेदन के विनिश्चय हेतु प्राधिकारी को प्रतिप्रेषित किया गया – आगे, प्रमुख सचिव, मध्यप्रदेश शासन को उपखंड अधिकारी के विरूद्ध ऐसी नैमित्तिकता एवं उपेक्षा के संबंध में जांच संचालित करने हेतु निदेशित किया गया – याचिका मंजूर। (तारा बाई (श्रीमती) वि. श्रीमती शांति बाई) **...390**

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. [Sunil Kumar Jain Vs. State of M.P.]** **...72**

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। (सुनील कुमार जैन वि. म.प्र. राज्य) **...72**

Constitution, Entry 53 of List II of Schedule VII – See – Upkar Adhiniyam, M.P., 1981, Section 3(1) **[Deepak Spinners Ltd. Vs. State of M.P.]**

(DB)...38

संविधान, अनुसूची **VII** *की सूची* **II** *की प्रविटि 53 – देखें – उपकर अधिनियम, म.प्र., 1981, धारा 3(1)* (दीपक स्पिनर्स लि. वि. म.प्र. राज्य) **(DB)…38**

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. [Suresh Kumar Wadhwa Vs. State of M.P.]** **(SC)…1**

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। (सुरेश कुमार वाधवा वि. म.प्र. राज्य) **(SC)…1**

***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. [Dilip Kumar Vs. Smt. Anita Jain] …*5**

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। (दिलीप कुमार वि. श्रीमती अनिता जैन) **…*5**

***Court Fees Act (7 of 1870), Article 17(iii) of Second Schedule & Section 7(iv)(c) – Ad Valorem Court fees* – Plaintiff filed a suit seeking declaration of a sale deed to be void – Court directed plaintiff to pay ad valorem Court fees – Challenge to – Held – Plaintiff is neither the executant nor a party to the sale deed – Plaintiff seeking simplicitor declaration that instrument is void and not binding on him – Not required to pay ad valorem Court fee – Fixed Court fee under Article 17(iii) of Second Schedule of Court Fees Act will be payable – Impugned order set aside – Petition allowed. [Gangesh Kumari Kak (Smt.) Vs. State of M.P.] …*24**

न्यायालय फीस अधिनियम (1870 का 7), द्वितीय अनुसूची का अनुच्छेद 17(iii) व धारा 7(iv)(सी) – मूल्यानुसार न्यायालय फीस – वादी ने विक्रय विलेख को शून्य होने की घोषणा चाहते हुए वाद प्रस्तुत किया – न्यायालय ने वादी को मूल्यानुसार न्यायालय फीस अदा करने हेतु निदेशित किया – को चुनौती – अभिनिर्धारित – वादी, विक्रय विलेख की न तो निष्पादिती है और न ही पक्षकार – वादी, केवल घोषणा चाहता है कि लिखत शून्य है एवं उस पर बंधनकारी नहीं है – मूल्यानुसार न्यायालय फीस का भुगतान अपेक्षित नहीं – न्यायालय फीस अधिनियम की द्वितीय अनुसूची के अनुच्छेद 17(iii) के अंतर्गत निश्चित न्यायालय फीस देय होगी – आक्षेपित आदेश अपास्त – याचिका मंजूर। (गंगेश कुमारी काक (श्रीमती) वि. म.प्र. राज्य) **…*24**

Court Fees Act (7 of 1870), Article 17(iii) of Second Schedule – See – Civil Procedure Code, 1908, Order 7 Rule 11 **[Vinod Kumar Sharma Vs. Satya Narayan Tiwari] …190**

न्यायालय फीस अधिनियम (1870 का 7), द्वितीय अनुसूची का अनुच्छेद 17(iii) – देखें – सिविल प्रक्रिया संहिता, 1908, आदेश 7 नियम 11 (विनोद कुमार शर्मा वि. सत्य नारायण तिवारी) **…190**

Crime Victim Compensation Scheme (M.P.), 2015, Section 2(j) & 2(k) – See – Criminal Procedure Code, 1973, Section 357-A **[Praveen Banoo (Smt.) Vs. State of M.P.] …*20**

अपराध पीड़ित प्रतिकर योजना (म.प्र.), 2015, धारा 2(जे) व 2(के) – देखें – दण्ड प्रक्रिया संहिता, 1973, धारा 357–ए (प्रावीन बानो (श्रीमती) वि. म.प्र. राज्य) **…*20**

***Criminal Practice – Absconsion of Accused* – Mere absconsion may not be indicative of guilty mind, but in light of surrounding circumstances, absconsion immediately after incident would assume importance – Motive – Motive attributed to the appellant for committing offence may not be very strong, however, even assuming that prosecution failed to prove, even then on the basis of circumstantial evidence, accused can be convicted. [Bhagwan Singh Vs. State of M.P.] (DB)…564**

दाण्डिक पद्धति – अभियुक्त की फरारी – मात्र फरारी, दोषी मस्तिष्क होने का बोधक नहीं हो सकती, परंतु आस–पास की परिस्थितियों के आलोक में, घटना के तुरंत पश्चात् फरारी, महत्वपूर्ण मानी जाएगी – हेतु – अपीलार्थी द्वारा अपराध कारित करने के लिए माना गया हेतु अति प्रबल नहीं हो सकता, तथापि, यदि यह धारणा भी की जाए कि अभियोजन साबित करने में असफल रहा, तब भी परिस्थितिजन्य साक्ष्य के आधार पर अभियुक्त को दोषसिद्ध किया जा सकता है। (भगवान सिंह वि. म.प्र. राज्य) **(DB)…564**

***Criminal Practice – Adverse Inference* – Held – In the FSL report, human blood has been found on the knife and clothes of appellant – Appellant failed to explain the origin of blood stains on his clothes which he was wearing at the time of incident and on the knife recovered from him – Adverse inference can easily be drawn against him. [Shrawan Vs. State of M.P.] (DB)…740**

दाण्डिक पद्धति – प्रतिकूल निष्कर्ष – अभिनिर्धारित – एफ एस एल प्रतिवेदन में चाकू एवं अपीलार्थी के कपड़ों पर मानव रक्त पाया गया है – अपीलार्थी अपने कपड़ों पर, जिन्हें वह घटना के समय पहने था, तथा उससे बरामद चाकू पर रक्त के धब्बों का स्त्रोत स्पष्ट करने में विफल रहा – उसके विरूद्ध प्रतिकूल निष्कर्ष आसानी से निकाला जा सकता है। (श्रवण वि. म.प्र. राज्य) **(DB)…740**

Criminal Practice – Hostile Witness – Testimony **– Held – Testimony of the hostile witness cannot be totally discarded merely on the ground that he been declared hostile – It can be used for the purpose of corroboration of testimony of other witnesses. [Prabhulal Vs. State of M.P.] (DB)…782**

दाण्डिक पद्धति – पक्षविरोधी साक्षी – परिसाक्ष्य – अभिनिर्धारित – मात्र इस आधार पर कि उसे पक्षविरोधी घोषित किया गया है, पक्षविरोधी साक्षी के परिसाक्ष्य को पूर्ण रूप से अस्वीकार नहीं किया जा सकता – अन्य साक्षियों के परिसाक्ष्य की संपुष्टि के प्रयोजन हेतु उसका उपयोग किया जा सकता है। (प्रभूलाल वि. म.प्र. राज्य) **(DB)…782**

Criminal Practice – Medical & Ocular Evidence – Inconsistency – Effect **– No injury on the head of the deceased which may be caused by sharp object – Witnesses stated that appellant/accused was armed with farsi and assaulted on head of the deceased – Held – Such contradiction is immaterial as there is injury on the head of the deceased and it may be possible that at the time of incident, weapon was not in the sharp condition, it might have been in blunt condition – It cannot be said that medical evidence is inconsistent with ocular evidence. [Prabhulal Vs. State of M.P.] (DB)…782**

दाण्डिक पद्धति – चिकित्सीय एवं चाक्षुष साक्ष्य – असंगति – प्रभाव – धारदार वस्तु से कारित की जा सकने वाली कोई चोट मृतक के सिर पर नहीं – साक्षियों का कथन है कि अपीलार्थी/अभियुक्त फर्सी से सुसज्जित था और मृतक के सिर पर वार किया – अभिनिर्धारित – उक्त विरोधाभास महत्वहीन है क्योंकि मृतक के सिर पर चोट है और यह संभव हो सकता है कि घटना के समय शस्त्र धारदार स्थिति में नहीं था, हो सकता है भोथरी स्थिति में रहा हो – यह नहीं कहा जा सकता कि चिकित्सीय साक्ष्य, चाक्षुष साक्ष्य के साथ असंगत है। (प्रभूलाल वि. म.प्र. राज्य) **(DB)…782**

Criminal Procedure Code, 1973 (2 of 1974), Section 24(8) – Appointment of Special Public Prosecutor – Remuneration – Grounds **– Held – Section 24(8) Cr.P.C. empowers the State Government to appoint Special Public Prosecutor – Such power is to be exercised judiciously and for valid reasons – State cannot appoint a Special Public Prosecutor and replace the duly appointed public prosecutor without application of mind, merely on a wish of a party, or merely on asking of the complainant – In the present case, no specific reasons were assigned to show need of Special Public Prosecutor, merely mentioning that case is treated to be a special case, is not sufficient – Further held – It is settled law that Special Public Prosecutor should ordinarily be paid from funds of State and only in special case, remuneration can be collected from private sources – Impugned order states that remuneration of Special Public Prosecutor will be paid by complainant, cannot be approved – Impugned order not sustainable and set aside – Writ Petition allowed. [Pawan Kumar Saraswat Vs. State of M.P.] …*19**

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

Criminal Procedure Code, 1973 (2 of 1974), Sections 96, 97, 99 & 100 – See – Penal Code, 1860, Section 302 & 304 Part I **[Dukhiram @ Dukhlal Vs. State of M.P.] (DB)…773**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 96, 97, 99 व 100 – देखें – दण्ड संहिता, 1860, धारा 302 व 304 भाग **I** (दुखीराम उर्फ दुखलाल वि. म.प्र. राज्य) **(DB)…773**

Criminal Procedure Code, 1973 (2 of 1974), Section 110 & 122(1)(b) – Forfeiture of Bond – Detention **– SDM u/S 110 CrPC directed petitioner to furnish a bond of Rs. 10,000 for maintaining good behaviour for a period of two years – Subsequently, again an offence was registered against petitioner whereby SDM u/S 122(1)(b) directed to forfeit the bond and to recover an amount of Rs. 10,000 from petitioner and directed to detain him in prison till the expiry of period of bond – Challenge to – Held – Invocation of powers of Magistrate u/S 122(1)(b) CrPC was utterly misconceived because the bond that could have been asked for from petitioner and which was ultimately filed by him was related to maintaining good behaviour and not for keeping peace – Petitioner cannot be arrested and sent to jail for remaining period of bond – Further held – Petitioner has not only been arraigned in aforesaid case but after investigation, police also filed a final report against him and if under such circumstances, Magistrate is satisfied that breach has occurred, he need not wait for either framing of charge or trial or conviction – Directing recovery of Rs. 10,000 was rightly made but direction of custody and detention is unsustainable in the eyes of law and that part of order is hereby set aside – Petition partly allowed. [Meenu @ Sachin Jain Vs. State of M.P.] …*17**

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

***Criminal Procedure Code, 1973 (2 of 1974), Section 125 – Maintenance Amount – Quantum – Take Home Salary – Deductions* – Revision filed by wife for enhancement against the order passed by Family Court u/S 125 Cr.P.C. whereby husband was directed to pay Rs. 3000 per month to wife and Rs. 2000 per month to child – Held – Wife and children are entitled to enjoy same status which they would have otherwise enjoyed in company of husband/ father – Further held – Husband's gross salary is Rs. 31,794 and it is well established principle of law that while calculating deductions from salary only statutory deductions can be taken note of and voluntary deductions cannot be considered – In the present case, deductions towards contribution to cooperative bank, repayment of CPF loan (house loan) and repayment of festival advance cannot be taken into consideration in order to assess the take home salary of husband – Loan is nothing but receipt of salary in advance – Accordingly husband's take home salary is Rs. 25,460 – Considering the status of parties, price index, inflation rate coupled with the requirements of baby child, husband directed to pay Rs. 4000 per month to wife and Rs. 3000 per month to daughter from date of order – Application allowed. [Meeta Shain (Smt.) Vs. K.P. Shain]** **...*26**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125 – भरणपोषण राशि – मात्रा – शुद्ध वेतन – कटौती – दण्ड प्रक्रिया संहिता की धारा 125 के अंतर्गत परिवार न्यायालय द्वारा पारित आदेश जिससे पति को 3,000 रू. प्रतिमाह पत्नी को एवं 2000 रू. प्रतिमाह बच्ची

को भुगतान करने हेतु निदेशित किया गया था, के विरूद्ध वृद्धि किये जाने हेतु पत्नी द्वारा पुनरीक्षण प्रस्तुत किया गया – अभिनिर्धारित – पत्नी और बच्चे उस समान स्थिति का उपभोग करने के हकदार हैं जो कि वे अन्यथा पति/पिता की संगति में उपभोग करते – आगे अभिनिर्धारित – पति का कुल वेतन 31,794 रू. है एवं यह विधि का सुस्थापित सिद्धांत है कि वेतन से कटौती की गणना करते समय केवल कानूनी कटौती का ध्यान रखा जा सकता है एवं स्वैच्छिक कटौती पर विचार नहीं किया जा सकता है – वर्तमान प्रकरण में, सहकारी बैंक में योगदान, सी.पी.एफ. ऋण (मकान ऋण) के प्रतिसंदाय एवं त्यौहार अग्रिम के प्रतिसंदाय के प्रति कटौती को पति के शुद्ध वेतन को निर्धारित करने के लिए विचार में नहीं लिया जा सकता है – ऋण कुछ और नहीं बल्कि अग्रिम रूप से वेतन की प्राप्ति है – तद्नुसार पति का शुद्ध वेतन 25,460 रू. है – पक्षकारों की स्थिति, मूल्य सूचकांक एवं मुद्रास्फीति की दर के साथ ही बच्चे की आवश्यकताओं को विचार में लेते हुए, पति को आदेश दिनांक से 4000 रू. प्रतिमाह पत्नी को एवं 3000 रू. प्रतिमाह बच्ची को भुगतान करने हेतु निदेशित किया गया – आवेदन मंजूर। (मीता शैन (श्रीमती) वि. के.पी. शैन) **...*26**

***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. [Bilavar Vs. State of M.P.] (DB)...137**

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। (बिलावर वि. म.प्र. राज्य) **(DB)...137**

***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. [Kuntal Baran Chakraborty Vs. Central Bureau of Investigation] ...215

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। (कुंतल बरन चक्रवर्ती वि. सेन्ट्रल ब्यूरो ऑफ इनवेस्टिगेशन) **...215**

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

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

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

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 197 – संज्ञान – मंजूरी – अभिनिर्धारित – यदि न्यायालय को यह स्पष्ट है कि परिवादी ने स्वयं कथन किया है कि याचीगण ने कदाशय के साथ अपनी शक्तियों का प्रयोग किया था, दण्ड प्रक्रिया संहिता की धारा 197 के अंतर्गत मंजूरी की अनुपस्थिति में न्यायालय द्वारा संज्ञान लिया जाना उचित नहीं है – विचारण न्यायालय को परिवादी को दण्ड प्रक्रिया संहिता की धारा 197 के अंतर्गत प्राधिकारी से मंजूरी प्राप्त करने हेतु निदेशित करना चाहिए था एवं तत्पश्चात् परिवाद प्रस्तुत करना था – दण्ड प्रक्रिया संहिता की धारा 197 के अंतर्गत मंजूरी आवश्यक थी क्योंकि अभिलेख यह दर्शाता है कि याचीगण अपनी शासकीय हैसियत में कार्य कर रहे थे – परिवाद, बहुप्रयोजनीय प्रकृति का होने के कारण, याचीगण के विरूद्ध कोई एक विनिर्दिष्ट अभिकथन प्रकट नहीं करता – परिवाद प्रकरण अभिखंडित – याचिका मंजूर। (व्ही.बी. सिंह वि. राजेन्द्र कुमार गुप्ता) **...611**

***Criminal Procedure Code, 1973 (2 of 1974), Section 204 – Issuance of Process – Practice and Procedure* – Held – At the stage of considering the issuance of process to accused person, Court is not required to see that if there is sufficient ground for conviction. [M.P. Mansinghka Vs. Dainik Pratah Kaal] ...821**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 204 – आदेशिका जारी की जाना – पद्धति एवं प्रक्रिया – अभिनिर्धारित – अभियुक्त को आदेशिका जारी करने का विचार किये जाने के प्रक्रम पर, न्यायालय द्वारा यह देखा जाना अपेक्षित नहीं है कि क्या दोषसिद्धि हेतु पर्याप्त आधार हैं। (एम.पी. मानसिंह का वि. दैनिक प्रातः काल) **...821**

***Criminal Procedure Code, 1973 (2 of 1974), Section 204 – Warrant Case – Issue of Non-Bailable Warrant* – Held – Merely because the offense for which, presence of accused is required is triable as a warrant case, issuance of non-bailable warrant at the first instance is not justified – There was no pressing or compelling reasons before the Trial Court to secure presence of the accused by way of a non-bailable warrant – Not a single line has been written by the lower Court justifying the issuance of non-bailable warrant at the first instance, reflecting an application of mind – All accused persons are public servants occupying posts of responsibility and dignity – Even if a prima facie case is apparent on records, the Court ought to have issued summons u/S 61 CrPC instead of exposing them to threat of an arrest – It is completely unjustified in the eyes of law. [V.B. Singh Vs. Rajendra Kumar Gupta]...611**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 204 – वारंट प्रकरण – गैर–जमानतीय वारंट का जारी किया जाना – अभिनिर्धारित – मात्र इसलिए कि वह अपराध जिसके लिए अभियुक्त की उपस्थिति अपेक्षित है, वारंट प्रकरण के रूप में विचारणीय है, प्रथम बार में गैर–जमानतीय वारंट जारी किया जाना न्यायोचित नहीं है – विचारण न्यायालय के समक्ष गैर–जमानतीय वारंट के माध्यम से अभियुक्त की उपस्थिति सुनिश्चित करने हेतु कोई दबाव बनाने वाले या बाध्यकारी कारण नहीं थे – मस्तिष्क का प्रयोग दर्शाते हुए प्रथम बार में

गैर–जमानतीय वांरट जारी करने को न्यायोचित ठहराते हुए विचारण न्यायालय द्वारा एक पंक्ति भी लिखित नहीं की गई है – सभी अभियुक्तगण लोक सेवक हैं जो कि जिम्मेदारी एवं गरिमा के पदों को धारण किये हुये हैं – यद्यपि अभिलेखों पर प्रथम दृष्ट्या प्रकरण स्पष्ट है, न्यायालय को उन्हें गिरफ्तारी की आशंका प्रकट करने की बजाय दण्ड प्रक्रिया संहिता की धारा 61 के अंतर्गत समन जारी करना चाहिए था – विधि की दृष्टि में यह पूर्णतः अनुचित है। (व्ही.बी. सिंह वि. राजेन्द्र कुमार गुप्ता) **...611**

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. [Jayant Laxmidas Vs. State of M.P.]** **...248**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 221(2) व 300(1) एवं खान अधिनियम, (1952 का 35), धारा 72C(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। (जयंत लक्ष्मीदास वि. म.प्र. राज्य) **...248**

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

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

Criminal Procedure Code, 1973 (2 of 1974), Section 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. [Amar Singh Kamria Vs. State of M.P.] …257**

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। (अमर सिंह कामरिया वि. म.प्र. राज्य) …257

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. [Amar Singh Kamria Vs. State of M.P.] …257**

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 के प्रयोजनों हेतु उपयोग में लाए जा सकते हैं – विचारण न्यायालय द्वारा कोई अवैधता कारित नहीं की गई – याचिका खारिज। (अमर सिंह कामरिया वि. म.प्र. राज्य) **...257**

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

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

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

Criminal Procedure Code, 1973 (2 of 1974), Section 397 & 401, Negotiable Instruments Act (26 of 1881), Section 138 and High Court of Madhya Pradesh Rules, 2008, Rule 48 – Maintainability of Revision **– Trial Court convicted the Applicant/accused for offence u/S 138 of the Act of 1881 – In appeal, the conviction was upheld and appeal was dismissed – Applicant/ accused neither paid the amount nor surrendered before the trial Court and filed this revision – Held – This Court granted bail to the applicant but even then she neither surrendered before the trial Court nor she furnished the bail – This Court cancelled the bail even then she did not surrender before the Court – Present revision filed by the applicant without surrendering before the Appellate Court is not maintainable in the light of Rule 48 of the M.P. High Court Rules 2008. [Simmi Dhillo (Smt.) Vs. Jagdish Prasad Dubey]**

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दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 397 व 401, परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 एवं मध्य प्रदेश उच्च न्यायालय नियम, 2008, नियम 48 – पुनरीक्षण की पोषणीयता – विचारण न्यायालय ने आवेदक/अभियुक्त को 1881 के अधिनियम की धारा 138 के अंतर्गत अपराध हेतु दोषसिद्ध किया – अपील में, दोषसिद्धि को कायम रखा गया था तथा अपील खारिज की गई थी – आवेदक/अभियुक्त ने न तो रकम अदा की, न ही विचारण न्यायालय के समक्ष आत्मसमर्पण किया और यह पुनरीक्षण प्रस्तुत किया – अभिनिर्धारित – इस न्यायालय ने आवेदक को जमानत प्रदान की परंतु तब भी उसने न तो विचारण न्यायालय के समक्ष आत्मसमर्पण किया, न ही उसने जमानत पेश की – इस न्यायालय ने जमानत निरस्त की तब भी उसने न्यायालय के समक्ष आत्मसमर्पण नहीं किया – आवेदक द्वारा, अपीली न्यायालय के समक्ष आत्मसमर्पण किये बिना प्रस्तुत वर्तमान पुनरीक्षण, म.प्र. उच्च न्यायालय नियम, 2008 के नियम 48 के आलोक में पोषणीय नहीं है। (सिम्मी ढिल्लो (श्रीमती) वि. जगदीश प्रसाद दुबे) ...*27

Criminal Procedure Code, 1973 (2 of 1974), Section 468 & 473, Forest Act (16 of 1927), Sections 41, 42 & 76 and Van Upaj Vyapar (Viniyaman) Adhiniyam, M.P. (9 of 1969), Section 5 & 16 – Limitation – Delay in taking Cognizance – **Offence was registered against the petitioner in the year 2002 and challan was filed in the year 2007, after five years – Trial Court took cognizance of the matter and registered the case on 10.08.2007 itself and thereafter issued notice to petitioner to decide the application u/S 473 Cr.P.C. for condonation of delay – Challenge to – Held – Limitation provided u/S 468(2)(c) is three years – Court shall without taking cognizance of the offence, must first of all issue notice to the prospective accused and hear him on the issue of condoning the delay in taking cognizance, otherwise it would be a violation of natural justice – Court taking cognizance of the offence before condoning the delay fell foul of the mandate of Section 468 Cr.P.C. – Further held – In the instant case, presently 15 years has lapsed and now interest of justice would not be served if petitioner is sent back to stand trial – Proceedings pending before the JMFC stands quashed – Petition allowed. [Vinay Sapre Vs. State of M.P.] …815**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 468 व 473, वन अधिनियम (1927 का 16), धाराएँ 41, 42 व 76 एवं वन उपज व्यापार (विनियमन) अधिनियम, म.प्र. (1969 का 9), धारा 5 व 16 – परिसीमा – संज्ञान लेने में विलंब – याची के विरूद्ध वर्ष 2002 में अपराध पंजीबद्ध किया गया था और चालान वर्ष 2007 में प्रस्तुत किया गया, पांच वर्ष पश्चात् – विचारण न्यायालय ने मामले का संज्ञान लिया और 10.08.2007 को ही प्रकरण पंजीबद्ध किया एवं तत्पश्चात् विलंब के लिए माफी हेतु धारा 473 दं.प्र.सं. के अंतर्गत आवेदन का विनिश्चय करने के लिए याची को नोटिस जारी किया – को चुनौती – अभिनिर्धारित – धारा 468(2)(सी) के अंतर्गत उपबंधित परिसीमा तीन वर्ष है – न्यायालय को अपराध का संज्ञान लिये बिना, सर्वप्रथम पूर्वेक्षित अभियुक्त को नोटिस जारी करना होगा तथा उसे संज्ञान लेने में विलंब के लिए माफी के विषय पर सुनेगा, अन्यथा यह नैसर्गिक न्याय का उल्लंघन होगा – विलंब माफ करने के पूर्व, न्यायालय द्वारा अपराध का संज्ञान लिया जाना, धारा 468 दं.प्र.सं. की आज्ञा के चंगुल में फँस गया है – आगे अभिनिर्धारित – वर्तमान प्रकरण में, अभी 15 वर्ष व्यपगत हुए हैं और अब न्याय का हित पूरा नहीं होगा यदि याची को विचारण का सामना करने के लिए वापस भेजा जाता है – न्यायिक दण्डाधिकारी प्रथम श्रेणी के समक्ष लंबित कार्यवाहियां अभिखंडित की गई – याचिका मंजूर। (विनय सप्रे वि. म.प्र. राज्य) …815**

Criminal Procedure Code, 1973 (2 of 1974), Section 482 – Scope – Quashment of FIR – **Offence registered u/S 7 of Prevention of Corruption Act, 1988 – Held – In the instant case, after investigation, challan has been filed and charges have been framed and accordingly trial Court recorded the evidence of prosecution witnesses – It is well settled principle of law that if allegation made in the FIR are taken at their face value and accepted in their**

entirety, criminal proceedings instituted on the basis of such FIR should not be quashed – Powers u/S 482 are very wide and very plentitude and requires great caution in its exercise – Criminal prosecution cannot be quashed at such mid-session – It is not that rarest of rare case which calls for exercise of inherent powers – Petition dismissed. [Radheshyam Soni Vs. State of M.P.]

(DB)…*21

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – व्याप्ति – प्रथम सूचना प्रतिवेदन अभिखंडित किया जाना – भ्रष्टाचार निवारण अधिनियम, 1988 की धारा 7 के अंतर्गत अपराध पंजीबद्ध किया गया – अभिनिर्धारित – वर्तमान प्रकरण में, अन्वेषण पश्चात्, चालान प्रस्तुत किया गया है और आरोप विरचित किये गये हैं तथा तद्नुसार विचारण न्यायालय ने अभियोजन साक्षियों का साक्ष्य अभिलिखित किया है – यह विधि का सुस्थापित सिद्धांत है कि यदि प्रथम सूचना प्रतिवेदन में किये गये अभिकथन को प्रत्यक्षतः लिया गया और उनकी संपूर्णता में स्वीकार किया गया, उक्त प्रथम सूचना प्रतिवेदन के आधार पर संस्थित की गई दाण्डिक कार्यवाहियां अभिखंडित नहीं की जानी चाहिए – धारा 482 के अंतर्गत शक्तियां व्यापक है और प्रचुर है तथा इनके प्रयोग में अति सावधानी अपेक्षित है – दाण्डिक अभियोजन को ऐसे सत्र के मध्य में अभिखंडित नहीं किया जा सकता – यह ऐसा विरल से विरलतम प्रकरण नहीं है जिसके लिए अंतर्निहित शक्तियों का प्रयोग किया जाये – याचिका खारिज। (राधेश्याम सोनी वि. म.प्र. राज्य) **(DB)…*21**

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. [Anant Vijay Soni Vs. State of M.P.] …203**

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। (अनंत विजय सोनी वि. म.प्र. राज्य) **...203**

Criminal Procedure Code, 1973 (2 of 1974), Amendment of 2007 – See – Penal Code, 1860, Section 420, 467, 468, 471, 120-B **[Laxmi Thakur (Smt.) Vs. State of M.P.] ...199**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), 2007 का संशोधन – देखें – दण्ड संहिता, 1860, धारा 420, 467, 468, 471, 120–B (लक्ष्मी ठाकुर (श्रीमती) वि. म.प्र. राज्य) **...199**

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. [Branch Manager, The Oriental Insurance Co. Ltd., Satna Vs. Smt. Ranju Yadav] (DB)...101**

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। (ब्रांच मेनेजर, द ऑरिएन्टल इंश्योरेन्स कं. लि., सतना वि. श्रीमती रंजू यादव) **(DB)...101**

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. [Branch Manager, The Oriental Insurance Co. Ltd., Satna Vs. Smt. Ranju Yadav] (DB)...101**

''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। (ब्रांच मेनेजर, द ऑरिएन्टल इंश्योरेन्स कं. लि., सतना वि. श्रीमती रंजू यादव) **(DB)…101**

Dowry Prohibition Act (28 of 1961), Section 3 & 4 – See – Penal Code, 1860, Section 304-B & 498-A **[Manohar Rajgond Vs. State of M.P.] …608**

दहेज प्रतिषेध अधिनियम (1961 का 28), धारा 3 व 4 – देखें – दण्ड संहिता, 1860, धारा 304–बी व 498–ए (मनोहर राजगोंड वि. म.प्र. राज्य) **…608**

Dowry Prohibition Act (28 of 1961), Section 4 – See – Penal Code, 1860, Sections 302, 304-B, 498-A & 201 **[Rajesh Kumar Vs. State of M.P.] (DB)…535**

दहेज प्रतिषेध अधिनियम (1961 का 28), धारा 4 – देखें – दण्ड संहिता, 1860, धाराएँ 302, 304–बी, 498–ए व 201 (राजेश कुमार वि. म.प्र. राज्य) **(DB)…535**

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. [Tele World Marketing (M/s.) Vs. The Joint Commissioner (Drugs), Food & Drugs Administration] …108**

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 में प्रस्तुत वाद पोषणीय है – अपील मंजूर। (टेली वर्ल्ड मार्केटिंग (मे.) वि. द ज्वाइंट कमिश्नर (ड्रग्स), फुड एण्ड ड्रग्स एडमिनिस्ट्रेशन) **...108**

Essential Commodities Act (10 of 1955), Section 3 & 7 – See – Juvenile Justice (Care and Protection of Children) Act, 2000, Sections 2(k), 2(l), 7 (a) & 20 **[Nitin Sharma Vs. State of M.P.] ...555**

आवश्यक वस्तु अधिनियम (1955 का 10), धारा 3 व 7 – देखें – किशोर न्याय (बालकों की देखरेख और संरक्षण) अधिनियम, 2000, धाराएँ 2(के), 2(एल), 7(ए), व 20 (नितिन शर्मा वि. म.प्र. राज्य) **...555**

Evidence Act (1 of 1872), Section 3 and Penal Code (45 of 1860), Section 304-B & 498-A – Testimony of Close Relatives – Interested witnesses – Consideration **– Held – Close relatives of deceased are interested witnesses but their testimony cannot be disbelieved on this ground alone – In cases of demand of dowry, domestic violence or bride burning, offence takes place within four walls of the matrimonial house and it is quite obvious that deceased would have told about the conduct and behaviour of her in-laws to her parents and close relatives not to any outsiders – Testimony of near/close relatives of the deceased cannot be brushed aside. [Rajesh Kumar Vs. State of M.P.] (DB)...535**

साक्ष्य अधिनियम (1872 का 1), धारा 3 एवं दण्ड संहिता (1860 का 45), धारा 304–बी एवं 498–ए – करीबी रिश्तेदारों का परिसाक्ष्य – हितबद्ध साक्षीगण – विचार – अभिनिर्धारित – मृतिका के करीबी रिश्तेदार हितबद्ध साक्षीगण है परंतु केवल इस आधार पर उनके परिसाक्ष्य पर अविश्वास नहीं किया जा सकता – दहेज की मांग के प्रकरणों में, घरेलू हिंसा या दुल्हन को जलाने के अपराध ससुराल की चार दीवारों के भीतर होते हैं एवं यह पूर्णतया स्पष्ट है कि मृतिका ने अपने माता–पिता एवं करीबी रिश्तेदारों को अपने ससुराल वालों के आचरण एवं व्यवहार के बारे में बताया होगा, न कि किसी बाहर वालों को – मृतिका के निकट/करीबी रिश्तेदारों के परिसाक्ष्य को नजर अंदाज नहीं किया जा सकता। (राजेश कुमार वि. म.प्र. राज्य) **(DB)...535**

Evidence Act (1 of 1872), Section 6 – See – Penal Code, 1860, Section 302 **[Khemchand Kachhi Patel Vs. State of M.P.] (DB)…747**

साक्ष्य अधिनियम (1872 का 1), धारा 6 – देखें – दण्ड संहिता, 1860, धारा 302 (खेमचन्द काछी पटेल वि. म.प्र. राज्य) **(DB)…747**

***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. [Gagriya Vs. State of M.P.] (DB)…159**

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। (गगरिया वि. म.प्र. राज्य) **(DB)… 159**

***Evidence Act (1 of 1872), Section 9 – See – Penal Code, 1860, Section 394 & 397* [Tilak Singh Vs. State of M.P.] …*13**

साक्ष्य अधिनियम (1872 का 1), धारा 9 – देखें – दण्ड संहिता, 1860, धारा 394 व 397 (तिलक सिंह वि. म.प्र. राज्य) **…*13**

***Evidence Act (1 of 1872), Section 32 – See – Penal Code, 1860, Sections 302, 354 & 449* [Shrawan Vs. State of M.P.] (DB)…740**

साक्ष्य अधिनियम (1872 का 1), धारा 32 – देखें – दण्ड संहिता, 1860, धाराएँ 302, 354 व 449 (श्रवण वि. म.प्र. राज्य) **(DB)…740**

***Evidence Act (1 of 1872), Section 32 and Penal Code (45 of 1860), Section 304-B & 498-A – Dying Declaration – Credibility* – In the instant case, there were two dying declarations – Contents of the dying declaration are duly supported by the evidence of brother and mother of the deceased – There is no allegation against husband that he threatened and beaten the deceased – Both dying declarations are found reliable with respect to cruelty and ill treatment by mother-in-law – It shows that husband and both sister-in-law did not actively participated in the crime. [Rajesh Kumar Vs. State of M.P.] (DB)…535**

साक्ष्य अधिनियम (1872 का 1), धारा 32 एवं दण्ड संहिता (1860 का 45), धारा 304–बी एवं 498–ए –मत्युकालिक कथन – विश्वसनीयता – वर्तमान प्रकरण में, दो मृत्युकालिक कथन थे – मृत्युकालिक कथन की अंतर्वस्तु, मृतिका के भाई एवं माँ के साक्ष्य द्वारा सम्यक् रूप से समर्थित है – पति के विरूद्ध ऐसा कोई अभिकथन नहीं है कि उसने मृतिका को धमकाया और मारा पीटा है – दोनों मृत्युकालिक कथन, सास द्वारा प्रताड़ना एवं बुरे बर्ताव के संबंध में भरोसेमंद पाये गये – यह दर्शाता है कि पति एवं दोनों ननदों ने अपराध में सक्रिय रूप से भाग नहीं लिया। (राजेश कुमार वि. म.प्र. राज्य) **(DB)…535**

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. [Makhanlal Vs. Balaram] …94**

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। (माखनलाल वि. बालाराम) …94

Evidence Act (1 of 1872), Section 145 and Criminal Procedure Code, 1973 (2 of 1974), Section 161 **– To take advantage of omission in previous statement, attention of witness has to be drawn to it, giving opportunity to explain omission – Witness was not confronted with omission with regard to last seen together – Evidence cannot be discarded. [Bhagwan Singh Vs. State of M.P.] (DB)…564**

साक्ष्य अधिनियम (1872 का 1), धारा 145 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 161 – पूर्वतर कथन में लोप का लाभ लेने के लिए, लोप को स्पष्ट करने का अवसर देते हुए साक्षी का ध्यान उस ओर आकर्षित करना होता है – साक्षी का सामना, अंतिम बार साथ देखे जाने के संबंध में लोप के साथ नहीं कराया गया था – साक्ष्य को अमान्य नहीं किया जा सकता। (भगवान सिंह वि. म.प्र. राज्य) **(DB)…564**

***Evidence Act (1 of 1872), Section 154 – Hostile Witness – Testimony – Effect* – Held – In the present case, Mesobai, neighbour of the deceased turned hostile but she partly supported the prosecution story, hence that part of her evidence can be relied upon her corroboration. [Shrawan Vs. State of M.P.] (DB)…740**

साक्ष्य अधिनियम (1872 का 1), धारा 154 – पक्षविरोधी साक्षी – परिसाक्ष्य – प्रभाव – अभिनिर्धारित – वर्तमान प्रकरण में, मृतिका की पड़ोसी, मेसोबाई पक्षविरोधी हो गई परंतु उसने आंशिक रूप से अभियोजन कथा का समर्थन किया है अतः उसके साक्ष्य के उस भाग पर संपुष्टि हेतु विश्वास किया जा सकता है। (श्रवण वि. म.प्र. राज्य) **(DB)…740**

***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. [Anil Pandre Vs. State of M.P.] (DB)…114**

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। (अनिल पांद्रे वि. म.प्र. राज्य) **(DB)…114**

***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. [Manoj Kumar Jain Vs. State of M.P.] …240**

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। (मनोज कुमार जैन वि. म.प्र. राज्य) **…240**

Forest Act (16 of 1927), Section 2(4) and Mines and Minerals (Development and Regulation) Act (67 of 1957), Transit of Timber & Other Forest Produce Rules, U.P., 1978, Rule 3 and Transit (Forest Produce) Rules, M.P., 2000 – Forest Produce – **Held – While considering the definition of Forest Produce, scientific and botanical sense has to be taken into consideration and commercial parlance test may not be adequate in such cases – Nature of different commodities explained. [State of Uttarakhand Vs. Kumaon Stone Crusher] (SC)…263**

वन अधिनियम (1927 का 16), धारा 2(4), खान और खनिज (विकास और विनियमन) अधिनियम (1957 का 67), इमारती लकड़ी एवं अन्य वनोपज का अभिवहन नियम, उ.प्र., 1978, नियम 3 एवं अभिवहन (वनोपज) नियम, म.प्र., 2000 – वनोपज – अभिनिर्धारित – वनोपज की परिभाषा पर विचार करते समय वैज्ञानिक एवं वानस्पतिक अर्थ को विचार में लिया जाना चाहिए एवं ऐसे प्रकरणों में वाणिज्यिक बोल–चाल की कसौटी पर्याप्त नहीं हो सकती – विभिन्न वस्तुओं का स्वरूप स्पष्ट किया गया है। (उत्तराखण्ड राज्य वि. कुमांउ स्टोन क्रशर) **(SC)…263**

Forest Act (16 of 1927), Section 2(4)(b) – Words "brought from" & "found in" – Interpretation – **Word "brought from" is an expression which conveys the idea of the items having their origin in forests and they have been taken out from the forest – Word "found in" means the item which has origin from forests, is found in the forest while "brought from" means that items having origin in forest have moved out from the forest. [State of Uttarakhand Vs. Kumaon Stone Crusher] (SC)…263**

वन अधिनियम (1927 का 16), धारा 2(4)(बी) – शब्द ''से लाई जावे'' एवं ''में पाई जावे'' – निर्वचन – शब्द ''से लाई जावे'' एक ऐसी अभिव्यक्ति है जो कि उन वस्तुओं की धारणा प्रकट करती है जिनकी उत्पत्ति वनों में है तथा उन्हें वन से निकाला गया है – शब्द ''में पाई जावे'' का अर्थ उस वस्तु से है जिसकी उत्पत्ति वनों से है, वन में पाई जाती है जबकि ''से लाई जावे'' का अर्थ उन वस्तुओं से है जिनकी उत्पत्ति वनों में है तथा उन्हें वनों से बाहर ले जाया गया है। (उत्तराखण्ड राज्य वि. कुमांउ स्टोन क्रशर) **(SC)…263**

Forest Act (16 of 1927), Sections 41, 42 & 76 – See – Criminal Procedure Code, 1973, Section 468 & 473 **[Vinay Sapre Vs. State of M.P.] …815**

वन अधिनियम (1927 का 16), धाराएँ 41, 42 व 76 – देखें – दण्ड प्रक्रिया संहिता, 1973, धारा 468 व 473 (विनय सप्रे वि. म.प्र. राज्य) **…815**

Forest Act (16 of 1927), Section 52 – Seizure of Forest Produce – Confiscation of Vehicle – **It was alleged that JCB machine, which belonged to the petitioner was found illegally excavating soil 4 metres away from the main road in the forest area – JCB machine was seized and confiscation proceedings were initiated by the forest department – Challenge to – Held – In absence**

of any seizure of forest produce or its panchnama, entire confiscation proceedings initiated in respect of vehicle cannot be sustained and is hereby quashed – Respondents directed to handover JCB machine to petitioner expeditiously – Petition allowed. [Vishwanath Singh Vs. State of M.P.]

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वन अधिनियम (1927 का 16), धारा 52 – वन उपज की जब्ती – वाहन का अधिहरण – यह अभिकथित किया गया था कि जे.सी.बी. मशीन, जो कि याची की थी, को वन क्षेत्र में मुख्य सड़क से 4 मीटर की दूरी पर अवैध रूप से मिट्टी का उत्खनन करते पाया गया था – जे.सी.बी. मशीन को जब्त किया गया था तथा वन विभाग द्वारा अधिहरण की कार्यवाहियां आरंभ की गई थी – को चुनौती – अभिनिर्धारित – वन उपज की किसी जब्ती या उसके पंचनामे की अनुपस्थिति में, वाहन के संबंध में आरंभ की गई संपूर्ण अधिहरण कार्यवाहियां कायम नहीं रखी जा सकती एवं एतद् द्वारा अभिखंडित की गई – प्रत्यर्थीगण को शीघ्र याची को जे.सी.बी. मशीन हस्तांतरित करने के लिए निदेशित किया गया – याचिका मंजूर। (विश्वनाथ सिंह वि. म.प्र. राज्य) **...*30**

***Forest Act (16 of 1927) and Mines and Minerals (Development and Regulation) Act (67 of 1957) – Field of Operation – Validity* – Held – Object and Regulation of the two legislations is different – Forest Act deals with forest and forest wealth with a different object and the 1957 Act deals with mines and minerals – Subjects of 1927 Act and 1957 Act are distinct and separate – There may be an incidental encroachment in respect of small area of operation of two legislation but both the Acts operate in different field – Incidental encroachment of one legislation with another is not forbidden in the Constitutional scheme of distribution of legislative powers – It is the duty of the Court to find out its true intent and purpose and to examine the particular legislation in its pith and substance – Act of 1957 impliedly repeals the Act of 1927 so far as Section 41 and 1978 Rules are concerned, cannot be accepted – Similarly, the submission, that by the Act of 1957, the provisions of 1927 Act and 1978 Rules have become void, inoperative and stand repealed, cannot be accepted – Various amendments in 1927 Act were made by the State of U.P. in exercise of its legislative powers conferred. [State of Uttarakhand Vs. Kumaon Stone Crusher] (SC)...263**

वन अधिनियम (1927 का 16) एवं खान और खनिज (विकास और विनियमन) अधिनियम (1957 का 67) – प्रवर्तन का क्षेत्र – विधिमान्यता – अभिनिर्धारित – दोनों विधानों का उद्देश्य एवं विनियमन भिन्न है – वन अधिनियम, वन एवं वन संपदा से संबंधित है जिसका उद्देश्य भिन्न है तथा 1957 का अधिनियम खान एवं खनिजों से संबंधित है – 1927 के अधिनियम और 1957 के अधिनियम के विषय भिन्न एवं पृथक हैं – इन दोनों विधानों के प्रवर्तन के क्षेत्र के छोटे से भाग के संबंध में आनुषंगिक अधिक्रमण हो सकता है परंतु दोनों अधिनियम भिन्न क्षेत्रों में प्रवर्तित होते हैं – एक विधान का दूसरे

विधान के साथ आनुषंगिक अधिक्रमण, विधायी शक्तियों के वितरण की संवैधानिक स्कीम में निषिद्ध नहीं है – न्यायालय का यह कर्तव्य है कि वह किसी विशिष्ट विधान के सही आशय एवं प्रयोजन का पता करे और उसके तत्व और सार का परीक्षण करे – 1957 का अधिनियम, 1927 के अधिनियम को विवक्षित रूप से निरसित करता है, जहाँ तक कि धारा 41 एवं 1978 के नियमों का संबंध है को स्वीकार नहीं किया जा सकता – इसी प्रकार, यह निवेदन कि 1957 के अधिनियम द्वारा 1927 का अधिनियम एवं 1978 के नियमों के उपबंध शून्य, अप्रवर्तनीय बन गये हैं व निरसित हो गये हैं, स्वीकार नहीं किया जा सकता – उ.प्र. राज्य द्वारा, उसे प्रदत्त विधायी शक्तियों के प्रयोग में 1927 के अधिनियम में विभिन्न संशोधन किये गये थे। (उत्तराखण्ड राज्य वि. कुमांउ स्टोन क्रशर) **(SC)…263**

***Forest – Explanation* – Definition of forest cannot be confined only to reserved forests, village forests and protected forests as enumerated in Forest Act, 1927 – Forest shall include all statutorily recognized forests, whether designated as reserve, protected or otherwise – Term "forest land" will not only include forest as understood in dictionary sense, but also any area recorded as forest in the government records irrespective of the ownership – Further held – As per the government notification, merely because both sides of roads are declared to be protected forest, the road itself will not fall within the purview of protected forest – Merely passing through the roads, it cannot be held that the goods or forest produce are passing through the protected forest. [State of Uttarakhand Vs. Kumaon Stone Crusher] (SC)…263**

वन – स्पष्टीकरण – वन की परिभाषा केवल आरक्षित वनों, वनग्रामों एवं संरक्षित वनों तक सीमित नहीं हो सकती जैसा कि वन अधिनियम, 1927 में दिया गया है – वन में सभी कानूनी रूप से मान्य वन शामिल होंगे, यद्यपि उन्हें आरक्षित, संरक्षित या अन्यथा नाम निर्दिष्ट किया गया हो – शब्द ''वन भूमि'' में न केवल वन शामिल होंगे जैसा कि शब्दावली के अर्थ में समझा जाता है परंतु ऐसा कोई भी क्षेत्र जो स्वामित्व पर विचार किये बिना सरकारी अभिलेखों में वन के रूप में अभिलिखित किया गया है – आगे अभिनिर्धारित – सरकारी अधिसूचना के अनुसार, मात्र इसलिए कि सड़कों की दोनों तरफ को संरक्षित वन घोषित किया गया है, सड़क स्वयं संरक्षित वन की परिधि के भीतर नहीं आती – मात्र सड़कों से गुजरना, यह अभिनिर्धारित नहीं किया जा सकता कि माल और वनोपज संरक्षित वन से गुजर रहे हैं। (उत्तराखण्ड राज्य वि. कुमांउ स्टोन क्रशर) **(SC)…263**

***High Court of Madhya Pradesh Rules, 2008, Rule 48 – See – Criminal Procedure Code, 1973, Section 397 & 401* [Simmi Dhillo (Smt.) Vs. Jagdish Prasad Dubey] …*27**

मध्य प्रदेश उच्च न्यायालय नियम, 2008, नियम 48 – देखें – दण्ड प्रक्रिया संहिता, 1973, धारा 397 व 401 (सिम्मी ढिल्लो (श्रीमती) वि. जगदीश प्रसाद दुबे) …*27

High Court Rules and Orders, M.P., Chapter 3 – See – Constitution – Article 226 [Surendra Security Guard Services (M/s.) Vs. Union of India] (DB)…54

उच्च न्यायालय नियम एवं आदेश, म.प्र., अध्याय 3 – देखें – संविधान – अनुच्छेद 226 (सुरेन्द्र सिक्योरिटी गार्ड सर्विसेस (मे.) वि. यूनियन ऑफ इडिया) **(DB)…54**

***Industrial Disputes Act (14 of 1947), Section 2(k)/10/25-B(2)(a)(ii)/ 25-F – See – Service Law* [Municipal Corporation, Jabalpur Vs. The Presiding Officer, Labour Court, Jabalpur] …401**

औद्योगिक विवाद अधिनियम (1947 का 14), धारा 2(के)/10/25–बी(2)(ए)(i)/ 25–एफ – देखें – सेवा विधि (म्यूनिसिपल कारपोरेशन, जबलपुर वि. द प्रिसाइडिंग ऑफीसर, लेबर कोर्ट, जबलपुर) **…401**

***Industrial Disputes Act (14 of 1947), Section 10 – Limitation – Belated Reference* – After departmental proceedings, workman was punished with dismissal from service on 02.12.1992 – Reference was made after 11 years before the CGIT which was allowed and compensation of Rs. 2 lacs was awarded to the petitioner/legal heir, as workman expired during pendency of the case before Tribunal – Employer and Employee both challenged the order of the Tribunal – Held – It is true that in the Act of 1947, no limitation is prescribed for raising an industrial dispute and Limitation Act, 1963 is also not applicable to the reference made under the Act – Further held – Looking to various judgments passed by the Supreme Court, it can safely be concluded that delay is a relevant factor which needs to be considered by Tribunal – In the instant case, reference was made after 11 years from the date of termination and workman was not able to establish that the issue was still alive when the matter was referred – It is also equally settled that "delay defeats equities" – In the instant case, because of such belated reference, inquiry record has become untraceable/unavoidable, therefore, employer could not produce the same – Supreme Court has held that when delay resulted in material evidence relevant to adjudication being lost or rendered unavailable, delay is fatal – It is well settled that party cannot take benefit of his own wrong – No relief was due to the workman – Award passed by the Tribunal is set aside – Petition filed by the employer is allowed and the one filed by the workman is dismissed. [Union of India Vs. Smt. Shashikala Jeattalvar] …692**

औद्योगिक विवाद अधिनियम (1947 का 14), धारा 10 – परिसीमा – विलम्बित निर्देश – कर्मकार को विभागीय कार्यवाहियों के पश्चात्, 02.12.1992 को सेवा से पदच्युति के साथ दण्डित किया गया था – 11 वर्ष पश्चात्, सी.जी.आई.टी. के समक्ष निर्देश प्रस्तुत किया गया था जिसे मंजूर किया गया था तथा याची/विधिक वारिस को रू. दो लाख का प्रतिकर प्रदान किया गया था क्योंकि, कर्मकार की मृत्यु अधिकरण के समक्ष प्रकरण लंबित रहने के दौरान

हुई थी – नियोक्ता एवं कर्मचारी दोनों ने अधिकरण के आदेश को चुनौती दी – अभिनिर्धारित – यह सत्य है कि 1947 के अधिनियम में औद्योगिक विवाद उठाने के लिए कोई परिसीमा विहित नहीं है तथा अधिनियम के अंतर्गत किये गये निर्देश को परिसीमा अधिनियम, 1963 लागू भी नहीं होता है – आगे अभिनिर्धारित – उच्चतम न्यायालय द्वारा पारित विभिन्न निर्णयों के देखते हुए, यह सुनिश्चित रूप से निष्कर्षित किया जा सकता है कि विलंब एक सुसंगत कारक है जिसे अधिकरण द्वारा विचार में लिया जाना आवश्यक है – वर्तमान प्रकरण में, सेवा समाप्ति की तिथि से 11 वर्ष पश्चात् निर्देश किया गया है एवं कर्मकार यह स्थापित नहीं कर पाया है कि जब मामला निर्दिष्ट किया गया था, मुद्दा जीवित था – यह भी समान रूप से स्थापित है कि ''विलंब से साम्या की पराजय होती है'' – वर्तमान प्रकरण में, उक्त विलम्बित निर्देश के कारण, जांच अभिलेख न पता लगाये जाने योग्य/अनुपलब्ध हो गया और इसलिए, नियोक्ता उसे प्रस्तुत नहीं कर सका – उच्चतम न्यायालय ने अभिनिर्धारित किया है कि जब विलम्ब के परिणामस्वरूप न्यायनिर्णयन हेतु सुसंगत तात्विक साक्ष्य गुम जाये या अनुपलब्ध हो जाये, विलम्ब घातक है – यह सुस्थापित है कि पक्षकार स्वयं की गलती का लाभ नहीं ले सकता – कर्मकार को कोई अनुतोष देय नहीं था – अधिकरण द्वारा पारित अवार्ड अपास्त किया गया – नियोक्ता द्वारा प्रस्तुत याचिका मंजूर की गई एवं कर्मकार द्वारा प्रस्तुत याचिका खारिज की गई। (यूनियन ऑफ इंडिया वि. श्रीमती शशिकला जेतलवार) **...692**

***Interpretation of Statues – 'Knowledge' & 'Intention'* – The Apex Court held that "as compared to 'knowledge' the intention requires something more than the mere foresight of the consequences, namely, the purposeful doing of a thing to achieve a particular end". [Khadak Singh @ Khadak Ram Vs. State of M.P.] (DB)...558**

कानूनों का निर्वचन – 'ज्ञान' एवं 'आशय' – सर्वोच्च न्यायालय ने अभिनिर्धारित किया कि '' 'ज्ञान' की तुलना में आशय मात्र परिणामों के पूर्व ज्ञान से कुछ अधिक अपेक्षा करता है, नामतः किसी विशिष्ट परिणाम को प्राप्त करने हेतु किसी कृत्य को प्रयोजनपूर्वक करना''। (खडक सिंह उर्फ खडक राम वि. म.प्र. राज्य) **(DB)...558**

***Juvenile Justice (Care and Protection of Children) Act (56 of 2000), Sections 2(k), 2(l), 7 (a) & 20 and Essential Commodities Act (10 of 1955), Section 3 & 7 – Amendment of 2006 – Age of Juvenile* – Appellant convicted and sentenced u/S 3/7 of Act of 1955 – Held – Date of birth of appellant is 29.05.1979 as verified by the Board of Secondary Education – Alleged offence was committed on 12.03.1997 and on that date accused/appellant was 17 years, 9 months and 13 days old – Appellant would be entitled to get benefit of Act of 2000 and according to which he was a juvenile as he had not completed the age of 18 years on the date of incident – Appellant has suffered a rigor for almost 20 years, would not be proper to remit the case back to Juvenile Justice Board – Conviction sustained but sentence liable to be quashed – Appeal allowed to the said extent. [Nitin Sharma Vs. State of M.P.] ...555**

किशोर न्याय (बालकों की देखरेख और संरक्षण) अधिनियम (2000 का 56), धाराएँ 2(के), 2(एल), 7(ए), व 20 एवं आवश्यक वस्तु अधिनियम (1955 का 10), धारा 3 व 7 – 2006 का संशोधन – किशोर की आयु – अपीलार्थी को 1955 के अधिनियम की धारा 3/7 के अंतर्गत दोषसिद्ध एवं दण्डादिष्ट किया गया – अभिनिर्धारित – अपीलार्थी की जन्मतिथि 29.05.1979 है जैसा कि माध्यमिक शिक्षा बोर्ड द्वारा सत्यापित किया गया है – अभिकथित अपराध 12.03.1997 को कारित किया गया था और उस दिनांक को अभियुक्त/अपीलार्थी 17 वर्ष, 9 माह और 13 दिन का था – अपीलार्थी, 2000 के अधिनियम का लाभ प्राप्त करने के लिए हकदार होगा, जिसके अनुसार वह किशोर था क्योंकि घटना दिनांक को उसने 18 वर्ष की आयु पूर्ण नहीं की थी – अपीलार्थी ने लगभग 20 वर्ष तक कठिनाई सहन की है, किशोर न्याय बोर्ड को प्रकरण प्रतिप्रेषित करना उचित नहीं होगा – दोषसिद्धि कायम परंतु दण्डादेश अभिखंडित किये जाने योग्य – उक्त सीमा तक अपील मंजूर। (नितिन शर्मा वि. म.प्र. राज्य) **…555**

***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. [Anita Jain (Smt.) Vs. Dilip Kumar] …*3**

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। (अनिता जैन (श्रीमती) वि. दिलीप कुमार) **…*3**

***Limitation Act (36 of 1963), Article 136 – Limitation*– Trial Court rightly reckoning the period of limitation from date of dismissal of miscellaneous appeal by High Court i.e. from 01.03.1995 – Since application for restitution of possession was filed on 01.05.1997 i.e. after two years, it is well within**

limitation as the limitation prescribed under Article 136 of Limitation Act, 1963 is twelve years. [Mana @ Ashok Vs. Budabai] …598

परिसीमा अधिनियम, (1963 का 36), अनुच्छेद 136 – परिसीमा – विचारण न्यायालय ने उचित रूप से परिसीमा की अवधि की गणना, उच्च न्यायालय द्वारा विविध अपील की खारिजी की तिथि अर्थात् 01.03.1995 से की – चूंकि कब्जे के प्रत्यास्थापन हेतु आवेदन 01.05.1997 को प्रस्तुत किया गया था अर्थात् दो वर्ष पश्चात्, वह भली–भांति परिसीमा के भीतर है क्योंकि परिसीमा अधिनियम, 1963 के अनुच्छेद 136 के अंतर्गत विहित परिसीमा बारह वर्ष है। (माना उर्फ अशोक वि. बुदाबाई) …598

***Limitation Act (36 of 1963), Article 137 & Section 15(2) – See – Arbitration and Conciliation Act, 1996, Section 11(6)* [Uttarakhand Purv Sainik Kalyan Nigam Ltd. (M/s.) Vs. Northern Coal Field Ltd.] …794**

परिसीमा अधिनियम (1963 का 36), अनुच्छेद 137 व धारा 15(2) – देखें – माध्यस्थम् और सुलह अधिनियम, 1996, धारा 11(6) (उत्तराखण्ड पूर्व सैनिक कल्याण निगम लि. (मे.) वि. नार्दन कोल फील्ड लि.) …794

***Lower Judicial Service (Recruitment and Conditions of Service) Rules, M.P. 1994, Rule 7, 9 & 10 and Civil Services (General Conditions of Service) Rules, M.P., 1961, Rule 6 – Appointment – Civil Judge – Eligibility – Good Character* – Petitioner successfully cleared/passed the preliminary examination, main examination and the interview and his name was recommended for appointment as Civil Judge – Subsequently, on the information of petitioner involvement in the criminal cases, his name was removed by the State Government from the selection list holding him not eligible – Petitioner filed a writ petition which was further referred to the larger bench – Held – Acquittal in a criminal case is not a certificate of good conduct of a candidate nor is sufficient to infer that candidate possess good character – Decision of acquittal passed by a criminal Court on the basis of compromise would not make the candidate eligible for appointment as the criminal proceedings are with the view to find culpability of commission of offence whereas the appointment to the civil post is in view of his suitability to the post – Test for each of them is based on different parameters – Competent authority has to take a decision in respect of suitability of candidate discharge the functions of a civil post – Supreme Court held that even if a candidate has made a disclosure of the concluded trial but still the employer has a right to consider the antecedents and cannot be compelled to appoint a candidate – Decision of the State Government that petitioner is not eligible for appointment, cannot be said to be illegal or without jurisdiction – Questions of Law referred to Larger Bench answered accordingly. [Ashutosh Pawar Vs. High Court of M.P.] (FB)…627**

निम्नतर न्यायिक सेवा (भर्ती तथा सेवा की शर्तें) नियम, म.प्र. 1994, नियम 7, 9 व 10 एवं सिविल सेवा (सेवा की सामान्य शर्तें) नियम, म.प्र., 1961, नियम 6 – नियुक्ति – सिविल जज – पात्रता – अच्छा चरित्र – याची ने सफलतापूर्वक प्रारंभिक परीक्षा, मुख्य परीक्षा एवं साक्षात्कार उत्तीर्ण किया तथा सिविल जज के रूप में नियुक्ति हेतु उसके नाम की अनुशंसा की गई – तत्पश्चात्, याची के आपराधिक प्रकरणों में शामिल होने की जानकारी पर राज्य सरकार द्वारा उसे पात्र नहीं होने की धारणा करते हुए, उसका नाम चयन सूची से हटाया गया – याची ने रिट याचिका प्रस्तुत की जिसे आगे वृहद न्यायपीठ को निर्दिष्ट किया गया – अभिनिर्धारित – आपराधिक प्रकरण में दोषमुक्ति, एक अभ्यर्थी के अच्छे आचरण का प्रमाणपत्र नहीं है, न ही यह निष्कर्ष निकालने के लिए पर्याप्त है कि अभ्यर्थी अच्छे चरित्र का है – समझौते के आधार पर आपराधिक न्यायालय द्वारा पारित दोषमुक्ति का विनिश्चय, अभ्यर्थी को नियुक्ति हेतु योग्य नहीं बनाएगा क्योंकि आपराधिक कार्यवाहियां, अपराध कारित करने में दोषिता का पता लगाने की दृष्टि से की गई है जबकि सिविल पद पर नियुक्ति, पद के लिए उसकी योग्यता की दृष्टि से है – इनमें से प्रत्येक की कसौटी भिन्न भिन्न मापदण्डों पर आधारित है – सक्षम प्राधिकारी को, अभ्यर्थी की एक सिविल पद के कार्यों के निर्वहन हेतु योग्यता के संबंध में निर्णय लेना होता है – उच्चतम न्यायालय ने अभिनिर्धारित किया है कि यदि अभ्यर्थी ने समाप्त विचारण का प्रकटन भी किया है परंतु तब भी नियोक्ता को पूर्ववृत्त विचार में लेने का अधिकार है और एक अभ्यर्थी को नियुक्त करने के लिए बाध्य नहीं किया जा सकता – राज्य सरकार का निर्णय कि याची नियुक्ति हेतु पात्र नहीं है, को अवैध या बिना अधिकारिता के नहीं कहा जा सकता – वृहद न्यायपीठ को निर्देशित विधि के प्रश्नों को तद्नुसार उत्तरित किया गया। (अशुतोष पवार वि. हाईकोर्ट ऑफ एम.पी.) **(FB)…627**

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. [Sundarlal Vs. State of M.P.] …86**

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 शर्तों 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। (सुन्दरलाल वि. म.प्र. राज्य) **...86**

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. [Sundarlal Vs. State of M.P.] ...86**

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। (सुन्दरलाल वि. म.प्र. राज्य) **...86**

Metalliferous Mines Regulation, 1961, Regulation No. 115(5) & 177(1) – See – Criminal Procedure Code, 1973, Section 221(2) & 300(1) **[Jayant Laxmidas Vs. State of M.P.] ...248**

धातु खान विनियम, 1961, विनियमन क्र. 115(5) व 177(1) – देखें – दण्ड प्रक्रिया संहिता, 1973, धारा 221(2) व 300(1) (जयंत लक्ष्मीदास वि. म.प्र. राज्य) **...248**

Mines Act, (35 of 1952), Section 72C(1)(a) – See – Criminal Procedure Code, 1973, Section 221(2) & 300(1) **[Jayant Laxmidas Vs. State of M.P.] ...248**

खान अधिनियम, (1952 का 35), धारा 72C(1)(a) – देखें – दण्ड प्रक्रिया संहिता, 1973, धारा 221(2) व 300(1) (जयंत लक्ष्मीदास वि. म.प्र. राज्य) **...248**

Model Bye-Laws for Bar Association, M.P. Clause 26 & 27 – See – Advocates Act, 1961, Section 15 & 28 **[Bar Association Lahar, Dist. Bhind Vs. State Bar Council of M.P.] (DB)...667**

अधिवक्ता संघ हेतु मॉडल उप विधि, म.प्र. खंड 26 व 27 – देखें – अधिवक्ता अधिनियम, 1961, धारा 15 व 28 (बार एसोसिएशन लहार, डिस्ट्रिक्ट भिण्ड वि. स्टेट बार काउंसिल ऑफ एम.पी.) **(DB)…667**

Motor Vehicles Act (59 of 1988), Section 56 – See – Motoryan Karadhan Adhiniyam, M.P., 1991, Section 3(1) & (2) **[Puspraj Singh Baghel Vs. State of M.P.] (DB)…79**

मोटर यान अधिनियम (1988 का 59), धारा 56 – देखें – मोटरयान कराधान अधिनियम, म.प्र., 1991, धारा 3(1) व (2) (पुष्पराज सिंह बघेल वि. म.प्र. राज्य) **(DB)…79**

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. [Puspraj Singh Baghel Vs. State of M.P.] (DB)…79**

मोटरयान कराधान अधिनियम, म.प्र. (1991 का 25), धारा 3(1) व (2) एवं मोटरयान 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**

नगरपालिका कर्मचारी (भर्ती तथा सेवा की शर्तें) नियम, म.प्र., 1968, नियम 9 व 10(2) – देखें – दण्ड संहिता, 1860, धारा 302 व 323 (शंभू खरे वि. म.प्र. राज्य) **…*11**

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. [Raju Ganesh Kamle Vs. State of M.P.] …64**

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। (राजू गणेश कामले वि. म.प्र. राज्य) **…64**

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. [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**

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

(DB)…449

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

Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 8/21 – Malkhana Register – Evidence – **Held – As per prosecution, seized brown sugar was kept in Malkhana – During the trial, Malkhana Register was not marked as Exhibit, neither statement of any witness in respect of the same has been brought on record nor has been examined during trial – No evidence that alleged seized article was kept in Malkhana or in safe custody – Benefit has to be given to appellant. [Shyam Bihari Vs. State of M.P.]**

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स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 8/21 – मालखाना पंजी – साक्ष्य – अभिनिर्धारित – अभियोजन के अनुसार, जब्तशुदा ब्राउन शुगर को मालखाने में रखा गया था – विचारण के दौरान, मालखाना पंजी को प्रदर्श अंकित नहीं किया गया था, इस संबंध में किसी साक्षी का न तो कथन अभिलेख पर लाया गया और न ही विचारण के दौरान परीक्षण किया गया है – कोई साक्ष्य नहीं कि अभिकथित जब्तशुदा वस्तु को मालखाना या सुरक्षित अभिरक्षा में रखा गया था – अपीलार्थी को लाभ देना होगा। (श्याम बिहारी वि. म.प्र. राज्य) **...755**

Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Sections 8/21, 42 & 50 – Conviction – Communication to Senior Officer – Search Procedure **– Brown Sugar was seized from appellant – Held – Rojnamcha entry reveals that no communication was made to senior officers before search and seizure, therefore there was no compliance of Section 42 of the Act of 1985 – Further held – For the purpose of search, offer was give to appellant, to be searched by a Gazetted Officer or by the officer who went for the search – It was the officer who went for the search has searched the appellant, thus there was a total non-compliance of Section 50 of the Act of 1985 – In view of the above non-compliance, conviction deserves to be and is accordingly set aside – Appeal allowed. [Shyam Bihari Vs. State of M.P.]** **...755**

स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धाराएँ 8/21, 42 व 50 – दोषसिद्धि – वरिष्ठ अधिकारी को संसूचना – तलाशी प्रक्रिया – अपीलार्थी से ब्राउन शुगर जब्त की गई थी – अभिनिर्धारित – रोजनामचा प्रविष्टी प्रकट करती है कि तलाशी एवं जब्ती के पूर्व वरिष्ठ अधिकारी को संसूचना नहीं दी गई थी, इसलिए 1985 के अधिनियम की धारा 42 का अनुपालन नहीं किया गया था – आगे अभिनिर्धारित – तलाशी के प्रयोजन हेतु अपीलार्थी को राजपत्रित अधिकारी द्वारा या तलाशी हेतु गये अधिकारी द्वारा तलाशी करवाने का प्रस्ताव दिया गया था – अधिकारी जो तलाशी हेतु गया था, के द्वारा अपीलार्थी की तलाशी ली गई अतः, 1985 के अधिनियम की धारा 50 का पूर्णतः अननुपालन हुआ था – उपरोक्त अननुपालन को दृष्टिगत रखते हुए, दोषसिद्धि अपास्त किये जाने योग्य है एवं तद्नुसार अपास्त की गई – अपील मंजूर। (श्याम बिहारी वि. म.प्र. राज्य) **...755**

Negotiable Instruments Act (26 of 1881), Section 138 and Criminal Procedure Code, 1973 (2 of 1974) – Practice and Procedure – Amendment in Complaint **– Petitioner/Complainant filed a case against the Respondent/ Accused u/S 138 of the Act of 1881 – Subsequently, complainant filed an application seeking amendment in the complaint regarding a typographical error, which was allowed by the JMFC – Accused filed a revision and the same was allowed – Complainant filed this petition – Held – Though there is no provision in the Criminal Procedure Code for amendment of the pleadings, the Apex Court has held that every Court whether civil or criminal possesses inherent powers to do right and to undo a wrong in course of administration of justice – In the present case, the year was wrongly mentioned as 2013 in**

place of 2014, it is a clerical/typographical error which can be corrected – Impugned order set aside and the one passed by the JMFC is restored – Petition allowed. [Shyama Patel (Smt.) Vs. Mehmood Ali] ...812

परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2) – पद्धति एवं प्रक्रिया – परिवाद में संशोधन – याची/परिवादी ने प्रत्यर्थी/अभियुक्त के विरूद्ध, 1881 के अधिनियम की धारा 138 के अंतर्गत प्रकरण प्रस्तुत किया – तत्पश्चात्, परिवादी ने परिवाद में मुद्रण त्रुटि से संबंधित संशोधन चाहते हुए एक आवेदन प्रस्तुत किया जिसे न्यायिक दण्डाधिकारी प्रथम श्रेणी द्वारा मंजूर किया गया – अभियुक्त ने एक पुनरीक्षण प्रस्तुत किया एवं उक्त को मंजूर किया गया था – परिवादी ने यह याचिका प्रस्तुत की – अभिनिर्धारित – यद्यपि दण्ड प्रक्रिया संहिता में अभिवचनों के संशोधन हेतु कोई उपबंध नहीं है, सर्वोच्च न्यायालय ने अभिनिर्धारित किया है कि प्रत्येक न्यायालय, चाहे सिविल या दाण्डिक, को न्याय के प्रशासन के क्रम में सही करने एवं गलत को सुधारने की अंतर्निहित शक्तियां है – वर्तमान प्रकरण में, वर्ष को 2014 के स्थान पर 2013 के रूप में गलती से उल्लिखित किया गया था, यह एक लिपिकीय/मुद्रण त्रुटि है, जिसे सुधारा जा सकता है – आक्षेपित आदेश अपास्त एवं न्यायिक दण्डाधिकारी प्रथम श्रेणी द्वारा पारित आदेश पुनःस्थापित किया गया – याचिका मंजूर। (श्यामा पटेल (श्रीमती) वि. महमूद अली) **...812**

Negotiable Instruments Act (26 of 1881), Section 138 – See – Criminal Procedure Code, 1973, Section 397 & 401 **[Simmi Dhillo (Smt.) Vs. Jagdish Prasad Dubey] ...*27**

परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 – देखें – दण्ड प्रक्रिया संहिता, 1973, धारा 397 व 401 (सिम्मी ढिल्लो (श्रीमती) वि. जगदीश प्रसाद दुबे) **...*27**

Nikshepakon Ke Hiton Ka Sanrakshan Adhiniyam, M.P., 2000 (16 of 2001), Section 4 & 8 and Constitution – Article 226 – Attachment Order – Special Court **– Attachment order of bank accounts and properties of petitioner was passed against the petitioner in a proceeding in which he was not even a party – Held – Attachment order can be passed by District Magistrate on complaints of depositors or otherwise – Such attachment order is an ad-interim order subject to judicial scrutiny by Special Court u/S 8 of the Adhiniyam and therefore principles of natural justice are not attracted before issuance of order of attachment – Principle of natural justice is codified in the shape of Section 8 of the Act and District Magistrate, after passing an order of attachment is required to apply to Special Court to make the order of attachment absolute and that is to be done only after issuing show cause notice to the person concerned – In the present case, petitioner has an alternate, efficacious and statutory remedy u/S 8 of the Act wherein he can raise all possible objections against attachment – Proceedings u/S 8 of the Act are already pending before the Special Court, hence interference declined – Petitions disposed of. [Pushp Vs. State of M.P.] ...702**

निक्षेपकों के हितों का संरक्षण अधिनियम, म.प्र., 2000 (2001 का 16), धारा 4 व 8 एवं संविधान – अनुच्छेद 226 – कुर्की आदेश – विशेष न्यायालय – याची के विरूद्ध, याची के बैंक खाते एवं सम्पत्तियां कुर्क करने का आदेश एक ऐसी कार्यवाही में पारित किया गया जिसमें वह पक्षकार भी नहीं था – अभिनिर्धारित – कुर्की आदेश को जिला मजिस्ट्रेट द्वारा, जमाकर्ता की शिकायतों पर या अन्यथा, पारित किया जा सकता है – उक्त कुर्की आदेश, अधिनियम की धारा 8 के अंतर्गत विशेष न्यायालय द्वारा न्यायिक संवीक्षा के अध्यधीन एक अंतरिम आदेश है और इसलिए कुर्की आदेश जारी करने के पूर्व नैसर्गिक न्याय के सिद्धांत आकर्षित नहीं होते – नैसर्गिक न्याय का सिद्धांत, अधिनियम की धारा 8 के रूप में संहिताबद्ध है तथा कुर्की का आदेश पारित करने के पश्चात्, जिला मजिस्ट्रेट से यह अपेक्षित है कि कुर्की के आदेश को अंतिम करने के लिए विशेष न्यायालय को आवेदन करे और ऐसा केवल संबंधित व्यक्ति को कारण बताओ नोटिस जारी करने के पश्चात् किया जाना चाहिए – वर्तमान प्रकरण में, याची के पास अधिनियम की धारा 8 के अंतर्गत वैकल्पिक, प्रभावकारी एवं कानूनी उपचार है, जहाँ वह कुर्की के विरूद्ध सभी संभावित आक्षेपों को उठा सकता है – अधिनियम की धारा 8 के अंतर्गत कार्यवाहियां पहले से विशेष न्यायालय के समक्ष लंबित हैं, अतः मध्यक्षेप से इंकार किया गया – याचिकायें निराकृत। (पुष्प वि. म.प्र. राज्य)

...702

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

शस्त्र की गैर–बरामदगी – प्रभाव – अभिनिर्धारित – मात्र शस्त्र की गैर–बरामदगी, संपूर्ण अभियोजन प्रकरण को जहाँ पर्याप्त अनाधिक्षेपनीय साक्ष्य उपलब्ध है, मिथ्या नहीं बनायेगी। (मुन्ना सिंह वि. म.प्र. राज्य) **(DB)...127**

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. [Shankar Vs. State of M.P.] (DB)...143**

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 की, 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। (शंकर वि. म.प्र. राज्य) **(DB)...143**

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. [Munna Singh Vs. State of M.P.]**

(DB)...127

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। (मुन्ना सिंह वि. म.प्र. राज्य) **(DB)...127**

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. [State of M.P. Vs. Siddhamuni]**

(DB)...121

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। (म.प्र. राज्य वि. सिद्धमुनी) **(DB)...121**

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

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

***Panchayats (Election Petitions, Corrupt Practices and Disqualification for Membership) Rules, M.P. 1995, Rules 3, 4, 7 & 8 – Election Petition – Summary Dismissal* – Held – Election Tribunal can only dismiss the election petition summarily under Rule 8 of Rules of 1995 when the Election Petition is filed without compliance of Rule 3, 4 and Rule 7 and not otherwise – Petition cannot be dismissed summarily on merits without framing issues on disputed**

questions of facts, recording of evidence and affording opportunity of hearing to the parties – In the present case, Petition was dismissed on general allegations that provisions of Rule 3, 4 and 7 of the Rules of 1995 were not complied with but there was no specific findings as to in what manner these rules were not complied – Petition was dismissed on merit without conducting trial by framing issues and recording evidence summarily holding that allegations made in petition does not constitute corrupt practice – Further held – A sacrosanct duty is cast on the Election Tribunal to try and adjudicate election petitions like a trial of a suit – Election Petition cannot be decided in a cavalier manner by adopting casual approach – Order unsustainable and is quashed – Respondent directed to decide the petition in accordance with law – Writ Petition allowed. [Ramesh Patel Madhpura Vs. State of M.P.] ...483

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

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

Adhiniyam when none of the grounds mentioned in the said section were available to the respondents – Further held – Section 122 itself provides for limitation for filing of election petition within thirty days from the date when elections are notified – Invoking the provisions of Section 122 in a proceedings u/S 36 of the Adhiniyam is palpably illegal – It is trite law that whatever is prohibited by law to be done directly, cannot be allowed to be done indirectly – Order passed by Collector invoking powers u/S 122 of the Adhiniyam and the order passed by SDO is unsustainable in the eyes of law and is hereby quashed – Petitioner's disqualification is set aside – Writ Petition allowed. [Badi Bahu Lodhi (Smt.) Vs. State of M.P.] ...418

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 36 व 122 – सरपंच को हटाया जाना – आधार – अधिकारिता – परिसीमा – अभिनिर्धारित – शिकायत के अवलोकन से प्रकट होता है कि वह निर्वाचन के समय याची द्वारा प्रस्तुत प्रपत्र में परिवार के सदस्यों की संख्या अर्थात् पुत्रियां जो विवाहित है और याची एवं उसके परिवार के सदस्यों के नाम की भूमि के भी संबंध में कतिपय जानकारी के छिपाव के संदर्भ में है – अधिनियम की धारा 36 में इनमें से कोई आधार प्रगणित नहीं है – अधिनियम की धारा 36 के अंतर्गत तथाकथित आवेदन को ग्रहण करने की कलेक्टर को कोई अधिकारिता नहीं जब उक्त धारा में उल्लिखित कोई भी आधार प्रत्यर्थीगण को उपलब्ध नहीं थे – आगे अभिनिर्धारित – धारा 122 स्वयं निर्वाचन अधिसूचित होने की तिथि से तीस दिनों के भीतर निर्वाचन याचिका प्रस्तुत करने हेतु परिसीमा उपबंधित करती है – अधिनियम की धारा 36 के अंतर्गत कार्यवाहियों में धारा 122 के उपबंधों का अवलंब लेना सुस्पष्ट रूप से अवैध है – यह प्रचलित विधि है कि जो कुछ भी प्रत्यक्ष रूप से किया जाना विधि द्वारा प्रतिषिद्ध है, उसे अप्रत्यक्ष रूप से करने की अनुमति नहीं दी जा सकती – कलेक्टर द्वारा अधिनियम की धारा 122 के अंतर्गत शक्तियों का अवलंब लेकर पारित किया गया आदेश एवं उपखंड अधिकारी द्वारा पारित आदेश, विधि की दृष्टि में कायम रखने योग्य नहीं है और एतद्द्वारा अभिखंडित – याची की निरर्हता अपास्त – रिट याचिका मंजूर। (बड़ी बहू लोधी (श्रीमती) वि. म.प्र. राज्य) **...418**

***Partnership Act (9 of 1932), Section 42(c) – Applicability* – Provisions of Section 42(c) does not confer any immunity from criminal prosecution where for legal purposes, the firm is dissolved but for deriving any unlawful benefit, the firm is shown to be in existence. [Omprakash Gupta Vs. State of M.P.] ...603**

भागीदारी अधिनियम (1932 का 9), धारा 42(सी) – प्रयोज्यता – धारा 42(सी) के उपबंध, दाण्डिक अभियोजन से कोई उन्मुक्ति प्रदत्त नहीं करते जहां विधिक प्रयोजनों हेतु फर्म विघटित है किंतु किसी विधि विरूद्ध लाभ व्युत्पन्न करने हेतु फर्म को अस्तित्व में दर्शाया गया है। (ओमप्रकाश गुप्ता वि. म.प्र. राज्य) **...603**

Passports Act (15 of 1967), Section 10(3)(e) & 10(5) and Penal Code (45 of 1860), Section 498-A & 406 – Impounding of Passport – **On the ground of pendency of a criminal case against the petitioner, order impounding his passport was passed by the respondent authority – Challenge to – Held – Mere pendency of a criminal case in a Court may be a cause to the Passport Officer to initiate action u/S 10(3)(e) of the Act of 1967 but it cannot be treated to a reason for impounding of the passport until the accused in a criminal case has been convicted by a competent Court – Further held – As and when the Passport Officer has to take action in exercise of the powers u/S 10(3)(e) of the Act of 1967, he ought to understand the nature of the criminal case pending against the person – In the instant case, bhabhi of the petitioner filed a case u/S 498-A and 406 IPC for demand of dowry arraying all family members as accused – Mere registration of a criminal case of demand of dowry is not sufficient to pass the order of impounding the passport without considering all the aspects and without assigning the cogent reasons – Impugned order quashed. [Navin Kumar Sonkar Vs. Union of India] …677**

पासपोर्ट अधिनियम (1967 का 15), धारा 10(3)(ई) व 10(5) एवं दण्ड संहिता (1860 का 45), धारा 498–ए व 406 – पासपोर्ट परिबद्ध किया जाना – याची के विरूद्ध दाण्डिक प्रकरण के लंबित रहने के आधार पर, प्रत्यर्थी प्राधिकारी द्वारा उसका पासपोर्ट परिबद्ध करने का आदेश पारित किया गया – को चुनौती – अभिनिर्धारित – मात्र न्यायालय में दाण्डिक प्रकरण का लंबित रहना, पासपोर्ट अधिकारी के लिए 1967 के अधिनियम की धारा 10(3)(ई) के अंतर्गत कार्रवाई आरंभ करने हेतु एक कारण हो सकता है किंतु इसे पासपोर्ट परिबद्ध करने हेतु कारण नहीं माना जा सकता जब तक कि सक्षम न्यायालय द्वारा अभियुक्त को दाण्डिक प्रकरण में दोषसिद्ध नहीं किया जाता – आगे अभिनिर्धारित – जब कभी पासपोर्ट अधिकारी को 1967 के अधिनियम की धारा 10(3)(ई) के अंतर्गत शक्तियों के प्रयोग में कार्रवाई करनी होती है, उसे उस व्यक्ति के विरूद्ध लंबित दाण्डिक प्रकरण का स्वरूप समझना चाहिए – वर्तमान प्रकरण में, याची की भाभी ने दहेज की मांग हेतु परिवार के सभी सदस्यों को अभियुक्त के रूप में दोषारोपित करते हुए धारा 498–ए व 406 भा.दं.सं. के अंतर्गत प्रकरण प्रस्तुत किया – सभी पहलुओं पर विचार किये बिना एवं प्रबल कारण दिये बिना, पासपोर्ट परिबद्ध करने का आदेश पारित करने के लिए मात्र दहेज की मांग के दाण्डिक प्रकरण का पंजीबद्ध किया जाना पर्याप्त नहीं है – आक्षेपित आदेश अभिखंडित। (नवीन कुमार सोनकर वि. यूनियन ऑफ इंडिया) …677

Pay Revision Rules, MP, 2009 – See – Service Law **[Jayanti Vyas (Smt.) Vs. State of M.P.] …673**

वेतन पुनरीक्षण नियम, म.प्र., 2009 – देखें – सेवा विधि (जयंती व्यास (श्रीमती) वि. म.प्र. राज्य) …673

Penal Code (45 of 1860), Section 34, 304-B & 498-A – Common Intention **– Held – Although husband and both sister-in-law did not rescue the deceased from mother-in-law, but that does not mean that they had any common intention to harass her or to kill her. [Rajesh Kumar Vs. State of M.P.]**

(DB)…535

दण्ड संहिता (1860 का 45), धारा 34, 304–बी एवं 498–ए – सामान्य आशय – अभिनिर्धारित – भले ही पति एवं दोनों ननदों ने मृतिका का सास से बचाव नहीं किया, परंतु उसका यह अर्थ नहीं कि उनका उसे प्रताड़ित करने का या मारने का कोई सामान्य आशय था। (राजेश कुमार वि. म.प्र. राज्य) **(DB)…535**

Penal Code (45 of 1860), Section 97 – Private/Self Defence **– Dispute relating to possession over land – Injuries caused to members of both the parties – Held – As the appellants assaulted the complainant party over the disputed land but has failed to prove the title on the said property and even there is no material or evidence to the effect that injuries caused to appellants were during the altercation – Plea of right to private defence is not available to appellants. [Prabhulal Vs. State of M.P.] (DB)…782**

दण्ड संहिता (1860 का 45), धारा 97 – प्राईवेट/स्वयं की प्रतिरक्षा – भूमि पर कब्जे से संबंधित विवाद – दोनों पक्षकारों के सदस्यों को चोटें कारित हुई – अभिनिर्धारित – चूंकि अपीलार्थीगण ने विवादित भूमि पर परिवादी पक्षकार पर हमला किया परंतु उक्त संपत्ति पर स्वत्व सिद्ध करने में विफल रहे हैं तथा इस प्रभाव की कोई सामग्री एवं साक्ष्य भी नहीं है कि अपीलार्थीगण को कारित चोटें, कहासुनी के दौरान की है – अपीलार्थीगण को प्राईवेट प्रतिरक्षा के अधिकार का अभिवाक् उपलब्ध नहीं है। (प्रभूलाल वि. म.प्र. राज्य)

(DB)…782

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. [Abhishek Mishra Vs. State of M.P.] …*1**

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 उत्प्रेरित 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। (अभिषेक मिश्रा वि. म.प्र. राज्य) **...*1**

***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. [Surendra Sharma Vs. State of M.P.] ...*12**

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 – कार्यवाहियाँ अभिखंडित किये जाने योग्य हैं – याचिका मंजूर। (सुरेन्द्र शर्मा वि. म.प्र. राज्य) **...*12**

***Penal Code (45 of 1860), Section 301 & 302/34 – Murder – Life Conviction – Doctrine of Transfer of Malice* – Held – Accused persons armed with Katar, iron rod and lathi, with common intention to kill, assaulted one Shameem but while causing injuries to him they killed one Rakesh who came to rescue Shameem – Further held – After running away from the spot the conduct of the appellants to come back again and to inflict multiple injuries by mean of deadly weapons demonstrate common intention of the appellants to commit murder – Supreme Court held that if accused persons were aiming**

at one person but killed other person, they would be punishable for committing offence of murder under the doctrine of transfer of malice a contemplated u/S 301 IPC – Trial Court rightly convicted the appellants – Appeal dismissed. [Mohd. Faizan Vs. State of M.P.] (DB)…734

दण्ड संहिता (1860 का 45), धारा 301 व 302/34 – हत्या – आजीवन दोषसिद्धि – द्वेष के अंतरण का सिद्धांत – अभिनिर्धारित – अभियुक्तगण ने कटार, लोहे की रॉड एवं लाठी से सुसज्जित होकर, जान से मारने के सामान्य आशय के साथ एक शमीम पर हमला किया किन्तु उसे चोटें कारित करते समय, उन्होंने राकेश, जो शमीम को बचाने आया था, को जान से मार दिया – आगे अभिनिर्धारित – मौके से भाग जाने के पश्चात्, अपीलार्थीगण का पुनः वापस आने और घातक शस्त्रों के जरिए विभिन्न चोटें पहुँचाने का आचरण, अपीलार्थीगण का हत्या कारित करने का सामान्य आशय दर्शित करता है – उच्चतम न्यायालय ने अभिनिर्धारित किया कि यदि अभियुक्तगण किसी एक व्यक्ति पर निशाना लगा रहे थे परंतु अन्य व्यक्ति को मार दिया, वे धारा 301 भा.दं.सं. के अंतर्गत अनुध्यात द्वेष के अंतरण के सिद्धांत के अंतर्गत हत्या का अपराध कारित करने के लिए दण्डित किये जाने योग्य है – विचारण न्यायालय ने अपीलार्थीगण को उचित रूप से दोषसिद्ध किया – अपील खारिज। (मोहम्मद फैजान वि. म.प्र. राज्य) **(DB)…734**

Penal Code (45 of 1860), Section 302 – Dead body not recovered **– Held – Prosecution proves beyond reasonable doubt that victim has been done to death – Accused can be held guilty of committing murder of deceased. [Bhagwan Singh Vs. State of M.P.] (DB)…564**

दण्ड संहिता (1860 का 45), धारा 302 – शव बरामद नहीं किया गया – अभिनिर्धारित – अभियोजन युक्तियुक्त संदेह से परे यह साबित करता है कि पीड़ित की हत्या की गई – अभियुक्त को मृतक की हत्या कारित करने का दोषी ठहराया जा सकता है। (भगवान सिंह वि. म.प्र. राज्य) **(DB)…564**

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

Accused failed to prove that the incident occurred under sudden and grave provocation – Appellant acted in a cruel manner and caused multiple stab injuries to the deceased resulting in her death – Trial Court rightly convicted the appellant – Appeal dismissed. [Bablu alias Virendra Kumar Vs. State of M.P.] **(DB)…*14**

दण्ड संहिता (1860 का 45), धारा 302 व धारा 300 का अपवाद 4 – मृत्युकालिक कथन – अपराध के हथियार की बरामदगी – प्रत्यक्ष साक्ष्य – हेतु की अनुपस्थिति – अभियुक्त द्वारा यह स्वीकार करते हुए कि उसने अपनी माँ एवं सौतेली बहन को अनेक चोटें कारित की, स्वयं प्रथम सूचना प्रतिवेदन दर्ज किया गया – अभिनिर्धारित – माँ की मृत्यु, शरीर के उन अंगों पर जिन पर अभियुक्त ने चोटें कारित की थी, संक्रमण एवं गैंग्रीन पनप जाने की वजह से सेप्टीसीमिया के कारण हुई – यह दर्शाने हेतु कोई साक्ष्य नहीं है कि उक्त (सेप्टीसीमिया), शल्यक्रिया के पश्चात् होने वाली जटिलताओं के कारण पनपा है – आगे अभिनिर्धारित – मृत्युकालिक कथन इस आधार पर अमान्य नहीं किया जा सकता कि उक्त को प्रश्न–उत्तर प्रारूप में अभिलिखित नहीं किया गया था – मृतक (अभियुक्त की माँ) का मृत्युकालिक कथन, कार्यपालिक मजिस्ट्रेट द्वारा स्वस्थता का प्रमाण–पत्र अभिप्राप्त करने के पश्चात् अभिलिखित किया गया था, जो कि पर्याप्त है तथा अभियुक्त को दोषसिद्ध करने हेतु एकमात्र आधार हो सकता है – आगे अभिनिर्धारित – जब व्यापक अभेद्य चाक्षुष साक्ष्य हैं तथा उक्त चिकित्सीय साक्ष्य द्वारा संपुष्ट किये गये हैं, हथियार की गैर–बरामदगी अभियोजन प्रकरण को प्रभावित नहीं करती – हथियार की गैर–बरामदगी एवं हेतु की अनुपस्थिति महत्वपूर्ण नहीं होगी जहाँ प्रकरण प्रत्यक्ष साक्ष्य पर आधारित है – अभियुक्त यह साबित करने में विफल रहा कि घटना अचानक और गंभीर प्रकोपन के अधीन घटित हुई – अपीलार्थी ने क्रूर तरीके से कृत्य किया एवं मृतक को घोंपने की अनेक चोटें कारित की फलस्वरूप उसकी मृत्यु हुई – विचारण न्यायालय ने उचित रूप से अपीलार्थी को दोषसिद्ध किया – अपील खारिज। (बबलू उर्फ वीरेन्द्र कुमार वि. म.प्र. राज्य) **(DB)…*14**

***Penal Code (45 of 1860), Section 302 and Evidence Act (1 of 1872), Section 6 – Murder – Life Conviction – Extra Judicial Confession – Admissibility in Evidence* – Husband assaulted his wife, inflicted number of injuries with sickle and also thrown a stone on her head – Wife died – Appellant's mother lodged the FIR – Held – From the Rojnamcha it is proved that husband / appellant himself had gone to police station on the date of incident and informed that he himself committed murder of the deceased/wife, which is subsequently corroborated by evidence of the SHO and report of mother of appellant – Such statement of appellant given to the Station Incharge is admissible u/S 6 of the Evidence Act – Such statement can also be treated as extra Judicial confession – Trial Court rightly convicted the appellant and awarded proper sentence – Appeal dismissed. [Khemchand Kachhi Patel Vs. State of M.P.]** **(DB)…747**

दण्ड संहिता (1860 का 45), धारा 302 एवं साक्ष्य अधिनियम (1872 का 1), धारा 6 – हत्या – आजीवन दोषसिद्धि – न्यायिकेतर संस्वीकति – साक्ष्य में ग्राह्यता – पति ने अपनी पत्नी पर हमला किया, हंसिये से कई चोटें पहुँचाई और उसके सिर पर एक पत्थर भी फेंका – पत्नी की मृत्यु हुई – अपीलार्थी की मां ने प्रथम सूचना प्रतिवेदन दर्ज किया – अभिनिर्धारित – रोजनामचा से यह साबित किया गया है कि पति/अपीलार्थी स्वयं घटना दिनांक को पुलिस थाना गया था और सूचित किया कि उसने स्वयं मृतिका/पत्नी की हत्या कारित की थी, तत्पश्चात् जिसकी संपुष्टि, थाना प्रभारी के साक्ष्य एवं अपीलार्थी की मां की रिपोर्ट से हुई है – अपीलार्थी का थाना प्रभारी को दिया गया उक्त कथन, साक्ष्य अधिनियम की धारा 6 के अंतर्गत ग्राह्य है – उक्त कथन को न्यायिकेतर संस्वीकृति के रूप में भी माना जा सकता है – विचारण न्यायालय ने अपीलार्थी को उचित रूप से दोषसिद्ध किया और उचित दण्डादेश प्रदान किया – अपील खारिज। (खेमचन्द काछी पटेल वि. म.प्र. राज्य) **(DB)…474**

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

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

***Penal Code (45 of 1860), Section 302/34 – 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. [Ajay Kol Vs. State of M.P.] (DB)…*2**

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। (अजय कोल वि. म.प्र. राज्य) **(DB)…*2**

Penal Code (45 of 1860), Section 302/34 & 324 – Conviction – Testimony of Eye Witnesses – Misnaming the weapon of offence **– Held – Misnaming the weapon by eye witness in moment of fear and anguish is insignificant and cannot be made basis for doubting the prosecution case nor will make the whole testimony of witness unacceptable especially when she is consistent in other material particulars such as identity of accused persons or the time and place of incident – It cannot be expected from a wife, whose husband is beaten to death and son is subjected to grievous injuries, to watch with precision as to which of the accused was causing which injury and by what weapon – FIR was lodged within an hour, disclosing the name of accused persons – Weapon of offence was recovered on the direction of accused persons – Commission of offence by accused persons is clearly established by prosecution beyond reasonable doubt – Conviction affirmed and upheld – Appeal dismissed. [Karun @ Rahman Vs. State of M.P.] (DB)…542**

दण्ड संहिता (1860 का 45), धारा 302/34 व 324 – दोषसिद्धि – चक्षुदर्शी साक्षियों का परिसाक्ष्य – अपराध के शस्त्र का गलत नाम बताया जाना – अभिनिर्धारित – चक्षुदर्शी साक्षी द्वारा भय एवं पीड़ा के क्षण में शस्त्र का गलत नाम बताया जाना महत्वहीन है और अभियोजन प्रकरण पर संदेह करने हेतु आधार नहीं बनाया जा सकता, न ही साक्षी के संपूर्ण परिसाक्ष्य को अस्वीकार्य बनायेगा, विशेषतः तब जब वह अन्य तात्विक विशिष्टियों में अविचल है जैसे कि अभियुक्तगण की पहचान या घटना का स्थान एवं समय – यह उस पत्नी से अपेक्षा नहीं की जा सकती जिसके पति को मरने तक पीटा गया है और जिसके पुत्र को घोर क्षतियां पहुँचायी गई है कि वह सूक्ष्मता से देखे कि अभियुक्तों में से कौन, कौन सी चोट कारित कर रहा है और किस शस्त्र से – प्रथम सूचना प्रतिवेदन एक घंटे के भीतर अभियुक्तगण के नाम प्रकट करते हुए दर्ज करायी गई थी – अभियुक्तगण के निदेश पर अपराध का शस्त्र बरामद किया गया था – अभियुक्तगण द्वारा अपराध कारित किया जाना,

अभियोजन द्वारा युक्तियुक्त संदेह से परे स्पष्ट रूप से स्थापित किया गया है – दोषसिद्धि अभिपुष्ट एवं मान्य – अपील खारिज। (करूण उर्फ रेहमान वि. म.प्र. राज्य) **(DB)…542**

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. [Munna Singh Vs. State of M.P.] (DB)…127**

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। (मुन्ना सिंह वि. म.प्र. राज्य) **(DB)…127**

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. [Shankar Vs. State of M.P.] (DB)…143**

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। (शंकर वि. म.प्र. राज्य) **(DB)…143**

***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. [Anil Pandre Vs. State of M.P.] (DB)…114**

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। (अनिल पांद्रे वि. म.प्र. राज्य) **(DB)…114**

Penal Code (45 of 1860), Sections 302, 300 & 201 – Murder Case – Circumstantial Evidence **– Held – Circumstances proved against appellant lead to only one conclusion that appellant committed murder – Appellant/ Accused made extra-judicial confession – Nothing on record to show that there was no premeditation or incident took place because of any sudden or grave provocation, in a heat of passion – Manner in which offence committed, would certainly fall within Section 300 IPC – By burning the dead body, appellant has caused disappearance of evidence of offence – Judgment and sentence affirmed – Appeal dismissed. [Bhagwan Singh Vs. State of M.P.]**

(DB)…564

दण्ड संहिता (1860 का 45), धाराएँ 302, 300 व 201 – हत्या का प्रकरण – परिस्थितिजन्य साक्ष्य – अभिनिर्धारित – अपीलार्थी के विरूद्ध साबित की गई परिस्थितियों से केवल एक ही निष्कर्ष निकलता है कि अपीलार्थी ने हत्या कारित की – अपीलार्थी/अभियुक्त ने न्यायिकेत्तर संस्वीकृति की – अभिलेख पर यह दर्शाने के लिए कुछ नहीं कि पूर्वचिंतन नहीं था अथवा घटना, अचानक या गंभीर प्रकोपन के कारण, भावावेश में घटित हुई – जिस ढंग से अपराध कारित किया गया वह निश्चित रूप से भा.दं.सं. की धारा 300 के भीतर आएगा – शव जलाकर अपीलार्थी ने अपराध के साक्ष्य का विलोपन कारित किया है – निर्णय एवं दण्डादेश अभिपुष्ट – अपील खारिज। (भगवान सिंह वि. म.प्र. राज्य) **(DB)…564**

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

दण्ड संहिता (1860 का 45), धारा 302 व 304 भाग **I** *– दोषसिद्धि – चक्षुदर्शी साक्षी का परिसाक्ष्य – आशय* – अभिनिर्धारित – मृतिका की पुत्री चक्षुदर्शी साक्षी थी जिसने घटना का अभिसाक्ष्य दिया और तद्नुसार अभियोजन साक्ष्य ने स्थापित किया कि जब मृतिका (अभियुक्त की पत्नी) खाना पका रही थी, अपीलार्थी और मृतिका के बीच झगड़ा हुआ था तथा इस स्थिति में अपीलार्थी ने स्टोव से केरोसीन निकालकर उसे मृतिका पर छिड़का और उसे आग लगा दी, तब अपीलार्थी ने उसे बचाने का प्रयास किया क्योंकि उसने आग बुझायी थी

– अपीलार्थी को भी चिकित्सालय में भर्ती किया गया था तथा उसे हांथों पर एवं सीने पर जलने की चोटें आयी थी – इन परिस्थितियों में, यह नहीं कहा जा सकता कि अपीलार्थी का आशय मृतिका को जान से मार देना था – अपीलार्थी द्वारा कारित अपराध, भा.दं.सं. की धारा 304 भाग I के अंतर्गत आयेगा – धारा 302 के अंतर्गत अपराध हेतु दोषसिद्धि एवं दण्डादेश अपास्त – एतद् द्वारा अपीलार्थी को भा.दं.सं. की धारा 304 भाग I के अंतर्गत दोषसिद्ध किया गया एवं 10 वर्ष सश्रम कारावास से दण्डादिष्ट किया गया – चूंकि अपीलार्थी ने 11 वर्ष का कारावास पूर्ण किया है, अतः छोड़ दिये जाने के लिए निदेशित किया गया – अपील अंशतः मंजूर। (खडक सिंह उर्फ खडक राम वि. म.प्र. राज्य) **(DB)…558**

***Penal Code (45 of 1860), Section 302 & 304 Part I and Criminal Procedure Code, 1973 (2 of 1974), Sections 96, 97, 99 & 100 – Murder – Conviction – Right of Private Defence* – Incident is said to have taken place in open place – When appellant inflicted axe blows to deceased, at that point of time there was no danger to the body of the appellant as he was standing about 20-25 feet away, so right of private defence is not available to the appellant – Apex Court held that right of private defence be used as preventive right and not punitive right – Further held – Appellant inflicted a blow of axe on the neck of the deceased who was armed with lathi – Appellant himself received injuries on his head and hence the offence committed would fall u/S 304 Part I IPC – Conviction u/S 302 set aside – Appellant convicted u/S 304 Part I IPC – Appeal partly allowed. [Dukhiram @ Dukhlal Vs. State of M.P.]**

(DB)…773

दण्ड संहिता (1860 का 45), धारा 302 व 304 भाग **I** *एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 96, 97, 99 व 100 – हत्या – दोषसिद्धि* – प्राईवेट प्रतिरक्षा का अधिकार – कथित रूप से घटना एक खुले स्थान पर घटित हुई – जब अपीलार्थी ने मृतक पर कुल्हाड़ी से वार किये तब उस क्षण अपीलार्थी के शरीर को कोई खतरा नहीं था क्योंकि वह लगभग 20–25 फीट दूर खड़ा था, इस तरह अपीलार्थी को प्राईवेट प्रतिरक्षा का अधिकार उपलब्ध नहीं है – सर्वोच्च न्यायालय ने अभिनिर्धारित किया कि प्राईवेट प्रतिरक्षा के अधिकार का उपयोग निवारक अधिकार के रूप में किया जाना चाहिए और न कि दण्डात्मक अधिकार के रूप में – आगे अभिनिर्धारित – अपीलार्थी ने मृतक, जो कि लाठी से सुसज्जित था, पर कुल्हाड़ी का वार किया – स्वयं अपीलार्थी को उसके सिर पर चोटें आयी और इसलिए कारित किया गया अपराध धारा 304 भाग–I भा.दं.सं. के अंतर्गत आयेगा – धारा 302 के अंतर्गत दोषसिद्धि अपास्त – अपीलार्थी को धारा 304 भाग–I भा.दं.सं. के अंतर्गत दोषसिद्ध किया गया – अपील अंशतः मंजूर। (दुखीराम उर्फ दुखलाल वि. म.प्र. राज्य)

(DB)…773

***Penal Code (45 of 1860), Sections 302, 304 Part I & 307 – Appreciation of Evidence – Delay in FIR and Recording Statement of Witnesses* – Trial Court convicted the accused u/S 304 Part I and 307 IPC – In appeal, High Court acquitted the accused – State Appeal – Held – There were material**

contradictions in statements of eye witnesses – 5 out of 12 prosecution witnesses turned hostile – FIR lodged after 13 days of incident – There was delay in – No plausible explanation for such huge inordinate delay – High Court rightly held that guilt of accused not established beyond reasonable doubt – Accused rightly acquitted – Appeal dismissed. [State of M.P. Vs. Nande @ Nandkishore Singh] **(SC)…617**

दण्ड संहिता (1860 का 45), धाराएँ 302, 304 भाग I *व 307 – साक्ष्य का मूल्यांकन – प्रथम सूचना प्रतिवेदन एवं साक्षीगण के कथन अभिलिखित करने में विलंब* – विचारण न्यायालय ने अभियुक्त को भारतीय दण्ड संहिता की धारा 304 भाग I व 307 के अंतर्गत दोषसिद्ध किया – अपील में, उच्च न्यायालय ने अभियुक्त को दोषमुक्त किया – राज्य अपील – अभिनिर्धारित – चक्षुदर्शी साक्षीगण के कथनों में तात्विक विरोधाभास थे – 12 में से 5 अभियोजन साक्षीगण पक्षद्रोही हो गए – घटना के 13 दिनों के पश्चात् प्रथम सूचना प्रतिवेदन दर्ज किया गया – उसमें विलंब था – इस प्रकार के बड़े असाधारण विलंब के लिए कोई सत्याभासी स्पष्टीकरण नहीं – उच्च न्यायालय ने उचित रूप से अभिनिर्धारित किया कि अभियुक्त की दोषिता युक्तियुक्त संदेह से परे स्थापित नहीं होती – अभियुक्त उचित रूप से दोषमुक्त – अपील खारिज। (म.प्र. राज्य वि. नन्दे उर्फ नंदकिशोर सिंह) **(SC)…617**

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. [Bilavar Vs. State of M.P.]** **(DB)…137**

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। (बिलावर वि. म.प्र. राज्य) **(DB)…137**

Penal Code (45 of 1860), Sections 302, 304 Part II & 323/34 – Conviction – Life Imprisonment – Appreciation of Evidence – Common Intention – **Dispute regarding possession of the land – Appellants were grazing their cattle over the land in dispute when the complainant party objected and sudden altercation started – Parties of both sides were injured and one person (Jeevan) died – Held – Death of deceased was caused because of penetration wound/stab on chest which was homicidal in nature as proved by the prosecution by medical evidence – No material contradictions and omissions in statement of prosecution witnesses – Incident had taken place suddenly without any premeditation and in the heat of passion – Appellants assaulted simultaneously but it does not mean that they started assaulting with common intention to cause death of the deceased and therefore in such circumstances all the accused persons are responsible for their individual acts – Appellants cannot be convicted for committing murder as there was no intention to cause death or to cause any injury which may be sufficient to cause death – It is not a case of murder but it is a case of culpable homicide not amounting to murder – Only appellant Prem Singh inflicted fatal injury and therefore he is liable to be convicted u/S 304 Part II IPC – Rest of the appellants/accused be convicted u/S 323 IPC – Appeal partly allowed. [Prabhulal Vs. State of M.P.]**

(DB)…782

दण्ड संहिता (1860 का 45), धाराएँ 302, 304 भाग **II** *व 323/34 – दोषसिद्धि – आजीवन कारावास – साक्ष्य का मूल्यांकन – सामान्य आशय* – भूमि के कब्जे से संबंधित विवाद – विवादित भूमि पर अपीलार्थीगण अपने पशु चरा रहे थे जब परिवादी पक्ष ने आक्षेप लिया और अचानक कहासुनी शुरू हुई – दोनों ओर के पक्षकारों को चोटें आयी और एक व्यक्ति (जीवन) की मृत्यु हुई – अभिनिर्धारित – मृतक की मृत्यु, सीने पर भेदन घाव/घोंपने के कारण कारित हुई थी जो कि मानव–वध स्वरूप की थी जैसा कि अभियोजन द्वारा चिकित्सीय साक्ष्य द्वारा सिद्ध किया गया – अभियोजन साक्षियों के कथन में कोई तात्विक विरोधाभास एवं लोप नहीं – घटना बिना पूर्व चिंतन के अचानक एवं भावनावेग में घटित हुई थी – अपीलार्थीगण ने एक साथ हमला किया था किंतु इसका अर्थ यह नहीं कि उन्होंने सामान्य आशय से मृतक की मृत्यु कारित करने के लिए हमला आरंभ किया था और इसलिए उक्त परिस्थितियों में सभी अभियुक्त व्यक्ति अपने अपने व्यक्तिगत कृत्य के लिए उत्तरदायी हैं – अपीलार्थीगण को हत्या कारित करने के लिए दोषसिद्ध नहीं किया जा सकता क्योंकि मृत्यु कारित करने या ऐसी कोई चोट कारित करने का आशय नहीं था जो मृत्यु कारित करने के लिए पर्याप्त हो सकती थी – यह हत्या का प्रकरण नहीं बल्कि हत्या की कोटि में न आने वाला आपराधिक मानव वध का प्रकरण है – केवल अपीलार्थी प्रेम सिंह ने घातक चोट पहुँचाई इसलिए वह धारा 304 भाग II भा.दं.सं. के अंतर्गत दोषसिद्ध किये जाने योग्य है – शेष अपीलार्थीगण/अभियुक्त को धारा 323 भा.दं.सं. के अंतर्गत दोषसिद्ध किया जाए – अपील अंशतः मंजूर। (प्रभूलाल वि. म.प्र. राज्य) **(DB)…782**

Penal Code (45 of 1860), Sections 302, 304-B, 498-A & 201 and Dowry Prohibition Act (28 of 1961), Section 4 – Conviction – Appreciation of Evidence **– Wife died due to burn injuries within two years of her marriage – Husband, mother-in-law and two sister-in-law were charged for the said offence – Held – Evidence on record clearly shows that mother-in-law of deceased use to torture her for demand of dowry and use to ill-treat her – It is also established that mother-in-law assaulted her and set her ablaze and murdered her – It is further clear from dying declarations that husband and both sister-in-law were not present with mother-in-law on the spot nor they supported for committing the offence – Dying declaration have been corroborated with testimony of brother and mother of deceased – In the police statements as well as in evidence, brother and mother of deceased did not allege anything against husband and both sister-in-laws which creates reasonable doubt in their favour – Husband and both sister-in-law are hereby acquitted from the charges – Conviction and sentence of Mother-in-law upheld – Appeal partly allowed. [Rajesh Kumar Vs. State of M.P.] (DB)…535**

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

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 एक साथ 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

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

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

(DB)…*23

Penal Code (45 of 1860), Sections 302, 354 & 449, Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), Section 3(2)(v) and Evidence Act (1 of 1872), Section 32 – Dying Declaration – Child Witnesses – Conviction – Life Imprisonment – Appreciation of Evidence – **Murder of one Suggabai by knife blows inflicted by the appellant in front of two child witnesses – Held – Incident on 22.04.2005 and victim died on 24.04.2005 and during this period various dying declaration were recorded – Held – After the incident, police was called and Dehati Nalishi was registered which was considered to be the first dying declaration – After the incident, victim ran to her neighbours and narrated the whole incident, such statement is also covered u/S 32 of the Evidence Act – Subsequently, Dying Declaration was recorded by Tehsildar – Statement u/S 161 Cr.P.C. was also recorded which was her last statement and can be treated as dying declaration – No contradiction and omission in the said dying declarations and are duly supported by the eye witnesses Jyoti (niece of deceased) and Ritesh (son of deceased) both aged 12-13 yrs. and are competent to understand the happenings occurred before them – Dying Declarations found reliable – Further held – Conviction can be based on the testimony of child witnesses which also corroborates the dying declaration – Trial Court rightly convicted the appellant – Appeal dismissed. [Shrawan Vs. State of M.P.] (DB)…740**

दण्ड संहिता (1860 का 45), धाराएँ 302, 354 व 449, अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 3(2)(v) एवं साक्ष्य अधिनियम (1872 का 1), धारा 32 – मृत्युकालिक कथन – बालक साक्षी – दोषसिद्धि – आजीवन कारावास – साक्ष्य का मूल्यांकन – एक सुग्गाबाई की अपीलार्थी द्वारा दो बालक साक्षियों के सामने चाकू के वार करके हत्या – अभिनिर्धारित – घटना 22.04.2005 की एवं पीड़िता की मृत्यु 24.04.2005 को और इस अवधि के दौरान विभिन्न मृत्युकालिक कथन अभिलिखित किये गये थे – अभिनिर्धारित – घटना के पश्चात् पुलिस बुलायी गई और देहाती नालिसी पंजीबद्ध की गई जिसे प्रथम मृत्यु कालिक कथन माना गया था – घटना के पश्चात्, पीड़िता अपने पड़ोसियों के पास भागी और संपूर्ण घटना सुनायी, उक्त कथन भी साक्ष्य अधिनियम की धारा 32 के अंतर्गत आच्छादित है – तत्पश्चात्, तहसीलदार द्वारा मृत्युकालिक कथन अभिलिखित किया गया था – धारा 161 दं.प्र.सं. के अंतर्गत भी कथन अभिलिखित किया गया जो कि उसका अंतिम कथन था और मृत्युकालिक कथन के रूप में माना जा सकता है – उक्त मृत्युकालिक कथनों में विरोधाभास एवं लोप नहीं और चक्षुदर्शी साक्षीगण ज्योति (मृतिका की भतीजी) एवं रितेश (मृतिका का पुत्र) दोनों की आयु 12–13 वर्ष है और उनके समक्ष घटित घटना को समझने में सक्षम है, के द्वारा सम्यक् रूप से समर्थित है – मृत्युकालिक कथन विश्वसनीय पाये गये – आगे अभिनिर्धारित – दोषसिद्धि, बालक साक्षियों के परिसाक्ष्य पर आधारित की जा सकती, जो मृत्युकालिक कथन की संपुष्टि भी करता है – विचारण न्यायालय ने अपीलार्थी को उचित रूप से दोषसिद्ध किया – अपील खारिज। (श्रवण वि. म.प्र. राज्य) **(DB)…740**

Penal Code (45 of 1860), Section 304-B & 498-A – Conviction – Appreciation of Evidence – **Wife committed suicide by consuming poison within 2 years of marriage – Husband, father-in-law, mother-in-law and brother-in-law were charged for an offence u/S 304-B IPC – All accused persons were acquitted of the offence u/S 304-B IPC but husband/appellant was convicted and sentenced for an offence u/S 498-A IPC – Challenge to – Held – As husband was acquitted for offence u/S 304-B IPC, the cause of death of deceased is no longer in question and therefore whatever was told by deceased to her relatives regarding maltreatment at her matrimonial home would fall under the category of hearsay evidence and cannot be admissible – Mother of deceased categorically admitted that if accused persons has returned the articles given in dowry there would have been no dispute and in fact separate case was instituted for the sole object of recovering the said articles – Fact goes to show that no sooner the articles were returned, the case instituted for recovering the articles was withdrawn by the complainants and a compromise was entered into in the present case – Further held – There is no allegation that cruelty was inflicted upon deceased for extracting money – Appellant deserves benefit of doubt – Conviction set aside – Appeal allowed. [Rajesh Vs. State of M.P.]** **…591**

दण्ड संहिता (1860 का 45), धारा 304–बी व 498–ए –दोषसिद्धि – साक्ष्य का मूल्यांकन – पत्नी ने विवाह के 2 वर्षों के भीतर जहर खाकर आत्महत्या की – पति, ससुर, सास एवं पति के भाई को भारतीय दंड संहिता की धारा 304–बी के अंतर्गत आरोपित किया गया था – सभी अभियुक्तगण भा.दं.सं. की धारा 304–बी के अंतर्गत अपराध हेतु दोषमुक्त किये गये परंतु पति/अपीलार्थी को भा.दं.सं. की धारा 498–ए के अंतर्गत अपराध के लिए दोषसिद्ध एवं दण्डादिष्ट किया गया था – को चुनौती – अभिनिर्धारित – चूंकि, पति को भा.दं.सं. की धारा 304–बी के अंतर्गत अपराध के लिए दोषमुक्त किया गया था, मृतिका की मृत्यु का कारण अब प्रश्न में नहीं है एवं इसलिए मृतिका ने उसके ससुराल में हुए बुरे बर्ताव के बारे में अपने रिश्तेदारों से जो भी कहा था, वह अनुश्रुत साक्ष्य की श्रेणी में आयेगा एवं ग्राह्य नहीं हो सकता – मृतिका की मां ने स्पष्ट रूप से यह स्वीकार किया कि यदि अभियुक्तगण ने दहेज में दी गई वस्तुएं लौटा दीं तो कोई विवाद नहीं रहेगा तथा वास्तव में कथित वस्तुओं को वापस पाने के एकमात्र उद्देश्य से एक पृथक वाद संस्थित किया गया था – तथ्य यह दर्शाते हैं कि जैसे ही वस्तुएं लौटाई गई थी, परिवादीगण द्वारा वस्तुओं की वापसी हेतु संस्थित वाद वापस ले लिया गया था एवं वर्तमान प्रकरण में समझौता किया गया था – आगे अभिनिर्धारित – ऐसा कोई अभिकथन नहीं है कि पैसे निकलवाने हेतु मृतिका के साथ क्रूरता का व्यवहार किया गया – अपीलार्थी संदेह का लाभ पाने का हकदार है – दोषसिद्धि अपास्त – अपील मंजूर। (राजेश वि. म.प्र. राज्य) **…591**

Penal Code (45 of 1860), Section 304-B & 498-A – See – Evidence Act 1872, Section 3 **[Rajesh Kumar Vs. State of M.P.] (DB)…535**

दण्ड संहिता (1860 का 45), धारा 304–बी एवं 498–ए – देखें – साक्ष्य अधिनियम, 1872, धारा 3 (राजेश कुमार वि. म.प्र. राज्य) **(DB)…535**

Penal Code (45 of 1860), Section 304-B & 498-A and Dowry Prohibition Act (28 of 1961), Section 3 & 4 – Quashing of Charge – Dying Declaration – **Wife died due to burn injuries within seven years of marriage – Offence registered against husband, mother-in-law and Jeth – Held – In dying declaration, wife although stated that she caught fire accidentally while she was cooking food but later on, when her parents arrived at hospital, she informed them that the applicants set her ablaze and she has given earlier dying declaration under the influence and threat of applicants – Parents of deceased and other witnesses have also stated that deceased was subjected to cruelty by applicants for demand of dowry – Probative value of earlier dying declaration would be considered on merits after completion of trial – Further held – At the stage of framing of charge, Trial Court is not expected to consider and scrutinize the material on record meticulously – If Judge forms an opinion that there is ground for presuming that accused has committed the offence, he may frame the charge – In the instant case, prima facie case is made out against the applicants – No illegality committed by trial Court – Revision dismissed. [Manohar Rajgond Vs. State of M.P.]**

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दण्ड संहिता (1860 का 45), धारा 304–बी व 498–ए एवं दहेज प्रतिषेध अधिनियम (1961 का 28), धारा 3 व 4 – आरोप अभिखंडित किया जाना – मत्युकालिक कथन – विवाह के सात वर्षों के भीतर जलने की क्षतियों के कारण पत्नी की मृत्यु हुई – पति, सास एवं जेठ के विरूद्ध अपराध पंजीबद्ध किया गया – अभिनिर्धारित – मृत्युकालिक कथन में यद्यपि पत्नी ने कथन किया है कि उसे खाना पकाते समय दुर्घटनापूर्वक आग लगी परंतु बाद में, जब उसके माता–पिता चिकित्सालय पहुँचे, उसने उन्हें सूचित किया कि आवेदकगण ने उसे आग लगायी और उसने अपना पूर्वतर मृत्युकालिक कथन आवेदकगण के असर एवं धमकी के अधीन दिया है – मृतिका के माता–पिता एवं अन्य साक्षियों ने भी कथन किया है कि आवेदकगण द्वारा मृतिका के साथ दहेज की मांग हेतु क्रूरता का व्यवहार किया गया था – पूर्वतर मृत्युकालिक कथन के प्रमाणक मूल्य का गुणदोषों पर विचार, विचारण पूर्ण होने के पश्चात् किया जायेगा – आगे अभिनिर्धारित – आरोप विरचित किये जाने के प्रक्रम पर, विचारण न्यायालय से अभिलेख की सामग्री पर विचार तथा बारीकी से छानबीन की अपेक्षा नहीं है – यदि न्यायाधीश राय बनाता है कि यह उपधारणा करने के लिए आधार है कि अभियुक्त ने अपराध कारित किया है, वह आरोप विरचित कर सकता है – वर्तमान प्रकरण में, आवेदकगण के विरूद्ध प्रथम दृष्ट्या प्रकरण बनता है – विचारण न्यायालय द्वारा कोई अवैधता कारित नहीं की गई – पुनरीक्षण खारिज। (मनोहर राजगोंड वि. म.प्र. राज्य)

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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. [Pammy alias Parmal Vs. State of M.P.] …*9

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। (पम्मी उर्फ परमल वि. म.प्र. राज्य) …*9

***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. [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 विरूद्ध 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 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 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 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, 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 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। (अनंत विजय सोनी वि. म.प्र. राज्य) **...203**

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. [Tilak Singh Vs. State of M.P.] ...*13**

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। (तिलक सिंह वि. म.प्र. राज्य) **...*13**

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. [Gagriya Vs. State of M.P.]**

(DB)...159

दण्ड संहिता (1860 का 45), धारा 396 व 397 – डकैती एवं हत्या – दोषसिद्धि – बाल साक्षी – बाल साक्षी के कथन चिकित्सीय साक्ष्य द्वारा समर्थित हैं 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 चिकित्सीय साक्ष्य को देखते हुये, उसके कथनों को अविश्वसनीय रूप से अस्वीकार नहीं किया जा सकता है – मौखिक साक्ष्य, चिकित्सीय 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। (गगरिया वि. म.प्र. राज्य) **(DB)…159**

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. [Manish Kumar Thakur Vs. State of M.P.] (DB)…235**

*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) **...199**

Penal Code (45 of 1860), Section 498-A & 406 – See – Passports Act, 1967, Section 10(3)(e) & 10(5) **[Navin Kumar Sonkar Vs. Union of India] ...677**

दण्ड संहिता (1860 का 45), धारा 498–ए व 406 – देखें – पासपोर्ट अधिनियम, 1967, धारा 10(3)(ई) व 10(5) (नवीन कुमार सोनकर वि. यूनियन ऑफ इंडिया) **...677**

Penal Code (45 of 1860), Section 499 (Exception 4) & 500 – Defamation – Newspaper Publication of Court Proceedings **– Held – A report which substantially deals with contentions of both the parties and if author and newspaper records its own opinion about the controversy can, in no manner be held to be punishable u/S 499 IPC but it is not at all permitted to publish a report which only refers to a version of one side and completely omits the defence of the other side – Inaccurate and selective reporting of Court proceedings are not protected by virtue of Exception 4 to Section 499 IPC and if such reporting are permitted, Courts will be undermining the rights of other party which is to lead life with dignity – Photograph of applicant was also published alongwith one sided narration which amounts to defamation – Conduct of respondent cannot be given benefit of Exception 4 to Section 499 IPC – Impugned order set aside – Magistrate directed to reconsider the case – Application allowed. [M.P. Mansinghka Vs. Dainik Pratah Kaal] ...821**

दण्ड संहिता (1860 का 45), धारा 499 (अपवाद 4) व 500 – मानहानि – न्यायालयीन कार्यवाहियों का समाचार पत्र में प्रकाशन – अभिनिर्धारित – एक प्रतिवेदन जो

सारतः दोनों पक्षकारों के तर्कों से संबंधित है तथा यदि लेखक एवं समाचार पत्र विवाद के बारे में अपनी राय अभिलिखित करते हैं, किसी भी ढंग में भारतीय दंड संहिता की धारा 499 के अंतर्गत दण्डनीय अभिनिर्धारित नहीं किये जा सकते परंतु ऐसा प्रतिवेदन प्रकाशित करने की बिल्कुल भी अनुमति नहीं है जो केवल एक पक्ष के विवरण को संदर्भित करे तथा दूसरे पक्ष के बचाव का पूर्ण रूप से लोप करे – न्यायालय की कार्यवाहियों की त्रुटिपूर्ण एवं चुनिंदा रिपोर्टिंग भारतीय दण्ड संहिता की धारा 499 के अपवाद 4 के आधार पर संरक्षित नहीं है, और यदि ऐसी रिपोर्टिंग की अनुमति दी गई, तो यह, अन्य पक्षकार के गरिमा के साथ जीवन जीने के अधिकारों को न्यायालय द्वारा कमजोर करना होगा – आवेदक की फोटो भी एक तरफा वर्णन के साथ प्रकाशित की गई थी जो मानहानि की कोटि में आता है – प्रत्यर्थीगण के आचरण को भारतीय दण्ड संहिता की धारा 499 के अपवाद 4 का लाभ नहीं दिया जा सकता – आक्षेपित आदेश अपास्त – मजिस्ट्रेट को प्रकरण पर पुनर्विचार करने हेतु निदेशित किया गया – आवेदन मंजूर। (एम.पी. मानसिंहका वि. दैनिक प्रातः काल) **...821**

Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (1 of 1996) – Entitlement for Reservation – **Petitioner, a physically challenged person with 50% locomotor disability claiming his entitlement of promotion as per the Act of 1995 and as per the reservation granted under the government circulars/memorandums – Held – perusal of various office memorandums issued from time to time goes to show that in an establishment, employer is under an obligation to reserve 3% post for the persons with disability in respect of Group–A, B, C, and D – Computation of reservation has to be done in an identical manner i.e. computing 3% reservation on total number of vacancies in the cadre strength – In the present case, in the respondent Insurance Company, there is no such reservation in respect of Group A and B category – Respondents directed to reserve vacancies keeping in view the Act of 1995 and instructions issued by Government of India – Respondents shall also consider the issue of promotion with respect to petitioner in respect of reserve vacancy – Writ Petition allowed. [Sushil Kanojia Vs. The Oriental Insurance Co. Ltd.]**

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निःशक्त व्यक्ति (समान अवसर, अधिकार संरक्षण और पूर्ण भागीदारी) अधिनियम, 1995 (1996 का 1) – आरक्षण हेतु पात्रता – याची जो कि 50% गति की निःशक्तता के साथ शारीरिक रूप से विकलांग व्यक्ति है, अधिनियम 1995 एवं सरकारी परिपत्रों/ज्ञापनों के अंतर्गत प्रदत्त आरक्षण के अनुसार, पदोन्नति हेतु अपनी हकदारी का दावा कर रहा है – अभिनिर्धारित – समय–समय पर जारी किये गये विभिन्न कार्यालयीन ज्ञापनों का परिशीलन दर्शाता है कि एक स्थापना में, नियोक्ता, ग्रुप–ए, बी, सी व डी के संबंध में निःशक्त व्यक्तियों हेतु 3% पद आरक्षित रखने के लिए बाध्यताधीन है – आरक्षण की संगणना, समान ढंग से करनी होगी अर्थात्, केडर सामर्थ्य में रिक्तियों की कुल संख्या पर 3% आरक्षण की संगणना करके – वर्तमान प्रकरण में, प्रत्यर्थी बीमा कंपनी में ग्रुप ए व बी

श्रेणी के संबंध में ऐसा कोई आरक्षण नहीं है – प्रत्यर्थीगण को अधिनियम 1995 एवं भारत सरकार द्वारा जारी अनुदेशों को दृष्टिगत रखते हुए रिक्तियां आरक्षित करने के लिए निदेशित किया गया – प्रत्यर्थीगण, आरक्षित रिक्ति के संबंध में पदोन्नति के मुद्दे को भी विचार में लेगा – रिट याचिका मंजूर। (सुशील कनोजिया वि. द ऑरिएन्टल इंश्योरेन्स कं. लि.) **...426**

Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (1 of 1996), Section 2(k) – Definition of 'establishment' **– Term 'establishment' covers a corporation under the Central, Provincial or State Act and also includes an authority or a body owned or controlled by the government or local authority – It also includes a 'Company' as defined u/S 617 of Companies Act, 1956 and all the government departments of India – In the instant case, the respondent no.1 company is an establishment as defined under the Act of 1995. [Sushil Kanojia Vs. The Oriental Insurance Co. Ltd.] ...426**

निःशक्त व्यक्ति (समान अवसर, अधिकार संरक्षण और पूर्ण भागीदारी) अधिनियम, 1995 (1996 का 1), धारा 2(के) – 'स्थापना' की परिभाषा – शब्द 'स्थापना' में केंद्रीय, क्षेत्रीय या राज्य अधिनियम के अधीन निगम आच्छादित है और इसमें सरकार अथवा स्थानीय प्राधिकारी के स्वामित्व का या उसके द्वारा नियंत्रित प्राधिकारी या निकाय भी शामिल है – इसमें 'कंपनी' जैसा कि कंपनी अधिनियम 1956 की धारा 617 के अंतर्गत परिभाषित है, और भारत के सभी सरकारी विभाग भी शामिल हैं – वर्तमान प्रकरण में, प्रत्यर्थी क्र. 1, कंपनी एक स्थापना है जैसा कि अधिनियम 1995 के अंतर्गत परिभाषित है। (सुशील कनोजिया वि. द ओरिएन्टल इंश्योरेन्स कं. लि.) **...426**

Practice & Procedure – Conflicting Judgments **– Held – Even if there is conflict between the two judgments of the Supreme Court by the equal strength, even then the earlier view would be binding precedent and will prevail if the earlier judgment was not brought to the notice of the Court in a later judgment. [Ashutosh Pawar Vs. High Court of M.P.] (FB)...627**

पद्धति एवं प्रक्रिया – विरूद्ध निर्णय – अभिनिर्धारित – यद्यपि, उच्चतम न्यायालय के समान सामर्थ्य के दो निर्णयों में अंतर्विरोध है तब भी पूर्वतर दृष्टिकोण बाध्यकारी पूर्व निर्णय होगा और अध्यारोही होगा यदि बाद के निर्णय में पूर्वतर निर्णय को न्यायालय के ध्यान में नहीं लाया गया था। (अशुतोष पवार वि. हाईकोर्ट ऑफ एम.पी.) **(FB)...627**

Practice & Procedure – Evidence of Hostile Witness – Delay in recording case diary statements – Credibility **– Held – Evidence of hostile witnesses can be relied upon to the extent to which it supports the prosecution version – In the present case, PW-2 (hostile witness) supported the prosecution case consistently in his examination in chief but on the next day, during cross-examination, he resiled from his previous statement with regard to identity of accused persons, however his evidence establishes the prosecution case**

with regard to time, place, manner and weapon of the offence – Further held – Victims were resident of Seoni malwa, after the incident, injured were referred to district hospital Hoshangabad, where after two days, one of injured succumbed to injuries – Statements were recorded after they came back from Hoshangabad – Under these circumstances, delay in recording case diary statements would not after the credibility of the prosecution case. [Karun @ Rahman Vs. State of M.P.] (DB)…542

पद्धति एवं प्रक्रिया – पक्षद्रोही साक्षी का साक्ष्य – केस डायरी कथन अभिलिखित किये जाने में विलंब – विश्वसनीयता – अभिनिर्धारित – पक्षद्रोही साक्षीगण के साक्ष्य पर उस सीमा तक विश्वास किया जा सकता है जहां तक वह अभियोजन कथा का समर्थन करता है – वर्तमान प्रकरण में, **PW-2** (पक्षद्रोही साक्षी) ने अपने मुख्य परीक्षण में अविचल रूप से अभियोजन प्रकरण का समर्थन किया है, परंतु अगले दिन, प्रतिपरीक्षण के दौरान, वह अभियुक्तगण की पहचान के संबंध में अपने पूर्ववर्ती कथन से पीछे हटा, अपितु अपराध का समय, स्थान, ढंग और शस्त्र के संबंध में उसका साक्ष्य अभियोजन प्रकरण को स्थापित करता है – आगे अभिनिर्धारित – पीड़ित व्यक्ति सिवनी मालवा के निवासी थे, घटना के पश्चात्, आहत व्यक्तियों को जिला चिकित्सालय होशंगाबाद निदेशित किया गया था जहां दो दिन पश्चात् आहत व्यक्तियों में से एक की क्षतियों से मृत्यु हुई – उनके होशंगाबाद से लौटने के पश्चात् कथन अभिलिखित किये गये थे – इन परिस्थितियों में, केस डायरी कथन अभिलिखित करने में विलंब, अभियोजन के प्रकरण की विश्वसनीयता को प्रभावित नहीं करेगा। (करूण उर्फ रेहमान वि. म.प्र. राज्य) **(DB)…542**

Practice and Procedure – Revisional Jurisdiction – Scope **– Held – Marshalling of evidence is beyond the scope of revisional jurisdiction of this Court, which is inherently limited to the enquiry into material available against the accused persons to see that ingredients of offences charged against them are made out or not. [Omprakash Gupta Vs. State of M.P.] …603**

पद्धति एवं प्रक्रिया – पुनरीक्षण अधिकारिता – परिधि – अभिनिर्धारित – साक्ष्य का क्रमबंधन इस न्यायालय की पुनरीक्षण अधिकारिता की परिधि से परे है जो कि अंतर्निहित रूप से अभियुक्तगण के विरूद्ध उपलब्ध सामग्री की जांच तक सीमित है यह देखने के लिए कि उनके विरूद्ध आरोपित अपराधों के घटक बनते हैं अथवा नहीं। (ओमप्रकाश गुप्ता वि. म.प्र. राज्य) **…603**

Practice and Procedure – Subsequent Application – Maintainability **– Held – As earlier application was not decided on merits and was dismissed for want of prosecution, therefore subsequent application filed by the Bank was rightly entertained by the District Magistrate. [Prafulla Kumar Maheshwari Vs. Authorized Officer and Chief Manager] …463**

पद्धति एवं प्रक्रिया – पश्चात्वर्ती आवेदन – पोषणीयता – अभिनिर्धारित – चूंकि पूर्ववर्ती आवेदन को गुणदोषों पर विनिश्चित नहीं किया गया था और अभियोजन के अभाव में खारिज किया गया था अतः बैंक द्वारा प्रस्तुत किये गये पश्चात्वर्ती आवेदन को जिला

मजिस्ट्रेट द्वारा उचित रूप से ग्रहण किया गया था। (प्रफुल्ल कुमार माहेश्वरी वि. अथॉराईज्ड ऑफीसर एण्ड चीफ मेनेजर) **...463**

***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. [Manoj Kumar Jain Vs. State of M.P.] ...240**

पद्धति – अभिनिर्धारित – अन्य उच्च न्यायालयों के निर्णय बाध्यकारी नहीं हैं, यद्यपि उनका आग्रह मूल्य है एवं इसलिए उक्त पर विचार किया जाना अपेक्षित है। (मनोज कुमार जैन वि. म.प्र. राज्य) **...240**

***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. [Saroj Rajak Vs. State of M.P.] (DB)...*10**

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। (सरोज रजक वि. म.प्र. राज्य) **(DB)...*10**

***Prevention of Corruption Act (49 of 1988), Section 13(1)(d) – See – Penal Code, 1860, Section 409, 420, 467, 468, 471, 120-B* [Manish Kumar Thakur Vs. State of M.P.] (DB)...235**

भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 13(1)(d) – देखें – दण्ड संहिता, 1860, धारा 409, 420, 467, 468, 471, 120–B (मनीष कुमार ठाकुर वि. म.प्र. राज्य) **(DB)...235**

***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. [Rajani Dabar (Smt.) (Dr.) Vs. State of M.P.] (DB)…253**

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। (रजनी डाबर (श्रीमती) (डॉ.) वि. म.प्र. राज्य) **(DB)…253**

***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. [Rajani Dabar (Smt.) (Dr.) Vs. State of M.P.] (DB)…253**

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। (रजनी डाबर (श्रीमती) (डॉ.) वि. म.प्र. राज्य) **(DB)…253**

***Principle of Natural Justice – Reasonable Opportunity of Hearing* – Held – Under the principle of natural justice, at least a reasonable opportunity should be afforded before criticizing the character of an individual – Reasonable opportunity is by way of holding an inquiry where specific charges of misconduct are informed to delinquent employee followed by reasonable opportunity to file reply, supply of all adverse material proposed to be used against the delinquent employee, adducing of evidence in favour or against the charges in presence of delinquent employee. [Malkhan Singh Malviya Vs. State of M.P.] (DB)…660**

नैसर्गिक न्याय का सिद्धांत – सुनवाई का युक्तियुक्त अवसर – अभिनिर्धारित – नैसर्गिक न्याय के सिद्धांत के अंतर्गत, किसी व्यक्ति के चरित्र की आलोचना करने से पूर्व कम से कम एक युक्तियुक्त अवसर प्रदान किया जाना चाहिए – युक्तियुक्त अवसर, जांच संचालन के जरिए होता है जहां अपचारी कर्मचारी को अवचार के विनिर्दिष्ट आरोपों की सूचना दी जाती है, उसके बाद प्रतिउत्तर प्रस्तुत करने के लिए युक्तियुक्त अवसर, अपचारी कर्मचारी के विरूद्ध उपयोग हेतु सभी प्रस्तावित प्रतिकूल सामग्री का प्रदाय, अपचारी कर्मचारी की उपस्थिति में आरोपों के पक्ष में या विरोध में साक्ष्य प्रस्तुत करना है। (मलखान सिंह मालवीय वि. म.प्र. राज्य) **(DB)…660**

***Prisoners Leave Rules, M.P., 1989 – See – Prisoners (M.P. Amendment), Act, 1985, Section 31-A* [Vikas Bharti Vs. State of M.P.] …*29**

बंदी अवकाश नियम, म.प्र., 1989 – देखें – बंदी (म.प्र. संशोधन), अधिनियम, 1985, धारा 31–ए (विकास भारती वि. म.प्र. राज्य) …*29

***Prisoners (M.P. Amendment), Act (10 of 1985), Section 31-A and Prisoners Leave Rules, M.P., 1989 – Grant of Parole – Applicability* – Petition against rejection of prayer for Parole – Petitioner convicted u/S 376 (2)(g) & 506(B) IPC and sentenced for life imprisonment – Prayer rejected by respondents on the ground of an interim order passed by the Apex Court in Union of India v/s V. Sriharan whereby State Governments are restrained from exercising their power of remission to life convicts – Challenge to – Held – Apex Court has finally decided the above case whereby it is held that imprisonment of life means till end of conviction of life with or without any scope of remission – In the present case, it is clear that period of parole is always included in the period of sentence, if life convicts are released on parole, their sentence would not be reduced – Parole does not amount to**

suspension, remission or commutation of sentence – Respondents directed to consider application of petitioners for grant of parole under the Rules of 1989 – Petition allowed. [Vikas Bharti Vs. State of M.P.] ...*29

बंदी (म.प्र. संशोधन), अधिनियम (1985 का 10), धारा 31–ए एवं बंदी अवकाश नियम, म.प्र., 1989 – पैरोल प्रदान किया जाना – प्रयोज्यता – पैरोल हेतु की गई प्रार्थना की नामंजूरी के विरूद्ध याचिका – याची, धारा 376(2)(जी) एवं 506(बी) भा.दं.सं. के अंतर्गत दोषसिद्ध एवं आजीवन कारावास से दण्डादिष्ट – भारत संघ वि. वी. श्रीहरन में सर्वोच्च न्यायालय द्वारा पारित किये गये अंतरिम आदेश, जिसमें राज्य सरकारों को, आजीवन सिद्धदोष व्यक्तियों को परिहार करने की उनकी शक्ति का प्रयोग करने से अवरूद्ध किया गया है, के आधार पर प्रत्यर्थीगण द्वारा प्रार्थना नामंजूर की गई – को चुनौती – अभिनिर्धारित – सर्वोच्च न्यायालय ने उपरोक्त प्रकरण का अंतिम रूप से विनिश्चिय किया है, जिसमें यह अभिनिर्धारित किया गया है कि आजीवन कारावास का अर्थ है परिहार के किसी विस्तार के साथ अथवा उसके बिना, जीवनकाल की दोषसिद्धि की समाप्ति तक – वर्तमान प्रकरण में, यह स्पष्ट है कि दण्डादेश की अवधि में पैरोल की अवधि सदैव शामिल होती है, यदि आजीवन सिद्धदोष व्यक्तियों को पैरोल पर छोड़ा गया, उनका दण्डादेश कम नहीं किया जाएगा – पैरोल, दण्डादेश का निलंबन, परिहार या लघुकरण की कोटि में नहीं आता – प्रत्यर्थीगण को 1989 के नियमों के अंतर्गत पैरोल प्रदान करने हेतु याचीगण के आवेदन पर विचार किये जाने के लिए निदेशित किया गया – याचिका मंजूर। (विकास भारती वि. म.प्र. राज्य) ...*29

***Public Distribution Order (M.P), 2015, Clause 16(7) & 18 – Removal/ Replacement of Salesman – Jurisdiction* – Petition against order of SDO (Shop Allotment Authority) directing the society running the fair price shop, to replace the petitioner salesman – Held – Order was not made for removal of petitioner from employment – It is true that power of replacing the salesman with a new one is not vested with the Shop Allotment Authority and such replacement certainly does not fall within the definition of 'removal' but under the generic powers vested with Shop Allotment Authority under Clause 18, he may issue directions to ensure planned distribution of essential commodities and the fair price shop/institution/ body/group/agency are duty bound to comply with the same – Order passed by SDO is not bereft of jurisdiction – Petitioner may avail remedy of appeal before Collector – Petition dismissed. [Rajendra Shrivastava Vs. State of M.P.] ...*22**

सार्वजनिक वितरण आदेश (म.प्र.), 2015, खंड 16(7) व 18 – विक्रेता को हटाना/प्रतिस्थापित किया जाना – अधिकारिता – उचित मूल्य की दुकान चला रही सोसाईटी को याची विक्रेता को प्रतिस्थापित करने के लिए निदेशित करते हुए उपखंड अधिकारी (दुकान आबंटन प्राधिकारी) के आदेश के विरूद्ध याचिका – अभिनिर्धारित – याची को नियोजन से हटाये जाने हेतु आदेश नहीं किया गया था – यह सत्य है कि विक्रेता को नये विक्रेता से प्रतिस्थापित करने की शक्ति, दुकान आबंटन प्राधिकारी में निहित नहीं है एवं

उक्त प्रतिस्थापन निश्चित रूप से 'हटाया जाना' की परिभाषा के भीतर नहीं आता बल्कि खंड 18 के अंतर्गत दुकान आबंटन प्राधिकारी में निहित अविशिष्ट शक्तियों के अंतर्गत है, वह आवश्यक वस्तुओं के सुनियोजित वितरण को सुनिश्चित करने के लिए निदेश जारी कर सकता है तथा उनका अनुपालन करने के लिए उचित मूल्य दुकान/संस्था/निकाय/समूह/एजेन्सी कर्तव्यबद्ध है – उपखंड अधिकारी द्वारा पारित आदेश अधिकारिता विहीन नहीं है – याची, कलेक्टर के समक्ष अपील के उपचार का अवलंब ले सकता है – याचिका खारिज। (राजेन्द्र श्रीवास्तव वि. म.प्र. राज्य) **...*22**

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

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

याचिका को चुनौती दी गई है, ऐसे याची को इस प्रकार के कानूनी उपबंधों की विधिमान्यता पर प्रश्न उठाने की अनुमति नहीं दी जाना चाहिए – याची को संगम ज्ञापन 2014 की विधिमान्यता को चुनौती देने के लिए सुने जाने का कोई अधिकार नहीं है – आगे अभिनिर्धारित – यहाँ तक कि अन्यथा, संगम ज्ञापन के 2014 में संशोधित 2010 के विनियमों के अनुरूप होने के नाते, प्रत्यर्थी क्र. 4 की कुलपति के रूप में नियुक्ति न्यायोचित है – याचिका 10,000/– व्यय के साथ खारिज। (श्रीकृष्ण सिंह रघुवंशी वि. यूनियन ऑफ इंडिया) **(DB)…370**

Public Service Commission (MP) (Limitation of functions) Regulations, 1957, Regulation 6 – See – Constitution – Article 320(3) **[Sunil Kumar Jain Vs. State of M.P.] …72**

लोक सेवा आयोग (म.प्र.) (कृत्यों का परिसीमन) विनियम, 1957, विनियम 6 – देखें – संविधान – अनुच्छेद 320(3) (सुनील कुमार जैन वि. म.प्र. राज्य) **…72**

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, (33 of 1989), Section 3(1)(xii) – See – Penal Code, 1860, Section 376 **[Anant Vijay Soni Vs. State of M.P.] …203**

अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 3(1)(xii) – देखें – दण्ड संहिता, 1860, धारा 376 (अनंत विजय सोनी वि. म.प्र. राज्य) **…203**

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), Section 3(2)(v) – See – Penal Code, 1860, Sections 302, 354 & 449 **[Shrawan Vs. State of M.P.] (DB)…740**

अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 3(2)(v) – देखें – दण्ड संहिता, 1860, धाराएँ 302, 354 व 449 (श्रवण वि. म.प्र. राज्य) **(DB)…740**

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. [Ramu @ Ramlal Vs. State of M.P.] …163**

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। (रामू उर्फ रामलाल वि. म.प्र. राज्य) **...163**

Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, (54 of 2002), Section 14 & 15 – Jurisdiction – Fact of Tenancy & Possession of Mortgaged Property **– Petitioner availed credit facilities from respondent Bank whereby they mortgaged a property with the bank – Since petitioner failed to repay the said loan, bank initiated action against the petitioner and filed application u/S 14 of the Act to take physical possession of the mortgage property – Challenge to – Held – District Magistrate exercising his powers under the Act has authorized Additional District Magistrate (ADM) to exercise powers u/S 14 of the Act and therefore orders passed under such exercise of powers by ADM is justified and within jurisdiction – Further held – Fact of tenancy in mortgaged property was well within the knowledge of bank but such fact was not disclosed in the application and therefore ADM without considering the fact of tenancy has passed the order of possession – In such circumstances, no action u/S 14 of the Act could be initiated – Further held – As per Section 15 of the Act of 2002, respondent bank can take over the management of company (petitioner) and keep the secured assets in its own custody till the rights of property is transferred in accordance with law – It is also clear that mortgaged property was a lease property and possession was taken by the Municipal Corporation and was only given on supurdginama to petitioner – Impugned orders passed by Additional District Magistrate are set aside – Bank will be at liberty to file fresh application u/S 14 of the Act of 2002 – Petition allowed. [Prafulla Kumar Maheshwari Vs. Authorized Officer and Chief Manager]** **...463**

वित्तीय आस्तियों का प्रतिभूतिकरण और पुनर्गठन तथा प्रतिभूति हित का प्रवर्तन (SARFAESI) *अधिनियम, (2002 का 54), धारा 14 व 15 – अधिकारिता – किराएदारी का तथ्य एवं बंधक संपत्ति का कब्जा* – याची ने प्रत्यर्थी बैंक से उधार सुविधा का उपभोग किया जिसके द्वारा उन्होनें बैंक के साथ संपत्ति बंधक की – चूंकि याची उक्त ऋण का प्रतिसंदाय करने में विफल रहा, बैंक ने याची के विरूद्ध कार्रवाई आंरभ की और बंधक संपत्ति के

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

***Service Law – Charge Sheet – Practice – Railway Board's Circular No. RBE No. 171/199* – Petitioner, a Health Inspector in Railway department was served with a charge sheet on 30.11.2011 and subsequently it culminated into order of punishment dated 21.02.2012 – After 2 ½ years, on 18.07.2014, again a charge sheet was issued to petitioner for same charges – Department vide order dated 15.07.2014 withdrawn the earlier charge sheet – Petitioner filed application before the Central Administrative Tribunal whereby the same was dismissed – Challenge to – Held – It was beyond the authority's competence to have withdrawn/recalled the earlier charge sheet dated 30.11.2011 which had already culminated into order of punishment and which petitioner had already undergone – For doing so, no reasons were assigned by the competent authority – Impugned order passed by Tribunal is not sustainable in law and is hereby set aside – Original Application filed by the petitioner allowed – Petition allowed. [J.S. Chauhan Vs. Union of India]**

(DB)...*25

सेवा विधि – आरोप पत्र – पद्धति – रेल बोर्ड का परिपत्र क्र. आर.बी.ई.क्र. 171/199 – याची रेल विभाग में स्वास्थ्य निरीक्षक, को 30.11.2011 को एक आरोप पत्र तामील किया गया था और तत्पश्चात्, उसका समापन दण्ड के आदेश दिनांक 21.02.2012 में हुआ – ढाई वर्ष पश्चात्, 18.07.2014 को, उन्हीं आरोपों के लिए याची को पुनः एक आरोप पत्र जारी किया गया – विभाग ने आदेश दिनांक 15.07.2014 के द्वारा पूर्ववर्ती आरोप पत्र वापस लिया – याची ने केंद्रीय प्रशासनिक अधिकरण के समक्ष आवेदन प्रस्तुत किया

जहां उक्त को खारिज किया गया – को चुनौती – अभिनिर्धारित – पूर्ववर्ती आरोप पत्र दिनांक 30.11.2011, जिसका समापन दण्ड के आदेश में पहले ही हो चुका है तथा जिसे याची को पहले ही भुगताया जा चुका है, को वापस लेना/प्रत्याहरण करना, यह प्राधिकारी की सक्षमता से परे था – ऐसा करने के लिए, सक्षम प्राधिकारी द्वारा कोई कारण नहीं दिये गये – अधिकरण द्वारा पारित आक्षेपित आदेश, विधि में कायम रखने योग्य नहीं एवं एतद् द्वारा अपास्त किया गया – याची द्वारा प्रस्तुत आरंभिक आवेदन मंजूर – याचिका मंजूर। (जे.एस. चौहान वि. यूनियन ऑफ इंडिया) **(DB)...*25**

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

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

***Service Law – Contractual Services – Peon – Termination – Inquiry – Reasonable Opportunity of Hearing* – Show cause notice issued to appellant for alleged misconduct – FIR was also registered for offences u/S 406, 409 and 420 IPC arising out of the same incident which gave rise to alleged misconduct – Subsequently, appellant was acquitted of the criminal charge – Order terminating the appellant was passed which was challenged in the Writ Petition which was dismissed – Challenge to – Held – Mere preliminary inquiry report prepared behind the back of petitioner and reply to the show cause notice was considered before issuing order of termination – Order was passed without giving reasonable opportunity to appellant to rebut the charges of misconduct by adducing evidence – Impugned order not sustainable in the eye of law being stigmatic and yet not preceded by affording of reasonable opportunity – Order of termination of appellant from service quashed –**

Employer may proceed against appellant in accordance with law. [Malkhan Singh Malviya Vs. State of M.P.] (DB)…660

सेवा विधि – संविदात्मक सेवाऐं – भृत्य – सेवा समाप्ति – जाँच – सुनवाई का युक्तियुक्त अवसर – अभिकथित अवचार हेतु अपीलार्थी को कारण बताओ नोटिस जारी किया गया – अभिकथित अवचार उत्पन्न करने वाली उसी घटना से उत्पन्न धारा 406, 409 व 420 भा.दं.सं. के अंतर्गत अपराधों के लिए प्रथम सूचना प्रतिवेदन भी पंजीबद्ध किया गया था – तत्पश्चात्, अपीलार्थी को दाण्डिक आरोप से दोषमुक्त किया गया था – अपीलार्थी की सेवा समाप्ति का आदेश पारित किया गया था जिसे रिट याचिका में चुनौती दी गई थी जो कि खारिज की गई – को चुनौती – अभिनिर्धारित – याची की पीठ पीछे मात्र प्रारंभिक जांच प्रतिवेदन तैयार किया गया था तथा सेवा समाप्ति का आदेश जारी करने के पूर्व कारण बताओ नोटिस का उत्तर विचार में लिया गया था – अपीलार्थी को साक्ष्य प्रस्तुत कर अविचार के आरोपों का खंडन करने के लिए युक्तियुक्त अवसर दिये बिना आदेश पारित किया गया था – आक्षेपित आदेश कलंकित करने वाला तथा इससे पूर्व युक्तियुक्त अवसर प्रदान नहीं किये जाने से विधि की दृष्टि में कायम रखने योग्य नहीं – अपीलार्थी का सेवा से सेवा समाप्ति का आदेश अभिखंडित – नियोक्ता, विधि के अनुसरण में अपीलार्थी के विरूद्ध कार्यवाही कर सकता है। (मलखान सिंह मालवीय वि. म.प्र. राज्य) **(DB)…660**

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

सेवा विधि – अनुशासनिक कार्यवाहियाँ – पदच्युति – हस्तक्षेप – रिट न्यायालय की अधिकारिता – अभिनिर्धारित – न्यायालय को प्रशासनिक निर्णय में हस्तक्षेप नहीं करना चाहिए जब तक कि वह अतार्किक न हो या प्रक्रियात्मक अनौचित्य से ग्रसित न हो या इस

अर्थ से न्यायालय की अंतश्चेतना को आघात न पहुँचाता हो कि वह तर्क या नैतिक मानकों की अवज्ञा था – अनुच्छेद 226 के अंतर्गत उच्च न्यायालय, लोक सेवक के विरूद्ध विभागीय जाँच करने वाले प्राधिकारियों के निर्णय पर अपील का न्यायालय नहीं है – न्यायिक पुनर्विलोकन की शक्ति, निर्णय के विरूद्ध निदेशित नहीं है बल्कि पर्यवेक्षण रिट अधिकारिता के प्रयोग में निर्णय करने की प्रक्रिया तक सीमित है – यह अपेक्षा नहीं है कि, अपचारी कर्मचारी को दोषिता के निष्कर्ष के पश्चात्, दंड की मात्रा के संबंध में कारण बताने के लिए अवसर दिया जाना चाहिए – अपचारी ने उसका लिखित जवाब प्रस्तुत किया है एवं सुनवाई के अवसर का भी उपभोग किया है – आगे अभिनिर्धारित – जब तक कि अपचारी यह नहीं दर्शा पाता कि जांचकर्ता अधिकारी के प्रतिवेदन प्रदाय न किये जाने के फलस्वरूप प्रतिकूल प्रभाव कारित हुआ है या न्यायहानि हुई है, दंड के आदेश का दूषित होना अभिनिर्धारित नहीं किया जा सकता – इस न्यायालय की एकल न्यायपीठ ने अनुशासनिक एवं अपीली प्राधिकारी द्वारा अभिलिखित निष्कर्षों के विरूद्ध अपील के न्यायालय के रूप में कार्यवाही की है और न केवल दंड के आदेश में हस्तक्षेप किया है बल्कि पुनःस्थापना भी आदेशित किया है – ऐसा हस्तक्षेप विधि में आवश्यक नहीं एवं रिट न्यायालय की परिधि से परे है – एकल न्यायपीठ द्वारा पारित आदेश अपास्त – अपील मंजूर। (म.प्र. राज्य वि. डॉ. अशोक शर्मा)

(DB)…352

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

सेवा विधि – पदोन्नति हेतु विभागीय पदोन्नति समिति एवं वार्षिक गोपनीय प्रतिवेदन – विचार में लिया जाना – अभिनिर्धारित – वर्ष 1989–90 हेतु, प्रत्यर्थीगण को इस वर्ष का गोपनीय प्रतिवेदन अभिलिखित नहीं करना चाहिए था क्योंकि याची ने बीज निगम में प्रतिनियुक्ति पर 90 दिनों से कम कार्य किया है तथा छः माह का अर्थात् लंबी अवधि का गोपनीय प्रतिवेदन विचार में लेते हुए, प्रत्यर्थीगण को उसे 'ख–अच्छा' श्रेणी दी जानी चाहिए थी – विभागीय पदोन्नति समिति का मूल अभिलेख दर्शाता है कि याची को वर्ष 1990–91 हेतु वार्षिक गोपनीय प्रतिवेदन कभी भी संसूचित नहीं किया गया और इस प्रकार याची को पदोन्नति हेतु अयोग्य घोषित करते समय उक्त असंसूचित वार्षिक गोपनीय प्रतिवेदन को विचार में नहीं लिया जाना चाहिए था – आक्षेपित आदेश अपास्त – प्रत्यर्थीगण को पुनर्विलोकन विभागीय पदोन्नति समिति गठित कर संयुक्त निदेशक के पद पर पदोन्नति हेतु

याची के प्रकरण का पुनर्विचार करने के लिए निदेशित किया गया – रिट याचिका मंजूर। (टी. पी. शर्मा वि. म.प्र. राज्य) ...443

***Service Law – Industrial Disputes Act (14 of 1947), Section 2(k)/10/25-B(2)(a)(ii)/25-F – Retrenchment – Reference – Limitation – Period of Work – Burden of Proof* – Against retrenchment, workman filed reference before Labour Court whereby instead of reinstatement, lump sum compensation of Rs. 1,00,000 was awarded to each workman – Challenge to – Held – Labour Court despite holding that there was unexplained delay of four years in filing the application by the workman, has allowed the same simply holding that there is no provision of limitation provided to file an application under the Industrial Dispute Act – Labour Court has not dealt with the inordinate delay in its proper perspective – Further held – In respect of the period of service of workman, although an opportunity to file relevant documents was given to the Corporation and later which was not filed by them but still that would not discharge the initial burden casted on the employees to stand on their own legs – Merely filing of affidavit by workman is not sufficient – Labour Court shifting the burden to the Corporation was not justified – Impugned awards are hereby quashed – Petitions allowed. [Municipal Corporation, Jabalpur Vs. The Presiding Officer, Labour Court, Jabalpur]** ...401

सेवा विधि – औद्योगिक विवाद अधिनियम (1947 का 14), धारा 2(के)/10/25–बी(2)(ए)(ii)/25–एफ – छंटनी – निर्देश – परिसीमा – कार्य की अवधि – साबित करने का भार – छंटनी के विरूद्ध, कर्मकार ने श्रम न्यायालय के समक्ष निर्देश प्रस्तुत किया जिससे बहाली करने के बजाय, प्रत्येक कर्मकार को रू. 1,00,000/– का एकमुश्त प्रतिकर अधिनिर्णीत किया गया था – को चुनौती – अभिनिर्धारित – श्रम न्यायालय द्वारा यह अभिनिर्धारित करने के बावजूद कि कर्मकार द्वारा आवेदन प्रस्तुत करने में चार वर्षों का विलंब स्पष्ट नहीं किया गया था, उक्त को साधारण रूप से यह अभिनिर्धारित करते हुए मंजूर किया, कि औद्योगिक विवाद अधिनियम के अंतर्गत आवेदन प्रस्तुत करने के लिए परिसीमा उपबंधित करता हुआ कोई उपबंध नहीं है – श्रम न्यायालय ने अपने उचित परिप्रेक्ष्य में असाधारण विलंब का निपटारा नहीं किया – आगे अभिनिर्धारित – कर्मकार की सेवा की अवधि के संबंध में, यद्यपि निगम को सुसंगत दस्तावेजों को प्रस्तुत करने हेतु अवसर प्रदान किया गया था एवं बाद में जिसे उनके द्वारा प्रस्तुत नहीं किया गया था परंतु फिर भी इससे कर्मचारीगण पर उनके कथनों को साबित करने के लिए उन पर डाला गया प्राथमिक भार उन्मोचित नहीं होगा – कर्मकार द्वारा मात्र शपथपत्र प्रस्तुत किया जाना पर्याप्त नहीं है – श्रम न्यायालय द्वारा भार को निगम पर परिवर्तित किया जाना न्यायोचित नहीं था – आक्षेपित अधिनिर्णय एतद् द्वारा अभिखंडित – याचिकाएँ मंजूर। (म्यूनिसिपल कारपोरेशन, जबलपुर वि. द प्रिसाइडिंग ऑफीसर, लेबर कोर्ट, जबलपुर) ...401

***Service Law – Pay Revision Rules, MP, 2009 – Recovery of Excess Pay – Permissibility – Written Undertaking* – Petitioner was paid excess amount during pay fixation – Respondents passed order of recovery of excess amount**

– Challenge to – Held – Petitioner belongs to Class III services and is due to retire on January 2018, i.e. within one year of the order of recovery – Excess amount has been made for a period in excess of 5 years from date of impugned order – Further held – Recovery is impermissible in law – Petitioner is going to retire within a month, hence despite undertaking, she is entitled for a relief of quashing of impugned recovery – Impugned order quashed – Petition allowed. [Jayanti Vyas (Smt.) Vs. State of M.P.] …673

सेवा विधि – वेतन पुनरीक्षण नियम, म.प्र., 2009 – अतिरिक्त भुगतान की वसूली – अनुज्ञेयता – लिखित वचनबंध – वेतन निर्धारण के दौरान याची को अधिक राशि का भुगतान किया गया था – प्रत्यर्थीगण ने अधिक राशि की वसूली का आदेश पारित किया – को चुनौती – अभिनिर्धारित – याची तृतीय वर्ग सेवा से है एवं जनवरी, 2018 में सेवानिवृत्त होने वाली है अर्थात् वसूली के आदेश के एक वर्ष के भीतर – अधिक राशि, आक्षेपित आदेश की तिथि से 5 वर्षों से अधिक अवधि के लिए दी गई है – आगे अभिनिर्धारित – वसूली, विधि में अननुज्ञेय है – याची एक माह के भीतर सेवानिवृत्त हो रही है, अतः वचनबंध के बावजूद वह आक्षेपित वसूली अभिखंडित करने के अनुतोष की हकदार है – आक्षेपित आदेश अभिखंडित – याचिका मंजूर। (जयंती व्यास (श्रीमती) वि. म.प्र. राज्य) **…673**

***Service Law – Recovery After Retirement* – Petition seeking quashment of order of recovery – Petitioner retired from service as class III employee – At the time of payment of his retiral dues, an order of recovery of dues was passed on the ground that pay fixed at the time of initial appointment was incorrect – Challenge to – Undertaking given by petitioner for recovery of excess amount at the time of pay fixation – Held – The said undertaking was obtained from the petitioner at the time of extending the benefit of pay revision and such an act of petitioner cannot be said to be a voluntary act – Order of recovery quashed – Petition allowed. [Vijay Shankar Trivedi Vs. State of M.P.] …682**

सेवा विधि – सेवा निवृत्ति पश्चात् वसूली – वसूली के आदेश को अभिखंडित किया जाना चाहते हुए याचिका – याची तृतीय श्रेणी कर्मचारी के रूप में सेवा से निवृत्त हुआ – उसके निवृत्ति देय के भुगतान के समय, देय की वसूली का आदेश इस आधार पर पारित किया गया था कि प्रारंभिक नियुक्ति के समय निर्धारित किया गया वेतन गलत था – को चुनौती – याची द्वारा वेतन निर्धारण के समय, अधिक रकम की वसूली हेतु वचनबंध दिया गया – अभिनिर्धारित – याची से उक्त वचनबंध, वेतन पुनरीक्षण का लाभ दिये जाने के समय अभिप्राप्त किया गया था और याची के ऐसे कृत्य को स्वेच्छापूर्वक कृत्य नहीं कहा जा सकता – वसूली का आदेश अभिखंडित – याचिका मंजूर। (विजय शंकर त्रिवेदी वि. म.प्र. राज्य) **…682**

***Service Law – Reservation for physically handicapped* – Held – Respondents are under an obligation to reserve 3% posts of the total vacancies for persons with disabilities with 1% each for persons suffering from (i)**

blindness or low vision, (ii) hearing impairment and (iii) locomotor disability or cerebral palsy, in the posts identified for each disability. [Sushil Kanojia Vs. The Oriental Insurance Co. Ltd.] ...426

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

***Special Police Establishment Act, M.P. (17 of 1947), Section 3 – See – Penal Code, 1860, Section 409, 420, 467, 468, 471, 120-B* [Manish Kumar Thakur Vs. State of M.P.] (DB)...235**

विशेष पुलिस स्थापना अधिनियम, म.प्र. (1947 का 17), धारा 3 – देखें – दण्ड संहिता, 1860, धारा 409, 420, 467, 468, 471, 120–B (मनीष कुमार ठाकुर वि. म.प्र. राज्य) **(DB)...235**

***Special Police Establishment Act, M.P. (17 of 1947), Section 3 & 5-A – See – Prevention of Corruption Act, 1988, Section 17* [Rajani Dabar (Smt.) (Dr.) Vs. State of M.P.] (DB)...253**

विशेष पुलिस स्थापना अधिनियम म.प्र., (1947 का 17), धारा 3 व 5–A – देखें – भ्रष्टाचार निवारण अधिनियम, 1988, धारा 17 (रजनी डाबर (श्रीमती) (डॉ.) वि. म.प्र. राज्य) **(DB)...253**

***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. [Ganpat Vs. Ashwani Kumar Singh] ...*6**

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) **...*6**

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) **...240**

Trade Marks Act (47 of 1999), Section 142 – Groundless threats of Legal Proceedings – Injunction Suit – Maintainability – **Appeal against dismissal of suit of Appellant/plaintiff for permanent injunction seeking restraint order against Respondent/defendant for issuance of groundless threats, declaration and damages u/S 142 of the Act of 1999 – Held – Section 142 entitles the person to bring an action or proceeding for infringement whether the person making groundless threats of legal proceeding is or is not the registered user of the trade mark and bring a suit against the defendant unless the first mentioned person, defendant satisfies the Court that trade mark is registered and that the acts in respect of which proceedings were threatened, constitute, or if done, would constitute an infringement of trade mark – Trial Court has not properly appreciated the provisions of Section 142 of the Act of 1999 –**

Suit is maintainable, trial Court directed to decide the suit on merits – Appeal allowed. [Ahilya Vedaant Education Welfare Society Vs. K. Vedaant Education Society] ...726

व्यापार चिन्ह अधिनियम (1999 का 47), धारा 142 – विधिक कार्यवाहियों की आधारहीन धमकियां – व्यादेश वाद – पोषणीयता – आधारहीन धमकियां जारी करने के लिए प्रत्यर्थी/प्रतिवादी के विरूद्ध अवरोध आदेश, घोषणा एवं क्षतिपूर्ति चाहते हुए, 1999 के अधिनियम की धारा 142 के अंतर्गत, अपीलार्थी के स्थाई व्यादेश हेतु वाद की खारिजी के विरूद्ध अपील – अभिनिर्धारित – धारा 142 व्यक्ति को अतिलंघन के लिए कार्रवाई या कार्यवाही पेश करने हेतु हकदार बनाती है कि क्या वह व्यक्ति जो कि विधिक कार्यवाही की आधारहीन धमकी दे रहा है, व्यापार चिन्ह् का रजिस्ट्रीकृत उपयोगकर्ता है या नहीं एवं प्रतिवादी के विरूद्ध एक वाद लाए जब तक कि पहला उल्लिखित व्यक्ति, प्रतिवादी, न्यायालय को संतुष्ट नहीं करता है कि व्यापार चिन्ह रजिस्ट्रीकृत है एवं यह कि वह कृत्य जिसके संबंध कार्यवाहियों की धमकी दी गई, गठित हुई या यदि की गई है, तो व्यापार चिन्ह का अतिलंघन गठित होगा – विचारण न्यायालय ने 1999 के अधिनियम की धारा 142 के उपबंधों का उचित रूप से मूल्यांकन नहीं किया – वाद पोषणीय है, विचारण न्यायालय को गुण–दोषों के आधार पर वाद का विनिश्चय किये जाने हेतु निदेशित किया गया – अपील मंजूर। (अहिल्या वेदांत एजुकेशन वेलफेयर सोसायटी वि. के. वेदांत एजुकेशन सोसायटी) **...726**

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

(SC)...263

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

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

entering within or outside the State which is the forest produce having originated in forest requires a transit pass for transiting in the State of U.P. – Any good which did not originate in forest whether situate in the state of U.P. or outside the State but is only passing through a forest area may not be a forest produce – Further held – Transit fee charged under the 1978 Rules is regulatory fee in character and state is not to prove quid pro quo for levy of transit fee. [State of Uttarakhand Vs. Kumaon Stone Crusher] (SC)…263

इमारती लकड़ी एवं अन्य वनोपज का अभिवहन नियम, उ.प्र., 1978, नियम 3 – अभिवहन पास – अभिवहन शुल्क – नियम 3 के अनुसार किसी वनोपज को उ.प्र. राज्य में या से या के भीतर लाने–ले जाने हेतु अभिवहन पास आवश्यक है – कोई उपज, माल जो राज्य के भीतर या बाहर प्रवेश करता है जो कि एक वनोपज है जिसकी उत्पत्ति वन में हुई है को उ.प्र. राज्य में अभिवहन हेतु, अभिवहन पास अपेक्षित है – कोई माल जिसकी उत्पत्ति वन में नहीं हुई है, यद्यपि उ.प्र. राज्य में स्थित हो या राज्य के बाहर हो, किंतु केवल वन क्षेत्र से गुजर रहा हो, वनोपज नहीं हो सकता – आगे अभिनिर्धारित – नियम 1978 के अंतर्गत लगाया गया अभिवहन शुल्क, विनियामक शुल्क के स्वरूप में है तथा राज्य को अभिवहन शुल्क के उद्ग्रहण हेतु तत्प्रतीत साबित नहीं करना होगा। (उत्तराखण्ड राज्य वि. कुमांउ स्टोन क्रशर) **(SC)…263**

***Transit of Timber & Other Forest Produce Rules, U.P., 1978, Rule 5 – Validity of Fourth and Fifth Amendment Rules – Increase in Fee* – Held – Although State is not required to prove any quid pro quo for levy or increase in fee but a broad co-relation has to be established between expenses incurred for regulation of Transit and the fee realized – It is rightly noticed that the expenditure claimed by the State is not only confined to expenditure for regulation of transit but also other expenditures of the forest department as well – Increase in transit fee was excessive and character of fee has changed from simple regulatory fee to a fee which is for raising revenue – High Court rightly strike down the Fourth and Fifth Amendment [State of Uttarakhand Vs. Kumaon Stone Crusher] (SC)…263**

इमारती लकड़ी एवं अन्य वनोपज का अभिवहन नियम, उ.प्र., 1978, नियम 5 – चौथे एवं पांचवे संशोधन नियमों की विधिमान्यता – शुल्क में बढ़ोत्तरी – अभिनिर्धारित – यद्यपि राज्य को शुल्क के उद्ग्रहण या बढ़ोत्तरी हेतु किसी तत्प्रतीत को साबित करना अपेक्षित नहीं परंतु अभिवहन के विनियमन हेतु वहन किये गये खर्चे एवं वसूले गये शुल्क के बीच व्यापक परस्पर संबंध स्थापित करना होगा – यह उचित रूप से पाया गया है कि राज्य द्वारा दावा किया गया व्यय न केवल अभिवहन के विनियमन हेतु व्यय तक सीमित है बल्कि वन विभाग के अन्य व्यय भी है – अभिवहन शुल्क में बढ़ोत्तरी अत्याधिक थी एवं शुल्क का स्वरूप साधारण विनियामक शुल्क से बदलकर ऐसे शुल्क में हुआ है जो कि राजस्व बढ़ाने हेतु किया गया है – उच्च न्यायालय ने उचित रूप से चौथे एवं पांचवे संशोधन नियमों को खंडित किया है। (उत्तराखण्ड राज्य वि. कुमांउ स्टोन क्रशर) **(SC)…263**

University Grants Commission (Minimum Qualifications for Appointment and Career Advancement of Teachers in Affiliated Universities and Institutions) (3rd Amendment) Regulations, 2009, Regulation 1.3.3 – Lecturer – Minimum Qualifications – Exemption **– NET qualification is now minimum qualification for appointment of lecturer and exemption granted to M.Phil degree holders have been withdrawn and exemption is allowed only to those Ph.D. degree holders who have obtained degree in accordance with, UGC (Minimum Standards and Procedure) Regulations published on 11.07.2009 – In the present case, no interference is called for – Appeals disposed with directions that eligibility of petitioners be considered taking also into consideration the UGC (Minimum Qualification for Appointment) Regulations, 2009. [State of M.P. Vs. Manoj Sharma] (SC)…620**

विश्वविद्यालय अनुदान आयोग (सम्बद्ध विश्वविद्यालयों और संस्थाओं में शिक्षकों की नियुक्ति एवं करियर में उन्नति हेतु न्यूनतम अर्हताएँ) (तीसरा संशोधन) विनियम, 2009, विनियमन 1.3.3 – व्याख्याता – न्यूनतम अर्हताएँ – छूट – व्याख्याता की नियुक्ति हेतु नैट अर्हता अब न्यूनतम अर्हता है एवं एम.फिल उपाधि धारकों को प्रदान की गई छूट वापस ले ली गई है एवं केवल उन पी.एच.डी. उपाधि धारकों को छूट मंजूर की गई है जिन्होंने 11.07.2009 को प्रकाशित यूजीसी (न्यूनतम मानक एवं प्रक्रिया) विनियम के अनुसार उपाधि प्राप्त की है – वर्तमान प्रकरण में, कोई हस्तक्षेप की आवश्यकता नहीं है – अपीलों का निपटारा इन निदेशों के साथ किया गया कि याचीगण की योग्यता पर, यूजीसी (नियुक्ति हेतु न्यूनतम योग्यता) विनियम, 2009 को भी विचार में लेते हुए, विचार किया जाना चाहिए। (म.प्र. राज्य वि. मनोज शर्मा) **(SC)…620**

University Grants Commission (Minimum Standards and Procedure for the Award of M.Phil/Ph.D Degree) Regulations, 2009, Regulations 3 & 5 – Appointment of Guest Lecturers – Qualifications **– Held – Regulations of 2009 by which university and institutions were prohibited from conducting M.Phil/ Ph.D through distance education mode, came into effect from 11.07.2009 and are prospective in nature – Degree obtained prior to the enforcement will not be washed out – High Court rightly directed the respondent State to consider the case of the petitioners on the basis of M.Phil. degree obtained prior to enforcement of Regulation of 2009. [State of M.P. Vs. Manoj Sharma] (SC)…620**

विश्वविद्यालय अनुदान आयोग (एम.फिल/पीएच.डी. उपाधि के लिए न्यूनतम मानक एवं प्रक्रिया), विनियम, 2009, विनियम 3 व 5 – अतिथि व्याख्याता की नियुक्ति – अर्हताएँ – अभिनिर्धारित – 2009 के विनियम जिनके द्वारा विश्वविद्यालय और संस्थाओं को दूरस्थ शिक्षा प्रणाली के माध्यम से एम.फिल/पीएच.डी संचालित करने से प्रतिषिद्ध किया गया था, 11.07.2009 से प्रभाव में आया एवं भविष्यलक्षी प्रकृति का है – प्रवर्तन से पूर्व प्राप्त उपाधि को रद्द नहीं किया जाएगा – उच्च न्यायालय ने प्रत्यर्थी राज्य को 2009 के विनियम

के प्रवर्तन से पूर्व प्राप्त एम.फिल. की उपाधि के आधार पर याचीगण के प्रकरण पर विचार करने हेतु उचित रूप से निदेशित किया। (म.प्र. राज्य वि. मनोज शर्मा) **(SC)…620**

***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. [Deepak Spinners Ltd. Vs. State of M.P.] (DB)…38**

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 नहीं 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। (दीपक स्पिनर्स लि. वि. म.प्र. राज्य) **(DB)…38**

***Van Upaj Vyapar (Viniyaman) Adhiniyam, M.P. (9 of 1969), Section 5 & 16 – See – Criminal Procedure Code, 1973, Section 468 & 473*[Vinay Sapre Vs. State of M.P.] …815**

वन उपज व्यापार (विनियमन) अधिनियम, म.प्र. (1969 का 9), धारा 5 व 16 – देखें – दण्ड प्रक्रिया संहिता, 1973, धारा 468 व 473 (विनय सप्रे वि. म.प्र. राज्य) **…815**

***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. [Ramesh Vs. State of M.P.] ...201

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। (रमेश वि. म.प्र. राज्य) ...201

***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. [M.P. Paschim Kshetra Vidyut Vitran Co. Ltd. Vs. Serco BPO Pvt. Ltd.]**

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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। (म.प्र. पश्चिम क्षेत्र विद्युत वितरण कं. लि. वि. सेरको बीपीओ प्रा.लि.) ...166

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FAREWELL

HON'BLE MR. JUSTICE RAJENDRA MAHAJAN

Born on March 7, 1956. Did M.Sc. (Chemistry) and LL.B. Entered into Judicial services on October 21, 1981 as Civil Judge Class-II. Promoted as Civil Judge Class-I in the year 1988, as CJM in the year 1992 and as Additional District and Sessions Judge in the year 1995. Was granted Selection Grade Scale in the year 2001 and Super Time Scale in the year 2008. Worked as ADJ at Indore, Gwalior and Ashoknagar. Worked as Law Officer to State Bureau of Economic Offences Wing, M.P. between the years 2000 and 2003. Promoted as District and Sessions Judge in the year 2007. Worked as District and Sessions Judge, Neemuch, Katni and Mandsaur. Also worked as Principal Judge in Family Court, Bhopal.

Elevated as Additional Judge of the High Court of Madhya Pradesh and took oath on 25.10.2014. Was appointed as Permanent Judge on 27.02.2016 and demitted office on 06.03.2018.

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 RAJENDRA MAHAJAN, GIVEN ON 06.03.2018, AT THE HIGH COURT OF M.P., BENCH GWALIOR.

Hon'ble Mr. Justice Sanjay Yadav, the Administrative Judge, High Court of M.P., Bench Gwalior, bids farewell to the demitting Judge :-

We have assembled here to bid an affectionate farewell to Hon'ble Justice Rajendra Mahajan on his demitting office as Judge of the Madhya Pradesh High Court.

Justice Rajendra Mahajan was born on 7th March, 1956. He took M.Sc. Degree (Chemistry) and then completed LL.B.. He joined the Judicial service on 21/10/1981 as Civil Judge Class II and was promoted as Civil Judge Class I in 1988. He was appointed as Additional District Judge in the year 1995; and was granted Selection Grade and Super Time Scales in the years 2001 and 2008 respectively. He worked as a Law Officer of Madhya Pradesh State Bureau of Economic Offences Wing and Principal Judge, Family Court. He was promoted as District Judge in the year 2007. Recognizing his merit he was appointed as Additional Judge on 25.10.2014 and Permanent Judge on 27.02.2016.

On elevation on 25.10.2014 Justice Mahajan said that by sheer destiny he became a Judge otherwise he would have been a Doctor or a Professor of Chemistry. It was stated by him that in Judicial service he was given three mantras by his Seniors for to be a good Judge :-

(i) before deciding a *lis*, read the relevant law and rulings thereon carefully.

(ii) when you decide a *lis* bonafidely and objectively, your reasoning may be wrong but your conclusion will be correct.

(iii) exercise the power of post like an accelerator of a vehicle, meaning thereby that power should not be into the head, on the other hand it must be beneath the feet.

During his tenure as Judge of the Madhya Pradesh High Court, Justice Rajendra Mahajan has disposed of as many as 8444 cases and delivered many landmark judgments. It may not be possible to refer to all; however a brief reference of some of these would establish of his adhering to three mantras.

In *Amir Vs. State of Madhya Pradesh:* 2016 (3) JLJ 20, while upholding the conviction of a juvenile for outraging the modesty of the prosecutrix, on the question of sentence took a practical and humane approach of a juvenile falling in bad company of co-accused who were major and illiterate and coming from a downtrodden family. Similar approach is reflected when in *Pradumna Vs. State of*

M.P. : 2015 (2) MPHT 166 where in a Criminal Revision under Section 53 of Juvenile Justice (Care and Protection of Children) Act, 2000 while disagreeing with the observation of Trial Court of the Juvenile being from the rural and illiterate background and some criminal cases being registered against the brother and mother of belonging to the family, having criminal antecedents.

In *Parveen Begam and others Vs. Mahfooj Khan:* 2016 (4) MPLJ 585 while dwelling on the issue of the custody of a minor child governed by Hanafi law held that if there is a conflict between personal law to which the child is subject and consideration of his/her welfare, the later i.e. the welfare of the child must prevail. Again in *Rajendra Singh Parmar Vs. Rajendra Kumari* : 2017 (2) MPLJ 2014 drawing a fine line as to whether it would be paternal or maternal grandparents, in the event of death of the parents of a minor child, the custody with the paternal grandparents was found to be more beneficial for the child as there existed the joint family to look after overall well being of the child.

In *Mohd. Anees Khan S/o Mohd. Saleem Khan and others vs. Farhat Naaz W/o Mohd. Anees Khan:* 2017 (3) MPLJ 362 taking a pragmatic view as to the scope of Protection of Women from Domestic Violence Act 2005, it is held that a grant of divorce by husband governed by Muslim law will have no bearing on the merit as to the cause arising whenever a woman is subjected to domestic violence.

Justice Rajendra Mahajan decided many civil and criminal matters with equal proficiency. Large number of judgments delivered by him are reported in Law Journals which reflect his deep knowledge of law and realistic approach in tackling complex issues.

Besides discharging his judicial renditions Justice Rajendra Mahajan has contributed valuable suggestions in administrative matters as a member of various Administrative Committees.

Justice Rajendra Mahajan had respect for everyone be it a Judge or a lawyer. Justice Rajendra Mahajan will always be remembered as a Judge whose actions were always just, rational and reasonable.

Besides being workaholic Justice Rajendra Mahajan has been polite, calm and cool in his disposition.

I, on behalf of the Judges of this Court and on my own behalf wish Mr. Justice Rajendra Mahajan and Mrs. Mahajan happiness, peace and good health.

May there always be work for your hands to do;

May your purse always hold a coin or two;

May the sun always shine on your window pane;

May a rainbow be certain to follow each rain;

May the hand of a friend always be near you;

May God fill your heart with gladness to cheer you.

(Irish Blessings)

Shri Vishal Mishra, Addl. Advocate General, M.P., bids farewell :-

Today we all have assembled here to give farewell to Lordship Shri Rajendra Mahajan Ji who is demitting this prestigious institution after successfully serving for 37 years.

Hon'ble Justice Shri Rajendra Mahajan was born on 07.03.1956. His father late Shri M.L. Mahajan was Principal in Higher Secondary School and was known for his strictness and discipline. After completing his primary education your Lordship got the Degree of M.Sc in Chemistry. Your Lordship joined this noble profession on 21st October 1981 as Civil Judge Class II. Thereafter your Lordship was promoted as Civil Judge Class I in the year 1988 and in the month of July, 1992 he was appointed as Chief Judicial Magistrate. He was appointed as an Additional District Judge in August, 1995. He was granted Selection Grade and Super Time Scales in the year 2001 and 2008 respectively. He has worked as a Law officer to M.P. State Bureau of Economic Offences Wing, Principal Judge, Family Court. He was promoted as a District Judge in the year 2007 and was posted at Mandsaur and looking to his hard work and dedication he was elevated as a Judge of this prestigious institution and was sworn on 25th October, 2014.

During his entire service tenure prior to his elevation as a High Court Judge, Lordship has earned vivid experience serving in different capacities at Ujjain, Khandwa, Thandla, Shujalpur, Sarangpur, Rajgarh, Indore, Gwalior, Bhopal, Ashoknagar, Neemuch and Katni.

Your Lordship has served this noble institution tirelessly, without any fear or favour for almost 37 years with utmost devotion, hard work and sincerity. He has always worked for the upliftment of this prestigious institution.

Your Lordship was having all the qualities of a good Judge. He was having a proper judicial temperament, patience, open-mindedness, courtesy, tact, courage, punctuality, firmness, understanding, compassion, humility and common sense. Your Lordship has displayed all these qualities in his working and with consistency. Your Lordship is having great skills of adjudicating all types of legal disputes, it will be appropriate to say that Lordship is having full and equal command over different fields of law. Your Lordship's licit assessor quality has worked for the betterment of the justice delivery system. Your Lordship has dealt with tedious legal issues from

time to time and has delivered large number of judgments which will be very useful for the practicing advocates for times to come.

I had occasion to argue before your Lordship when he was in officiating capacity as Additional District and Sessions Judge, Gwalior and also before this Hon'ble High Court and has found that your Lordship has treated all the lawyers alike despite being senior or junior. He has never shown anger while sitting on the dais and used to give patience hearing and used to deal with all the arguments advanced before him and are reflected in the order sheets. I have found that Lordship has brought to the task of judging an acute sense of fairness and great deal of empathy for and understanding of the frailties of the human conditions. This is the jurisdiction in which sometimes the best but more often the worst of the people and their lives are exposed and played out for which a judge has to work with highest degree of integrity and full devotion to separate wheat from the chaff. Your Lordship has displayed the aforesaid quality on several occasions and has done justice to the litigant.

It is true that a person entering into government service has to retire one day. But this is not the end of his work, rather a person has gained so much experience that he is ready to play his second innings. Your lordship is completing his tenure as a Judge today and it appears that he is ready to play his second inning. We hope that Lordship will always be available to guide us.

Recognizing the saying that behind every successful man there is a woman, so we extend our sincere thanks to respected Mrs. Anita Mahajan who was always there with him at all the times.

I, on behalf of State Government, on behalf of all the law officers and my own behalf congratulate Lordship for completing his tenure successfully and give our best wishes to Lordship for his second inning. We also pray for good health of your Lordship and his family.

Shri Anil Mishra, President, High Court Bar Association, Gwalior, bids farewell :-

We have all gathered here to bid farewell to our beloved Judge Hon'ble Justice Rajendra Mahajan ji.

It has been quite some time that Justice Shri Rajendra Mahajan has been with us in Gwalior. In the short span of time through his simplicity he has endeared all of us. Many milestones have been achieved by this Court under his able guidance.

Hon'ble Justice Rajendra Mahajan after brilliant career joined the M.P. Judicial services. Hon'ble Justice Shri Mahajan ji was born on 7th March, 1956.

Hon'ble Justice Shri Mahajan ji got the Degree of M.Sc. Chemistry and LL.B. with brilliant academic record. After getting the Degree of LL.B., Hon'ble Justice

Shri Mahajan ji was selected on the post of Civil Judge Class-II and joined the Judicial Service on 21st October 1981 and in the year 1988 he was appointed as Civil Judge Class-I. Hon'ble Justice Shri Mahajan ji was promoted as Addl. District and Sessions Judge in the year 1995. He has acted as Officiating District Judge in various Districts and also in Gwalior as an Addl. District and Sessions Judge. He was granted Selection Grade and Super Time Scales in the year 2001 and 2008 respectively.

Hon'ble Justice Shri Mahajan ji has served as Law Officer to MP State Bureau of Economic Offences Wing, Principal Judge, Family Court, Bhopal. He was promoted to the post of District Judge in the year 2007 and thereafter rendered his services as District Judge Neemuch, Katni and Mandsaur.

Hon'ble Justice Shri Mahajan ji was appointed as Additional Judge of MP High Court on 25th October 2014.

Since the initial day of appointment in judicial service, he worked with utmost devotion and sincerity. I must emphasize that his judgments and orders reflects the justice and were exemplary and imitable.

Hon'ble Justice Shri Mahajan ji has delivered several landmark judgments in his entire judicial career. His Lordship's verdicts shall be followed and relied by the forthcoming generations of pious judicial systems and may strengthen it. His crystal clear and vast knowledge of law and legal aspects, which reflects all the way through the judgments rendered by his Lordship, is remarkable and shall remain perpetually as a precedent.

Hon'ble Justice Mahajan has many qualities and amongst what has impressed me the most is his rock-solid self belief and forthrightness. His Lordship has always remained calm through adversity and has been a source of strength for all of us, actually his Lordship has been a source of great encouragement in dispensing justice as a Judge.

I bid His Lordship a farewell on behalf of the Bar with wishes and a very bright future ahead. In the end I am quoting….**Richer Bach an American writer……..**

> **"Don't be dismayed at goodbyes. A Farewell is necessary before you can meet again. And meeting again, after moments or lifetimes is certain for those who are friends".**

How sad to say that Hon'ble Justice Shri Mahajan ji is getting retired. May be he gets retired from this office however he will never get retired from our heart. He will always be in our heart forever because no one can compare him and take his place. We are here today to give him farewell, it is very sad moment, however we have to make it a happy moment in order to see him off very happily on his last working day. Farewell parties becomes very emotional and even much more, however we have to organize it.

His great achievements have inspired us a lot and would be continued in the future with us. Really, we have been blessed with having such a Judge in High Court. Really, his Lordship will be missed a lot by all of us here. I would like to say Hon'ble good luck before starting new journey and wish him a great success in his life. Thank you Hon'ble Justice Shri Mahajan ji for giving us such wonderful years which will be stored in our heart forever.

I, on behalf of the High Court Bar Association, Gwalior, wish you a bright third inning of life ahead and prosperous health. Further we are having hope to remain in future as part and parcel of our noble judicial system.

Shri Ankur Modi, Member, M.P. State Bar Council, bids farewell :-

Judges will come and Judges will go but the function of impartment of Justice in the temples of justice shall go on. But there are very few of the Judges who would leave an indelible mark that would make them immortal and would be remembered through their works for an endless period of time. Such is the majesty of My lord Justice Mahajan.

Having served for more than three decades in the service of Justice, My Lord had risen through the ranks. Initially appointed as a Civil Judge in the year 1981 and after a long journey of over three decades he reached the final lap of his career when My Lord was elevated as a Judge to the Madhya Pradesh High Court in the year 2014.

With thirty years of hands on experience in the impartment of Justice, My Lord was able to cope up with the mounting pressure of work in the High Court and demand for justice from the litigants and lawyers with commendable ease and at times with fortitude.

Slow and steady was the way of working of My Lord, quest for quality and not quantum appealed to My Lord and with this conscience driven approach, My Lord decided all the cases that came before him. The exactitude with which My Lord weighed and balanced law and equity was unparalleled. Compassion played an important role to My Lord and in his compassionate wisdom he found it just and appropriate to discharge 82 years old lady from the charge of conspiracy and forgery vide judgment dated 17.11.2017 in CRR no. 279/2014.

There are many such orders and judgments of My Lord that reflects equity and compassion driven approach of My Lord which transgressed and broke through the self-imposed procedural restraints in order to meet out Justice to the litigant.

We bid farewell to My Lord Justice Mahajan who retires from the bench today and I, on behalf of the State Bar Council wish him all the luck and best wishes for his new course of life ahead. I hope and pray that My Lord stays healthy and fit and occupies himself with such engagement where he is able to continue contributing to the society with his huge experience and learning that he has gathered while serving as a Judge.

Shri Vivek Khedkar, Asstt. Solicitor General, bids farewell :-

We all have assembled here today to say "GOODBYE" to My Lord Justice Rajendra Mahajan on his demitting the office of a Judge of this prestigious High Court of Madhya Pradesh.

Today while addressing at this juncture, it is a great pleasure and honour for me but also with a heavy heart, I am expressing my gratitude to My Lord for demitting his office. I personally feel that a true judge is going to retire and it is also a great loss to the legal fraternity. So many times feelings cannot be expressed by words but with great pleasure and honour, I am expressing my gratitude towards My Lord.

First time I interacted with My Lord Hon'ble Justice Rajendra Mahajan while His Lordship was posted as Additional District Judge, Gwalior. I feel that My Lord was doing justice right from beginning with a pragmatic approach. I found him right from beginning as a sincere worker behind his face. He is having decent personality and having full quality of complete Judge capable of doing social justice for applying legal principles with pragmatic approach. I had an opportunity to appear before My Lord in this August Institution as an Assistant Solicitor General and as an Advocate also and I found that My Lord is having vast knowledge in Criminal laws as well as in Civil also. One specialty I found while appearing before My Lord is that My Lord gave equal treatment to all the lawyers including the juniors and seniors. Face value before My Lord was not a matter but always the fact and legal approach was a basic thing before My Lord.

My Lord Hon'ble Justice Shri Rajendra Mahajan, as the divinity in his name itself spreads fragrance amongst all, was born on 7th March 1956. After completing M.Sc. (Chemistry) and LL.B. with good academic record, he joined Judicial Services on 21st of October 1981 as a Civil Judge Class-II. He was promoted as a Civil Judge Class-I in the year 1988 and then appointed as a C.J.M. from 27th of July 1992. Later on he got promoted on the post of Additional District Judge in the year 1995 and was also granted Selection Grade and Super Time Scales in the year 2001 and 2008 respectively. My Lord served as a Law Officer to Madhya Pradesh State Bureau of Economic Offences Wing, Principal Judge, Family Court, Bhopal, District Judge, Neemuch, Katni and Mandsaur. He was appointed as an Additional Judge of this August Institution on 25th October, 2014.

My Lord Hon'ble Justice Shri Mahajan is having various qualities and great knowledge of law. After completing more than 37 years of judicial service, now My Lord is going to demit his office. My Lord Justice Mahajan is very kind hearted and full of compassion for the poor person. Various judgments given by My Lord will definitely guide us in years together.

I, on my behalf and on behalf of Union of India convey and express the gratitude for all the faith and trust My Lord has bestowed upon us and guided us towards excellence. I am also expressing my gratitude and good wishes towards My Lord for his future life. I wish My Lord for a healthy and wealthy life. Your journey of accomplishment will continue to inspire us in achieving heights on the path of justice dispensation system.

Shri K.B. Chaturvedi, Senior Advocate, Gwalior, bids farewell :-

We have assembled here for farewell ovation of Hon'ble Justice Shri R.K. Mahajan, who is demitting the prestigious office of this Court on completing his tenure.

Hon'ble Shri Justice R.K. Mahajan was born on 7th March, 1956 and passed M.Sc and LL.B with good academic records. My Lord joined judicial service on 21st October, 1981 as Civil Judge Class II and completed hard journey of judicial officer efficiently upto the post of District Judge as promoted in the year 2007.

Recognizing his judicial contribution in judicial work, My Lord was elevated as Judge of this Hon'ble High Court on 25th October 2014 and posted at Gwalior. My Lord is very simple, given patience hearing to the advocates and the decisions published in law Journals will guide the legal fraternity as precedent.

His legal acumen was observed by all of us, his sharp understanding is based on the principle laid down by Apex Court. He was always firm on the principles and adhered to them by dispensation of justice. My Lord have never taken care of the number of cases listed before him. Hardly few minutes takes to my Lord to understand the crux of the matter and My Lord decided effectively those cases within the four corners of law.

The bar of this bench always remember to My Lord for his excellent personality, great command on law and gentle behavior.

I myself and on behalf of Senior Advocates pray to God for his good health and prosperous life in future. I also pay regards to the family members of Justice Mahajan present today on this occasion.

Farewell Speech delivered by Hon'ble Mr. Justice Rajendra Mahajan :-

Upon putting in 36 years and over six months judicial service, today I am demitting the office of the Judge with great satisfaction. It was sheer destiny that had made me the Judge at the age of near-about 25 years without being enrolled as an Advocate. In fact, I wanted to become a Doctor but I was underage by a few months when I was a student of B.Sc. Part-I. Thereafter, I decided to appear in the PMT Examination at the same time studying in B.Sc. Part-II. However, my father fell seriously ill and remained bed-ridden for some months. Thereupon, my father insisted

upon me to drop the idea of becoming a Doctor as the course of MBBS is five years and six months whereas I could do M.Sc. in three years' time and get a job. When I was appearing in the annual examinations of B.Sc. Part-III, my eyes got infected and I had to leave annual examinations in mid-way. In the re-examination, I passed the exams of two subjects namely Botany and Zoology. Before the result of re-examination was out, the admission in M.Sc. Chemistry, which was my preferred subject, was closed. Therefore, I decided to join LL.B. course and M.A. in Economics. I got the highest marks in the University in the first year of LL.B.. However, I got second division marks on lower side in M.A. (Previous). Both the subjects were not of my much liking. Then, I got admission in M.Sc. Chemistry and took the Degree in the subject with First Division. I did Law second year and third year while doing government services. In the year 1980, the vacancies for Civil Judge Class-II were published and I applied therefor. I got through the examination of Civil Judge Class-II with good position in the merit-list. On 21st October I joined as Civil-Judge Class-II at Ujjain. However, I was not interested in pursuing my career in the judicial service. I always waited for the vacancies of Lecturership in college for Chemistry subject but it was an era of adhocism in department of education of M.P. Government that lasted for about ten years. Meanwhile, I became C.J.M and I decided to continue my career in judicial service.

2. On this occasion, I remember and pay my reverence to late Shri L.J. Mandlik, my first District Judge, Justice A.P. Shrivastava, of whom I was a Trainee Judge, Justice S.P. Khare, who was my first C.J.M., Justice S.L. Jain, Justice I.S. Shrivastava, Justice N.K. Gupta, Justice G.D. Saxena, Justice Subhash Kakade and Justice M.K. Mudgal. They all had instilled in me the qualities of becoming a good Judge. I also pay my sincere gratitude to all the Judges of the M.P. High Court with whom, I sat as their Puisne Judge in the Division Benches. At this occasion, I also remember members of my staff, without their co-operation, I could not discharge my duties as a Judge successfully.

3. At Gwalior, I discharged my duties as High Court Judge for about 8 months. During that period, I got active co-operation from all the quarters. In this regard, I am grateful to them.

4. I deeply show my appreciation to my wife Smt. Anita Mahajan who has always stood by me and successfully shouldered the family responsibilities.

5. I am also grateful to all the former speakers who have spoken kind words for me and expressed good wishes for my future retired life. At last, I, on this occasion express my gratitude to all the guests present here to grace the occasion.

Thanking You.

Jai Bharat Jai Hind.

NOTES OF CASES SECTION

Short Note
****(24)***
Before Mr. Justice S.C. Sharma
W.P. No. 4995/2015 (Indore) decided on 24 January, 2018

GANGESH KUMARI KAK (SMT.) …Petitioner
Vs.
STATE OF M.P. & ors. …Respondents

***Court Fees Act (7 of 1870), Article 17(iii) of Second Schedule & Section 7(iv)(c) – Ad Valorem Court fees* – Plaintiff filed a suit seeking declaration of a sale deed to be void – Court directed plaintiff to pay *ad valorem* Court fees – Challenge to – Held – Plaintiff is neither the executant nor a party to the sale deed – Plaintiff seeking simplicitor declaration that instrument is void and not binding on him – Not required to pay *ad valorem* Court fee – Fixed Court fee under Article 17(iii) of Second Schedule of Court Fees Act will be payable – Impugned order set aside – Petition allowed.**

न्यायालय फीस अधिनियम (1870 का 7), द्वितीय अनुसूची का अनुच्छेद 17(iii) व धारा 7(iv)(सी) – मूल्यानुसार न्यायालय फीस – वादी ने विक्रय विलेख को शून्य होने की घोषणा चाहते हुए वाद प्रस्तुत किया – न्यायालय ने वादी को मूल्यानुसार न्यायालय फीस अदा करने हेतु निदेशित किया – को चुनौती – अभिनिर्धारित – वादी, विक्रय विलेख की न तो निष्पादिती है और न ही पक्षकार – वादी, केवल घोषणा चाहता है कि लिखत शून्य है एवं उस पर बंधनकारी नहीं है – मूल्यानुसार न्यायालय फीस का भुगतान अपेक्षित नहीं – न्यायालय फीस अधिनियम की द्वितीय अनुसूची के अनुच्छेद 17(*iii*) के अंतर्गत निश्चित न्यायालय फीस देय होगी – आक्षेपित आदेश अपास्त – याचिका मंजूर।

Case referred:

(2010) 12 SCC 112.

Parties through their counsel.

Short Note
****(25)(DB)***
Before Mr. Justice Sanjay Yadav & Mr. Justice Ashok Kumar Joshi
M.P. No. 235/2018 (Gwalior) decided on 2 February, 2018

J.S. CHAUHAN …Petitioner
Vs.
UNION OF INDIA & ors. …Respondents

***Service Law – Charge Sheet – Practice – Railway Board's Circular No. RBE No. 171/199* – Petitioner, a Health Inspector in Railway department was**

served with a charge sheet on 30.11.2011 and subsequently it culminated into order of punishment dated 21.02.2012 – After 2 ½ years, on 18.07.2014, again a charge sheet was issued to petitioner for same charges – Department vide order dated 15.07.2014 withdrawn the earlier charge sheet – Petitioner filed application before the Central Administrative Tribunal whereby the same was dismissed – Challenge to – Held – It was beyond the authority's competence to have withdrawn/recalled the earlier charge sheet dated 30.11.2011 which had already culminated into order of punishment and which petitioner had already undergone – For doing so, no reasons were assigned by the competent authority – Impugned order passed by Tribunal is not sustainable in law and is hereby set aside – Original Application filed by the petitioner allowed – Petition allowed.

सेवा विधि – आरोप पत्र – पद्धति – रेल बोर्ड का परिपत्र क्र. आर.बी.ई.क्र. 171/199 – याची रेल विभाग में स्वास्थ्य निरीक्षक, को 30.11.2011 को एक आरोप पत्र तामील किया गया था और तत्पश्चात्, उसका समापन दण्ड के आदेश दिनांक 21.02.2012 में हुआ – ढाई वर्ष पश्चात्, 18.07.2014 को, उन्हीं आरोपों के लिए याची को पुनः एक आरोप पत्र जारी किया गया – विभाग ने आदेश दिनांक 15.07.2014 के द्वारा पूर्ववर्ती आरोप पत्र वापस लिया – याची ने केंद्रीय प्रशासनिक अधिकरण के समक्ष आवेदन प्रस्तुत किया जहां उक्त को खारिज किया गया – को चुनौती – अभिनिर्धारित – पूर्ववर्ती आरोप पत्र दिनांक 30.11.2011, जिसका समापन दण्ड के आदेश में पहले ही हो चुका है तथा जिसे याची को पहले ही भुगताया जा चुका है, को वापस लेना/प्रत्याहरण करना, यह प्राधिकारी की सक्षमता से परे था – ऐसा करने के लिए, सक्षम प्राधिकारी द्वारा कोई कारण नहीं दिये गये – अधिकरण द्वारा पारित आक्षेपित आदेश, विधि में कायम रखने योग्य नहीं एवं एतद् द्वारा अपास्त किया गया – याची द्वारा प्रस्तुत आरंभिक आवेदन मंजूर – याचिका मंजूर।

The order of the Court was delivered by : **SANJAY YADAV, J.**

Case referred:

(2007) 10 SCR 612.

Alok Kumar Sharma, for the petitioner.
Mahendra Kumar Sharma, for the respondents No. 1 to 3.

NOTES OF CASES SECTION

Short Note
****(26)***
Before Mr. Justice G.S. Ahluwalia
Cr.R. No. 636/2015 (Gwalior) decided on 18 January, 2018

MEETA SHAIN (SMT.) …Applicant
Vs.
K.P. SHAIN …Non-applicant

***Criminal Procedure Code, 1973 (2 of 1974), Section 125 – Maintenance Amount – Quantum – Take Home Salary – Deductions* – Revision filed by wife for enhancement against the order passed by Family Court u/S 125 Cr.P.C. whereby husband was directed to pay Rs. 3000 per month to wife and Rs. 2000 per month to child – Held – Wife and children are entitled to enjoy same status which they would have otherwise enjoyed in company of husband/father – Further held – Husband's gross salary is Rs. 31,794 and it is well established principle of law that while calculating deductions from salary only statutory deductions can be taken note of and voluntary deductions cannot be considered – In the present case, deductions towards contribution to cooperative bank, repayment of CPF loan (*house loan*) and repayment of festival advance cannot be taken into consideration in order to assess the take home salary of husband – Loan is nothing but receipt of salary in advance – Accordingly husband's take home salary is Rs. 25,460 – Considering the status of parties, price index, inflation rate coupled with the requirements of baby child, husband directed to pay Rs. 4000 per month to wife and Rs. 3000 per month to daughter from date of order – Application allowed.**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125 – भरणपोषण राशि – मात्रा – शुद्ध वेतन – कटौती – दण्ड प्रक्रिया संहिता की धारा 125 के अंतर्गत परिवार न्यायालय द्वारा पारित आदेश जिससे पति को, 3,000 रू. प्रतिमाह पत्नी को एवं 2000 रू. प्रतिमाह बच्ची को भुगतान करने हेतु निदेशित किया गया था, के विरूद्ध वृद्धि किये जाने हेतु पत्नी द्वारा पुनरीक्षण प्रस्तुत किया गया – अभिनिर्धारित – पत्नी और बच्चे उस समान स्थिति का उपभोग करने के हकदार हैं जो कि वे अन्यथा पति/पिता की संगति में उपभोग करते – आगे अभिनिर्धारित – पति का कुल वेतन 31,794 रू. है एवं यह विधि का सुस्थापित सिद्धांत है कि वेतन से कटौती की गणना करते समय केवल कानूनी कटौती का ध्यान रखा जा सकता है एवं स्वैच्छिक कटौती पर विचार नहीं किया जा सकता है – वर्तमान प्रकरण में, सहकारी बैंक में योगदान, सी.पी.एफ. ऋण (मकान ऋण) के प्रतिसंदाय एवं त्यौहार अग्रिम के प्रतिसंदाय के प्रति कटौती को पति के शुद्ध वेतन को निर्धारित करने के लिए विचार में

नहीं लिया जा सकता है – ऋण कुछ और नहीं बल्कि अग्रिम रूप से वेतन की प्राप्ति है – तद्नुसार पति का शुद्ध वेतन 25,460 रू. है – पक्षकारों की स्थिति, मूल्य सूचकांक एवं मुद्रास्फीति की दर के साथ ही बच्चे की आवश्यकताओं को विचार में लेते हुए, पति को आदेश दिनांक से 4000 रू. प्रतिमाह पत्नी को एवं 3000 रू. प्रतिमाह बच्ची को भुगतान करने हेतु निदेशित किया गया – आवेदन मंजूर।

M.P. Agrawal, for the applicant.
Devendra Kumar Sharma, for the non-applicant.

Short Note
****(27)***
Before Mr. Justice G.S. Ahluwalia
Cr.R. No. 626/2006 (Gwalior) decided on 18 January, 2018

SIMMI DHILLO (SMT.) …Applicant
Vs.
JAGDISH PRASAD DUBEY & anr. …Non-applicants

***Criminal Procedure Code, 1973 (2 of 1974), Section 397 & 401, Negotiable Instruments Act (26 of 1881), Section 138 and High Court of Madhya Pradesh Rules, 2008, Rule 48 – Maintainability of Revision* – Trial Court convicted the Applicant/accused for offence u/S 138 of the Act of 1881 – In appeal, the conviction was upheld and appeal was dismissed – Applicant/ accused neither paid the amount nor surrendered before the trial Court and filed this revision – Held – This Court granted bail to the applicant but even then she neither surrendered before the trial Court nor she furnished the bail – This Court cancelled the bail even then she did not surrender before the Court – Present revision filed by the applicant without surrendering before the Appellate Court is not maintainable in the light of Rule 48 of the M.P. High Court Rules 2008.**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 397 व 401, परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 एवं मध्य प्रदेश उच्च न्यायालय नियम, 2008, नियम 48 – पुनरीक्षण की पोषणीयता – विचारण न्यायालय ने आवेदक/अभियुक्त को 1881 के अधिनियम की धारा 138 के अंतर्गत अपराध हेतु दोषसिद्ध किया – अपील में, दोषसिद्धि को कायम रखा गया था तथा अपील खारिज की गई थी – आवेदक/अभियुक्त ने न तो रकम अदा की, न ही विचारण न्यायालय के समक्ष आत्मसमर्पण किया और यह पुनरीक्षण प्रस्तुत किया – अभिनिर्धारित – इस न्यायालय ने आवेदक को जमानत प्रदान की परंतु तब भी उसने न तो विचारण न्यायालय के समक्ष आत्मसमर्पण किया, न ही उसने जमानत पेश की – इस न्यायालय ने जमानत निरस्त की तब भी उसने न्यायालय के समक्ष आत्मसमर्पण नहीं किया

– आवेदक द्वारा, अपीली न्यायालय के समक्ष आत्मसमर्पण किये बिना प्रस्तुत वर्तमान पुनरीक्षण, म.प्र. उच्च न्यायालय नियम, 2008 के नियम 48 के आलोक में पोषणीय नहीं है।

Cases referred :

2010 Cr.L.R. (M.P.) 278, 2012 (3) MPLJ 534.

D.S. Kushwaha, for the applicant.
Rajeev Shrivastava, for the non-applicant No. 1.
R.S. Yadav, P.P. for the non-applicant No. 2/State.

Short Note
****(28)***
Before Mr. Justice S.C. Sharma
W.P. No. 2975/2017 (Indore) decided on 31 January, 2018

SUMER SINGH …Petitioner
Vs.
RESHAM BAI & anr. …Respondents

Constitution – Article 226 – Power of Sub Divisional Officer – Jan Sunwai **– Petition against the order passed by Sub Divisional Officer whereby issue of title and possession was decided and subsequently eviction order has been passed – In appeal, Collector dismissed the same on the ground that order has not been passed under the provisions of MP Land Revenue Code and hence appeal not maintainable – Held –*Jan Sunwai* is certainly not a court as per any statute – Nowadays, it has become a trend that Revenue Authorities, District Magistrate, Sub Divisional Officer are deciding the title disputes and if such kind of procedure is permitted to continue, the Civil Procedure Code shall come to end and these authorities shall be deciding all the suit and injunction matters – Such a procedure in democratic set up cannot be permitted – Majesty of law has to be protected – Practice of kangaroo courts and Kangaroo justice is against the rule of law and deserves to be deprecated – Impugned orders quashed – Authorities directed to place the petitioner in possession – Cost of Rs. 25000 imposed – Petition disposed.**

संविधान – अनुच्छेद 226 – उपखंड अधिकारी की शक्ति – जन सुनवाई – उपखंड अधिकारी द्वारा पारित आदेश, जिसके द्वारा हक एवं कब्जे के विवाद्यक का विनिश्चय किया गया तथा तत्पश्चात्, बेदखली का आदेश पारित किया गया, के विरूद्ध याचिका – अपील में, कलेक्टर ने उक्त को इस आधार पर खारिज किया कि आदेश को, म.प्र. भू–राजस्व संहिता के उपबंधों के अंतर्गत पारित नहीं किया गया है और इसलिए अपील पोषणीय नहीं –

अभिनिर्धारित – किसी भी कानून के अनुसार, जन सुनवाई निश्चित रूप से एक न्यायालय नहीं है – आजकल यह चलन बन गया है कि राजस्व प्राधिकारीगण, जिला मजिस्ट्रेट, उप खंड अधिकारी, हक के विवादों का विनिश्चय कर रहे हैं और यदि इस प्रकार की प्रक्रिया को जारी रहने की अनुमति दी गई तो सिविल प्रक्रिया संहिता समाप्त हो जाएगी तथा ये प्राधिकारीगण सभी वाद एवं व्यादेश के मामलों का विनिश्चय करेंगे – लोकतांत्रिक व्यवस्था में ऐसी किसी प्रक्रिया की अनुमति नहीं दी जा सकती – विधि की महिमा का संरक्षण करना होगा – गैर कानूनी न्यायालयों का चलन विधि के नियम के विरूद्ध है एवं निन्दा के योग्य है – आक्षेपित आदेशों को अभिखंडित किया गया – याची को कब्जा दिये जाने के लिए प्राधिकारीगण को निदेशित किया गया – रू. 25000 का व्यय अधिरोपित किया गया – याचिका निराकृत।

Parties through their counsel.

Short Note

****(29)***

Before Mr. Justice Vivek Rusia

W.P. No. 2755/2017 (Indore) decided on 3 January, 2018

VIKAS BHARTI & anr. …Petitioners

Vs.

STATE OF M.P. & ors. …Respondents

***Prisoners (M.P. Amendment), Act (10 of 1985), Section 31-A and Prisoners Leave Rules, M.P., 1989 – Grant of Parole – Applicability* – Petition against rejection of prayer for Parole – Petitioner convicted u/S 376 (2)(g) & 506(B) IPC and sentenced for life imprisonment – Prayer rejected by respondents on the ground of an interim order passed by the Apex Court in Union of India v/s V. Sriharan whereby State Governments are restrained from exercising their power of remission to life convicts – Challenge to – Held – Apex Court has finally decided the above case whereby it is held that imprisonment of life means till end of conviction of life with or without any scope of remission – In the present case, it is clear that period of parole is always included in the period of sentence, if life convicts are released on parole, their sentence would not be reduced – Parole does not amount to suspension, remission or commutation of sentence – Respondents directed to consider application of petitioners for grant of parole under the Rules of 1989 – Petition allowed.**

बंदी (म.प्र. संशोधन), अधिनियम (1985 का 10), धारा 31–ए एवं बंदी अवकाश नियम, म.प्र., 1989 – पैरोल प्रदान किया जाना – प्रयोज्यता – पैरोल हेतु की गई प्रार्थना

की नामंजूरी के विरूद्ध याचिका – याची, धारा 376(2)(जी) एवं 506(बी) भा.दं.सं. के अंतर्गत दोषसिद्ध एवं आजीवन कारावास से दण्डादिष्ट – भारत संघ वि. वी. श्रीहरन में सर्वोच्च न्यायालय द्वारा पारित किये गये अंतरिम आदेश, जिसमें राज्य सरकारों को, आजीवन सिद्धदोष व्यक्तियों को परिहार करने की उनकी शक्ति का प्रयोग करने से अवरूद्ध किया गया है, के आधार पर प्रत्यर्थीगण द्वारा प्रार्थना नामंजूर की गई – को चुनौती – अभिनिर्धारित – सर्वोच्च न्यायालय ने उपरोक्त प्रकरण का अंतिम रूप से विनिश्चिय किया है, जिसमें यह अभिनिर्धारित किया गया है कि आजीवन कारावास का अर्थ है परिहार के किसी विस्तार के साथ अथवा उसके बिना, जीवनकाल की दोषसिद्धि की समाप्ति तक – वर्तमान प्रकरण में, यह स्पष्ट है कि दण्डादेश की अवधि में पैरोल की अवधि सदैव शामिल होती है, यदि आजीवन सिद्धदोष व्यक्तियों को पैरोल पर छोड़ा गया, उनका दण्डादेश कम नहीं किया जाएगा – पैरोल, दण्डादेश का निलंबन, परिहार या लघुकरण की कोटि में नहीं आता – प्रत्यर्थीगण को 1989 के नियमों के अंतर्गत पैरोल प्रदान करने हेतु याचीगण के आवेदन पर विचार किये जाने के लिए निदेशित किया गया – याचिका मंजूर।

Cases referred:

(2016) 7 SCC 1, 2000 (8) SCC 437.

Shashank Sharma, for the petitioner.
Mukesh Kumawat, G.A. for the respondent/State.

Short Note
****(30)***
Before Mr. Justice Subodh Abhyankar
W.P. No. 666/2017 (Jabalpur) decided on 11 January, 2018

VISHWANATH SINGH …Petitioner
Vs.
STATE OF M.P. & ors. …Respondents

***Forest Act (16 of 1927), Section 52 – Seizure of Forest Produce – Confiscation of Vehicle* – It was alleged that JCB machine, which belonged to the petitioner was found illegally excavating soil 4 metres away from the main road in the forest area – JCB machine was seized and confiscation proceedings were initiated by the forest department – Challenge to – Held – In absence of any seizure of forest produce or its panchnama, entire confiscation proceedings initiated in respect of vehicle cannot be sustained and is hereby quashed – Respondents directed to handover JCB machine to petitioner expeditiously – Petition allowed.**

NOTES OF CASES SECTION

वन अधिनियम (1927 का 16), धारा 52 – वन उपज की जब्ती – वाहन का अधिहरण – यह अभिकथित किया गया था कि जे.सी.बी. मशीन, जो कि याची की थी, को वन क्षेत्र में मुख्य सड़क से 4 मीटर की दूरी पर अवैध रूप से मिट्टी का उत्खनन करते पाया गया था – जे.सी.बी. मशीन को जब्त किया गया था तथा वन विभाग द्वारा अधिहरण की कार्यवाहियां आरंभ की गई थी – को चुनौती – अभिनिर्धारित – वन उपज की किसी जब्ती या उसके पंचनामे की अनुपस्थिति में, वाहन के संबंध में आरंभ की गई संपूर्ण अधिहरण कार्यवाहियां कायम नहीं रखी जा सकती एवं एतद् द्वारा अभिखंडित की गई – प्रत्यर्थीगण को शीघ्र याची को जे.सी.बी. मशीन हस्तांतरित करने के लिए निदेशित किया गया – याचिका मंजूर।

Manas Mani Verma, for the petitioner.
G.S. Thakur, G.A. for the respondents/State.

I.L.R. [2018] M.P. 617 (SC)
SUPREME COURT OF INDIA

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

Cr.A. No. 624/2016 decided on 23 January, 2018

STATE OF M.P. …Appellant

Vs.

NANDE @ NANDKISHORE SINGH …Respondent

A. Penal Code (45 of 1860), Sections 302, 304 Part I & 307 – Appreciation of Evidence – Delay in FIR and Recording Statement of Witnesses **– Trial Court convicted the accused u/S 304 Part I and 307 IPC – In appeal, High Court acquitted the accused – State Appeal – Held – There were material contradictions in statements of eye witnesses – 5 out of 12 prosecution witnesses turned hostile – FIR lodged after 13 days of incident – There was delay in – No plausible explanation for such huge inordinate delay – High Court rightly held that guilt of accused not established beyond reasonable doubt – Accused rightly acquitted – Appeal dismissed.**

(Paras 9, 10 & 11)

क. दण्ड संहिता (1860 का 45), धाराएँ 302, 304 भाग I व 307 – साक्ष्य का मूल्यांकन – प्रथम सूचना प्रतिवेदन एवं साक्षीगण के कथन अभिलिखित करने में विलंब – विचारण न्यायालय ने अभियुक्त को भारतीय दण्ड संहिता की धारा 304 भाग I व 307 के अंतर्गत दोषसिद्ध किया – अपील में, उच्च न्यायालय ने अभियुक्त को दोषमुक्त किया – राज्य अपील – अभिनिर्धारित – चक्षुदर्शी साक्षीगण के कथनों में तात्विक विरोधाभास थे – 12 में से 5 अभियोजन साक्षीगण पक्षद्रोही हो गए – घटना के 13 दिनों के पश्चात् प्रथम सूचना प्रतिवेदन दर्ज किया गया – उसमें विलंब था – इस प्रकार के बड़े असाधारण विलंब के लिए कोई सत्याभासी स्पष्टीकरण नहीं – उच्च न्यायालय ने उचित रूप से अभिनिर्धारित किया कि अभियुक्त की दोषिता युक्तियुक्त संदेह से परे स्थापित नहीं होती – अभियुक्त उचित रूप से दोषमुक्त – अपील खारिज।

B. Constitution – Article 136 – Jurisdiction **– Held – This Court while exercising jurisdiction under Article 136 of Constitution, generally does not interfere with the impugned judgment unless there is a glaring mistake committed by Court below or there has been an omission to consider vital piece of evidence.**

(Para 11)

ख. संविधान – अनुच्छेद 136 – अधिकारिता – अभिनिर्धारित – यह न्यायालय संविधान के अनुच्छेद 136 के अंतर्गत अधिकारिता का प्रयोग करते समय, साधारणतः आक्षेपित निर्णय के साथ हस्तक्षेप नहीं करता जब तक कि निचले न्यायालय द्वारा सुस्पष्ट गलती कारित न की गई हो या साक्ष्य के महत्वपूर्ण अंश पर विचार करने में लोप हुआ हो।

J U D G M E N T

The Judgment of the Court was delivered by:
N.V. Ramana, J. :- This appeal by special leave arises out of a judgment dated 22nd April, 2009 of the High Court of Madhya Pradesh, Bench at Gwalior, passed in Criminal Appeal No. 349 of 2002. By the said judgment, the High Court reversed the order of conviction against the respondent herein for the offences punishable under Section 304, Part I and 307, IPC passed by the learned trial Court, and acquitted him of the charges.

2. According to the prosecution, on 1st June, 1994 at about 9.30 p.m. Rajendra Pathak (PW 12), the SHO of P.S. Singhonia on receiving a telephone call from Khariyahar hospital that some women belonging to the village Kotla Ka Pura were admitted in the hospital with serious burn injuries, rushed to the hospital and conducted inquiry. In the investigation, it was revealed that on the said date, the victims, namely, Parvesh, Deepa, Maya, Rekha and Baby were attending marriage celebrations at the house of Nathi Singh (PW 3), when the accused—respondent herein hurled a burning cow dung cake at them and caused serious burn injuries to them. After recording the statements of injured witnesses, the I.O. prepared spot map, recovered a can of kerosene oil and registered the crime case.

3. While undergoing treatment, Deepa died on account of burn injuries on 3rd June, 1994 and Maya, another victim, succumbed to the injuries on 18th June, 1994. Accordingly, charges were levelled against the accused—respondent for the offences punishable under Sections 307 and 302, IPC and committed the case to the Court of Sessions.

4. The learned trial Judge, upon finding that there was no proof that the accused had intentionally killed the deceased, came to the conclusion that the burning cow dung cake was carelessly thrown by the accused on the women for which he is liable to be punished under Section 304, Part I, IPC instead of Section 302, IPC. In that view of the matter, the trial Court convicted the accused—respondent and sentenced him to suffer rigorous imprisonment for ten years (two counts) for the offence punishable under Section 304, Part I, IPC and rigorous imprisonment for seven years for the offence punishable under Section 307, IPC, with default clause.

5. Against the order of conviction and sentence passed by the trial Court, the respondent—accused approached the High Court in appeal. The High Court, by the judgment impugned herein, allowed the appeal of the accused observing that the prosecution has failed to establish the crime beyond all reasonable doubts, and acquitted him of the charges. Hence the State is in appeal.

6. The case of the State is that the judgment of the trial Court convicting the accused was passed after accurate appreciation of the facts and law duly analyzing the statements of prosecution witnesses in a prudent manner. But, the High Court, on erroneous appreciation of facts and overlooking the evidences set aside the trial Court judgment and

acquitted the accused by applying a flawed appreciation of law. Learned counsel appearing for the State submitted that the accused had knowingly committed the offence of culpable homicide with due knowledge that his act would cause severe burn injuries to the victims which may lead to their death. The High Court did not give due weightage to the statements of eyewitnesses, but giving more importance to the delay in registering FIR exonerated the accused and wrongly declared that the respondent—accused had no intention to commit the overt act.

7. On the other hand, Ms. Nidhi, learned counsel who was appointed through the Supreme Court Legal Services Committee to represent the accused—respondent, supported the impugned judgment.

8. We have considered the submissions of the learned counsel and perused the material available on record. There is no dispute regarding facts and events in the case. At the same time, both the Courts below have come to the common conclusion that the accused—respondent does not bear an intention to kill a particular person. By going through the record, *prima facie* it appears that the trial Court passed the order of conviction against the accused—respondent in consequence of statements of alleged eyewitnesses (PWs 5 & 7) and considering the concurrent chain of events. But, the fact remains that the prosecution should be able to prove its case beyond all reasonable doubts, for awarding conviction to an accused.

9. In the instant case, admittedly there was no enmity between the accused and the victims. Out of the 12 prosecution witnesses, Maya—injured (PW 1), Natthi Singh (PW 3), Jugraj Singh (PW 4), Parvesh—injured (PW 6) and Ranjeet Singh Tomar (PW 8), did not support the case of prosecution and they turned hostile. As far as the statements of alleged eyewitnesses P.W.5 and P.W.7 are concerned, on which learned counsel for the State has heavily relied on, there were material contradictions inasmuch as PW 5 (Rekha) in her cross examination stated that when the incident took place it was moonless night, the area was surrounded in darkness as there was no light and one cannot identify another. She also admitted that she heard the name of the accused for the first time after the incident. However, Sobaran Singh (P.W.7) contradicted the same. In his deposition at para 8 stated that in the light of the gas light all persons were visible. It did not happen that electricity supply was cut and it became dark.

10. Another discrepancy in the prosecution case is that the First Information Report was lodged on 16.06.1994 i.e. 13 days after the incident and there is no plausible explanation coming forth from the prosecution for this inordinate delay. We also find that the statements of the witnesses were recorded on 28.06.1994 and there is no explanation of such huge delay in recording the statements.

11. Generally, this Court while exercising its jurisdiction under Article 136 of the Constitution, does not interfere with the impugned judgment unless among other things, there is a glaring mistake committed by the court below or there has been an omission to

consider vital pieces of evidence. But here in the case on hand, in our considered view, the High Court has thoroughly considered all aspects of the case and rightly taken them into account. Only after considering the credibility of the eyewitnesses and the circumstances in which the incident occurred, the High Court reached to the correct conclusion that this is certainly not a case where the guilt of the accused could be said to have been established beyond reasonable doubt and in a great detail, expressed the reasons for its conclusion.

12. In view of the above, we find no cogent reason to disturb the order of acquittal passed by the High Court. The appeal is accordingly dismissed.

Appeal dismissed

I.L.R. [2018] M.P. 620 (SC)
SUPREME COURT OF INDIA

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

C.A. No. 871/2018 decided on 25 January, 2018

STATE OF M.P. & ors. …Appellants

Vs.

MANOJ SHARMA & ors. …Respondents

(Alongwith C.A. No. 872/2018)

***A. University Grants Commission (Minimum Standards and Procedure for the Award of M.Phil/Ph.D Degree) Regulations, 2009, Regulations 3 & 5 – Appointment of Guest Lecturers – Qualifications* – Held – Regulations of 2009 by which university and institutions were prohibited from conducting M.Phil/Ph.D through distance education mode, came into effect from 11.07.2009 and are prospective in nature – Degree obtained prior to the enforcement will not be washed out – High Court rightly directed the respondent State to consider the case of the petitioners on the basis of M.Phil. degree obtained prior to enforcement of Regulation of 2009.**

(Paras 11, 12 & 13)

क. विश्वविद्यालय अनुदान आयोग (एम.फिल/पीएच.डी. उपाधि के लिए न्यूनतम मानक एवं प्रक्रिया), विनियम, 2009, विनियम 3 व 5 – अतिथि व्याख्याता की नियुक्ति – अर्हताएँ – अभिनिर्धारित – 2009 के विनियम जिनके द्वारा विश्वविद्यालय और संस्थाओं को दूरस्थ शिक्षा प्रणाली के माध्यम से एम.फिल/पीएच.डी संचालित करने से प्रतिषिद्ध किया गया था, 11.07.2009 से प्रभाव में आया एवं भविष्यलक्षी प्रकृति का है – प्रवर्तन से पूर्व प्राप्त उपाधि को रद्द नहीं किया जाएगा – उच्च न्यायालय ने प्रत्यर्थी राज्य को 2009 के विनियम के प्रवर्तन से पूर्व प्राप्त एम.फिल. की उपाधि के आधार पर याचीगण के प्रकरण पर विचार करने हेतु उचित रूप से निदेशित किया।

B. University Grants Commission (Minimum Qualifications for Appointment and Career Advancement of Teachers in Affiliated Universities

***and Institutions) (3rd Amendment) Regulations, 2009, Regulation 1.3.3 – Lecturer – Minimum Qualifications – Exemption* – NET qualification is now minimum qualification for appointment of lecturer and exemption granted to M.Phil degree holders have been withdrawn and exemption is allowed only to those Ph.D. degree holders who have obtained degree in accordance with, UGC (Minimum Standards and Procedure) Regulations published on 11.07.2009 – In the present case, no interference is called for – Appeals disposed with directions that eligibility of petitioners be considered taking also into consideration the UGC (Minimum Qualification for Appointment) Regulations, 2009.**

(Para 20 & 22)

ख. विश्वविद्यालय अनुदान आयोग (सम्बद्ध विश्वविद्यालयों और संस्थाओं में शिक्षकों की नियुक्ति एवं करियर में उन्नति हेतु न्यूनतम अर्हताएँ) (तीसरा संशोधन) विनियम, 2009, विनियमन 1.3.3 – व्याख्याता – न्यूनतम अर्हताएँ – छूट – व्याख्याता की नियुक्ति हेतु नैट अर्हता अब न्यूनतम अर्हता है एवं एम.फिल उपाधि धारकों को प्रदान की गई छूट वापस ले ली गई है एवं केवल उन पीएच.डी. उपाधि धारकों को छूट मंजूर की गई है जिन्होनें 11.07.2009 को प्रकाशित यूजीसी (न्यूनतम मानक एवं प्रक्रिया) विनियम के अनुसार उपाधि प्राप्त की है – वर्तमान प्रकरण में, कोई हस्तक्षेप की आवश्यकता नहीं है – अपीलों का निपटारा इन निदेशों के साथ किया गया कि याचीगण की योग्यता पर, यूजीसी (नियुक्ति हेतु न्यूनतम योग्यता) विनियम, 2009 को भी विचार में लेते हुए, विचार किया जाना चाहिए।

Case referred:

(2015) 8 SCC 129.

J U D G M E N T

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

2. These two appeals have been filed against the identically worded judgments of High Court of Madhya Pradesh dated 05.12.2012 and 17.01.2013 respectively dismissing the writ appeal filed by the State of Madhya Pradesh. The facts and issue in both the appeals being common, it is sufficient to refer to the facts and pleadings in civil appeal arising out of SLP (C) No. 26528 of 2017 for deciding both the appeals. The parties shall be referred to as described in the writ petition.

3. The writ petitioners had passed M.Phil. from different universities under distance education (between the year 2007 to 2009) before 11.07.2009. Writ petitioners were engaged as guest lecturers in different Government/Semi Government Colleges since before the year 2009. Higher Education Department of the Government of Madhya Pradesh issued an order dated 22.02.2012 on the subject "Arrangement of Guest Lecturers in Government Colleges for the remaining period of Academic Session 2011-12 and upcoming sessions".

4. The Government order provided for criteria for selection under which various marks were allocated for Ph.D and NET/SET, M.Phil. and NET/SET. Regional Additional Director, Higher Education, Gwalior Madhya Pradesh issued an advertisement dated 21.04.2012 inviting application for the post of Guest Lecturer in different subjects. Writ Petitioners had applied for different posts of Guest Lecturers through online mode. Their applications were not accepted. On inquiry, they came to know that those candidates who had obtained M.Phil. degree through distance education programme are not qualified.

5. Writ Petition No. 3290 of 2012, *Manoj Sharma and others v. State of Madhya Pradesh* was filed wherein High Court passed an interim order on 14.05.2012 and directing the respondents to accept the application form of the candidates and the result of the candidates was to be kept in the seal-cover.

6. Writ Petitioners on the strength of the interim order submitted their applications. Writ Petition No. 3290 of 2012, Manoj Sharma and others versus State of Madhya Pradesh was finally disposed off by learned Single Judge on 29.08.2012, holding that those candidates who have cleared M.Phil. qualification before the Regulations 2009, namely, University Grants Commission (Minimum Standards and Procedure for the award of M.Phil./Ph.D Degree) Regulations, 2009 (hereinafter shall be referred to as "Regulations 2009 of UGC (Minimum Standards and Procedure") are eligible and their result be declared. Learned Single Judge issued following directions:

> *"It is further reported that although petitioner's case was considered, but by way of interim order, it was directed that his result will not be declared. Now final order is passed. Petitioner is found eligible, therefore, respondents shall consider the case of the petitioner as eligible on the basis of the aforesaid Master of Philosophy certificate and declare the result alongwith other candidates."*

7. The State of Madhya Pradesh filed a writ appeal against the judgments of learned Single Judge and Division Bench of the High Court *vide* its judgment dated 05.12.2012 dismissed the appeal. The State is in appeal against the judgment of the Division Bench.

8. Learned counsel for the appellant submits that in view of the regulations framed by the University Grants Commission, Regulations 2009 of UGC (Minimum Standards and Procedure), the M.Phil./Ph.D. Programmes conducted through distance education are not acceptable. He submits that since M.Phil. degree of the writ petitioners was by distance education mode, they do not fulfil the qualification for appointment as Guest Lecturer and the judgment of the learned Single Judge and Division Bench taking a contrary view is unsustainable.

9. No one has appeared on behalf of the respondent at the time of hearing. Although a counter affidavit on behalf of the Respondent No. 1, Manoj Sharma has been filed, supporting the view taken by the learned Single Judge and the Division Bench. We have

considered the submission of the learned counsel for the appellant and perused the record.

10. The Regulations 2009 of UGC on Minimum Standards and Procedure were published in Gazette of India on 11.7.2009. Regulation 5 which is relevant, is to the following effect:

> *" Regulation 5. Notwithstanding anything contained in these Regulations or any other Rule or regulation, for the time being in force, no University, Institution, Deemed to be University and College/Institution of National Importance shall conduct M.Phil and Ph.D Programmes through distance education mode."*

11. Learned Single Judge and Division Bench took the view that according to Regulations 2009 of UGC on Minimum Standards and Procedure, it was only with effect from 11.7.2009 that any university, institution or deemed university were prohibited from conducting M.Phil./Ph.D. through distance education mode hence, degree obtained prior to enforcement of said regulation are not washed out. The High Court has held that Regulations 2009 of UGC (Minimum Standards and Procedure) are prospective in nature and shall not operate retrospectively. Learned Single Judge took the view that Regulations 2009 of UGC (Minimum Standards and Procedure) being not retrospective shall not wipe out the M.Phil. qualification already acquired by the writ petitioners prior to abovesaid regulation.

12. Regulation 3 under Regulations 2009 of UGC (Minimum Standards and Procedure), clearly provides for enforcement for the regulation from the date of their publication in the Gazette of India. Regulation 3 is as follows:

> *" They shall come into force with effect from the date of their publication in the Gazette of India.*"

13. Thus, it is clear that regulations are prospective in nature and may not affect the qualifications granted by an university or institution prior to the enforcement of the regulation. We thus do not find any error in the judgment of the High Court of Madhya Pradesh. Learned Single Judge had thus rightly directed the respondent to consider the case of the writ petitioners on the basis of M.Phil. degree and declare the result alongwith other candidates.

14. There is another issue which needs to be noticed at this juncture. On the same day when regulations pertaining to Minimum Standards and Procedure for the award of M.Phil./Ph.D Degree were published, another regulations were published in the Gazette on the same day i.e. on 11.7.2009, namely, UGC(Minimum Qualifications for Appointment and Career Advancement of Teachers in Affiliated Universities and Institutions) (3rd amendment) Regulations, 2009 (hereinafter shall be referred to as "Regulations 2009 of UGC(Minimum Qualifications for Appointment").

15. University Grants Commission had issued regulations relating to minimum qualification for the post of lecturer in the year 2000 which regulations were amended in 2002 and 2006. According to Regulations 2000, Regulation 1.3.3 provides for qualification for Lecturer as follows:

> "*1.3.3 Lecturer*
>
> *Good academic record with at least 55% of the marks or, an equivalent grade of B in the 7 point scale with latter grades O, A, B, C, D, E and F at the Master's degree level, in the relevant subject from an Indian University, or, an equivalent degree from a foreign university.*
>
> *Besides fulfilling the above qualifications, candidates should have cleared the eligibility test (NET) for lecturers conducted by the UGC, CSIR or similar test accredited by the UGC.*
>
> *Note: NET shall remain the compulsory requirement for appointment as Lecturer even for candidates having Ph.D. degree. However, the candidates who have completed M. Phil. Degree or have submitted Ph.D. thesis in the concerned subject up to 31st December, 1993, are exempted from appearing in the NET examination.*"

16. As noted above, the above-mentioned regulations were amended and amendments dated 11.7.2009 were relevant whereas the note as contained in Regulation 1.3.3 was substituted by following:

> *"NET/SLET shall remain the minimum eligibility condition for recruitment and appointment of Lecturers in Universities /Colleges/ Institutions.*
>
> *Provided, however, that candidates, who are or have been awarded Ph.D. Degree in compliance of the "University Grants Commission(minimum standards and procedure for award of Ph.D Degree), Regulation 2009, shall be exempted from the requirement of the minimum eligibility condition of NET/SLET for recruitment and appointment of Assistant Professor or equivalent positions in Universities/Colleges /Institutions.*"

17. It has to be noticed that the amendment as made in the minimum qualification, now provides that the exemption from NET shall be given to the Ph.D. degree holders, only when Ph.D. degree has been awarded to them in compliance with the Regulations 2009 of UGC (Minimum Standards and Procedure). The above provision thus, made it mandatory that for lecturers NET qualification is necessary and exemption shall be granted to those Ph.D. degree holders who have obtained Ph.D. degree in accordance with the

Regulations 2009 of UGC (Minimum Standards and Procedure). The purpose and object of the above amendments in both Regulations 2009 of UGC (Minimum Standards and Procedure) as well as Regulations 2009 of UGC (Minimum Qualifications for Appointment) is not far to seek. There has been challenge to amendments made in Regulations 2009 of UGC (Minimum Qualifications for Appointment)in so far as it denied the benefit to Ph.D degree holders who had obtained Ph.D prior to 11.7.2009. Writ Petitions were filed in different High Courts challenging the regulations on different grounds including that regulations are arbitrary and violative of Article 14 which discriminate the Ph.D. degree holders who have obtained Ph.D. degree prior to 11.7.2009 and those who obtained the degree after 11.7.2009 in accordance with Regulations 2009 of UGC on Minimum Standards and Procedure.

18. The challenge to regulations were repelled by different High Courts whereas Allahabad High Court *vide* its judgment dated 6.4.2012 in *Dr. Ramesh Kumar Yadav and Another versus University of Allahabad and Others* has upheld the challenge. Appeals were filed against the judgment of the Rajasthan High Court, Delhi High Court and Madras High Court by the candidates whose writ petitions were dismissed as well as against the judgment of the Allahabad High Court dated 06.04.2012, upholding the contention of the candidates. This Court decided all the appeals by its judgment reported in *P. Susheela and Others versus University Grants Commission and Others,* (2015) 8 SCC 129. This Court upheld the judgment of the High Courts of Rajasthan, Madras and Delhi and set aside the judgment of the Allahabad High Court dated 6.4.2012, upholding that the amendments made in Regulations 2009 of UGC(Minimum Qualifications for Appointment) were valid and there is a valid classification between the candidates who have obtained degree prior to Regulations 2009 of UGC (Minimum Standards and Procedure) and those who obtained the degree in accordance with the above-said regulation.

19. Thus, rejecting the contention of the private respondent, following was laid down in paragraph Nos. 16, 17 and 18:

> *"16. Similar is the case on facts here. A vested right would arise only if any of the appellants before us had actually been appointed to the post of Lecturer/Assistant Professors. Till that date, there is no vested right in any of the appellants. At the highest, the appellants could only contend that they have a right to be considered for the post of Lecturer/Assistant Professor. This right is always subject to minimum eligibility conditions, and till such time as the appellants are appointed, different conditions may be laid down at different times. Merely because an additional eligibility condition in the form of a NET test is laid down, it does not mean that any vested right of the appellants is affected, nor does it mean that the regulation laying down such minimum eligibility condition would be retrospective in*

operation. Such condition would only be prospective as it would apply only at the stage of appointment. It is clear, therefore, that the contentions of the private appellants before us must fail.

17. One of the learned counsel for the petitioners argued, based on the language of the direction of the Central Government dated 12-11-2008 that all that the Government wanted UGC to do was to "generally" prescribe NET as a qualification. But this did not mean that UGC had to prescribe this qualification without providing for any exemption. We are unable to accede to this argument for the simple reason that the word "generally" precedes the word "compulsory" and it is clear that the language of the direction has been followed both in letter and in spirit by the UGC regulations of 2009 and 2010.

18. The arguments based on Article 14 equally have to be rejected. It is clear that the object of the directions of the Central Government read with the UGC Regulations of 2009/2010 are to maintain excellence in standards of higher education. Keeping this object in mind, a minimum eligibility condition of passing the national eligibility test is laid down. True, there may have been exemptions laid down by UGC in the past, but the Central Government now as a matter of policy feels that any exemption would compromise the excellence of teaching standards in universities/ colleges/institutions governed by the UGC. Obviously, there is nothing arbitrary or discriminatory in this - in fact it is a core function of UGC to see that such standards do not get diluted."

20. Thus, from the above judgment, it is clear that NET qualification is now minimum qualification for appointment of Lecturer and exemption granted to M.Phil. degree holders have been withdrawn and exemption is allowed only to those Ph.D. degree holders who have obtained the Ph.D. degree in accordance with 11.7.2009 regulations, namely, Regulations 2009 of UGC (Minimum Standards and Procedure). Although, this aspect has not been noticed by the High Court but since the learned Single Judge has directed the consideration of the case of the writ petitioner on the basis of M.Phil. degree which was obtained by them by distance education mode prior to 2009, it is necessary that their eligibility for the post be examined taking into consideration the Regulations 2009 of UGC (Minimum Qualifications for Appointment). The advertisement and selection for Guest Lecturers having been conducted in the year 2012 when both the Regulations 2009 of UGC (Minimum Standards and Procedure) and Regulations 2009 of UGC(Minimum Qualifications for Appointment) were applicable.

21. There is nothing on the record as to whether after the judgment of the learned Single Judge, writ petitioners' result was declared and they were selected or appointed.

This Court has also passed an interim order of 16.08.2013 staying the operation of the judgment of the High Court for the period of three months. No further orders have been passed extending the interim order.

22. We are thus of the view that judgment of the High Court needs no interference in this appeal, however, the appeals are to be disposed off with the direction to consider the eligibility of the writ petitioner taking also into consideration the Regulations 2009 of UGC (Minimum Qualifications for Appointment).

23. Both the appeals are disposed off accordingly.

Order accordingly

I.L.R. [2018] M.P. 627 (FB)
FULL BENCH

Before Mr. Justice Hemant Gupta, Chief Justice,
Mr. Justice Ravi Shankar Jha & Smt. Justice Nandita Dubey
W.P. No. 5865/2016 (Jabalpur) order passed on 12 January, 2018

ASHUTOSH PAWAR …Petitioner
Vs.
HIGH COURT OF M.P. & anr. …Respondents

***A. Lower Judicial Service (Recruitment and Conditions of Service) Rules, M.P. 1994, Rule 7, 9 & 10 and Civil Services (General Conditions of Service) Rules, M.P., 1961, Rule 6 – Appointment – Civil Judge – Eligibility – Good Character* – Petitioner successfully cleared/passed the preliminary examination, main examination and the interview and his name was recommended for appointment as Civil Judge – Subsequently, on the information of petitioner involvement in the criminal cases, his name was removed by the State Government from the selection list holding him not eligible – Petitioner filed a writ petition which was further referred to the larger bench – Held – Acquittal in a criminal case is not a certificate of good conduct of a candidate nor is sufficient to infer that candidate possess good character – Decision of acquittal passed by a criminal Court on the basis of compromise would not make the candidate eligible for appointment as the criminal proceedings are with the view to find culpability of commission of offence whereas the appointment to the civil post is in view of his suitability to the post – Test for each of them is based on different parameters – Competent authority has to take a decision in respect of suitability of candidate discharge the functions of a civil post – Supreme Court held that even if a candidate has made a disclosure of the concluded trial but still the employer has a right to consider the antecedents and cannot be compelled to appoint a candidate – Decision of the State Government that petitioner is not eligible**

for appointment, cannot be said to be illegal or without jurisdiction – Questions of Law referred to Larger Bench answered accordingly.

(Paras 19, 32 & 47)

क. निम्नतर न्यायिक सेवा (भर्ती तथा सेवा की शर्तें) नियम, म.प्र. 1994, नियम 7, 9 व 10 एवं सिविल सेवा (सेवा की सामान्य शर्तें) नियम, म.प्र., 1961, नियम 6 – नियुक्ति – सिविल जज – पात्रता – अच्छा चरित्र – याची ने सफलतापूर्वक प्रारंभिक परीक्षा, मुख्य परीक्षा एवं साक्षात्कार उत्तीर्ण किया तथा सिविल जज के रूप में नियुक्ति हेतु उसके नाम की अनुशंसा की गई – तत्पश्चात्, याची के आपराधिक प्रकरणों में शामिल होने की जानकारी पर राज्य सरकार द्वारा उसे पात्र नहीं होने की धारणा करते हुए, उसका नाम चयन सूची से हटाया गया – याची ने रिट याचिका प्रस्तुत की जिसे आगे वृहद न्यायपीठ को निर्दिष्ट किया गया – अभिनिर्धारित – आपराधिक प्रकरण में दोषमुक्ति, एक अभ्यर्थी के अच्छे आचरण का प्रमाणपत्र नहीं है, न ही यह निष्कर्ष निकालने के लिए पर्याप्त है कि अभ्यर्थी अच्छे चरित्र का है – समझौते के आधार पर आपराधिक न्यायालय द्वारा पारित दोषमुक्ति का विनिश्चय, अभ्यर्थी को नियुक्ति हेतु योग्य नहीं बनाएगा क्योंकि आपराधिक कार्यवाहियां, अपराध कारित करने में दोषिता का पता लगाने की दृष्टि से की गई है जबकि सिविल पद पर नियुक्ति, पद के लिए उसकी योग्यता की दृष्टि से है – इनमें से प्रत्येक की कसौटी भिन्न भिन्न मापदण्डों पर आधारित है – सक्षम प्राधिकारी को, अभ्यर्थी की एक सिविल पद के कार्यों के निर्वहन हेतु योग्यता के संबंध में निर्णय लेना होता है – उच्चतम न्यायालय ने अभिनिर्धारित किया है कि यदि अभ्यर्थी ने समाप्त विचारण का प्रकटन भी किया है परंतु तब भी नियोक्ता को पूर्ववृत्त विचार में लेने का अधिकार है और एक अभ्यर्थी को नियुक्त करने के लिए बाध्य नहीं किया जा सकता – राज्य सरकार का निर्णय कि याची नियुक्ति हेतु पात्र नहीं है, को अवैध या बिना अधिकारिता के नहीं कहा जा सकता – वृहद न्यायपीठ को निर्देशित विधि के प्रश्नों को तद्नुसार उत्तरित किया गया।

B. Constitution – Article 226 – Judicial Review – Scope and Interference – Jurisdiction of High Court **– Held – Power of judicial review under Article 226 is not as Court of appeal but to find out whether the decision making process is in accordance with law and is not arbitrary or irrational – Further held – Even if High Court finds some illegality in the decision of the State Government, jurisdiction of High Court under Article 226 is to remit the matter to authority for reconsideration rather than to substitute the decision of competent authority with that of its own – Decision of the State Government holding that petitioner is not suitable, is just, fair and reasonable keeping in view the nature of the post and the duties to be discharged.**

(Paras 34, 40 & 41)

ख. संविधान – अनुच्छेद 226 – न्यायिक पुनर्विलोकन – व्याप्ति एवं मध्यक्षेप – उच्च न्यायालय की अधिकारिता – अभिनिर्धारित – अनुच्छेद 226 के अंतर्गत न्यायिक पुनर्विलोकन की शक्ति, अपील के न्यायालय के रूप में नहीं है बल्कि यह पता लगाने के लिए

है कि क्या निर्णय करने की प्रक्रिया विधि के अनुसरण में है एवं मनमानी या तर्कहीन नहीं है – आगे अभिनिर्धारित – यदि उच्च न्यायालय राज्य सरकार के निर्णय में कुछ अवैधता पाता भी है, अनुच्छेद 226 के अंतर्गत उच्च न्यायालय की अधिकारिता, सक्षम प्राधिकारी के निर्णय को अपने स्वयं के निर्णय से प्रतिस्थापित करने की नहीं बल्कि, मामले को पुनर्विचार हेतु प्राधिकारी को प्रतिप्रेषित करने की है – राज्य सरकार का यह धारणा करते हुए निर्णय कि याची योग्य नहीं है, पद का स्वरूप एवं निर्वहन किये जाने के कर्तव्यों को दृष्टिगत रखते हुए न्यायसंगत, निष्पक्ष एवं युक्तियुक्त है।

***C. Practice & Procedure – Conflicting Judgments* – Held – Even if there is conflict between the two judgments of the Supreme Court by the equal strength, even then the earlier view would be binding precedent and will prevail if the earlier judgment was not brought to the notice of the Court in a later judgment.**

(Para 23)

ग. पद्धति एवं प्रक्रिया – विरूद्ध निर्णय – अभिनिर्धारित – यद्यपि, उच्चतम न्यायालय के समान सामर्थ्य के दो निर्णयों में अंतर्विरोध है तब भी पूर्वतर दृष्टिकोण बाध्यकारी पूर्व निर्णय होगा और अध्यारोही होगा यदि बाद के निर्णय में पूर्वतर निर्णय को न्यायालय के ध्यान में नहीं लाया गया था।

Cases referred:

(1998) 1 SCC 550, (2016) 8 SCC 471, (2015) 2 SCC 591, (2013) 7 SCC 685, (2013) 7 SCC 263, (2013) 9 SCC 363, (2010) 14 SCC 103, C.A. No. 67/2018 decided on 08.01.2018 (Supreme Court), (2015) 2 SCC 377, 2003 (1) MPHT 226 (FB), (2011) 4 SCC 644, (1993) 4 SCC 288, (1987) 3 SCC 1, (1995) 5 SCC 457, W.P. No. 2848/2013 decided on 14.12.2017 (Bombay High Court), W.A. No. 367/2015 decided on 17.12.2015, Special Leave to Appeal (C) No. 20522/2016 decided on 07.11.2016 (Supreme Court), AIR 1954 SC 440, AIR 1965 SC 532, 1969 (3) SCC 489, (1994) 6 SCC 651, (2008) 1 SCC 683, (1994) 4 SCC 448, (2008) 8 SCC 475, (2014) 3 SCC 767.

Ishan Soni, for the petitioner.

Anoop Nair, for the respondent No. 1.

Samdarshi Tiwari, Addl. A.G. with *Brahmdatt Singh*, G.A. for the respondent No. 2/State.

O R D E R

The Order of the Court was delivered by:

Hemant Gupta, C.J. :- A Division Bench of this Court while hearing the present writ petition on 23.10.2017 found conflict between the two Division Bench decisions of this Court in W.P. No.5887/2016 (*Arvind Gurjar vs. State of M.P. and another*) decided on 27.10.2016 and W.A. No.163/2009 (*Roop Narayan Sahu vs. State of*

M.P. and others) decided on 11.08.2017. Therefore, the following questions were framed for the decision of the larger Bench:-

1. Whether in all cases, where an FIR lodged against a person for minor offences has been quashed on the basis of a compromise arrived at between the parties or a person has been acquitted on account of a compromise between the parties, the character of the person applying for appointment thereafter, has to be treated as Good and such a person cannot be held ineligible for appointment under the Rules of 1994?

2. Whether the High Court in exercise of its powers under Article 226 of the Constitution of India, can step into the shoes of the Appointing Authority and determine as to whether the person concerned is fit for appointment or whether the High Court on finding that the Authority concerned has wrongly exercised its discretion in holding the candidate to be ineligible should, after quashing the order, remit the matter back to the authority concerned for reconsideration or for fresh consideration as to the eligibility of the person ?

3. Whether the High Court while allowing such a petition in exercise of its powers under Article 226 of the Constitution of India can issue a further direction to the authority to appoint the person concerned on the post from the date his batchmates were appointed and to grant him back dated seniority and all other benefits or whether the High Court should simply remit the matter back to the authority for taking a decision in this regard ?

4. Whether the high standards of adjudging the good character of a candidate for appointment as a Judicial Officer, which has been adopted and followed by the State under the Rules of 1994 till the decision in the case of *Arvind Gurjar* (supra) were and are right and proper or whether in view of the decision in the case of *Arvind Gurjar* (supra), the same should be considered to be relaxed to the extent that in all cases the character of a person should be treated to be good where he has been acquitted for minor offences on the basis of a compromise?

5. Whether the decision in the case of *Arvind Gurjar* (supra) lays down the correct law ?

6. Any other question that may arise for adjudication or decision in the dispute involved in the present petition and which the Larger Bench thinks appropriate to decide?

2. The brief facts leading to the present writ petition are that the petitioner applied for appointment as Civil Judge, Class-II (Entry Level). The selection process of the said recruitment commenced vide advertisement dated 13.10.2014 (Annexure P-1). The petitioner successfully completed all the three stages of the examination i.e. preliminary examination, main examination and interview and his name was recommended for appointment as Civil Judge, Class-II. However, while recommending the name of the petitioner on 3rd September 2015, the following was communicated to the State Government by this Court:-

> "(2) *Shri Ashutosh Pawar (Roll No.1621), s/o Shri Gaurav Pawar,* R/o 9, Adarsh Indira Nagar, Main Road, Indore (MP) – 452002, Selected at Sr.No.-1 in ST category, has informed that on the basis of crimes registered against him at Police Station Malhargunj, Indore- (i) Cr.Case 1742/08 under S. 452, 294, 324/34, 323/34, 506-B IPC was commenced, which was disposed on the basis of compromise and he was acquitted vide order dt. 13/04/2012 (copy of Order enclosed with Attestation Form), Passed by Shri Ashutosh Shukla, JMFC, Indore; (ii) Cr. Case 135/05 under S. 294, 323/34, 506-B IPC was commenced before juvenile justice Board and on admission on 12.01.07, order of admonition was passed.
>
> Before issuing the appointment order, in respect of these selected candidate, the Government is required to verify as to the status and result of the criminal cases against them and to take such necessary steps as may be required under concerned law/rules."
>
> *[emphasis supplied]*

3. It is on the basis of the said communication, the State Government communicated on 9th March, 2016 (Annexure P-11) that the petitioner is not suitable for appointment to the post of Civil Judge, Class-II. The said order has been challenged by the petitioner in the present writ petition.

4. Learned counsel for the petitioner relies upon a Division Bench judgment of this Court in *Arvind Gurjar's* case (supra) wherein the writ petition was filed by a candidate, whose name was also recommended along with the present petitioner for appointment. The said petition was allowed relying upon the judgments of the Supreme Court reported as (1998) 1 SCC 550 (*Nilgiris Bar Association vs. T.K. Mahalingam and another*) and (2016) 8 SCC 471 (*Avtar Singh vs. Union of India and others*). The Division Bench held as under:-

> "**11**. The larger Bench of three Judges Bench of the Apex Court has specifically held that it is obligatory on the part of the employer to consider the background facts of the case, nature of offence and

whether acquittal in a criminal case would affect fitness for employment. In the present case it has been mentioned in the order that the offence punishable under Section 506-B of IPC is a grievous offence and conviction of seven years could be imposed and because the petitioner was acquitted on the basis of compromise, hence, he is not eligible to be appointed to the post of Civil Judge, Class-II. There is no consideration about the facts of the case and the fact that the incident had taken place between two groups of students. There was no plan and thereafter the matter was compromised. It is a common knowledge that at the time of registration of a case the complainant intends to mention the grievous nature of offence. It is very easy to mention that person threatened to kill but that has to be considered taking into consideration the facts of the case. The petitioner did not use any force. There is no mention of the fact that even the petitioner threatened the complainant to kill. During the student life there is possibility of quarrel between the two groups of students. On that basis the person cannot be held a person of not having a good character. If a criminal case is registered and which has resulted in compromise, on our opinion on that basis, it can not be held that a person is not having good character when the character certificate has been issued by the Principal after judging the total academic career. In the character certificate it is specifically mentioned that no disciplinary action was taken against the petitioner neither it was initiated when he was studying law, Hence, in our opinion, the order of denial of the petitioner for appointment to the post of Civil Judge, Class-II is contrary to law on the basis of singular incident which has resulted in compromise."

5. The Supreme Court judgments reported as (2015) 2 SCC 591 (*State of Madhya Pradesh and others vs. Parvez Khan*); and (2013) 7 SCC 685 (*Commissioner of Police, New Delhi and another vs. Mehar Singh*) though wrongly mentioned as (2013) 7 SCC 263 (*Jarnail Singh vs. State of Haryana*) were considered by the Division Bench in *Arvind Gurjar's* case (supra) but the Bench returned a finding that the said cases are distinguishable as the allegations in these cases were quite serious whereas the criminal case registered against the petitioner therein had resulted in his acquittal on the basis of compromise, therefore, it cannot be said that the petitioner does not have good character and issued directions to appoint the petitioner as Civil Judge, Class-II.

6. On the other hand, another Division Bench in *Roop Narayan Sahu* (supra) was examining the case of appointment to the post of Constable. The candidature of the petitioner therein was rejected although he was acquitted by granting benefit of doubt. The Court held as under:-

"**14**. Thus, the decision taken by the Department was not mechanical, but it was a conscious decision after taking into consideration the facts and circumstances of the case in proper perspective. Further, if a candidate is to be recruited to the Police service, he must be worthy confidence of an utmost rectitude and must have impeccable character and integrity. The persons having criminal antecedents, would not fall within the ambit of the said category. Even if he is acquitted or discharged, it cannot be presumed that he can be completely exonerated.

[See: *State of Madhya Pradesh and others vs. Parvez Khan,* (2015) 2 SCC 591]"

7. The appointment to the post of Civil Judge, Class-II is governed by the Madhya Pradesh Lower Judicial Service (Recruitment and Conditions of Service) Rules, 1994 (in short "the Rules of 1994"). Rule 7 is a clause pertaining to eligibility. Sub-clause (d) of the said Rules provides that no person shall be eligible for appointment by direct recruitment unless he has good character and is of sound health and free from any bodily defect, which renders him unfit for such appointment. Rule 9 of the Rules of 1994 gives finality to the decision of the High Court as to the eligibility or otherwise of a candidate for admission to the examination whereas Rule 10 provides that the High Court shall forward to the Government a list of selected candidates in order of merit for recruitment. The Sub-rule (2) of the Rule 10 contemplates that the candidate will be considered for appointment to the available vacancies subject to the provisions of the Rules of 1994 and M.P. Civil Services (General Conditions of Service) Rules, 1961 (in short "the Rules of 1961"). The relevant Rules of the Rules of 1994, read as under:-

"**7. Eligibility**. - No person shall be eligible for appointment by direct recruitment to posts in category (i) of Rule 3(1) unless -

(a) xxx xxx xxx

(b) xxx xxx xxx

(c) xxx xxx xxx

(d) he has good character and is of sound health and free from any bodily defect which renders him unfit for such appointment.

xxx xxx xxx

9. Finality of High Court's decision about the eligibility of a candidate. - The decision of the High Court as to the eligibility or otherwise of a candidate for admission to the examination shall be final.

10. List of the candidates recommended by the High Court.- (1) The High Court shall forward to the Government a list arranged in

order of merit of the candidates selected for recruitment by the High Court. The list shall be published for general information.

(2) Subject to the provisions of these rules and the Madhya Pradesh Civil Services (General Conditions of Service) Rules, 1961 the candidates will be considered for appointment to the available vacancies, in the order in which their names appear in the list."

8. The Rule 6 of the Rules of 1961 deals with disqualification to public services of the State, which reads as under:-

"**6. Disqualification.** - (1) No male candidate who has more than one wife living and no female candidate who has married a person having already a wife living shall be eligible for appointment to any service or post:

Provided that the Government may, if satisfied that there are special grounds for doing so, exempt any such candidate from the operation of this rule.

(2) No candidate shall be appointed to a service or post unless he has been found after such medical examination as may be prescribed, to be in good mental and bodily health and free from any mental or bodily defect likely to interfere with the discharge of the duties of the service or post:

Provided that in exceptional cases a candidate may be appointed provisionally to a service or post before his medical examination, subject to the condition that the appointment is liable to be terminated forthwith, if he is found medically unfit.

(3) No candidate shall be eligible for appointment to a service or post if, after such enquiry as may be considered necessary, the appointing authority is satisfied that he is not suitable in any respect for service or post.

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9. It may be mentioned here that the petitioner has disclosed two cases which were lodged against him i.e. (i) an offence punishable under Sections 323, 294, 506-B and 34 of IPC for which the petitioner was tried by the Juvenile Justice Board but was let off after giving him warning in the aforesaid crime and (ii) an FIR was lodged against him for the offence under Sections 452, 324/34, 323/34, 506-B and 294 of IPC being Criminal Case No.1742/2008. In the said case, the petitioner was acquitted on 13.04.2012 in view of the compromise between the parties in respect of compoundable offences and in respect of offence under Section 452 of IPC, the petitioner was acquitted granting benefit of doubt. The pendency of two cases was communicated by the High Court to the State

Government for appropriate decision thereon and it is thereafter, the State has taken a decision to reject the candidature of the petitioner.

10. In the aforesaid factual background, the questions referred to for the decision of the Larger Bench are taken up for decision.

11. As the question Nos.1, 4 and 5 correlate with each other, therefore, they are being dealt with and decided conjointly.

QUESTION Nos. 1, 4 & 5:

> **1**. Whether in all cases, where an FIR lodged against a person for minor offences has been quashed on the basis of a compromise arrived at between the parties or a person has been acquitted on account of a compromise between the parties, the character of the person applying for appointment thereafter, has to be treated as Good and such a person cannot be held ineligible for appointment under the Rules of 1994?
>
> **4**. Whether the high standards of adjudging the good character of a candidate for appointment as a Judicial Officer, which has been adopted and followed by the State under the Rules of 1994 till the decision in the case of *Arvind Gurjar* (supra) were and are right and proper or whether in view of the decision in the case of *Arvind Gurjar* (supra), the same should be considered to be relaxed to the extent that in all cases the character of a person should be treated to be good where he has been acquitted for minor offences on the basis of a compromise?
>
> **5**. Whether the decision in the case of *Arvind Gurjar* (supra) lays down the correct law?

12. Learned counsel for the petitioner referred to a judgment of the Division Bench of this Court in *Arvind Gurjar's* case (supra) and also to the Supreme Court decision in *Nilgiris Bar Association* (supra) to contend that acquittal from a criminal case does not lead to any blemish on the character of the petitioner, therefore, it cannot be said that the petitioner is not possessed of good character.

13. On the other hand, Shri Tiwari, appearing for the State refers to the Supreme Court judgments reported as *Mehar Singh* (supra) and *Parvez Khan* (supra) to contend that acquittal of a candidate in a criminal trial is not conclusive as the appointing Authority has to consider the suitability of a candidate keeping in view the nature of post and the duties to be discharged. It is contended that the appointment of the petitioner is as a Judicial Officer; therefore, no blemish whatsoever could be ignored. It is contended that the acquittal of a person in a criminal trial means that no

case is made out for conviction but that does not mean that the candidate is suitable for appointment. Still further, the decision of the State cannot be said to be arbitrary or irrational, which may warrant interference in exercise of power of judicial review.

14. In *Nilgiris Bar Association's* case (supra), Section 4 of the Probation of Offenders Act, 1958 was being examined and this was a case where a person representing himself as an Advocate, enrolled himself with the Bar Association and started working as an Advocate. On a complaint lodged by the Bar Association, the impostor pleaded guilty to the charge and was released under Section 4 of the Probation of Offenders Act, 1958. The Bar Association challenged the order of the Magistrate in a revision. The order was not interfered with but the respondent before the Supreme Court was directed to donate a sum of Rs.15,000/- to the Bar Association for buying books to their library. It is the said order, which was challenged by the Bar Association before the Supreme Court. The Supreme Court not only set aside an order passed by the learned Single Bench but also of the Magistrate and the respondent was sentenced to undergo rigorous imprisonment for six months for the offence punishable under Sections 419 and 420 of IPC each. The Supreme Court observed that the expression "character" is not defined in the Act. The word "character" is not an abstract opinion in which the offender is held by others. The Supreme Court ultimately held as under:-

> "**11**. Character of the offender in this case reflects in the modality in which he was inveigling in a noble profession duping everybody concerned. In such a view of the matter the two courts could not have formed an opinion in favour of the character of the respondent. It is apposite to observe here that the learned Single Judge did not mention anything about the character of the respondent qua the accusations found against him."

15. We find that the reliance placed by the petitioner on the judgment in *Nilgiris Bar Association's* case (*supra*) is hardly of any help to the argument raised. Firstly, the Supreme Court has convicted and sentenced the impostor for an offence under Section 419 and 420 of IPC keeping in view his "character". Referring to Black's Law Dictionary, the Supreme Court held that "character" is defined as "the aggregate of the moral qualities which belong to and distinguish an individual person; the general result of the one's distinguishing attributes. Therefore, it is a question of fact in each case as to whether a person is of a "good character", suitable for appointment against a public post. Therefore, the reliance on the said judgment by the Bench in *Arvind Gurjar's* case (supra) is misplaced.

16. In *Mehar Singh's* case (supra), the Supreme Court was considering the cancellation of a candidature for appointment to the post of Constable with Delhi Police. The Commissioner of Police has issued a Standing Order for screening the candidates involved in criminal cases. Such screening committee rejected the

candidature of the appellant. The Supreme Court maintained the order of rejection of candidature of the candidate for appointment to the post of Constable while observing that the police force is a disciplined force. It shoulders great responsibility of maintaining law and order and public order in the society. People repose great faith and confidence in it. It must be worthy of that confidence. A candidate wishing to join the police force must be a person of utmost rectitude. He must have impeccable character and integrity. A person having criminal antecedents will not fit in this category. The Court held as under:-

> "**23**. A careful perusal of the policy leads us to conclude that the Screening Committee would be entitled to keep persons involved in grave cases of moral turpitude out of the police force even if they are acquitted or discharged if it feels that the acquittal or discharge is on technical grounds or not honourable. The Screening Committee will be within its rights to cancel the candidature of a candidate if it finds that the acquittal is based on some serious flaw in the conduct of the prosecution case or is the result of material witnesses turning hostile. It is only experienced officers of the Screening Committee who will be able to judge whether the acquitted or discharged candidate is likely to revert to similar activities in future with more strength and vigour, if appointed, to the post in a police force. The Screening Committee will have to consider the nature and extent of such person's involvement in the crime and his propensity of becoming a cause for worsening the law and order situation rather than maintaining it. In our opinion, this policy framed by the Delhi Police does not merit any interference from this Court as its object appears to be to ensure that only persons with impeccable character enter the police force.
>
> **24.** We find no substance in the contention that by cancelling the respondents' candidature, the Screening Committee has overreached the judgments of the criminal court. We are aware that the question of co- relation between a criminal case and a departmental inquiry does not directly arise here, but, support can be drawn from the principles laid down by this Court in connection with it because the issue involved is somewhat identical namely whether to allow a person with doubtful integrity to work in the department. While the standard of proof in a criminal case is the proof beyond all reasonable doubt, the proof in a departmental proceeding is preponderance of probabilities. Quite often criminal cases end in acquittal because witnesses turn hostile. Such acquittals are not acquittals on merit. An acquittal based on benefit of doubt would not stand on par with a clean acquittal on merit after a full fledged trial, where there is no

indication of the witnesses being won over. In *R.P. Kapur v. Union of India, AIR 1964 SC 787,* this Court has taken a view that departmental proceedings can proceed even though a person is acquitted when the acquittal is other than honourable.

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26. In light of above, we are of the opinion that since the purpose of departmental proceedings is to keep persons, who are guilty of serious misconduct or dereliction of duty or who are guilty of grave cases of moral turpitude, out of the department, if found necessary, because they pollute the department, surely the above principles will apply with more vigour at the point of entry of a person in the police department i.e. at the time of recruitment. If it is found by the Screening Committee that the person against whom a serious case involving moral turpitude is registered is discharged on technical grounds or is acquitted of the same charge but the acquittal is not honourable, the Screening Committee would be entitled to cancel his candidature. Stricter norms need to be applied while appointing persons in a disciplinary force because public interest is involved in it.

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29. In this connection, we may usefully refer to *Delhi Admn. vs. Sushil Kumar (1996) 11 SCC 605*. In that case, the respondent therein had appeared for recruitment as a constable in Delhi Police Services. He was selected provisionally, but, his selection was subject to verification of character and antecedents by the local police. On verification, it was found that his antecedents were such that his appointment to the post of constable was not found desirable. Accordingly, his name was rejected. He approached the Tribunal. The Tribunal allowed the application on the ground that since the respondent had been discharged and/or acquitted of the offence punishable under Section 304, Section 324 read with Section 34 and Section 324 of the IPC, he cannot be denied the right of appointment to the post under the State. This Court disapproved of the Tribunal's view. It was observed that verification of the character and antecedents is one of the important criteria to test whether the selected candidate is suitable for the post under the State. This Court observed that though the candidate was provisionally selected, the appointing authority found it not desirable to appoint him on account of his antecedent record and this view taken by the appointing authority in the background of the case cannot be said to be unwarranted. Whether

the respondent was discharged or acquitted of the criminal offences, the same has nothing to do with the question as to whether he should be appointed to the post. What would be relevant is the conduct or character of the candidate to be appointed to a service and not the actual result thereof.

30. It was argued that *Delhi Admn. vs. Sushil Kumar (1996) 11 SCC 605* must be distinguished from the facts of the instant case because the respondent therein had concealed the fact that a criminal case was registered against him, whereas, in the instant case there is no concealment. It is not possible for us to accept this submission. The aspect of concealment was not considered in *Sushil Kumar* at all. This Court only concentrated on the desirability to appoint a person, against whom a criminal case is pending, to a disciplined force. *Sushil Kumar* cannot be restricted to cases where there is concealment of the fact by a candidate that a criminal case was registered against him. When the point of concealment or otherwise and its effect was not argued before this Court, it cannot be said that in *Sushil Kumar* this Court wanted to restrict its observations to the cases where there is concealment of facts.

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33. So far as respondent Mehar Singh is concerned, his case appears to have been compromised. It was urged that acquittal recorded pursuant to a compromise should not be treated as a disqualification because that will frustrate the purpose of Legal Services Authorities Act, 1987. We see no merit in this submission. Compromises or settlements have to be encouraged to bring about peaceful and amiable atmosphere in the society by according a quietus to disputes. They have to be encouraged also to reduce arrears of cases and save the litigants from the agony of pending litigation. But these considerations cannot be brought in here. In order to maintain integrity and high standard of police force, the Screening Committee may decline to take cognizance of a compromise, if it appears to it to be dubious. The Screening Committee cannot be faulted for that.

34. The respondents are trying to draw mileage from the fact that in their application and/or attestation form they have disclosed their involvement in a criminal case. We do not see how this fact improves their case. Disclosure of these facts in the application/ attestation form is an essential requirement. An aspirant is expected to state these facts honestly. Honesty and integrity are inbuilt

requirements of the police force. The respondents should not, therefore, expect to score any brownie points because of this disclosure. Besides, this has no relevance to the point in issue. It bears repetition to state that while deciding whether a person against whom a criminal case was registered and who was later acquitted or discharged should be appointed to a post in the police force, what is relevant is the nature of the offence, the extent of his involvement, whether the acquittal was a clean acquittal or an acquittal by giving benefit of doubt because the witnesses turned hostile or because of some serious flaw in the prosecution, and the propensity of such person to indulge in similar activities in future. This decision, in our opinion, can only be taken by the Screening Committee created for that purpose by the Delhi Police. If the Screening Committee's decision is not mala fide or actuated by extraneous considerations, then, it cannot be questioned.

35. The police force is a disciplined force. It shoulders the great responsibility of maintaining law and order and public order in the society. People repose great faith and confidence in it. It must be worthy of that confidence. A candidate wishing to join the police force must be a person of utmost rectitude. He must have impeccable character and integrity. A person having criminal antecedents will not fit in this category. Even if he is acquitted or discharged in the criminal case, that acquittal or discharge order will have to be examined to see whether he has been completely exonerated in the case because even a possibility of his taking to the life of crimes poses a threat to the discipline of the police force. The Standing Order, therefore, has entrusted the task of taking decisions in these matters to the Screening Committee. The decision of the Screening Committee must be taken as final unless it is mala fide. In recent times, the image of the police force is tarnished. Instances of police personnel behaving in a wayward manner by misusing power are in public domain and are a matter of concern. The reputation of the police force has taken a beating. In such a situation, we would not like to dilute the importance and efficacy of a mechanism like the Screening Committee created by the Delhi Police to ensure that persons who are likely to erode its credibility do not enter the police force. At the same time, the Screening Committee must be alive to the importance of trust reposed in it and must treat all candidates with even hand."

[emphasis supplied]

17. In *Parvez Khan's* case (supra), the candidate wanted appointment on compassionate ground. The candidature was rejected though he was acquitted in a

criminal trial. The Supreme Court quoted from *Mehar Singh's* case and observed as under:-

> "**13**. From the above observations of this Court, it is clear that a candidate to be recruited to the police service must be worthy of confidence and must be a person of utmost rectitude and must have impeccable character and integrity. A person having criminal antecedents will not fit in this category. Even if he is acquitted or discharged, it cannot be presumed that he was completely exonerated. Persons who are likely to erode the credibility of the police ought not to enter the police force. No doubt the Screening Committee has not been constituted in the case considered by this Court, as rightly pointed out by learned counsel for the Respondent, in the present case, the Superintendent of Police has gone into the matter. The Superintendent of Police is the appointing authority. There is no allegation of mala fides against the person taking the said decision nor the decision is shown to be perverse or irrational. There is no material to show that the appellant was falsely implicated. Basis of impugned judgment is acquittal for want of evidence or discharge based on compounding."

18. It may be noticed that the two judgments of the Supreme Court reported as (2013) 9 SCC 363 (*Devendra Kumar vs. State of Uttaranchal and others*) and (2010) 14 SCC 103 (*Daya Shankar Yadav vs. Union of India and others*) which were referred to by the learned counsel for the petitioner during the course of hearing dealt with a situation where the candidate had concealed the material information of lodging of the criminal cases. In *Daya Shankar Yadav's* case (supra) though the Court found that the verification form was not clear but still it was held that when the candidate has suppressed the material fact that he was prosecuted, the candidature was rightly rejected. In *Devendra Kumar's* case (supra) again the candidate had suppressed the fact of his involvement in a criminal trial but the concealment of such fact by itself was found to be an act of moral turpitude. The Supreme Court in *Devendra Kumar* (supra) held as under:-

> "**25**. More so, if the initial action is not in consonance with law, the subsequent conduct of a party cannot sanctify the same. *Sublato fundamento cedit opus* - a foundation being removed, the superstructure falls. A person having done wrong cannot take advantage of his own wrong and plead bar of any law to frustrate the lawful trial by a competent Court. In such a case the legal maxim *nullus commodum capere potest de injuria sua propria* applies. The persons violating the law cannot be permitted to urge that their offence cannot be subjected to inquiry, trial or investigation. (Vide:

Union of India v. Maj. Gen. Madan Lal Yadav, (1996) 4 SCC 127; and *Lily Thomas v. Union of India and others, (2000) 6 SCC 224*). Nor can a person claim any right arising out of his own wrongdoing. (*jus ex injuria non oritur)*."

19. In a Larger Bench decision in *Avtar Singh's* case (supra), the Supreme Court was primarily considering the question of suppression of fact and appointment of a candidate to the civil post. The Court held that even if a candidate has made disclosure of the concluded trial but still the employer has a right to consider the antecedents and cannot be compelled to appoint a candidate. The Court held as under:-

"**30**. The employer is given 'discretion' to terminate or otherwise to condone the omission. Even otherwise, once employer has the power to take a decision when at the time of filling verification form declarant has already been convicted/acquitted, in such a case, it becomes obvious that all the facts and attending circumstances, including impact of suppression or false information are taken into consideration while adjudging suitability of an incumbent for services in question. In case the employer come to the conclusion that suppression is immaterial and even if facts would have been disclosed it would not have adversely affected fitness of an incumbent, for reasons to be recorded, it has power to condone the lapse. However, while doing so employer has to act prudently on due consideration of nature of post and duties to be rendered. For higher officials/higher posts, standard has to be very high and even slightest false information or suppression may by itself render a person unsuitable for the post. However same standard cannot be applied to each and every post. In concluded criminal cases, it has to be seen what has been suppressed is material fact and would have rendered an incumbent unfit for appointment. An employer would be justified in not appointing or if appointed to terminate services of such incumbent on due consideration of various aspects. Even if disclosure has been made truthfully the employer has the right to consider fitness and while doing so effect of conviction and background facts of case, nature of offence etc. have to be considered. Even if acquittal has been made, employer may consider nature of offence, whether acquittal is honourable or giving benefit of doubt on technical reasons and decline to appoint a person who is unfit or dubious character. In case employer comes to conclusion that conviction or ground of acquittal in criminal case would not affect the fitness for employment incumbent may be appointed or continued in service.

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> **34**. No doubt about it that verification of character and antecedents is one of the important criteria to assess suitability and it is open to employer to adjudge antecedents of the incumbent, but ultimate action should be based upon objective criteria on due consideration of all relevant aspects.
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> **xxx** **xxx** **xxx**
>
> **36.** What yardstick is to be applied has to depend upon the nature of post, higher post would involve more rigorous criteria for all services, not only to uniformed service. For lower posts which are not sensitive, nature of duties, impact of suppression on suitability has to be considered by authorities concerned considering post/nature of duties/ services and power has to be exercised on due consideration of various aspects.
>
> **xxx** **xxx** **xxx**
>
> **38**. We have noticed various decisions and tried to explain and reconcile them as far as possible. In view of aforesaid discussion, we summarize our conclusion thus:
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> *** *** ***
>
> **38.5** In a case where the employee has made declaration truthfully of a concluded criminal case, the employer still has the right to consider antecedents, and cannot be compelled to appoint the candidate."

20. The judgment in *Avtar Singh's* case (supra) (paras 34, 36 and 38.5 as extracted above) takes same view as has been taken in *Mehar Singh* (supra) and *Parvez Khan* (supra) though there is no specific reference made to such judgments.

21. Recently, the Supreme Court in yet another judgment rendered on 08.01.2018 in Civil Appeal No.67/2018 (*Union Territory, Chandigarh Administration and others vs. Pradeep Kumar and another*) has allowed the State's appeal relying upon its earlier decisions in *Mehar Singh (supra); Parvez Khan* (supra); as well as in the case of *Avtar Singh* (supra). Again, this was a case for appointment on the posts of Constable in Chandigarh Police and the issue for consideration was: whether the candidature of the respondents who had disclosed their involvement in criminal cases and also their acquittal could be cancelled by the Screening Committee on the ground of their unsuitability and as to when the Court can interfere with the opinion of the Screening Committee. The Court held as under:-

> "**10**. The acquittal in a criminal case is not conclusive of the suitability of the candidates in the concerned post. If a person is acquitted or discharged, it cannot always be inferred that he was

falsely involved or he had no criminal antecedents. Unless it is an honourable acquittal, the candidate cannot claim the benefit of the case. What is honourable acquittal, was considered by this Court in *Deputy Inspector General of Police and Another v. S. Samuthiram* (2013) 1 SCC 598, in which this Court held as under:-

> "24. The meaning of the expression "honourable acquittal" came up for consideration before this Court in *RBI v. Bhopal Singh Panchal* (1994) 1 SCC 541. In that case, this Court has considered the impact of Regulation 46(4) dealing with honourable acquittal by a criminal court on the disciplinary proceedings. In that context, this Court held that the mere acquittal does not entitle an employee to reinstatement in service, the acquittal, it was held, has to be honourable. The expressions "honourable acquittal", "acquitted of blame", "fully exonerated" are unknown to the Code of Criminal Procedure or the Penal Code, which are coined by judicial pronouncements. It is difficult to define precisely what is meant by the expression "honourably acquitted". When the accused is acquitted after full consideration of prosecution evidence and that the prosecution had miserably failed to prove the charges levelled against the accused, it can possibly be said that the accused was honourably acquitted."

11. Entering into the police service required a candidate to be of good character, integrity and clean antecedents. In *Commissioner of Police, New Delhi and Another v. Mehar Singh* (2013) 7 SCC 685, the respondent was acquitted based on the compromise. This Court held that even though acquittal was based on compromise, it is still open to the Screening Committee to examine the suitability of the candidate and take a decision. Emphasizing upon the importance of character and integrity required for joining police force/discipline force, in *Mehar Singh* case, this Court held as under:-

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The same principle was reiterated in *State of Madhya Pradesh and Others v. Parvez Khan* (2015) 2 SCC 591.

12. While considering the question of suppression of relevant information or false information in regard to criminal prosecution, arrest or pendency of criminal case(s) against the candidate, in *Avtar Singh v. Union of India and Others* (2016) 8 SCC 471, three-Judges

> Bench of this Court summarized the conclusion in para (38). As per the said decision in para (38.5), "In a case where the employee has made declaration truthfully of a concluded criminal case, the employer still has the right to consider antecedents, and cannot be compelled to appoint the candidate."
>
> **13**. It is thus well settled that acquittal in a criminal case does not automatically entitle him for appointment to the post. Still it is open to the employer to consider the antecedents and examine whether he is suitable for appointment to the post. From the observations of this Court in *Mehar Singh* and *Parvez Khan* cases, it is clear that a candidate to be recruited to the police service must be of impeccable character and integrity. A person having criminal antecedents will not fit in this category. Even if he is acquitted or discharged, it cannot be presumed that he was honourably acquitted/completely exonerated. The decision of the Screening Committee must be taken as final unless it is shown to be mala fide. The Screening Committee also must be alive to the importance of the trust repose in it and must examine the candidate with utmost character."

22. The reliance of the learned counsel for the petitioner on the judgment of the Supreme Court reported as (2015) 2 SCC 377 (*Joginder Singh vs. Union Territory of Chandigarh and others*) is of no help to the arguments raised as the attention of the Court was not drawn to earlier judgment in *Mehar Singh's* case (supra). After the judgment in *Joginder Singh* (supra), *Parvez Khan's* case (supra) was decided on 1.12.2014 and *Pradeep Kumar's* case (supra) has been decided recently on 08.01.2018 quoting extensively from the judgment in *Mehar Singh's* case (supra). The view taken in *Mehar Singh; Parvez Khan and Pradeep Kumar's* cases (supra) is no different than the view taken by the larger Bench of the Supreme Court in *Avtar Singh's* case (supra), which unequivocally held that the decision in respect of suitability of a candidate has to be taken by the employer.

23. But even if there is conflict between the two judgments of the Supreme Court by the equal strength, even then the earlier view would be binding precedent if the earlier judgment was not brought to the notice of the Court in a later judgment. A Full Bench of this Court in 2003 (1) MPHT 226 (FB) (*Jabalpur Bus Operators Association and others vs. State of M.P.* and another) has held that in case of conflict between the two judgments of the coordinate Bench of the Supreme Court, the earlier judgment will prevail. The relevant extract is reproduced as under:-

> "**9**. Having considered the matter with broader dimensions, we find that various High Courts have given different opinion on the question involved. Some hold that in case of conflict between two

judgments on a point of law, later decision should be followed; while others say that the Court should follow the decision which is correct and accurate whether it is earlier or later. There are High Courts which hold that decision of earlier Bench is binding because of the theory of binding precedent and Article 141 of the Constitution of India. There are also decisions which hold that Single Judge differing from another Single Judge decision should refer the case to Larger Bench, otherwise he is bound by it. Decisions which are rendered without considering the decisions expressing contrary view have no value as a precedent. But in our considered opinion, the position may be stated thus-

With regard to the High Court, a Single Bench is bound by the decision of another Single Bench. In case, he does not agree with the view of the other Single Bench, he should refer the matter to the Larger Bench. Similarly, Division Bench is bound by the judgment of earlier Division Bench. In case, it does not agree with the view of the earlier Division Bench, it should refer the matter to Larger Bench. In case of conflict between judgments of two Division Benches of equal strength, the decision of earlier Division Bench shall be followed except when it is explained by the latter Division Bench in which case the decision of later Division Bench shall be binding. The decision of Larger Bench is binding on Smaller Benches.

In case of conflict between two decisions of the Apex Court, Benches comprising of equal number of Judges, decision of earlier Bench is binding unless explained by the latter Bench of equal strength, in which case the later decision is binding. Decision of a Larger Bench is binding on smaller Benches. Therefore, the decision of earlier Division Bench, unless distinguished by latter Division Bench, is binding on the High Courts and the Subordinate Courts. Similarly, in presence of Division Bench decisions and Larger Bench decisions, the decisions of Larger Bench are binding on the High Courts and the Subordinate Courts. No decision of Apex Court has been brought to our notice which holds that in case of conflict between the two decisions by equal number of Judges, the later decision in binding in all circumstances, or the High Courts and Subordinate Courts can follow any decision which is found correct and accurate to the case under consideration. High Courts and Subordinate Courts should lack competence to interpret decisions of Apex Court since that would not only defeat what is envisaged under Article 141 of the Constitution of India but also militate hierarchical supremacy of Courts. The common

thread which runs through various decisions of Apex Court seems to be that great value has to be attached to precedent which has taken the shape of rule being followed by it for the purpose of consistency and exactness in decisions of Court, unless the Court can clearly distinguish the decision put up as a precedent or is per incuriam, having been rendered without noticing some earlier precedents with which the Court agrees. Full Bench decision in *Balbir Singh's* case (supra) which holds that if there is conflict of views between the two co-equal Benches of the Apex Court, the High Court has to follow the judgment which appears to it to state the law more elaborately and more accurately and in conformity with the scheme of the Act, in our considered opinion, for reasons recorded in the preceding paragraph of this judgment, does not lay down the correct law as to application of precedent and is, therefore, over-ruled on this point."

24. In view of the judgment in *Avtar Singh's* case (supra), the reliance of the learned counsel for the petitioner on the judgment of the Supreme Court reported as (2011) 4 SCC 644 (*Commissioner of Police and others vs. Sandeep Kumar*) and on *Joginder Singh* (supra) is not tenable.

25. The present is not a case of concealment of facts but in view of the judgment of the Supreme Court in *Mehar Singh and Parvez Khan* (supra) wherein appointment to the post of Constable has been held to be a post requiring utmost rectitude and only a person of impeccable character and integrity is required to be appointed, such test will increase manifold in respect of a Judicial Officer, who is called upon to discharge the sovereign functions in the administration of justice. The Supreme Court in a judgment reported as (1993) 4 SCC 288 (*All India Judges' Association and others vs. Union of India and others*) observed as under:-

"7. It is not necessary to repeat here what has been stated in the judgment under review while dealing with the same contentions raised there. We cannot however, help observing that the failure to realize the distinction between the judicial service and the other services is at the bottom of the hostility displayed by the review petitioners to the directions given in the judgment. The judicial service is not service in the sense of 'employment'. The judges are not: employees. As members of the judiciary, they exercise the sovereign judicial power of the State…..... The Judges, at whatever level they may be, represent the State and its authority unlike the administrative executive or the members of the other services. The members of the other services, therefore, cannot be placed on par with the members of the judiciary, either constitutionally or functionally.

> **8**. This distinction between the Judges and the members of the other services has to be constantly kept in mind for yet another important reason. Judicial independence cannot be secured by making mere solemn proclamations about it. It has to be secured both in substance and in practice. It is trite to say that those who are in want cannot be free. Self-reliance is the foundation of independence. The society has a stake in ensuring the independence of the judiciary, and no price is too heavy to secure it. To keep the judges in want of the essential accoutrements and thus to impede them in the proper discharge of their duties, is to impair and whittle away justice itself. "

26. In a judgment reported as (1987) 3 SCC 1 (*Daya Shankar v. High Court of Allahabad and others*) while examining the conduct of use of unfair means by a Judicial Officer in the LL.M. examination, it was held that Judicial Officers have only one standard of rectitude, honesty and integrity. They cannot act even remotely unworthy of the office they occupy. The Court held as under:-

> **"11.** In our opinion the conclusion reached by the Inquiry Officer that the petitioner used unfair means is fully justified. No amount of denial could take him away from the hard facts revealed. The conduct of the petitioner is undoubtedly unworthy of a judicial officer. Judicial officer cannot have two standards, one in the court and another outside the court. They must have only one standard of rectitude, honesty and integrity. They cannot act even remotely unworthy of the office they occupy."

27. In a judgment reported as (1995) 5 SCC 457 (*C. Ravichandran Iyer vs. Justice A.M. Bhattacharjee and others*) it has been held by the Supreme Court that judicial offices are essentially a public trust. Society is, therefore, entitled to expect that a Judge must be a man of high integrity, honesty and required to have moral vigour, ethical firmness and impervious to corrupt or venial influences. It was held as under:-

> **"21.** Judicial office is essentially a public trust. Society is, therefore, entitled to expect that a Judge must be a man of high integrity, honesty and required to have moral vigour, ethical firmness and impervious to corrupt or venial influences. He is required to keep most exacting standards of propriety in judicial conduct. Any conduct which tends to undermine public confidence in the integrity and impartiality of the court would be deleterious to the efficacy of judicial process. Society, therefore, expects higher standards of conduct and rectitude from a Judge. … It is, therefore, a basic requirement that a Judge's official and personal conduct be free from impropriety; the same must be in

> tune with the highest standard of propriety and probity. The standard of conduct is higher than that expected of a layman and also higher than that expected of an advocate. In fact, even his private life must adhere to high standards of probity and propriety, higher than those deemed acceptable for others. Therefore, the Judge can ill-afford to seek shelter from the fallen standard in the society."

28. Thus, the expectations from a Judicial Officer are of much higher standard. There cannot be any compromise in respect of rectitude, honesty and integrity of a candidate who seeks appointment as Civil Judge. The personal conduct of a candidate to be appointed as Judicial Officer has to be free from any taint. The same must be in tune with the highest standard of propriety and probity. The standard of conduct is higher than that expected of an ordinary citizen and also higher than that expected of a professional in law as well.

29. Recently, a Division Bench of Bombay High Court in W.P. No.2848/2013 (*Mohammed Imran s/o Shabbir Daryawardi vs. State of Maharashtra and others*) decided on 14.12.2017 was considering the cancellation of candidature of a candidate for the post of Civil Judge (Junior Division). The Court held as under:-

> "On hearing the learned Counsel for the parties, we find that the petitioner would not be entitled to the relief claimed. The petitioner had applied for the post of CJJD and JMFC. As rightly submitted on behalf of the respondent no.3, for appointment to the said post, the applicant should have had unblemished character and conduct and his antecedents need to be looked into before making the appointment....."

30. At this stage, we may point out that a Division Bench of Indore Bench of this Court in Writ Appeal No.367/2015 (*Sandeep Pandey vs. State of M.P. and others*) decided on 17.12.2015 distinguished *Mehar Singh's* case (supra) on the ground that – that was a case dealing with Standing Orders issued by Delhi Administration whereas in Madhya Pradesh, the Regulation 54 of the M.P. Police Regulations contemplates that a person seeking appointment to the post of Constable should bear good moral character. Whether a person bears good moral character has to be adjudged by the Inspector General of Police. The Court found that since there is no Standing Order, therefore, judgment in *Mehar Singh's* case (supra) is not applicable.

31. We find that the Standing Order is nothing but a procedure to determine suitability of a candidate for appointment to a post in a transparent and in a non-arbitrary manner by the high ranking officials whereas Regulation-54 of the M.P. Police Regulations empowers the Inspector General of Police to take a call as to whether a candidate possesses good moral character. Instead of a Committee in

Delhi, the suitability is required to be judged in the case of appointment in the Police by the Inspector General of Police. Therefore, the Court was bound by the judgment in *Mehar Singh's* case (supra) and thus, such judgment of this Court in *Sandeep Pandey'*case (supra) does not lay down correct law. We may notice that a special leave petition bearing Special Leave to Appeal (C) No.20522/2016 (*State of M.P. and others vs. Sandeep Pandey*) against the said judgment has been granted by the Supreme Court on 07.11.2016 and operation of the impugned judgment has been stayed and that the Civil Appeal No.010749/2016 is pending consideration.

32. Therefore, in respect of the Questions No.1, 4 and 5 we hold that decision of criminal Court on the basis of compromise or an acquittal cannot be treated that the candidate possesses good character, which may make him eligible, as the criminal proceedings are with the view to find culpability of commission of offence whereas the appointment to the civil post is in view of his suitability to the post. The test for each of them is based upon different parameters and therefore, acquittal in a criminal case is not a certificate of good conduct to a candidate. The competent Authority has to take a decision in respect of the suitability of candidate to discharge the functions of a civil post and that mere acquittal in a criminal case would not be sufficient to infer that the candidate possesses good character. In this view of the matter, we find that the judgment in *Arvind Gurjar's* case (supra) holding that it cannot be held that candidate does not have a good character, is not the correct enunciation of law. Consequently, the judgment in *Arvind Gurjar's* case (supra) is overruled.

33. This brings us to consider the Question Nos. 2 and 3 referred to for the opinion, which read as under:-

QUESTION Nos.2 & 3:

> "**2.** Whether the High Court in exercise of its powers under Article 226 of the Constitution of India, can step into the shoes of the Appointing Authority and determine as to whether the person concerned is fit for appointment or whether the High Court on finding that the Authority concerned has wrongly exercised its discretion in holding the candidate to be ineligible should, after quashing the order, remit the matter back to the authority concerned for reconsideration or for fresh consideration as to the eligibility of the person?
>
> **3**. Whether the High Court while allowing such a petition in exercise of its powers under Article 226 of the Constitution of India can issue a further direction to the authority to appoint the person concerned on the post from the date his batchmates were appointed and to grant him back dated seniority and all other benefits or whether the High Court should simply remit the matter back to the authority for taking a decision in this regard?"

34. The power of judicial review under Article 226 of the Constitution of India is not that as of Court of appeal but to find out whether the decision making process is in accordance with law and is not arbitrary or irrational. In a Constitution Bench judgment reported as AIR 1954 SC 440 (*T.C. Basappa vs. T. Nagappa and another*) it was held that the High Court has power to issue writs in a case where subordinate tribunals or bodies or officers act wholly without jurisdiction or in excess of it or in violation of the principles of natural justice, or refuse to exercise a jurisdiction vested in them or there is an error apparent on the face of record but such jurisdiction is not wide or large as to enable the High Court to convert itself into a Court of appeal and examine for itself the correctness of the decision impugned. Relevant extract of the said decision is reproduced as under:-

> "**(11)** In dealing with the powers of the High Court under article 226 of the Constitution this Court has expressed itself in almost similar terms vide – '*Veerappa Pillai vs. Raman and Raman Ltd.*, AIR 1952 SC 192 at pp. 195-196 (I) and said:
>
> > "Such writs as are referred to in article 226 are obviously intended to enable the High Court to issue them in grave cases where the subordinate Tribunals or bodies or officers act wholly without jurisdiction, or in excess of it, or in violation of the principles of natural justice, or refuse to exercise a jurisdiction, vested in them, or there is an error apparent on the face of the record, and such act, omission, error or excess has resulted in manifest injustice. However extensive the jurisdiction may be, it seems to us that it is not so wide or large as to enable the High Court to convert itself into a Court of appeal and examine for itself the correctness of the decision impugned and decide what is the proper view to be taken or the order to be made."
>
> These passages indicate with sufficient fullness the general principles that govern the exercise of jurisdiction in the matter of granting writs of certiorari under article 226 of the Constitution.
>
> **xxx xxx xxx**
>
> (**24**). As regards the omission to include hiring charges the High Court has observed that the Tribunal did not record any finding that such hiring was proved. The Tribunal has in fact found that as regards some cars they were hired, while others had been taken on loan, the money value for their use having been paid by the first respondent which is tantamount to saying that he had to pay the hiring charges.

The matter has been dealt with in paragraph 29(d) of the Tribunal's order and the entire evidence has been gone through.

We are unable to say that the finding of the Tribunal that the respondent No.1 had omitted to include in his return of election expenses the dinner and hotel charges is a finding unsupported by any evidence. Reference may be made in this connection to paragraph 29(f) of the Tribunal's order which deals with the matter in detail.

On the whole our opinion is that the so-called apparent errors pointed out by the High Court are neither errors of law nor do they appear on the face of the record. An appellate Court might have on a review of this evidence come to a different conclusion but these are not matters which would justify the issue of a writ of certiorari. In our opinion the judgment of the High Court cannot be supported and this appeal must be allowed. The writ issued by the High Court will therefore be vacated. We make no order as to costs of this appeal."

35. In another Constitution Bench judgment reported as AIR 1965 SC 532 (*State of Mysore and another vs. K.N. Chandrasekhara*), the question examined was in relation to the appointment to the post of Munsif by the Karnataka Public Service Commission. The Court held that if the High Court was satisfied that the persons, who were occupying the post were appointed contrary to the Rules, the High Court could set aside the proceedings of the Commission and direct preparation of fresh list according to law but could not direct to include the name of the six petitioners only because they applied to the Court. The relevant extract read as under:-

"**10**. It may at once be observed that the order passed by the High Court cannot in any view of the case be sustained. The High Court could, if it held that the notification issued by the Commission and the appointments made by the State pursuant thereto were made in violation of the statutory rules, quash the list but the High Court could not direct that the names of six persons merely because they had applied for setting aside the list of candidates selected for promotion be incorporated in that list. The direction made by the High Court was in the nature of mandamus. Such a direction could be issued against a person or body to compel the performance of a public duty imposed upon it by law - statutory or common. The commission is undoubtedly a body constituted pursuant to the provisions of the Constitution and has to exercise powers and perform functions entrusted to it by the Rules framed under Art. 309. But the order which the High Court made was not for compelling performance of its duty imposed upon the Commission by statute or common law. If

> the High Court came to the conclusion that the proceeding of the Commission was vitiated on account of some irregularity or illegality, it could declare the proceeding void. The High Court however held that the orders including respondents 4 to 13 to the petitions in the list of persons eligible for appointment should be allowed to stand, because the petitioners in the petitions before it did not insist on the issue of a writ of quo warranto. If the High Court was satisfied on an application specifically made in that behalf that the persons who were occupying posts to which they were appointed contrary to the rules governing the appointment and consequently were not competent to occupy the posts, it is difficult to appreciate the ground on which the High Court would be justified in declining to pass appropriate orders. Either the High Court could set aside the proceeding of the Commission and direct preparation of a fresh list according to law, or the High Court could dismiss the petitions because in its view the list was regularly prepared. But the order passed by the High Court maintaining the inclusion of respondents 4 to 13 in the list and then directing the Commission to include the names of the six petitioners in the list merely because they had applied to the High Court is without authority."

36. In another judgment reported as 1969 (3) SCC 489 (*Thakur Birendra Singh vs. The State of M.P. and others*), the Court held that the High Court could have quashed the orders but the High Court was not sitting in appeal over the decision of the Board of Revenue. Once the orders complained of are quashed, the matter should have been left at large without any further direction leaving the Revenue Authorities free to take any steps.

37. The scope of power of judicial review has also been examined in a judgment reported as (1994) 6 SCC 651 (*Tata Cellular vs. Union of India*), the Supreme Court held as under:-

> "**74**. Judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decision-making process itself.
>
> **75**. In *Chief Constable of the North Wales Police v. Evans* (1982) 3 All ER 141, 154, Lord Brightman said :
>
> > "Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made.
>
> * * *

> Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power."

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

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

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

> "An application for judicial review is not an appeal." In *Lonrho plc v. Secretary of State for Trade and Industry* (1989) 2 All ER 609, Lord Keith said: "Judicial review is a protection and not a weapon."

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

> "Judicial review is concerned not with the merits of a decision but with the manner in which the decision was made.... Judicial review is entirely different from an ordinary appeal. It is made effective by the court quashing the administrative decision without substituting its own decision, and is to be contrasted with an appeal where the appellate tribunal substitutes its own decision on the merits for that of the administrative officer."

76. In *R. v. Panel on Take-overs and Mergers, ex p in Guinness plc (1989) 1 All ER 509,* Lord Donaldson, M.R. referred to the judicial review jurisdiction as being supervisory or 'longstop' jurisdiction. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing the abuse of power, be itself guilty of usurping power.

77. The duty of the court is to confine itself to the question of legality. Its concern should be :

1. Whether a decision-making authority exceeded its powers?

2. Committed an error of law,

3. committed a breach of the rules of natural justice,

4. reached a decision which no reasonable tribunal would have reached

or,

5. abused its powers.

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

(i) Illegality : This means the decision- maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(ii) Irrationality, namely, Wednesbury unreasonableness.

(iii) Procedural impropriety.

The above are only the broad grounds but it does not rule out addition of further grounds in course of time. As a matter of fact, in *R. v. Secretary of State for the Home Department*, ex Brind (1991) 1 ACR 696, Lord Diplock refers specifically to one development, namely, the possible recognition of the principle of proportionality. In all these cases the test to be adopted is that the court should, "consider whether something has gone wrong of a nature and degree which requires its intervention".

38. The Supreme Court in a judgment reported as (2008) 1 SCC 683 (*Aravali Golf Club vs. Chander Hass*) has held that in the name of judicial activism Judges

cannot cross their limits and try to take over functions which belong to another organ of the State. The Court held as under:-

> "**17**. Before parting with this case we would like to make some observations about the limits of the powers of the judiciary. We are compelled to make these observations because we are repeatedly coming across cases where judges are unjustifiably trying to perform executive or legislative functions. In our opinion this is clearly unconstitutional. In the name of judicial activism judges cannot cross their limits and try to take over functions which belong to another organ of the State.
>
> **18**. Judges must exercise judicial restraint and must not encroach into the executive or legislative domain, vide *Indian Drugs & Pharmaceuticals Ltd. v. Workmen (2007) 1 SCC 408; and S.C. Chandra v. State of Jharkhand* (2007) 8 SCC 279 (see concurring judgment of M. Katju, J.).
>
> **19**. Under our Constitution, the legislature, the executive and the judiciary all have their own broad spheres of operation. Ordinarily it is not proper for any of these three organs of the State to encroach upon the domain of another, otherwise the delicate balance in the Constitution will be upset, and there will be a reaction.
>
> **20**. Judges must know their limits and must not try to run the Government. They must have modesty and humility, and not behave like emperors. There is broad separation of powers under the Constitution and each organ of the State — the legislature, the executive and the judiciary — must have respect for the other and must not encroach into each other's domains.
>
> **21**. The theory of separation of powers first propounded by the French thinker Montesquieu (in his book *The Spirit of Laws*) broadly holds the field in India too. In Chapter XI of his book *The Spirit of Laws* Montesquieu writes:
>
> > "When the legislative and executive powers are united in the same person, or in the same body of Magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.
> >
> > *Again, there is no liberty, if the judicial power be not separated from the legislative and executive. Were it joined*

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

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

39. A Full Bench of this Court in Writ Appeal No.581/2017 (*Nitin Pathak vs. State of M.P. and others*) examined the question as to whether in exercise of power of judicial review the Court can refer the matter to a Court chosen expert or whether the Court itself can act as Court of appeal and make a different view than what has been finalised as the model answer key by the Examining Body. The Bench held as under:-

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

40. In view of the law laid down in above said judgments, there is no doubt that in exercise of power of judicial review under Article 226 of the Constitution of India, this Court only examines the decision-making process and does not substitute itself as a Court of appeal over the reasons recorded by the State Government. We find that the decision of the State Government holding that the petitioner is not suitable, is just, fair and reasonable keeping in view the nature of the post and the duties to be discharged.

41. Even if the High Court finds that the decision of the State Government is suffering from some illegality, the jurisdiction of the High Court in a writ petition under Article 226 of the Constitution of India is to remit the matter to the Authority

for reconsideration rather than to substitute the decision of the competent Authority with that of its own. The Supreme Court in a judgment reported as (1994) 4 SCC 448 (*State of Haryana vs. Naresh Kumar Bali*) was examining a question: as to whether there could be a direction to appoint a candidate, who sought appointment on compassionate ground. The Supreme Court held as under:-

> "**16**. With regard to appointment on compassionate ground we have set out the law in *Life Insurance Corpn. of India v. Asha Ramchhandra Ambekar (1994) 2 SCC 718*. The same principle will clearly apply here. What the High Court failed to note is the post of an Inspector is a promotional post. The issuing a direction to appoint the respondent within three months when direct recruitment is not available, is unsupportable. The High Court could have merely directed consideration of the claim of the respondent in accordance with the rules. It cannot direct appointment. Such a direction does not fall within the scope of mandamus. Judicial review, it has been repeatedly emphasised, is directed against the decision-making process and not against the decision itself; and it is no part of the court's duty to exercise the power of the authorities itself. There is widespread misconception on the scope of interference in judicial review. The exercise of the extraordinary jurisdiction constitutionally conferred on the Apex Court under Article 142(1) of the Constitution can be of no guidance on the scope of Article 226."

42. Again while considering the question of compassionate appointment in a judgment reported as (2008) 8 SCC 475 (*General Manager, State Bank of India and others vs. Anju Jain*), the Supreme Court held that there could not be any direction for appointment or promotion. The relevant para of the said decision is extracted as under:-

> "**37**. Even on second ground, the submission of the Bank is well-founded. As noted earlier, the learned Single Judge issued direction to the Bank to appoint the writ petitioner, widow of the deceased employee within one month. As per settled law, a writ of mandamus can be issued directing the authority to consider the case of the petitioner for an appointment or promotion as the case may be but no direction can be given to appoint or promote a person."

43. Similar view has been expressed in a judgment reported as (2014) 3 SCC 767 (*Ganapath Singh Gangaram Singh Rajput vs. Gulbarga University represented by its Registrar and others*) wherein while dealing with the scope of Writ of Mandamus in the matter of appointment/recruitment, the Supreme Court held, thus:-

> "**25**. Ordinarily, in a case where the person appointed is found ineligible, this Court after setting aside such appointment, directs for consideration of cases of such of the candidates, who have been found eligible. It is only in exceptional cases that this Court issues mandamus for appointment. The case in hand is not one of those cases where the High Court ought to have issued mandamus for appointment of Shivanand as Lecturer in MCA. Hence, we are of the opinion that the High Court rightly held Ganpat ineligible and quashed his appointment. However, it erred in issuing mandamus for appointment of Shivanand. Accordingly, we uphold the impugned order (*Shivanand v. Gulbarga University, Writ Appeal No.3216 of 2004, order dated 19-11-2009/24-11-2009 (KAR*) of the High Court whereby it had set aside the appointment of the appellant herein and direct that the case of the writ petitioner Shivanand and all other candidates be considered in accordance with law. However, we make it clear that the selection already made shall be taken to its logical conclusion."

44. Therefore, the High Court could not issue any direction for appointment of a candidate from the date the other candidates were appointed as such is not the jurisdiction vested in the High Court under Article 226 of the Constitution of India.

45. In view of the above, we find that the judgment of this Court in *Arvind Gurjar's* case (supra) does not lay down the correct law as the High Court has substituted its decision regarding suitability of a candidate and also issued a direction to appoint the petitioner, therefore, the entire judgment does not lay down correct law and is thus, overruled. The question Nos. 2 and 3 are answered accordingly.

QUESTION No.6:

> (6) Any other question that may arise for adjudication or decision in the dispute involved in the present petition and which the Larger Bench thinks appropriate to decide?

46. Learned counsel for the petitioner raised another argument that the High Court has recommended the name of the petitioner for appointment as Civil Judge, therefore, the State Government is not competent to reject the name of the petitioner for appointment. He relies upon Rule 10 of the Rules of 1994 to contend that the High Court has to determine the eligibility of the candidate and not the State Government.

47. Though the argument raised by the learned counsel for the petitioner has merit but in the present case, the High Court while recommending the name of the petitioner has left the question of eligibility to be determined by the State Government. The High Court does not have any mechanism to verify the antecedents. Though the petitioner has disclosed such antecedents and appropriately a decision on eligibility

should have been taken by the High Court but once the High Court has left the decision to the State Government, the decision of the State Government that the petitioner is not eligible for appointment, cannot be said to be illegal or without jurisdiction. However, we may clarify that decision in respect of eligibility of any candidate on account of involvement in a criminal case has to be taken by the High Court. If the State has any information in respect of the antecedents or any other material which is relevant in respect of suitability of a candidate, the State must share the information with the High Court. The ultimate decision on suitability of candidate for appointment is to rest with the High Court. The question No.6 stands answered accordingly.

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

Order accordingly

I.L.R. [2018] M.P. 660 (DB)
WRIT APPEAL

Before Mr. Justice Sheel Nagu & Mr. Justice S.A. Dharmadhikari

W.A. No. 1166/2017 (Gwalior) decided on 8 March, 2018

MALKHAN SINGH MALVIYA …Appellant

Vs.

STATE OF M.P. …Respondent

***A. Service Law – Contractual Services – Peon – Termination – Inquiry – Reasonable Opportunity of Hearing* – Show cause notice issued to appellant for alleged misconduct – FIR was also registered for offences u/S 406, 409 and 420 IPC arising out of the same incident which gave rise to alleged misconduct – Subsequently, appellant was acquitted of the criminal charge – Order terminating the appellant was passed which was challenged in the Writ Petition which was dismissed – Challenge to – Held – Mere preliminary inquiry report prepared behind the back of petitioner and reply to the show cause notice was considered before issuing order of termination – Order was passed without giving reasonable opportunity to appellant to rebut the charges of misconduct by adducing evidence – Impugned order not sustainable in the eye of law being stigmatic and yet not preceded by affording of reasonable opportunity – Order of termination of appellant from service quashed – Employer may proceed against appellant in accordance with law. (Para 13 & 14)**

क. सेवा विधि – संविदात्मक सेवाऐं – भृत्य – सेवा समाप्ति – जाँच – सुनवाई का युक्तियुक्त अवसर – अभिकथित अवचार हेतु अपीलार्थी को कारण बताओ नोटिस जारी किया गया – अभिकथित अवचार उत्पन्न करने वाली उसी घटना से उत्पन्न

धारा 406, 409 व 420 भा.दं.सं. के अंतर्गत अपराधों के लिए प्रथम सूचना प्रतिवेदन भी पंजीबद्ध किया गया था – तत्पश्चात्, अपीलार्थी को दाण्डिक आरोप से दोषमुक्त किया गया था – अपीलार्थी की सेवा समाप्ति का आदेश पारित किया गया था जिसे रिट याचिका में चुनौती दी गई थी जो कि खारिज की गई – को चुनौती – अभिनिर्धारित – याची की पीठ पीछे मात्र प्रारंभिक जांच प्रतिवेदन तैयार किया गया था तथा सेवा समाप्ति का आदेश जारी करने के पूर्व कारण बताओ नोटिस का उत्तर विचार में लिया गया था – अपीलार्थी को साक्ष्य प्रस्तुत कर अवचार के आरोपों का खंडन करने के लिए युक्तियुक्त अवसर दिये बिना आदेश पारित किया गया था – आक्षेपित आदेश कलंकित करने वाला तथा इससे पूर्व युक्तियुक्त अवसर प्रदान नहीं किये जाने से विधि की दृष्टि में कायम रखने योग्य नहीं – अपीलार्थी का सेवा से सेवा समाप्ति का आदेश अभिखंडित – नियोक्ता, विधि के अनुसरण में अपीलार्थी के विरूद्ध कार्यवाही कर सकता है।

B. ***Principle of Natural Justice – Reasonable Opportunity of Hearing*** **– Held – Under the principle of natural justice, at least a reasonable opportunity should be afforded before criticizing the character of an individual – Reasonable opportunity is by way of holding an inquiry where specific charges of misconduct are informed to delinquent employee followed by reasonable opportunity to file reply, supply of all adverse material proposed to be used against the delinquent employee, adducing of evidence in favour or against the charges in presence of delinquent employee.**

(Para 11)

ख. नैसर्गिक न्याय का सिद्धांत – सुनवाई का युक्तियुक्त अवसर – अभिनिर्धारित – नैसर्गिक न्याय के सिद्धांत के अंतर्गत, किसी व्यक्ति के चरित्र की आलोचना करने से पूर्व कम से कम एक युक्तियुक्त अवसर प्रदान किया जाना चाहिए – युक्तियुक्त अवसर, जांच संचालन के जरिए होता है जहां अपचारी कर्मचारी को अवचार के विनिर्दिष्ट आरोपों की सूचना दी जाती है, उसके बाद प्रतिउत्तर प्रस्तुत करने के लिए युक्तियुक्त अवसर, अपचारी कर्मचारी के विरूद्ध उपयोग हेतु सभी प्रस्तावित प्रतिकूल सामग्री का प्रदाय, अपचारी कर्मचारी की उपस्थिति में आरोपों के पक्ष में या विरोध में साक्ष्य प्रस्तुत करना है।

C. ***Consequential Benefit – Salary*** **– Appellant, a contractual/ temporary employee served more than 11 years before the order of termination – Entitled to 25% of salary as would have otherwise become due if order of termination had not been passed, calculated from date of termination till date.**

(Para 15)

ग. परिणामिक लाभ – वेतन – अपीलार्थी, एक संविदात्मक/अस्थाई कर्मचारी ने सेवा समाप्ति के आदेश से पूर्व 11 वर्षों से अधिक सेवा दी है – सेवा समाप्ति की दिनांक से आज दिनांक तक संगणना कर वेतन, जैसा कि अन्यथा देय होता यदि सेवा समाप्ति का आदेश पारित नहीं किया गया होता, के 25% का हकदार है।

Cases referred:

ILR 2001 SC 1144, AIR 1974 SC 423, AIR 1976 SC 2547, AIR 1999 SC 983, (1999) 2 SCC 21, (2000) 5 SCC 152, W.A. No. 528/2015 decided on 13.06.2016, AIR 1958 SC 300.

S.K. Sharma, for the appellant.
Ami Prabal, Dy. A.G. for the respondent/State.

J U D G M E N T

The Judgment of the Court was delivered by:
Sheel Nagu, J. :- The instant intra court appeal filed under Section 2(i) of M.P. Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005 (hereinafter referred as "2005 Act") assails the final order dated 26.09.2017 passed in WP.1029 /2009 whereby the learned single judge while exercising the writ jurisdiction u/ Art. 226 of the Constitution of India has dismissed the petition filed by the petitioner / appellant seeking quashment of order dated 27.01.2010 (Annexure P-6) by which his contractual services as a Peon, under the Rajeev Gandhi Shiksha Mission, continuing since 1997, have been terminated.

2. Learned counsel for the rival parties are heard.

3. The writ Court while dismissing the petition in question found that a show cause notice dated 13.01.2009 (Annexure P-4) was issued asking the petitioner to respond to the allegation of misconduct alleged therein or else the service would stand terminated. Learned single Judge further found that FIR was also registered alleging offences punishable u/Ss. 406, 409, 420 of IPC on 12.01.2009 arising out of same incident which gave rise to the said alleged misconduct. The writ court after considering the submission of learned counsel for the petitioner / appellant that the petitioner had been acquitted subsequently of the criminal charge, upheld the termination by recording the finding that the termination was not solely based on the factum of registration of offence but the misconduct alleged in the show cause notice rendered the petitioner (a mere contractual employee) unsuitable for the job and therefore, petitioner had no right to continue for having lost the trust of the employer.

4. Undisputed facts are that the petitioner was initially appointed on 04.10.1997 vide Annexure P-1 on temporary basis under the Rajeev Gandhi Shiksha Mission. Service of the petitioner were continued uninterruptedly for the next more than 11 years when he received show cause notice Annexure P-4 dated 13.01.2009 asking him to show cause in regard to the misconduct informed therein failing which the services would stand terminated. Petitioner filed his reply to the same vide Annexure P-5 denying the charges. The reply was found to be unsatisfactory leading to issuance of impugned order dated 27.01.2009 (Annexure P/6) on the ground of the said

misconduct mentioned therein which primarily related to misappropriation of certain books on 01.01.2009 and 09.01.2009, based upon the preliminary enquiry conducted by District Project Coordinator, District Education Centre, Vidisha. The impugned order further referred to the criminal prosecution lodged against the petitioner by FIR dated 12.01.2009 u/Ss. 406, 409 and 420 IPC arising out of the same incident which gave rise to the said misconduct.

5. Aggrieved, the petitioner filed WP No. 1029/2009(s) which was responded to by primarily urging that the petitioner was purely a temporary employee engaged on contractual basis who had indulged in misconduct of serious nature in regard to which offence was also registered and therefore, by following the due process of law including affording of opportunity by way of show cause notice as aforesaid and considering his response, his services were terminated, which cannot be termed as unlawful.

6. Learned counsel for the petitioner has relied upon the decision of this Court in the case of *Rahul Tripathi Vs. Rajeev Gandhi Shiksha Mission, Bhopal and Ors.* reported in ILR 2001 SC 1144 to contend that in circumstances similar to the one attending the instant case, this Court in the case of Rahul Tripathi, who was also a contractual employee working under the same Rajeev Gandhi Shiksha Mission, had set aside the termination by finding the same to be stigmatic and yet not preceded by any inquiry in accordance with law except a show cause notice. It is submitted that the Single bench in the said case of *Rahul Tripathi* placed reliance on the decisions of Apex Court in the case of *Shamsher Singh Vs. State of Punjab* reported in AIR 1974 SC 423, S*tate of U.P. Vs. Ramchnadra Trivedi*; AIR 1976 SC 2547, *Dipti Prakash Banerjee Vs. Satvendra Nath Bose National Centre for Basic Sciences, Calcutta & ors.*; AIR 1999 SC 983, *Radheshyam Gupta Vs. U.P. Industries Agro;* (1999) 2 SCC 21 & *Chandra Prakash Shahi Vs. State of U.P. & Ors;* (2000) 5 SCC 152, where from the standpoint of a stigmatic order, distinction between motive and foundation was explained. The single bench of this Court in *Rahul Tripathi* (supra) truncated the order of termination assailed therein. Reliance is further placed by petitioner on recent decision of Division Bench of this Court in WA. 528/2015 (*Paramjeet Singh & Anr. Vs. The State of M.P. & Ors*) rendered on 13th June, 2016 where similar view has been taken by following the decision in the case of *Rahul Tripathi* (supra).

7. It is seen from the pleadings in WP No. 1029/2009 (s) that petitioner had categorically raised the ground of termination being stigmatic not preceded by inquiry following the principle of natural justice where reasonable opportunity to defend the charges of misconduct was afforded to him.

8. A bare perusal of the impugned order (Annexure P-6) dated 27.01.2009 reveals that misconduct about misappropriation of books alleged against the petitioner on 01.01.2009 and 09.01.2009, for which show cause notice was issued after

conduction of preliminary inquiry, was found to be proved even before considering the reply (Annexure P-5), but without affording reasonable opportunity to the petitioner to rebut the charges of misconduct by adducing evidence, before the services of the petitioner were terminated.

9. To decipher the nature of order passed while terminating services of the petitioner, the same is being reproduced below :-

कार्यालय कलेक्टर (जिला शिक्षा केन्द्र) सर्व शिक्षा अभियान
जिला – विदिशा

क्रमांक/जि. शि. के./ स्थापना/2009/2468 विदिशा, दिनांक 27/02/09

आदेश

जिले में सर्व शिक्षा अभियान की कुछ पुस्तकें दिनांक 11.01.09 को कबाड़ी की दुकान में मेटाडोर में बिकने के लिये पाये जाने पर जिला परियोजना समन्वयक जिला शिक्षा केन्द्र विदिशा द्वारा की गई जांच में पाया गया कि श्री मलखान सिंह मालवीय, संविदा भृत्य, जिला शिक्षा केन्द्र विदिशा द्वारा बिना कार्यालय प्रमुख की अनुमति के ही जनपद शिक्षा केन्द्र, बासौदा के बी.ए.सी से दिनांक 01.01.09 तथा 09.01.09 को पुस्तके प्राप्त की तथा पावती दी। जिस पर श्री मलखान सिंह, संविदा भृत्य को कार्यालयीन पत्र क्र./स्था/ 2279 दिनांक 13.01.09 द्वारा कारण बताओ सूचना पत्र जारी किया जाकर सात दिवस में जवाब चाहा गया कि संबंधित का कृत्य मिशन के संविदा कर्मचारियों की सामान्य सेवा शर्तों तथा निष्ठा के विपरीत पाये जाने के कारण क्यों न संविदा समाप्त कर दी जाये? उक्त नोटिस संबंधित के निवास पर गवाहियों के समक्ष चस्पा किया गया तथा रजिस्टर्ड डाक से भी भेजा गया। संबंधित का जवाब समयावधि समाप्त हो जाने के बावजूद अप्राप्त है। संबंधित के कार्यालय प्रमुख द्वारा थाना सिटी कोतवाली विदिशा में 12.01.2009 को प्रथम सूचना रिपोर्ट भी दर्ज कराई गई। जिस पर कोतवाली में धारा 406, 409, 420 ता. हि. का प्रकरण भी संबंधित के विरूद्ध दर्ज किया गया है। और संबंधितजन कार्यालय से बिना सूचना दिये फरार हैं। निर्धारित समयावधि बाद प्राप्त संबंधीजन का जवाब परीक्षण में पूर्णतः असंतोषजनक पाया गया। श्री मलखान सिह मालवीय संविदा भृत्य के उपरोक्त कृत्यों के कारण सर्व शिक्षा अभियान (राजीव गांधी शिक्षा मिशन) के संविदा कर्मचारियों की सामान्य सेवा शर्तों के नियमों के तहत एतद् द्वारा श्री मालवीय की संविदा तत्काल प्रभाव से समाप्त कर सेवा से पृथक किया जाता है। यह आदेश तत्काल प्रभाव से लागू होगा।

10. A bare perusal of the above termination order reveals that the same is stigmatic in nature in asmuch as blaming the petitioner for a serious misconduct of misappropriation of certain Government material without conducting any inquiry into the alleged charges. The only inquiry shown to be conducted as is evident from the recital of termination order is preliminary inquiry conducted behind the back of

petitioner by District Project Coordinator, District Education Centre, Vidisha. Thereafter the competent authority has issued show cause notice dated 13.01.2009 and after taking into account the reply (Annnexure P-5) of the petitioner where he denied the charges in toto, the competent authority accepted the finding rendered in the preliminary inquiry of the misconduct being proved.

11. Undoubtedly, the termination order castes stigma / blemish on the future career prospects of the petitioner by finding him guilty of serious misconduct. The least that is required under the principle of natural justice is that a reasonable opportunity should be afforded before criticizing the character of an individual. The reasonable opportunity is by way of holding an inquiry where specific charges of misconduct are informed to the delinquent employee followed by a reasonable opportunity of filing reply, supply of all the adverse material proposed to be used against the delinquent employee, adducing of evidence in favour and against the charges in the presence of delinquent employee and thereafter to render a finding of misconduct or otherwise and the consequential order. It is needless to emphasize that further opportunity to the delinquent employee to have a say on the question of quantum of punishment would only rise if the delinquent employee holds the post on substantive basis or there are any enabling statutory provisions or executive instructions obliging the competent authority to do so. But since the petitioner was contractual / temporary employee no such further opportunity on the question of quantum of punishment is required to be given.

11.1 The Apex Court while deciding the case of *Khem Chand Vs. Union of India & ors.* reported in AIR 1958 SC 300 though pertaining to Art. 311 (2) of Constitution of India, had an occasion to summarize the concept of reasonable opportunity as follows which is reproduced below to the extent it relates to the present case :-

> *(19) To summarize : the reasonable opportunity envisaged by the provision under consideration includes :-*
>
> *(a) An opportunity to deny his guilt and establish his innocence, which he can deny only do if he is told what the charges levelled against him are and the allegations on which such charges are based;*
>
> *(b) an opportunity to defend himself by cross-examining the witnesses produced against him and by examining himself or any other witnesses in support of his defence;*
>
> *(c) an opportunity to make his representation as to why the proposed punishment should not be inflicted on him, which he can only do if the competent authority, after the enquiry is over and after applying his mind to the gravity or otherwise of the charges proved against the government servant tentatively*

proposes to inflict one of the three punishments and communicates the same to the government servant."

12. The decision of the Apex Court in the case of *Chandra Prakash Shahi* (supra) is further worthy of reference and reproduction to the extent of para 28 & 29 to emphasize the concept of motive and foundation :-

"28. The important principles which are deducible on the concept of "motive" and "foundation", concerning a probationer, are that a probationer has no right to hold the post and his services can be terminated at any time during or at the end of the period of probation on account of general unsuitability for the post in question. If for the determination of suitability of the probationer for the post in question or for his further retention in service or for confirmation, an inquiry is held and it is on the basis of that inquiry that a decision is taken to terminate his service, the order will not be punitive in nature. But, if there are allegations of misconduct and an inquiry is held to find out the truth of that misconduct and an order terminating the service is passed on the basis of that inquiry, the order would be punitive in nature as the inquiry was held not for assessing the general suitability of the employee for the post in question, but to find out the truth of allegations of misconduct against that employee. In this situation, the order would be founded on misconduct and it will not be a mere matter of "motive".

29. "Motive" is the moving power which impels action for a definite result, or to put it differently, "motive" is that which incites or stimulates a person to do an act. An order terminating the services of an employee is an act done by the employer. What is that factor which impelled the employer to take this decision? If it was the factor of general unsuitability of the employee for the post held by him, the action would be upheld in law. If, however, there were allegations of serious misconduct against the employee and a preliminary enquiry is held behind his back to ascertain the truth of those allegations and a termination order is passed thereafter, the order, having regard to other circumstances, would be founded on the allegations of misconduct which were found to be true in the preliminary inquiry."

13. Reverting to the facts of the case, it is noticeable that before casting stigma on the petitioner by holding him guilty of misconduct, a mere preliminary inquiry report prepared behind the back of the petitioner and reply of petitioner to the show cause

notice was considered by the competent authority before issuing order of termination of service. The misconduct as alleged in the show cause notice and the preliminary inquiry conducted behind the back of the petitioner were the foundation of the termination. The termination was not merely on the basis of finding the services of the petitioner to be no more required but because he was found guilty of the misconduct.

14. In view of the above, the order of termination of petitioner contained in Annexure P-6 is unsustainable in the eye of law being stigmatic and yet not preceded by affording of reasonable opportunity. Consequently, the impugned order passed in WP No. 1029/2009(s) dt. 26.09.2017 is set aside and the termination dated 27.01.2009 is quashed with liberty to the employer to proceed against the petitioner in accordance with law, if so advised.

15. Coming to the issue of consequential benefits arising from the present order, it is seen that the petitioner was contractual / temporary employee and had served more than 11 years before being terminated from service. Moreover the appointment was made under the Rajeev Gandhi Shiksha Mission which does not enjoy the character of permanency. It is further not evident from the record as to whether in this last 8 to 9 years the petitioner was gainfully employed or not and as to whether in the face of employment itself being temporary / contractual, whether it is any more required or not. Thus, this Court in the peculiar facts and circumstances attending the case, as mentioned above, denies full salary to the petitioner and merely directs that petitioner shall be entitled to 25% of the salary as would have otherwise become due if the order of termination had not been passed calculated from the date of termination till date provided the project continues to be functional.

16. With the aforesaid observation, present appeal stands disposed of.

Appeal allowed

I.L.R. [2018] M.P. 667 (DB)

WRIT PETITION

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

W.P. No. 750/2017 (Jabalpur) decided on 9 January, 2018

BAR ASSOCIATION LAHAR, DIST. BHIND …Petitioner

Vs.

STATE BAR COUNCIL OF M.P. & anr. …Respondents

(Alongwith W.P. No. 14586/2016)

Advocates Act, (25 of 1961), Section 15 & 28, Advocates Welfare Fund Act, M.P., (9 of 1982), Section 16 and Model Bye-Laws for Bar Association, M.P. Clause 26 & 27 – Elections and Internal Affairs of Bar Association – Interference by State Bar Council **– Held – The State Bar Council or its**

appellate Committee has no power, authority or jurisdiction to interfere with the process of election or to interfere with internal affairs of Bar association regarding membership or its suspension etc. – No provision of statute or any Rule has been produced which confers power to State Bar Council to interfere with election process and internal affairs of the Bar Associations – Impugned orders passed by the respondents are quashed – Petition allowed.

(Para 6 & 12)

अधिवक्ता अधिनियम (1961 का 25), धारा 15 व 28, अधिवक्ता कल्याण निधि अधिनियम, म.प्र., (1982 का 9), धारा 16 एवं अधिवक्ता संघ हेतु मॉडल उप विधि, म.प्र. खंड 26 व 27 – अधिवक्ता संघ के निर्वाचन एवं आंतरिक मामले – राज्य अधिवक्ता परिषद द्वारा हस्तक्षेप – अभिनिर्धारित – राज्य अधिवक्ता परिषद या उसकी अपीली समिति को अधिवक्ता संघ की निर्वाचन प्रक्रिया में हस्तक्षेप अथवा सदस्यता या उसके निलंबन इत्यादि के संबंध में आंतरिक मामलों में हस्तक्षेप की कोई शक्ति, प्राधिकार या अधिकारिता नहीं है – कानून या किसी नियम का कोई उपबंध प्रस्तुत नहीं किया गया है जो राज्य अधिवक्ता परिषद को अधिवक्ता संघ की निर्वाचन प्रक्रिया या आंतरिक मामलों में हस्तक्षेप की शक्ति प्रदत्त करता है – प्रत्यर्थीगण द्वारा पारित किये गये आक्षेपित आदेश अभिखंडित किये गये – याचिका मंजूर।

Cases referred:

(2011) 13 SCC 774, AIR 1995 MP 137.

Sameer Seth, for the petitioner in W.P. No. 750/2017.
Parag S. Chaturvedi, for the petitioner in W.P. No. 14586/2016.
R.K. Sahu, for the respondents.

O R D E R

The Order of the Court was delivered by:
Vijay Kumar Shukla, J. :- Both the writ petitions have been transferred for hearing from the Bench at Gwalior to the Principal Seat Jabalpur. In the instant petitions a common pivotal questions are raised for consideration:

(i) Whether the State Bar Council or its Appellate Committee has any authority to interfere with the process of election or to annul the elections conducted by the Bar Associations ? and

(ii) Whether State Bar Council has any authority to interfere with the affairs of Bar Associations regarding action taken against their Members for suspension of membership ?

Before adverting to the legal questions raised for consideration, it is condign to refer the facts, in brief, of both the writ petitions.

2. In W.P. No.750/2017 filed by the Bar Association, Lahar, District Bhind, the result of the election of the Bar Association was declared on 29th March 2016 and the elected committee took over the charge. The Appellate Committee of the State Bar Council passed a *suo motu* proceeding and set aside the election of the petitioner. The petitioner – Bar Association preferred W.P. No.2464/2016 assailing the order passed by the Appellate Committee and the entire *suo motu* proceedings. This Court by order dated 6-4-2016 has stayed the effect and operation of the order dated 4-4-2016. The said petition was finally decided by order dated 24-11-2016 granting liberty to the Bar Association to file an election petition before the appropriate committee notified by the State Bar Council. The decision taken by the Appellate Committee was directed not to be given effect to.

3. By the impugned order dated 20-12-2016 vide Annexure-P/1, the State Bar Council again initiated *suo motu* proceedings in respect of the election of the petitioner – Association. The said decision is challenged in the present petition being an arbitrary and discriminatory action. It has been contended that the Appellate Committee of the State Bar Council has no authority and jurisdiction to interfere with the election process of the Bar Association. It is also asserted that as per Clause 26 of the M.P. Model Bye-Laws for Bar Association (for short 'Model Bye-Laws') the election of any Bar Association may be subject to an election petition, which may be preferred within 10 days from the date of declaration of the results to the Appellate Committee.

4. In another writ petition filed by the Bar Association, Chachoda, District Guna, assail is to the order dated 27th March 2016 passed by the Appellate Committee of the State Bar Council, directing the petitioner – Association to submit the records as regards suspension of the membership of an advocate, Shri Mohit Shrimal and also to furnish the income and expenses details and documents pertaining to the election held by the Bar Association. By order dated 4-4-2016 the petitioner – Bar Association has been dissolved and the Officiating Secretary of the respondent No.1 has been directed to appoint an *adhoc* committee. The same issue has been raised that the State Bar Council has no authority to interfere with the affairs of the Bar Association regarding action taken against its members for suspension from membership.

5. On behalf of the State Bar Council it has been submitted that the State Bar Council is a statutory body having legal obligations to take necessary action in order to maintain uniformity and fair elections as well as welfare of the advocates. It is submitted that Section 2(1)(a) of the Advocates Act, 1961 [hereinafter referred to as 'the Act'] envisages 'advocate' - which means an advocate entered in any roll under the provisions of this Act. Section 2(1)(n) of the Act envisages 'State roll' - means a roll of advocates prepared and maintained by a State Bar Council under Section 17. Section 6 provides functions of the State Bar Council. Section 28 of the Act empowers the State Bar Council to make Rules and the Bar Associations in the State are also

recognized under Section 16 of the Act M.P. Advocates Welfare Fund Act, 1982 [for short the 'Act 1982']. Thus, they are under the direct disciplinary control of the State Bar Council in order to bring parity with respect to terms and conditions governing the affairs of the Bar Associations recognized by it. It has framed Model Bye-Laws and directed that all the recognized Bar Associations should adopt the same in *stricto sensu*. It is further contended that as per Clause 27 of the Model Bye-Laws since the Bar Association has not functioned properly and without assigning reason and in absence of an information to the State Bar Council, the Association has no power to suspend membership of any of the advocate. He further contended that in the light of the judgment passed by the apex Court in *Supreme Court Bar Association and others vs. B.D. Kaushik,* (2011) 13 SCC 774 while applying the principle of 'one bar one vote', the State Bar Council has been conferred the power to supervise the elections of the Bar Associations. The impugned order is legal and valid, as it has been issued in exercise of powers envisaged under sections 15 and 28 of the Act and Clause 27 of the Model Bye-Laws. In the case of *B.D. Kaushik* (supra) while enforcing the principle of 'one bar one vote' the Bar Council has been conferred the power to supervise the elections of the Bar Associations.

6. We do not find any force in the said argument as in *B.D. Kaushik* (supra) was a matter of membership of the Supreme Court Bar Association arising out of the proceedings of the civil suit. The Apex Court emphasized on the principle of 'one bar one vote', but the apex Court has not held that the Bar Council shall have the power to interfere with the elections of the Bar Associations. Besides, no provision of statute or any Rule has been brought to the notice of this Court by the counsel appearing on behalf of the State Bar Council conferring power to the State Bar Council to interfere with the election process and internal affairs of the Bar Associations.

7. Before adverting to the other legal issue involved in these cases, it is apposite to refer to relevant sections of the Act:

> "2. (1) (a) - 'Advocate' means an advocate entered in any roll under the provisions of this Act;
>
> xx xx
>
> (d) 'Bar Council' means a Bar Council constituted under this Act;
>
> (e) 'Bar Council of India' means the Bar Council constituted under Section 4 for the territories to which this Act extends;
>
> xx xx
>
> (i) 'Legal Practitioner' means an advocate or vakil or any High Court, a pleader, mukhtar or revenue agent;
>
> xx xx

(m) 'State Bar Council' means a Bar Council constituted under Section 3;

(n) 'State roll' means a roll of advocates prepared and maintained by a State Bar Council under section 17."

8. Chapter II of the Act deals with Bar Councils. Section 3 stipulates that there shall be a Bar Council in the State as mentioned in the Section. Under sub-sections constitution of State Bar Councils is prescribed. Section 4 of the Act makes a provision for constitution of the Bar Council of India. Thus, it is manifest that every Bar Council shall be a body corporate by virtue of Section 5 of the Act. Section 6 of the Act provides functions of the State Bar Council, the same being relevant for the present purpose, is extracted hereunder:

"6. Functions of State Bar Councils-

(1) The functions of a State Bar Council shall be-

(a) to admit persons as advocates on its roll.

(b) to prepare and maintain such roll

(c) to entertain and determine cases of misconduct against advocates on its roll

(d) to safeguard the rights, privileges and interest of advocates on its roll

(dd) *(Note:- Ins. by Act 70 of 1993, sec.2 (i) (a))* to promote the growth of Bar Associations for the purpose of effective implementations of the welfare schemes referred to in clause (a) of sub section (2) of this section and clause (a) of sub section (2) of section

(e) to promote and support law reform

(ee) *(Note:- Ins. by Act 60 of 1973, sec.6)* to conduct seminars and organize talks on legal topics by eminent jurists and publish journals and papers of legal interest.

(eee) to organize legal aid to the poor in the prescribed manner

(f) to manage and invest the funds of the Bar Council

(g) to provide for the election of its members.

(gg) *(Note:- Ins. by Act 70 of 1993, sec.2 (I) (b))* to visit and inspect Universities in accordance with the directions given under clause (I) of sub-section (1) of section7;

(h) to perform all other functions conferred on it by or under this Act;

(i) to do all other things necessary for discharging the aforesaid functions

(2) [*(Note:- Sub-sections (2) and (3) subs. by Act 60 of 1973, sec.6, for sub-section (2).)* A State Bar Council may constitute one or more funds in the prescribed manner for the purpose of].

a. Giving financial assistance to organize welfare scheme for the indigent, disabled or other advocates.

b. Giving legal aid or advice in accordance with the rules made in this behalf

c. [*(Note:- Ins. by Act 70 of 1993, sec.2 (ii).)* Establishing law libraries].

(3) A State Bar Council may receive any grants, donations, gifts or benefactions for all or any of the purposes specified in sub-section (2) which shall be credited to the appropriate fund or funds constituted under that sub-section."

9. The term of office of the Members of the State Bar Council is prescribed in Section 8 of the Act. Section 8A makes a provision for constitution of Special Committee in the absence of election of the State Bar Council. Section 10 provides for constitution of various committees other than disciplinary committees. Section 15 confers power on the Bar Council to make rules for the manner of election of the Chairman and the Vice-Chairman of the Bar Council etc. Thus, in Chapater II of the Act there is no provision conferring power to the State Bar Council to make any rule in respect of election of the Bar Associations.

10. Chapter III of the Act provides admission and enrolment of advocates with the State Bar Council. Section 17 of the Act says that it shall be the duties of the State Bar Council to maintain roll of advocates. The eligibility to be enrolled as an advocate of state roll is prescribed under Section 24. Disqualification for enrolment is provided under Section 24-A of the Act.

11. From a bare reading of the various provisions of the Act it is graphically clear that there is no provision either under the Act or under the Advocates Welfare Fund Act, 1982 [hereinafter referred to as 'the Act 1982'] to interfere with the elections conducted by the Bar Associations. The said Act 1982 requires recognition of Bar Association for the purpose of admitting the Members of the Bar Association for grant of welfare fund to them. The provision of the Act 1982 empowers the Bar

Council to give such directions, as are necessary for carrying out the purpose of Act. Object of the said Act is to constitute a welfare fund for benefit of the advocates, cessation of practice, and for matters connected therewith or incidental thereto. The only purpose of the said Act is to provide succour to advocates who cease to practice or advocates who suffer from any disability or who die. The said Act no where confers the power to the State Bar Council to have control or to supervise the election affairs of a Bar Association.

12. A similar issue has been considered by a Co-ordinate Bench of this Court in *R.N. Tiwari vs. State Bar Council of M.P. and others*, AIR 1995 MP 137 wherein it is held that the Bar Council has no authority or power or jurisdiction to stay the election process or to interfere with the election affairs of a Bar Association. In the case of *Vinifred Bose vs. The Bar Council of Tamil Nadu and Puducherry,* (W.P. No.5010 of 2015, decided on 11-6-2015), after considering various provisions of the Advocates Act, 1961 it was held that if the Bar Council takes upon itself the role of supervision and overseeing the elections to each of the Associations, the Bar Council may lose focus on the functions statutorily entrusted to them.

13. In view of consideration of the statutory provisions of the Act and the Advocates Welfare Fund Act, we do not find any provision conferring the power on the State Bar Council to interfere with the election process or with the election of a Bar Association.

14. In view of the aforesaid enunciation of law and appreciating the anatomy of the provisions of the Act and the Advocates Welfare Fund Act enacted therefrom, **the writ petitions are allowed.** The impugned orders passed by the respondents are hereby quashed. However, in the facts and circumstances of the case, there shall be no order as to costs.

Petition allowed

I.L.R. [2018] M.P. 673
WRIT PETITION

Before Mr. Justice Vivek Rusia

W.P. No. 4092/2017 (Indore) decided on 9 January, 2018

JAYANTI VYAS (SMT.) …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

***Service Law – Pay Revision Rules, M.P., 2009 – Recovery of Excess Pay – Permissibility – Written Undertaking* – Petitioner was paid excess amount during pay fixation – Respondents passed order of recovery of excess amount – Challenge to – Held – Petitioner belongs to Class III services and is due to retire on January 2018, i.e. within one year of the order of recovery – Excess**

amount has been made for a period in excess of 5 years from date of impugned order – Further held – Recovery is impermissible in law – Petitioner is going to retire within a month, hence despite undertaking, she is entitled for a relief of quashing of impugned recovery – Impugned order quashed – Petition allowed.

(Para 9 & 10)

सेवा विधि – वेतन पुनरीक्षण नियम, म.प्र., 2009 – अतिरिक्त भुगतान की वसूली – अनुज्ञेयता – लिखित वचनबंध – वेतन निर्धारण के दौरान याची को अधिक राशि का भुगतान किया गया था – प्रत्यर्थीगण ने अधिक राशि की वसूली का आदेश पारित किया – को चुनौती – अभिनिर्धारित – याची तृतीय वर्ग सेवा से है एवं जनवरी, 2018 में सेवानिवृत्त होने वाली है अर्थात् वसूली के आदेश के एक वर्ष के भीतर – अधिक राशि, आक्षेपित आदेश की तिथि से 5 वर्षों से अधिक अवधि के लिए दी गई है – आगे अभिनिर्धारित – वसूली, विधि में अननुज्ञेय है – याची एक माह के भीतर सेवानिवृत्त हो रही है, अतः वचनबंध के बावजूद वह आक्षेपित वसूली अभिखंडित करने के अनुतोष की हकदार है – आक्षेपित आदेश अभिखंडित – याचिका मंजूर।

Cases referred:

2015 (1) MPHT 130 (SC), (2016) 14 Supreme Court Cases 267.

Ranjeet Sen, for the petitioner.
V. Patwa, G.A. for the respondent/State.

(Supplied: Paragraph numbers)

O R D E R

Vivek Rusia, J :- The petitioner has filed the present petition being aggrieved by order dt. 23.1.2017 by which recovery of Rs. 1,28,304/- along with interest @ 12% Rs.67,750/- total Rs. 1,96,054/- has been ordered.

2. The petitioner was initially appointed on the post of ANM (Auxiliary Nurse Midwife) in the year 1988. Thereafter her services were regularised after completing the period of probation. During her service she was given the benefit of pay revision under the Pay Revision Rules, 2009 and the benefit of Bramha Swaroop Committee. The petitioner was granted the benefit of second kramonnati w.e.f. 2.11.2008. Now she is going to retire in the month of January, 2018. The respondent Chief Medical and Health Officer Khargone, has passed the order dt. 23.1.2017 alleging that she has been paid excess amount from 1.4.2006 while pay fixation. After the aforesaid order, the respondents have passed order to recover the said amount.

3. After notice, the respondents have filed the return by submitting that as per recommendation of the Bramha Swaroop Committee, the petitioner was entitled for pay scale of Rs. 5200-20200+2100 grade pay w.e.f. 1.4.2006 but by mistake she was

fixed in the pay scale of Rs.5200-20200+2400 grade pay. The petitioner had signed the undertaking to the effect that after the aforesaid pay fixation if any excess amount is paid due to the pay fixation, the same can be recovered or is liable to be refunded. Copy of written undertaking is filed as Annexure R/4 therefore, the recovery is permissible from the retiral dues of the petitioner.

4. Learned Counsel for the petitioner submitted that the pay fixation was done by the respondent and if there was any anomaly in it for which the petitioner cannot be held responsible. She is a Class-III employee therefore, recovery is not permissible in the light of the judgment passed by the Apex Court in case of *State of Punjab & others vs. Rafiq Masih reported in 2015 (1) MPHT 130 (SC).*

5. Learned Counsel has also placed reliance over the judgment of Division Bench passed in W.A. No.251/2017 Dr. Ashok Pal v. State of M.P. In which also the recovery after retirement has been quashed.

6. Learned GA submits that the case of the petitioner is not covered under any of the situation given in the case of *Rafiq Masih* (supra). In support of his contention, the learned GA has placed reliance over the judgment of the Apex Court in case of *High Court of Punjab and Haryana and others vs. Jagdev Singh* reported in (2016) 14 Supreme Court Cases 267 in which the Apex Court has held that the recovery is permissible from the officers to whom payment was made in the first instance, was clearly put on a notice that excess payment was found to have been made would be required to be refunded and in such situation, he is bound by the undertaking.

7. Even otherwise, recovery after retirement cannot be made in the light of the Apex Court decision in the case of *State of Punjab and others vs. Rafiq Masih* (supra), the Hon'ble Supreme Court has considered the facts of number of cases, in which, excess amount have been paid to the employees/officers due to various reasons like wrongful fixation, revision of pay etc. and after dealing with all such situations, the apex Court has summarized all cases into 5 categories and issued directions in para 12 and held that in these cases recovery is impermissible.

8. Para 12 of the aforesaid judgment is reproduced below:

> "12. It is not possible to postulate all situations of hardship, which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to herein above, we may, as a ready reference, summarize the following few situations, wherein recoveries by the employers, would be impermissible in law:

(i) Recovery from employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).

(ii) Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.

(iii) Recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.

(iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.

(v) In any other case, where the Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover.

9. The Apex Court in case of *State of Punjab and others vs. Rafiq Masih* (supra) has held that recovery from the employees belonging to Class-III and Class-IV service would be impermissible in law and also the recovery from the retired employee who are due to retire within one year and recovery from the employees when the excess payment has been made for a period in excess of 5 years before the order of recovery is made. The case of the petitioner falls under all the three categories as she belongs to the Class-III services, the recovery is within one year because she is due to retire in the month of January, 2018 and the excess amount has been made for a period in excess of 5 years from the date of impugned order. In case of *Jagdev Singh* (supra) the Apex Court has held that the principle enunciated in Proposition *(ii)* i.e. recovery from retired employee or employees who are due to retire within one year of the order of recovery cannot be made is the same as in the present case where the written undertaking was given by the writ petitioner as well. In the said case, Jagdev Singh, was a Judicial Officer and the benefit of Superior Judicial Service Revised Pay Rules was given to him therefore, he was not in a position to plead the hardship because of the recovery. But in the present case, the petitioner is going to retire as ANM which is a Class-III post therefore, her case falls under Condition No.(i) to (iii) all hence, the recovery is impermissible.

10. The respondent has placed the reliance over the judgment passed by the Writ Court in W.P. No. 1484/2016 dt. 3.2.2017 by which the writ petition was dismissed and the recovery was up held. The said order of Writ Court has also been upheld by the Division Bench in Writ Appeal No. 303/2017. The Division Bench has held that the recovery is permissible because the employee has given an written undertaking

for the recovery. In the said case, the recovery has been upheld in the light of the judgment passed in the case of *Jagdev Singh* (supra) because the petitioner is aged about 51 years and at present he is in service but in the present case, the petitioner is going to retire within a month as already mentioned above. Hence, it is distinguishable. Hence, the petitioner is entitled for the relief of quashing of impugned recovery in light of judgment passed by the Apex Court in case of Rafiq Masih (supra).

11. Hence, the petition is allowed. Annexure P/1 is quashed.

No orders as to cost.

Petition allowed

I.L.R. [2018] M.P. 677
WRIT PETITION

Before Mr. Justice J.K. Maheshwari

W.P. No. 19148/2017 (Jabalpur) decided on 12 January, 2018

NAVIN KUMAR SONKAR …Petitioner

Vs.

UNION OF INDIA & ors. …Respondents

***Passports Act (15 of 1967), Section 10(3)(e) & 10(5) and Penal Code (45 of 1860), Section 498-A & 406 – Impounding of Passport* – On the ground of pendency of a criminal case against the petitioner, order impounding his passport was passed by the respondent authority – Challenge to – Held – Mere pendency of a criminal case in a Court may be a cause to the Passport Officer to initiate action u/S 10(3)(e) of the Act of 1967 but it cannot be treated to a reason for impounding of the passport until the accused in a criminal case has been convicted by a competent Court – Further held – As and when the Passport Officer has to take action in exercise of the powers u/S 10(3)(e) of the Act of 1967, he ought to understand the nature of the criminal case pending against the person – In the instant case, bhabhi of the petitioner filed a case u/S 498-A and 406 IPC for demand of dowry arraying all family members as accused – Mere registration of a criminal case of demand of dowry is not sufficient to pass the order of impounding the passport without considering all the aspects and without assigning the cogent reasons – Impugned order quashed.**

(Para 9)

पासपोर्ट अधिनियम (1967 का 15), धारा 10(3)(ई) व 10(5) एवं दण्ड संहिता (1860 का 45), धारा 498–ए व 406 – पासपोर्ट परिबद्ध किया जाना – याची के विरूद्ध दाण्डिक प्रकरण के लंबित रहने के आधार पर, प्रत्यर्थी प्राधिकारी द्वारा उसका पासपोर्ट परिबद्ध करने का आदेश पारित किया गया – को चुनौती – अभिनिर्धारित – मात्र न्यायालय में दाण्डिक प्रकरण का लंबित रहना, पासपोर्ट अधिकारी के लिए 1967 के अधिनियम की धारा 10(3)(ई)

के अंतर्गत कार्रवाई आरंभ करने हेतु एक कारण हो सकता है किंतु इसे पासपोर्ट परिबद्ध करने हेतु कारण नहीं माना जा सकता जब तक कि सक्षम न्यायालय द्वारा अभियुक्त को दाण्डिक प्रकरण में दोषसिद्ध नहीं किया जाता – आगे अभिनिर्धारित – जब कभी पासपोर्ट अधिकारी को 1967 के अधिनियम की धारा 10(3)(ई) के अंतर्गत शक्तियों के प्रयोग में कार्रवाई करनी होती है, उसे उस व्यक्ति के विरूद्ध लंबित दाण्डिक प्रकरण का स्वरूप समझना चाहिए – वर्तमान प्रकरण में, याची की भाभी ने दहेज की मांग हेतु परिवार के सभी सदस्यों को अभियुक्त के रूप में दोषारोपित करते हुए धारा 498–ए व 406 भा.दं.सं. के अंतर्गत प्रकरण प्रस्तुत किया – सभी पहलूओं पर विचार किये बिना एवं प्रबल कारण दिये बिना, पासपोर्ट परिबद्ध करने का आदेश पारित करने के लिए मात्र दहेज की मांग के दाण्डिक प्रकरण का पंजीबद्ध किया जाना पर्याप्त नहीं है – आक्षेपित आदेश अभिखंडित।

Cases referred:

2013 DLT 202, AIR 1987 (SC) 1057, 1978 (2) SCR 621.

Ankit Saxena, for the petitioner.
Mohan Sausarkar, for the respondent Nos. 1 & 2.

O R D E R

J.K. Maheshwari, J. :- This petition under Article 226 of the Constitution of India has been filed challenging the order Annexure P-6 dated 04/08/2017 passed by the Regional Passport Officer, Bhopal directing to impound the Passport bearing No.H7818877 issued on 10/11/2009 in the name of Navin Kumar Sonkar in exercise of the powers under Section 10 (3)(e), of the Passports Act, 1967 (hereinafter it be referred as Passport Act) because the "criminal case is pending before the Court" against him however directed to submit the passport in the Passport Office, Bhopal.

2. Learned counsel appearing on behalf of the petitioner submits that the notice Annexure P-4 was issued inter alia stating that as per the information received from SHO Mahila Thana, Udaypur, Rajasthan an offence under Section 498A and 406 of the IPC, was registered however the Passport is required to be surrendered in the office. The explanation has been sought from petitioner why the material information has been suppressed regarding registration of the criminal case at the time of obtaining the Passport. In absence of the reply, it is said why the Passport should not be cancelled in exercise of the power of the Section 10(3)(e) of the Passport Act.

3. The petitioner has filed the reply vide Annexure P-6 inter alia contending that the Passport was issued on 10/11/2009 while the offence was registered at Crime No.111/2015 on 17/08/2015 after five and half years of grant of the Passport, therefore, allegation of suppression of material information of the criminal case is incorrect. The Authority without considering the same and assigning any cogent reason as required under Section 10(3)(e) and Section 10(5) of the Passport Act, passed the order impugned which is not in accordance with law. In support of the said contention

reliance has been placed on the judgment of *Shashank Shekhar Vs. Union of India* passed in WP No.2391/2015 decided on 08/05/2015 and also on the judgment of Delhi High Court in the case of *Manish Kumar Mittal Vs. Chief Passport Officer* reported in 2013 DLT 202. It is urged that the objection raised by the respondent regarding pendency of the representation is of no avail in absence of having any cogent reason to pass the order impugned impounding the Passport. Therefore, the order impugned may ordered to be quashed and the Passport impounded by the Authority may be ordered to be restored.

4. On the other hand, Shri Mohan Sausarkar, learned counsel for the respondent Nos.1 and 2 contends that it is a case wherein a criminal case was registered against the petitioner under Section 498 A & 406 of the IPC in Udaypur, Rajasthan, however, on receiving the information by the Passport Office, a show cause notice was issued to the petitioner and after receiving the reply, the order impugned has rightly been passed in exercise of the power as conferred to the Authority under Section 10(3)(e) and 10(5) of the Passport Act, therefore, interference in this petition is not warranted. In support of the said contention, reliance has been placed on the judgment of the Supreme Court in the case of *Union of India and Ors. Vs. Charanjit Kaur* reported in AIR 1987 (SC) 1057. Vide said judgment if the Regional Passport Officer is having information regarding activities of the holder of the passport which is prejudicial to the interests of the sovereignty and integrity and security of India, it is open to the authority to assess the sufficiency of such information as observed in the judgment of the Apex Court in the case of *Meneka Gandhi Vs. Union of India* reported in [1978 (2) SCR 621]. In view of the said submissions, it is urged that the competent authority has not committed any error to impound the passport of the petitioner.

5. Learned counsel for the respondents further submits that the appeal in the shape of representation filed by the petitioner is pending before the Appellate Authority. However, in case this Court is of the opinion that the order impugned is not justified then Appellate Authority may be directed to decide the said appeal within time frame. However during pendecy (sic : pendency) of the appeal, extraordinary jurisdiction under Article 226 of the Constitution of India should not be invoked by the Court.

6. After having heard learned counsel of both the parties, as reveal Section 10 of the Passport Act confers the power to the Passport Authority having regard to the provisions of Sub- Section(1) to Sub-Section (6) or any notification issued under Section 19, vary or cancel the endorsement on a passport or travel document, or may with the previous approval of the Central Government, vary or cancel the conditions (other than prescribed in the Passport) subject to which a Passport or travel document has been issued, and may for that purpose require the holder of a Passport or a travel document by notice in writing, to deliver the said Passport or travel document to the authority within such time as may be specified in the notice. Under sub section 3, the

Passport Authority may impound or cause to be impounded or revoke a Passport or travel document. The case on hand relates to Section 10(3)(e) of the passports Act, as apparent from the show cause notice as well as the order impugned. As per the said section, any proceedings in respect of an offence allegedly have been committed by the holder of the Passport or travel document, and is pending before a competent Criminal Court in India, then the Passport Authority may exercise the discretion for the purpose of impounding or to revoke the passport or the travel document.

7. Sub Section 5 of Section 10 specifies where the Passport Authority is of the opinion that an order varying or canceling the endorsements or varying the conditions of a passport or travel document under sub-section (1) or an order impounding or revoking a passport or travel document under sub-section (3), is necessary then such authority shall record in writing a brief statement of the reasons for making such order and furnish a copy to the holder of the Passport or travel document on demand made, unless in any case the Passport Authority is of the opinion that it will not be in the interest of the sovereignty and integrity of India, the security of India, friendly relation-ship of India with any foreign country or in the interests of the public at large.

8. On perusal of the aforesaid provisions, it is crystal clear like a day light that in case the proceedings in respect to an offence allegedly have been committed by the holder of the Passport and a criminal case is pending in a competent Court then assigning the reasons why revocation or impounding of the passport or travel document is necessary, the competent Authority may pass an order, and supply its copy to the holder on demand made, except for the reason of the security and integrity of the public at large.

9. On perusal of the impugned order, the authority merely referred that a criminal case is pending in the Court, against petitioner, however, as per Section 10(3)(e) of the Passport Act, directed to impound the Passport of the petitioner. In this regard, it can safely be observed that pendency of a criminal case in a Court, may be a cause to the Passport Officer to initiate an action under Section 10(3)(e) of the Passports Act, but it cannot be treated to be the reason for impounding of the Passport. The reasons for such impounding may be different, such as, the authority has received the information that petitioner would not appear as and when required in the Court or he would abscond in the case or engaged in the activity affecting the integrity and internal security of the country. Therefore, mere pending criminal case may give a cause to initiate the action to the Passport Officer, but it cannot be the reason for impounding the Passport. In this regard, it can safely be observed that as and when the Passport Officer has to take an action in exercise of the power of Section 10(3)(e) of the Passport Act, he ought to understand the nature of the criminal case also pending against the person. On perusal of the allegation in the criminal case, it is apparent that the sister-in-law (Bhabhi) of the present petitioner lodged an FIR with respect to

dowry demand against her husband joining all the family members as accused, wherein the petitioner being brother of husband also joined as an accused. In the criminal cases of demand of dowry Judicial notice can safely be taken that in most of the offences registered under Order 498A, all the family members are joined as accused to pressurize the family of the groom, though the family members resides separately, or may be in the different city or even the abroad. However, in such circumstances, mere registration of criminal case of demand of dowry is not sufficient to pass the order of impounding the passport without considering all these aspects, or without assigning the cogent reasons. In this regard and the judgment in the case of *Shashank Shekhar* (Supra) would aptly apply to the facts of the present case, whereby the order passed by the Passport Authority under Section 10(3)(e) of the Passports Act, was set aside due to not assigning the reasons. The judgment in the case of Manish Mittal (Supra) of Delhi High Court is also relevant, wherein the Court has observed that in case the order of impounding/revocation of the Passport has been passed, contrary to the provisions of the law, then mere pendency of the appeal is of no consequence, and it can not be a ground to dismiss the writ petition.

10. In view of the foregoing discussion, it is apparent that the order passed by the Passport Officer, Bhopal is not in conformity to the spirit of Section 10(5) of the Passport Act, therefore, it is not necessary to relegate the matter to the Appellate Authority to pass the final order, on the representation of the petitioner however the said argument is hereby repelled.

11. At this stage, the judgment of *Charanjeet Kaur* (Supra) relied by learned counsel for the respondent may also be referred. In the said judgment the Supreme Court found that on the basis of the material available on record, it is apparent that the petitioner is the wife of the president of National Council of Khalistan. Therefore, sufficient material was available with the Passport Officer to record satisfaction that question of sovereignty, integrity and security of the India is involved and relying upon such information, if the authority has impounded the Passport, interference was declined by the Court. In this regard the provision of Section 10(c) of the Passport Act is relevant. In that case, the authority records the satisfaction looking to the issue of sovereignty, integrity and security of the India and friendly relation with the foreign country which may not be affected by continuation of the Passport or issuance of the Passport, however in that event the Passport Authority may exercise the discretion for impounding of the same. But in the facts of the present case, no such facts and circumstances have been brought on record. In fact, in the present case, a criminal case was registered by the Bhabhi of the petitioner regarding dowry demand against her husband, in which all the family members have joined as accused, however, the registration of said criminal case would not come within the purview of Section 10(3)(c) of the Passport Act. Therefore, the judgment of *Charanjit Kaur* (Supra) relied by the respondents is having no application in the facts of the present case.

12. It is also relevant to note here that the show cause notice Annexure P-4 has been issued by the Passport Authority on the premise that petitioner has concealed the material information at the time of obtaining the Passport. In this regard, it is not in dispute that the passport was issued on 07/08/2009 and a criminal case was registered in the year 2015 in Mahila Thana, Udaypur after about five years of issuance of the Passport, however, the said criminal case was not pending on the date of issuance. Therefore, the basis to issue the show cause notice itself is not based on sound reasoning and in addition, looking to the discussion made hereinabove, it is apparent that pendency of a criminal case may be a cause to initiate an action but it cannot be a reason for impounding the Passport until the accused in a criminal case has been convicted by a competent Court. In view of the foregoing discussions, in my considered opinion the impugned order Anneuxre (sic : Annexure) P-6 dated 04/08/2017 passed by the Passport Officer, Bhopal is contrary to the Provisions of Section 10(5) of the Passport Act, 1967, therefore, it is hereby quashed.

13. Accordingly, this petition succeeds and is hereby allowed. Respondent Nos.1 & 2 are directed to issue the Passport of the petitioner within a period of two weeks on furnishing an affidavit by the petitioner to the Passport Authority specifying that as and when required he shall tender his appearance in the criminal case as referred in the show cause notice. After releasing the said Passport, if petitioner decides to go on foreign trip then such information be furnished to the Court and on reaching at the destination, he shall furnish the address of his residence and the office where he is working on an affidavit authenticated by the notary at a place where he is residing. In the affidavit it be also mentioned that as and when any adverse order is passed by the Court in the said criminal case against him, he shall tender his appearance within a month from the date of the order. In the facts parties are directed to bear their own costs.

Petition allowed

I.L.R. [2018] M.P. 682
WRIT PETITION

Before Mr. Justice J.K. Maheshwari

W.P. No. 2395/2017 (Jabalpur) decided on 17 January, 2018

VIJAY SHANKAR TRIVEDI …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

***A. Service Law – Recovery After Retirement* – Petition seeking quashment of order of recovery – Petitioner retired from service as class III employee – At the time of payment of his retiral dues, an order of recovery of dues was passed on the ground that pay fixed at the time of initial appointment was incorrect – Challenge to – Undertaking given by petitioner for recovery of excess amount at the time of pay fixation – Held – The said undertaking**

was obtained from the petitioner at the time of extending the benefit of pay revision and such an act of petitioner cannot be said to be a voluntary act – Order of recovery quashed – Petition allowed.

(Para 14 & 15)

क. सेवा विधि – सेवा निवृत्ति पश्चात् वसूली – वसूली के आदेश को अभिखंडित किया जाना चाहते हुए याचिका – याची तृतीय श्रेणी कर्मचारी के रूप में सेवा से निवृत्त हुआ – उसके निवृत्ति देय के भुगतान के समय, देय की वसूली का आदेश इस आधार पर पारित किया गया था कि प्रारंभिक नियुक्ति के समय निर्धारित किया गया वेतन गलत था – को चुनौती – याची द्वारा वेतन निर्धारण के समय, अधिक रकम की वसूली हेतु वचनबंध दिया गया – अभिनिर्धारित – याची से उक्त वचनबंध, वेतन पुनरीक्षण का लाभ दिये जाने के समय अभिप्राप्त किया गया था और याची के ऐसे कृत्य को स्वेच्छापूर्वक कृत्य नहीं कहा जा सकता – वसूली का आदेश अभिखंडित – याचिका मंजूर।

B. Civil Services (Pension) Rules, M.P. 1976, Rule 65 **– Held – Rule 65 of the Rules of 1976 casts duty on the "Retiring" government servant and it has nothing to do with the "Retired" government servant – Rule 65 is not applicable to "Retired" government servant.**

(Para 17)

ख. सिविल सेवा (पेंशन) नियम, म.प्र. 1976, नियम 65 – अभिनिर्धारित – 1976 के नियमों का नियम 65, ''निवृत्त हो रहे'' शासकीय सेवक पर कर्तव्य डालता है और इसका ''निवृत्त हो चुके'' शासकीय सेवक से कोई लेना देना नहीं – नियम 65, ''निवृत्त हो चुके'' शासकीय सेवक को लागू नहीं है।

Cases referred:

2014 (4) SCC 334, W.P. No. 8791/2016 decided on 06.10.2017, Civil Special Appeal (W) No.349/2014 decided on 24.11.2016 (High Court of Rajasthan), (2016) 14 SCC 267, W.P. No. 16633/2016 decided on 23.06.2017 (High Court of Rajasthan), W.A. No. 1232/2017 decided on 15.12.2017, W.P. No. 18758/2015 decided on 11.01.2018, 2017 (3) MPLJ 175.

Ravi M.K. Vyas, for the petitioner.
Girish Kekre, G.A. for the State.

O R D E R

J.K. Maheshwari, J. :- This petition under Article 226 of the Constitution of India has been filed by the petitioner, who is a retired Subedar (M) of the Police Department of the Government of M.P. seeking quashment of order of recovery Annexure P-6 dated 23.11.2016 and to seek further direction to decide representation Annexure P-7 and to grant any other relief, which may be deemed fit in the facts of the case.

2. The facts unfolded to file the present petition are that the petitioner was appointed on the post of Assistant Sub Inspector (M) as per order Annexure P-2 dated 19.6.1982. He was promoted on the post of Account Subedar (M) as per order Annexure P-3 dated 11.7.2014. Thereafter on attaining the age of superannuation he retired from the said post vide order Annexure P-4 dated 31.10.2016. Because the post retiral dues and pensionary benefits of the petitioner were not settled, however, he submitted representation Annexure P-7 to respondent No. 4 to grant his legible dues. In response thereto order of recovery Annexure P-6 dated 23.11.2016 has been passed, which is assailed in view of the judgment of the Supreme Court in the case of *State of Punjab & others Versus Rafiq Masih* (*White Washer*) reported in 2014(4) SCC 334. It is contended that the petitioner was a Class III employee since retired, therefore, in the light of the judgment of the Supreme Court in *Rafiq Masih* (supra) the recovery from the retiral dues, as directed, is not permissible.

3. Learned counsel for the petitioner has placed reliance on a judgment of this Court in W.P. No.8791/2016 (*Smt. Kapsi Bai Vs. State of M.P*) decided on 6.10.2017 inter alia contending that this Court has considered the judgment of Division Bench of the High Court of Rajasthan, Jodhpur in Civil Special Appeal (W) No. 349/2014 (*Mohammed Yusuf Versus Maharana Pratap Agriculture & Technology and another*) decided on 24.11.2016 wherein the judgment of *High Court of Punjab & Haryana & others Versus Jagdev Singh* reported in (2016) 14 SCC 267 has been distinguished and the case of *Rafiq Masih* (supra) has been relied upon. However, agreeing with the view taken by the High Court of Rajasthan, this Court has quashed the order of recovery. In the said judgment it was observed that in W.P. No. 16633/2016 (*Dr. Ashok Kumar Parashar Versus The State of M.P.*) decided on 23.6.2017, the Court has rightly observed that Rule 65 of *M.P. Civil Services (Pension) Rules, 1976* (hereinafter referred to as the Pension Rules) is not applicable to retired Government servant. Reliance has also been placed on a judgment of Division Bench of this Court in W.A. No.1232/2017 (*The State of Madhya Pradesh & others Versus Chandrashwar Prasad Singh*) decided on 15.12.2017 whereby the Division Bench has observed that since the employee has no option but to give undertaking so as to avail the benefit of pay-fixation, it cannot be said to be voluntary act, thus, such undertaking cannot be made basis for sustaining the recovery. It is said that the aforesaid judgment of Division Bench has again been relied upon by Single Bench of this Court in W.P. No. 18758/2015 (*Phoolchand Patel Versus The State of Madhya Pradesh*) decided on 11.1.2018 and the order of recovery is quashed. In such circumstances, the recovery as directed against the petitioner may be ordered to be quashed.

4. *Per contra*, the State Government by filing the return has inter alia not disputed the factum regarding appointment, promotion and retirement of the petitioner. It is said that at the time of retirement while preparing the pension papers, it was found

that the pay of petitioner fixed at the time of his initial appointment was incorrect, which continued till attaining the age of superannuation, however, in view of Rule 65 of the Pension Rules, the recovery of the excess amount has rightly been made. The petitioner was informed vide orders dated 5.11.2016 but he has not responded, therefore, the order of recovery dated 23.11.2016 has rightly been passed. In addition, it is said that on account of pendency of a criminal case against the petitioner, he is being paid the provisional pension. It is further submitted that the petitioner had submitted two undertakings at the time of getting the benefit of revision of pay vide Annexure R-2 for recovery of the excess amount, if any paid to him. However, looking to those undertakings, the judgment of the Supreme Court in the case of *Jagdev Singh* (supra) is applicable to the present case. It is further submitted that Rule 65 of the Pension Rules deals the recovery and adjustment of the Government dues and as per the said Rule, the petitioner is duty bound to clear all his dues, which were not cleared by him, therefore, also the recovery has rightly been directed.

5. After having heard learned counsel for both the parties and on perusal of the facts of the case, the moot questions arise for consideration are;

(I) Whether recovery from the petitioner, since retired, can be made vide Annexure R-1 in lieu of undertaking furnished by him as per Annexure R-2?

(II) Whether Rule 65 of the Pension Rules would be applicable to the retired Government employee, however, the stand taken by the State Government is justified?

6. The issue regarding recovery from the employee either in service or after attaining the age of superannuation, came for consideration before the Supreme Court in the case of *Rafiq Masih* (supra) wherein the Apex Court in Para-12 has postulated certain categories and observed that the recovery from them is impermissible. Para-12 is relevant, however, it is reproduced as thus:-

> "**12.** It is not possible to postulate all situations of hardship, which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to herein above, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:
>
> **(i)** Recovery from employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).
>
> **(ii)** Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.

(iii) Recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.

(iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.

(v) In any other case, where the Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover."

7. The judgment of *Rafiq Masih* (supra) came for consideration in the judgment of *Jagdev Singh* (supra) wherein the Supreme Court in Para-10 after referring five categories, in which recovery was held to be impermissible in the case of *Rafiq Masih* (supra), referring Clause (ii) in Para-11 and 12 has held as under:-

"11. The principle enunciated in proposition (ii) above cannot apply to a situation such as in the present case. In the present case, the officer to whom the payment was made in the first instance was clearly placed on notice that any payment found to have been made in excess would be required to be refunded. The officer furnished an undertaking while opting for the revised pay scale. He is bound by the undertaking.

12. For these reasons, the judgment of the High Court which set aside the action for recovery is unsustainable. However, we are of the view that the recovery should be made in reasonable instalments. We direct that the recovery be made in equated monthly instalments spread over a period of two years."

8. After the judgment of *Jagdev Singh* (supra), the issue came for consideration before the Division Bench of the High Court of Rajasthan in *Mohdmmed (sic : Mohammed) Yusuf* (supra) wherein the Division Bench has held as under:-

"In the case in hand it is not disputed that the fixation impugned were made atleast 10 years earlier i.e. from the date the respondent University pass an order to effect recovery. It is also the position admitted that the appellants prior to their retirement were in employment of the University on the post of Technician/Junior

Mechanic, the posts is Group-C cadre and the appellants stood retired from service much back in the year 2002. So far as the issue with regard to undertaking given by them is concerned, that cannot be equated with the undertaking given by the Officer whose case was dealt with by the Hon'ble Apex Court in the *State of Punjab & Haryana & Ors.* (supra). In the case aforesaid, the person concerned was a Civil Judge (Junior Division) and further the undertaking given by him was in quite specific terms that any payment found to have been made in excess would be liable to be adjusted and further that fixation of the refund made was to be used for adjustment of excess payment, if any given.

In the instant matter, the undertaking said to be given is in a proforma that simply mentions for refund of over payments, if any made, on account of incorrect fixation. The undertaking is a part of proforma and it is well known that the persons belonging to lower posts put signatures on such undertaking without application of mind.

In these circumstances, we are of the considered opinion that cases of the present appellants are required to be dealt with in accordance with law laid down by the Apex Court in the case of *Rafiq Masih* (supra).

The appeals are accordingly allowed. The judgment impugned dated 24.2.2004 passed by the learned Single Bench is set aside. The writ petitions preferred by the petitioners are allowed to the extent that the respondent University shall not effect any recovery from pay/pensionary benefits/post retiral benefits or otherwise from them on account of the amount said to be paid in excess while awarding selection grades or making pay fixation.

9. In the said judgment the Court distinguished the judgment of *Jagdev Singh* (supra) on the pretext that if a person belong to Group-C retired from the service and given his undertaking, which cannot be equated with the undertaking given by the Civil Judge (Junior Division), which was dealt with in the case of *Jagdev Singh* (supra). It was further held that the undertaking is not specific to the recovery, however, it cannot be relied upon. Thus relying upon the judgment of *Rafiq Masih* (supra) and setting aside the order passed by learned Single Judge, the recovery was quashed.

10. The Division Bench judgment of High Court of Rajasthan in *Mohammed Yusuf* (supra) has been considered by co-ordinate Bench of this Court in *Kapsi Bai* (supra) wherein the defence taken by the State Government regarding undertaking given by the employee was negatived and the recovery was quashed.

11. The issue regarding recovery from a retired employee also came for consideration in the case of *Om Prakash Verma Vs. State of M.P. & others* reported in 2017(3) MPLJ 175 whereby the Single Bench of this Court quashed the recovery distinguishing the judgment of *Jagdev Singh* (supra) stating that the said judgment only deals proposition No. (ii) of the judgment of *Rafiq Masih* (supra) and do not apply for other propositions particularly to the case of Group-C and Group-D employees.

12. The Division Bench of this Court in *The State of Madhya Pradesh & others Versus Chandrashwar Prasad Singh* (supra) vide order dated 15.12.2017 has considered the same arguments advanced on behalf of the State Government relying upon the judgment of *Jagdev Singh* (supra) and the Court held as under:-

> We find that the said judgment relied upon by learned counsel for the State has no applicability in the facts of the present case as the undertaking itself is unconscionable writing obtained by the State. The employee has no option but to submit undertaking to avail the benefit of pay-fixation. In a judgment of the Supreme Court reported as (1986) 3 SCC 136 (*Central Inland Water Transport Corporation Limited and Another v. Brojo Nath Ganguly and Another*), a condition in the appointment letter that the Corporation could terminate the services of the employees without prior notice if it was satisfied that the employee was unfit medically or was guilty of any subordination in respect of other misconduct, was found to be illegal. The Supreme Court held as under:-
>
> "**68**. We now turn to the second question which falls for determination in these Appeals, namely, whether an unconscionable term in a contract of employment entered into with the Corporation, which is "the State" within the meaning of the expression in Article 12, is void as being violative of Article 14. What is challenged under this head is clause (i) of Rule 9 of the said Rules. This challenge levelled by the Respondent in each of these two Appeals succeeded in the High Court.
>
> xxx xxx
>
> **78**. Legislation has also interfered in many cases to prevent one party to a contract from taking undue or unfair advantage of the other. Instances of this type of legislation are usury laws, debt relief laws and laws regulating the hours of work and conditions of service of workmen and their unfair discharge from service, and control orders directing a party to sell a particular essential commodity to another.
>
> xxx xxx

93. The normal rule of Common Law has been that a party who seeks to enforce an agreement which is opposed to public policy will be non-suited. The case of A. Schroeder Music Publishing Co. Ltd. v. Macaulay [(1974) 1 WLR 1308], however, establishes that where a contract is vitiated as being contrary to public policy, the party adversely affected by it can sue to have it declared void. The case may be different where the purpose of the contract is illegal or immoral. In *Kedar Nath Motani and others v. Prahlad Rai and others,* [1960] 1 S.C.R. 861 reversing the High Court and restoring the decree passed by the trial court declaring the appellants' title to the lands in suit and directing the respondents who were the appellants' benamidars to restore possession, this Court, after discussing the English and Indian law on the subject, said (at page 873):

"The correct position in law, in our opinion, is that what one has to see is whether the illegality goes so much to the root of the matter that the plaintiff cannot bring his action without relying upon the illegal transaction into which he had entered. If the illegality be trivial or venial, as stated by Willistone and the plaintiff is not required to rest his case upon that illegality, then public policy demands that the defendant should not be allowed to take advantage of the position. A strict view, of course, must be taken of the plaintiff's conduct, and he should not be allowed to circumvent the illegality by restoring to some subterfuge or by mis-stating the facts. If, however, the matter is clear and the illegality is not required to be pleaded or proved as part of the cause of action and the plaintiff recanted before the illegal purpose was achieved, then, unless it be of such a gross nature as to outrage the conscience of the Court, the plea of the defendant should not prevail."

The types of contracts to which the principle formulated by us above applies are not contracts which are tainted with illegality but are contracts which contain terms which are so unfair and unreasonable that they shock the conscience of the court. They are opposed to public policy and require to be adjudged void." In view of the aforesaid judgment, we find that since the employee has no option but to give undertaking so as to avail the benefit of pay-fixation, it cannot be said to be voluntary act thus, such undertaking cannot be made basis for sustaining the recovery of Rs.87,354/-.

13. The said judgment has again been relied upon in the case of *Phoolchand Patel* (supra) by the Co-ordinate Bench of this Court quashing the order of recovery directed against the petitioner.

14. In view of the foregoing discussion, the legal position which can be culled out is that the judgment of *Jagdav (sic: Jagdev) Singh* (supra) is a judgment on proposition No. (ii) of the judgment of *Rafiq Masih* (supra). Proposition No. (ii) deals the recovery from retired Government employees or the employees who are due to retire within one year from the order of recovery. The Division Bench of the High Court of Rajasthan in *Mohammed Yusuf* (supra) distinguished the ratio of the judgment of *Jagdev Singh* (supra) on facts reiterated in the undertaking, if any, given by the Civil Judge, as was the case before the Supreme Court, would not apply in the case of Group-C employees, while Division Bench of this Court in the case of *Chandrashwar Prasad Singh* (supra) distinguished the same taking a view that if any undertaking has been obtained from an employee at the time of availing the benefit of pay fixation, it cannot be said to be voluntary act on his part because the said employee was having no option except to give such undertaking, it cannot be made the basis for sustaining the recovery. Though the Single Bench in the case of *Om Prakash* (supra) distinguished the judgment of *Jagdev Singh* (supra) on the pretext that the petitioner is a Class III employee but in the case at hand though the petitioner was a Class III employee now retired, therefore, this Court merely referred the said judgment to accept the analogy as taken by the High Court of Rajasthan in the case of *Mohammed Yusuf* (supra) as well as by this Court in the case of *Chandrashwar Prasad Singh* (supra).

15. Looking to the aforesaid legal position, it is necessary to analize the facts of the present case. On perusal, it reveals that the State Government vide order dated 5.11.2016 said that the petitioner is not entitled for the pay scale which was allowed to him from the initial date of appointment, therefore, recovery to the tune of Rs.23,43,433/- along with the interest has been ordered vide order Annexure P-6 dated 23.11.2016. The undertakings which are brought on record relates to fixation of pay at the time of pay revision; first undertaking was submitted on 21.4.1987 and subsequent undertaking is undated. Its language indicates that the benefit of revision of pay extended to the petitioner is provisional and at the time of its finalization, excess amount may be returned back or may be deducted from him. However, looking to the said fact the analogy drawn by Division Bench of this Court in the case of *Chandrashwar Prasad Singh* (supra) aptly applies to the facts of this case because the said undertaking was obtained from the petitioner at the time of extending the benefit of pay revision and such act of the petitioner cannot be said to be voluntary act. In view of the said discussion distinguishing the judgment of *Jagdev Singh* (supra), and applying the ratio of *Rafiq Masih* (supra) the order of recovery Annexure P-6 dated 23.11.2017 is hereby quashed.

16. Now reverting to question No. 2 whether Rule 65 of the Pension Rules would be applicable to the retired Government employee? In this regard, the stand taken by the State Government is that, it would apply to the retired employee, however, recovery can be made from him. To advert the said contention, the language engrafted in Rule 65 of the Pension Rules is relevant, however, it is reproduced as thus:-

> **65. Recovery and adjustment of Government dues.-** (1) It shall be the duty of every retiring Government servant to clear all Government dues before the date of his retirement.
>
> (2) Where a retiring Government servant does not clear the Government dues and such dues are ascertainable.-
>
> (a) an equivalent cash deposit may be taken from him; or
>
> (b) out of the gratuity payable to him, his nominee or legal heir, an amount equal to that recoverable on account of ascertainable Government dues shall be deducted.
>
> *Explanation.*-1. The expression "ascertainable Government dues" includes balance of house building or conveyance advance, arrears of rent and other charges pertaining to occupation of Government accommodation, over-payment of pay and allowances and arrears of income -tax deductible at source under the Income-tax Act, 1961 (No. 43 of 1961).

17. On perusal of the aforesaid, it is clear that sub-rule (1) specifies the dues of "retiring" Government servant while sub-rule (2) deals the deposit or deduction from the gratuity payable to "retiring" Government servant, therefore, Rule 65 deals the contingency casting the duty on the "retiring" Government servant as well as on the Government, it is nothing to do with the "retired" Government servant. It do not postulate the contingency which may be made applicable after retirement of the employee.

18. Learned Government Advocate made an attempt referring Rule 66 (3)(a) of the Pension Rules to contend that the words "retiring employee" would be deemed to be continued even after retirement upto the period of six months. After going through the entire Rule 66, it can safely be held that Rule 66(3)(a), (b) and (c) applies to deal with a situation, after retirement of the Government employee. In case the formalities as specified in Rule 66(1) (a) and (b) and Rule 66 (2)(a), (b) and (c) has been observed by the Government then what would be the validity period of the undertaking and effect of the amount so deposited by such employee for the purpose of recovery of Government dues, if any from him, otherwise as per sub-rule (4), the legal procedure which is permissible under the law can be taken. In view of the foregoing discussion repelling the argument of learned Government Advocate, the questions posed for answers hereinabove are decided in favour of the petitioner and against the State Government.

19. Accordingly, the inescapable conclusion which can be arrived at in the present case is the order of recovery Annexure P-6 dated 23.11.2016 issued by the Government is hereby quashed. In consequence, this petition succeeds and is hereby allowed. In the facts and circumstances of the case, parties are directed to bear their own costs.

Petition allowed

I.L.R. [2018] M.P. 692
WRIT PETITION

Before Mr. Justice Sujoy Paul

W.P. No. 13175/2017 (Jabalpur) decided on 30 January, 2018

UNION OF INDIA & anr. …Petitioners
Vs.
SMT. SHASHIKALA JEATTALVAR …Respondent

(Alongwith W.P. No. 2133/2017)

***Industrial Disputes Act (14 of 1947), Section 10 – Limitation – Belated Reference* – After departmental proceedings, workman was punished with dismissal from service on 02.12.1992 – Reference was made after 11 years before the CGIT which was allowed and compensation of Rs. 2 lacs was awarded to the petitioner/legal heir, as workman expired during pendency of the case before Tribunal – Employer and Employee both challenged the order of the Tribunal – Held – It is true that in the Act of 1947, no limitation is prescribed for raising an industrial dispute and Limitation Act, 1963 is also not applicable to the reference made under the Act – Further held – Looking to various judgments passed by the Supreme Court, it can safely be concluded that delay is a relevant factor which needs to be considered by Tribunal – In the instant case, reference was made after 11 years from the date of termination and workman was not able to establish that the issue was still alive when the matter was referred – It is also equally settled that "delay defeats equities" – In the instant case, because of such belated reference, inquiry record has become untraceable/unavoidable, therefore, employer could not produce the same – Supreme Court has held that when delay resulted in material evidence relevant to adjudication being lost or rendered unavailable, delay is fatal – It is well settled that party cannot take benefit of his own wrong – No relief was due to the workman – Award passed by the Tribunal is set aside – Petition filed by the employer is allowed and the one filed by the workman is dismissed.**

(Paras 10, 13, 16, 17 & 18)

औद्योगिक विवाद अधिनियम (1947 का 14), धारा 10 – परिसीमा – विलम्बित निर्देश – कर्मकार को विभागीय कार्यवाहियों के पश्चात्, 02.12.1992 को सेवा से पदच्युति के साथ दण्डित किया गया था – 11 वर्ष पश्चात्, सी.जी.आई.टी. के समक्ष निर्देश प्रस्तुत किया गया था जिसे मंजूर किया गया था तथा याची/विधिक वारिस को रू. दो लाख का प्रतिकर प्रदान किया गया था क्योंकि, कर्मकार की मृत्यु अधिकरण के समक्ष प्रकरण लंबित रहने के दौरान हुई थी – नियोक्ता एवं कर्मचारी दोनों ने अधिकरण के आदेश को चुनौती दी – अभिनिर्धारित – यह सत्य है कि 1947 के अधिनियम में औद्योगिक विवाद उठाने के

लिए कोई परिसीमा विहित नहीं है तथा अधिनियम के अंतर्गत किये गये निर्देश को परिसीमा अधिनियम, 1963 लागू भी नहीं होता है – आगे अभिनिर्धारित – उच्चतम न्यायालय द्वारा पारित विभिन्न निर्णयों के देखते हुए, यह सुनिश्चित रूप से निष्कर्षित किया जा सकता है कि विलंब एक सुसंगत कारक है जिसे अधिकरण द्वारा विचार में लिया जाना आवश्यक है – वर्तमान प्रकरण में, सेवा समाप्ति की तिथि से 11 वर्ष पश्चात् निर्देश किया गया है एवं कर्मकार यह स्थापित नहीं कर पाया है कि जब मामला निर्दिष्ट किया गया था, मुद्दा जीवित था – यह भी समान रूप से स्थापित है कि ''विलंब से साम्या की पराजय होती है'' – वर्तमान प्रकरण में, उक्त विलम्बित निर्देश के कारण, जांच अभिलेख न पता लगाये जाने योग्य/अनुपलब्ध हो गया और इसलिए, नियोक्ता उसे प्रस्तुत नहीं कर सका – उच्चतम न्यायालय ने अभिनिर्धारित किया है कि जब विलम्ब के परिणामस्वरूप न्यायनिर्णयन हेतु सुसंगत तात्विक साक्ष्य गुम जाये या अनुपलब्ध हो जाये, विलम्ब घातक है – यह सुस्थापित है कि पक्षकार स्वयं की गलती का लाभ नहीं ले सकता – कर्मकार को कोई अनुतोष देय नहीं था – अधिकरण द्वारा पारित अवार्ड अपास्त किया गया – नियोक्ता द्वारा प्रस्तुत याचिका मंजूर की गई एवं कर्मकार द्वारा प्रस्तुत याचिका खारिज की गई।

Cases referred:

2001 (5) SCC 340, 2008 (10) SCC 115, 1996 (5) SCC 609, 2014 (4) SCC 108, 2014 (10) SCC 301, 2013 (14) SCC 543, 2015 (15) SCC 1, 2005 (5) SCC 91, 1993 Supp (4) SCC 67, 2007 (9) SCC 109, 2000 (2) SCC 455, 2001 (1) SCC 133, 2014 (1) SCC 648.

N.S. Ruprah, for the petitioners in W.P. No. 13175/2017 and for the respondent in W.P. No. 2133/2017.

Ashish Mishra, for the petitioner in W.P. No. 2133/2017 & for the respondent in W.P. No. 13175/2017.

O R D E R

Sujoy Paul, J. :- In these petitions, the employer and the workman (represented by his widow/legal heir) are at loggerheads on respective portions of award of Central Government Industrial Tribunal-cum-Labour Court (hereinafter referred to as "Tribunal"), Jabalpur dated 04.10.2006 passed in Case No. CGIT/LC/R/48/2003. The employer is also aggrieved by order of the Tribunal dated 13.04.2012 whereby the preliminary issue regarding legality and validity of departmental inquiry was answered against the employer.

2. Draped in brevity, the relevant facts are that the appropriate Government by letter dated 10.02.2003 sent an industrial dispute to the Tribunal for its adjudication. The Tribunal was required to answer the following reference:

> *"Whether the action of the management of Divisional Railway Manager, Central Railway, Bhusawal (Maharashtra) in stopping*

the services of Shri Virendra Kumar S/o Shri Narsingh Rao w.e.f. 02.12.1992 is legal and justified ?

If not, to what relief the workman is entitled to ?"

3. After receiving notices, the parties filed their respective statement of claim and written statement before the Tribunal. The Tribunal framed a preliminary issue regarding validity of departmental inquiry which resulted into termination of Shri Virendra Kumar. The issue No.1 was decided on 13.04.2012. The Tribunal came to hold that the management has failed to file any inquiry papers in the proceedings. In absence of record of departmental inquiry, the Tribunal accepted the allegations of other side regarding procedural flaw in the domestic inquiry and opined that inquiry was vitiated. Consequently, the employer was given liberty to prove the misconduct in the Court. The management thereafter led evidence before the Tribunal. The Tribunal in its award dated 04.10.2016 found that the management was not able to prove the misconduct and accordingly, the removal order was set aside. Since the workman Shri Virendra Kumar died during the pendency of the proceedings before the Tribunal, the Tribunal directed to pay Rs.2 lacs as compensation to the workman besides holding that action of management in stopping the services of Shri Virendra Kumasr (sic : Kumar) w.e.f. 02.12.1992 was not legal.

4. The stand of the employer is that the workman was subjected to a disciplinary proceedings. After following the principles of natural justice, the inquiry was concluded and the punishment of dismissal from service was inflicted on the workman way back on 02.12.1992. He was dismissed from Bhusawal (Maharashtra) in December, 1992. He did not challenge the dismissal order before any forum for a long time. He preferred an appeal dated 30.01.2001 (Annexure-P/3) wherein he did not challenge the procedural part or decision making process of departmental inquiry. He prayed for substitution of punishment by suggesting that other minor punishment are available in the statute book which can replace the punishment of termination.

5. Another mercy appeal (Annexure-P/5) dated 09.04.2001 is on the same line and subject. Reliance is placed on yet another appeal dated 19.04.2001 (Annexure-P/6).

6. Shri N.S. Ruprah, learned counsel for the employer submits that in none of the appeals, the workman attached the decision making process and hence he is 'estopped' from raising these points at a later stage before the Tribunal. The main ground of attack to the award is that since reference was made belatedly i.e. after 11 years from the date of termination of the workman, no relief was due to the workman. No industrial dispute existed in the eyes of law. The workman cannot take advantage of his own inaction whereby he raised industrial dispute after about a decade and during this time, the record of the disciplinary proceedings were either destroyed or not traceable. For the delay on the part of the workman, the employer cannot be held

responsible and the departmental inquiry could not have been declared illegal for non-production of record of domestic inquiry. Reliance is placed on 2001 (5) SCC 340 (*Deokinandan Sharma Vs. Union of India and others*) and 2008 (10) SCC 115 (*C. Jacob Vs. Director of Geology and Mining and another*). It is urged that after having taken the solitary ground regarding quantum of punishment in successive appeals, the workman has waived his right to raise any other ground before the Tribunal. Reliance is also placed on 1996 (5) SCC 609 (*Pfizer Ltd. Vs. Mazdoor Congress and others*) and 2014 (4) SCC 108 (*Chennai Metropolitian Water supply and Sewerage Board and others*).

7. *Per contra*, Shri Ashish Mishra, learned counsel for the workman contended that the Tribunal was justified in declaring the departmental inquiry as illegal. In the Industrial Dispute Act, no limitation is prescribed to raise an industrial dispute. Hence, on the ground of alleged delay in raising dispute, no fault can be found in the award of the Tribunal. The Tribunal has partially erred in not granting the benefit of backwages till the date of death of the workman and also the retiral dues/pension etc. These benefits are claimed by the workman with 18% interest on delayed payment. Shri Mishra relied on 2014 (10) SCC 301 (*Raghubir Singh Vs. General Manager, Haryana Roadways, Hisar*) and an unreported order passed in W.P. No.201/2016 (*Shamim Bano Vs. Manager, Gajandoh Mines of WCL*) decided on 10.04.2017.

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

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

10. True it is that in ID Act, 1947, no limitation is prescribed for raising an industrial dispute. The Limitation Act, 1963 is also not applicable to the reference made under the ID Act. The Apex Court in 2013 (14) SCC 543 (*Rajasthan State Agriculture Marketing Board Vs. Mohan Lal*) held that though no limitation is prescribed, the delay in raising industrial dispute is definitely an important circumstance which the Labour Court must keep in view at the time of exercise of discretion irrespective of whether or not such objection has been raised by the other side. In the instant dispute, the employer had categorically raised the objection regarding delay in raising the dispute. Thus, as a thumb rule, it cannot be said that delay has no significance in an industrial dispute.

11. In 2015 (15) SCC 1 (*Prabhakar Vs. Sericulture Department*), it was poignantly held that notwithstanding the fact that the law of limitation does not apply, it is to be shown by the workman that there is a dispute in presenti. For this purpose, it has to be demonstrated that even if considerable period has lapsed and there are laches and delays, such delay has not resulted into making the industrial dispute cease to exist. Therefore, if the workman is able to give satisfactory explanation for these laches and delays and demonstrated that the circumstances disclose that issue is still alive, delay would not come in his way.

12. Similarly, in 2005 (5) SCC 91 (*Haryana State Co-operative Land Development Bank Vs. Neelam*), the Court held that the aim and object of ID Act may be to impart social justice to the workman, but the same by itself would not mean that irrespective of his conduct, a workman would automatically be entitled to relief. The procedural laws like estoppel, waiver and acquiescence are equally applicable to the industrial proceedings.

13. In this view of the matter, it can be safely concluded that delay is a relevant factor which needs to be considered by the Industrial Tribunal. In the instant case, the reference was made after 11 years from the date of termination of the workman. The workman was not able to establish that the issue was still alive when matter was referred by the appropriate Government. This is equally settled that doctrine of laches is in fact an application of maxmim (sic : maxim) of equity "delay defeats equities". This principle was also considered by the Supreme Court in the case of *Prabhakar* (supra). The Tribunal did not frame any issue on the objection of the employer relating to delay in raising industrial dispute. In the impugned award also, the Tribunal has not examined the impact of delay in raising the industrial dispute. Thus, the award of the Tribunal has become vulnerable.

14. As noticed, the Tribunal declared the departmental inquiry as illegal because the Railway Administration could not produce the record of the departmental inquiry. The question is : whether such a course adopted by the Tribunal was in accordance with law ? More so, when the workman raised the dispute belatedly i.e. after 11 years from his dismissal and during this time, the record of a departmental inquiry became untraceable. Shri Ashish Mishra, learned counsel for the workman placed heavy reliance on 2014 (10) SCC 301 (*Raghuveer Singh Vs. General Manager, Haryana Roadways, Hissar*) and contended that since Limitation Act has no application on reference made by appropriate Government, no fault can be found in the award. A careful reading of the said judgment shows that the Apex Court considered the aspect of delay in raising the industrial dispute. It was recorded that "*moreover, it is reasonable to adjudicate the industrial dispute in spite of delay in raising and referring the matter, since there is no mention of any loss or unavailability of material evidence due to delay"*. Thus, as per the judgment of *Raghuveer Singh* (supra) also, if because of delay, the evidence or record becomes untraceable/unavailable, delay becomes fatal.

15. In 1993 Supp (4) SCC 67 (*Ratan Chandra Sammanta Vs. Union of India*), it was held that a labourer retrenched by the employer deprives himself of remedy available in law by delay itself; lapse of time results in losing the remedy and the right as well. The delay would certainly be fatal if it has resulted in material evidence relevant to adjudication being lost and rendered not available. The same view has been taken by Supreme Court in 2007 (9) SCC 109 (*Dharappa Vs. Bijapur Cooperative Milk Producer Societies Union Ltd*). In 2000 (2) SCC 455 (*Nedungadi*

Bank Ltd. Vs. K.P. Madhavankutty) and 2001 (1) SCC 133 (*Balbir Singh Vs. Punjab Roadways*), the Apex Court poignantly held that the delay would be fatal if it has resulted in the material evidence relevant to adjudication being lost or rendered unavailable. Unfortunately, the learned Tribunal has not considered these relevant aspects.

16. If the facts of the instant dispute are examined on the anvil of the aforesaid principles laid down, it will be clear like noon day that the workman had miserably failed to give any satisfactory explanation for delay and laches in raising the industrial dispute. He could not demonstrate that the circumstances disclose that issue is still alive and delay will not come in his way. In absence of establishing the aforesaid, it cannot be said that the dispute was alive or existed when reference was made. On the basis of belated reference in the present case, no relief was due to the workman.

17. The Supreme Court in catena of judgments held that when delay resulted in material evidence relevant to adjudication being lost or rendered unavailable, delay is fatal. This principle is squarely applicable in the present case. The departmental inquiry was held to be illegal mainly on the ground that the employer could not produce the record of the departmental inquiry. The inquiry record became unavailable because of delay in raising such industrial dispute. The enquiry record was not traceable after a decade of termination of workman and for this reason, enquiry could not be declared as bad because workman was responsible for this delay of 11 years. This is equally settled that a party cannot take benefit of his own wrong. [See: 2014 (1) SCC 648 (*Oil and Natural Gas Corporation Limited Vs. Modern Construction and Company*)].

> "20. This Court in *Bhartiya Sewa Samaj Trust Vs. Yogeshbhai Ambalal Patel*, 2012 (9) SCC 310, while dealing with the issue held:
>
> > 28. A person alleging his own infamy cannot be heard to any forum, what to talk of a writ court, as explained by the legal maxim *allegans suam, turpitudinem non est audiendus*. If a party has committed a wrong, he cannot be permitted to take the benefit of his own wrong ….. This concept is also explained by the legal maxims *commodum ex injuria sua non habere debet and nullus commodum capere potest de injuria sua propria*."

18. As analyzed above, it is clear that the Tribunal had missed the relevant points. The points were relating to impact of belated reference which was raised after 11 years from the date of termination. The Tribunal also failed to see that delay in raising the industrial dispute has resulted into loss of documentary evidence/record of the departmental inquiry. The Tribunal without considering the settled legal position, mechanically held that departmental inquiry was vitiated and on merits, the employer could not establish the charge after 11 years. Without considering the aforesaid material

points, the Tribunal mechanically answered the reference in favour of the workman. Thus the order dated 13.04.2012 and the award dated 04.10.2016 cannot sustain judicial scrutiny. Accordingly, the award dated 04.10.2016 is set aside. Resultantly, W.P. No.13175/2017 filed by the employer is allowed. As a corollary, W.P. No.2133/2017 filed by the workman is dismissed.

19. Petitions are disposed of.

Order accordingly

I.L.R. [2018] M.P. 698
WRIT PETITION

Before Mr. Justice Vivek Agarwal

W.P. No. 1763/2009 (Gwalior) decided on 1 February, 2018

ANJUL KUSHWAHA (SMT.) …Petitioner

Vs.

STATE OF M.P. …Respondent

***A. Appointment of Anganwadi Karyakarta – Weighted Marks – Entitlement* – Held – Petitioner does not possess 5 years teaching experience as Didi, hence not entitled for 10 weighted marks – Further, petitioner vide affidavit projected herself to be a deserted woman whereas in the application form, she shown her status to be a married woman and not a deserted woman, hence not entitled for any weighted marks on this ground also – Merely to seek appointment, petitioner has suppressed the fact of residing with her husband and close relatives – Petition dismissed.**

(Paras 9, 10, 11 & 12)

क. आंगनवाड़ी कार्यकर्ता की नियुक्ति – भारित अंक – हकदारी – अभिनिर्धारित – याची के पास दीदी के रूप में 5 वर्ष का शिक्षण अनुभव नहीं है अतः, 10 भारित अंकों के लिए हकदार नहीं – इसके अतिरिक्त, याची ने स्वयं को शपथपत्र द्वारा एक अभित्यक्त महिला प्रदर्शित किया जबकि आवेदन पत्र में उसने अपनी स्थिति विवाहित महिला दर्शाई और न कि एक अभित्यक्त महिला, अतः इस आधार पर भी किसी भारित अंकों की हकदार नहीं – मात्र नियुक्ति चाहने के लिए, याची ने अपने पति एवं नजदीकी रिश्तेदारों के साथ निवासरत होने के तथ्य का छिपाव किया है – याचिका खारिज।

***B. BPL Category – Entitlement* – Petitioner's name appearing in the BPL ration card issued to her sister-in-law (nanad) – Held – Petitioner's husband is alive and has not deserted her – By no stretch of imagination, status of sister-in-law as per Hindu Law and customs can be considered to be head of the family of petitioner – Family card showing herself in BPL category will not entitle the petitioner for any weighted marks, especially when her husband is alive.**

(Para 14)

ख. गरीबी रेखा से नीचे की श्रेणी – हकदारी – याची का नाम उसकी ननद को जारी किये गये गरीबी रेखा से नीचे के राशन कार्ड पर प्रकट हो रहा है – अभिनिर्धारित – याची का पति जीवित है तथा उसका अभित्यजन नहीं किया है – हिन्दू विधि एवं रूढ़ियों के अनुसार, कल्पना की सीमा से परे, ननद को याची के कुटुम्ब का प्रमुख नहीं माना जा सकता – राशन कार्ड में उसे गरीबी रेखा से नीचे की श्रेणी में दर्शाया जाना, याची को किसी भारित अंकों के लिए हकदार नहीं बनाएगा विशेष रूप से तब जब उसका पति जीवित है।

Case referred:

(2000) 2 MPWN 267.

K.B. Chaturvedi with *G.P. Chaurasiya*, for the petitioner.
Harish Dixit, G.A. for the respondent/State.
R.S. Rathore, for the respondent No. 5.

J U D G M E N T

Vivek Agarwal, J. :- Petitioner has filed this petition being aggrieved by order dated 13.03.2009 passed by Commissioner, Chambal Division, Morena, whereby appeal filed by the private respondent- Smt. Neelam Rathore has been accepted and the appointment order as Anganwadi Karyakarta issued through the order of the Collector in favour of the present petitioner, who was respondent No. 1 before the Court of Commissioner, has been set aside.

2. Petitioner's contention is that the petitioner belongs to BPL category as can be seen from Ration Card (Annexure P/5) in which her name is mentioned alongwith her sister-in-law (Nanad) Rajabeti. Further reliance has been placed on affidavit (Annexure P/5-A) in which the petitioner depicted herself as a deserted woman and mentioned in the affidavit that for last one year her husband is torturing her and, therefore, she is a deserted woman. Third ground is that petitioner has certificates of teaching 16 persons as *Guruji* as contained in Annexure P/9 and another certificate from Govt. Primary School, Lahari, Bhind showing herself as Voluntary Teacher who worked from 01.10.2006 to 30.04.2007. The petitioner has also enclosed copy of one certificate as Anganwadi Karyakarta as contained in Annexure P/17, wherein it has been shown that the petitioner worked as Anganwadi Karyakarta w.e.f. 10.11.2008 to 09.12.2008. Placing reliance on such certificates, petitioner submits that in terms of the scheme of appointment of Anganwadi Karyakarta petitioner should have been granted 10 marks for BPL card holder, 10 marks for being a deserted woman and 10 marks for her experience as *Guruji*/Anganwadi Karyakarta/teaching experience in primary school. The fourth ground which has been taken by the petitioner is in regard to limitation that private respondent No. 5 had not filed the appeal before the Commissioner within the prescribed period of limitation, which has been shown to be 10 days in the policy (Annexure P/2) and therefore, the appeal was barred by time

and such appeal should not have been entertained by the Commissioner. In support of this ground, learned counsel for the petitioner has placed reliance on the judgment of Supreme Court in the case of *Ragho Singh Vs. Mohan Singh* reported in (2000)2 MPWN 267, wherein it has been held that if there is no application for condonation filed and appeal is barred by limitation, then the limitation cannot be condoned in the absence of such application for condonation of delay.

3. Learned counsel for the petitioner has also taken this Court through the representation which was made by her to the Project Officer as is contained in Annexure P/13 dated 15.09.2007. This representation addressed to the Project Officer reveals that she had sought marks on two grounds namely; 10 marks for being a BPL card holder and 10 marks for her experience as a teacher (Shishu Didi Padhna Badhna Anubhav), however, she had not claimed any mark for being a deserted woman in the representation which was filed before the Project Officer. This was the first representation made by the petitioner against the Provisional Select List issued by the respondent.

4. It is petitioner's contention that since the representation was not decided by the Project Officer and he had issued an appointment order in favour of respondent No. 5 Ku. Neelam Rathore on 25.10.2007, therefore, the petitioner had filed an appeal before the Collector, Bhind which has been decided vide order dated 18.09.2008 (Annexure P/15).

5. This appeal has been decided by Collector only on the sole ground that the petitioner is a deserted woman and therefore, if 10 marks would have been granted to her she would get 43 marks as against 36 marks secured by private respondent Ku. Neelam Rathore. On the basis of such analysis, when the Collector, Bhind allowed the appeal then private respondent Neelam Rathore had filed second appeal before the Court of Commissioner, Chambal Division, Morena.

6. It will be necessary to point out that Collector did not consider any other ground namely BPL card holder and her experience (Shishu Didi Padhna Badhna Anubhav) and treated her to be a deserted woman and directed for issuance of order in her favour.

7. These arguments gave rise to following issues namely :-

(i). Whether the certificate obtained by the petitioner as Anganwadi Karyakarta after the selection process is valid certificate?

(ii). Whether the certificate produced by the petitioner of working as *Guruji* and also as a voluntary teacher as are contained in Annexure P/9 and P/10 will entitle the petitioner to get 10 marks as per sub para 4 of clause 2(A) of the policy (Annexure P/2)?

(iii). Whether the BPL card obtained by the petitioner alongwith her sister-in-law can be said to be a valid card entitling her to secure 10 marks on account of her place in BPL category?

(iv). Whether the Commissioner exceeded his jurisdiction in condoning the delay in filing the appeal as was filed by the private respondent?

8. As far as issue No. 1 is concerned, learned counsel for the petitioner gracefully admits that the certificate (Annexure P/17) is for the period after recruitment process was complete is of no value to her, therefore, next issue which arises is whether certificate contained in Annexure P/9 and P/10 pertaining to teaching experience can be considered for granting 10 marks as per sub para 4 of clause 2 (A) of the Policy (Annexure P/2):-

> "4. आंगनवाड़ी केंद्रों की सहायिका/मिनी आंगनवाड़ी केंद्रों की कार्यकर्ता/ शिशु शिक्षा केंद्र की दीदियों /शहरी विकास अभिकरण द्वारा संचालित बालवाड़ियों की शिक्षिका/ पूर्व में शहरी क्षेत्र में संचालित पोषण आहार केंद्रों पर कार्यरत पोषण आहार संगठिकाओं / पूर्व में अन्य स्थान पर कार्यरत आंगनवाड़ी कार्यकर्ता के रूप में 5 वर्ष कार्य का अनुभव। (उक्त लाभ केवल उन्हीं आवेदिकाओं को दिया जावेगा जिन्हें शिकायत के आधार पर हटाया न गया हो) "

9. Reading of sub para 4 of the Policy in clause 2(A) reveals that:-

(i). When circular dated 10.07.2007 is read with Circular dated 27.07.2000, as has been discussed by the High Court at Principal Seat, Jabalpur in case of *Smt. Shashikala Patel Vs. State of M.P.* decided in W.P. No. 3673/2013, on 03.12.2013, it is apparent that 10 weightage marks are given in lieu of 5 years experience as Didi. Since petitioner did not possess 5 years teaching experience as didi she is not entitled for 10 weighted marks.

(ii). Secondly, marks for teaching in Balwadis being run by Urban Development Authorities are to be given. But Annexure P/9 is from Gram Panchayat and not from a Balwadi of a Urban Development Authority.

10. There are no weightage marks prescribed for experience vide Annexure P/10 as a voluntary teacher, therefore, petitioner is not entitled to any marks on account of her teaching experience as is contained in Annexure P/9 and P/10.

11. As far as her status as a deserted woman is concerned, Commissioner has categorically recorded a finding that though the petitioner has filed an affidavit that she is a deserted woman but in the form which was filled by her for appointment as Anganwadi Karyakarta, she has shown her status as that of a married woman and not of a deserted woman, therefore, it can be conveniently concluded that the petitioner was not a deserted woman as per the application form. Besides this, petitioner has not disclosed any ground for claiming any marks on the basis of she being a deserted woman before the Project Officer as can be seen from her first application (Annexure P/13).

12. This Court is of the opinion that subsequently merely to seek an appointment petitioner has suppressed the fact of residing with her husband and close relatives and projected herself to be a deserted woman. Thus, on the ground of being a deserted

woman, petitioner is also not entitled to claim any marks and she could not have secured any marks on this ground, therefore, the Collector erred in granting marks treating petitioner to be a deserted woman.

13. As far as BPL card is concerned, petitioner has placed reliance on the fact that Anneuxre (sic : Annexure) P/5 i.e. BPL card is a public document and therefore, it cannot be disputed.

14. The petitioner has failed to explain that how sister-in-law (Nanad) will be construed as a family of petitioner when her husband is still alive and has not treated her as a wife who has been deserted. The petitioner may have in individual capacity/ identity or alongwith her husband and her in-laws but by no stretch of imagination status of sister-in-law as per the Hindu Law and customs can be considered to be head of family of the petitioner being a married woman and therefore, family card showing herself in BPL category will not give assistance to the petitioner and therefore, the petitioner is not entitled to claim any marks for being a BPL Card holder when she has tried to claim this status on the strength of Family Card issued to her Nanad especially when her husband is alive.

15. Now the only issue survives for adjudication is the ground of condonation of delay. The main order reveals that the Commissioner has considered the issue of delay and after considering the grounds, has condoned the delay. Once the delay has been condoned and ground was made out to condone the delay, there is no material to show that there was no application before the Commissioner to condone the delay, therefore, the ratio of the law laid down in the case of *Ragho Singh* (supra) will not be applicable to the facts and circumstances of the case. Even otherwise it is settled principle of law that technicalities should never be used to defeat the substantial rights of the other party. In the present case, the petitioner has not approached any of the forum as has been narrated above with clean hands, therefore, questioning the jurisdiction of the Commissioner on the basis of technicality, no relief can be granted. Thus, the petition fails and is dismissed.

Petition dismissed

I.L.R. [2018] M.P. 702
WRIT PETITION

Before Mr. Justice Sujoy Paul

W.P. No. 3990/2017 (Jabalpur) decided on 2 February, 2018

PUSHP …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

Nikshepakon Ke Hiton Ka Sanrakshan Adhiniyam, M.P., 2000 (16 of 2001), Section 4 & 8 and Constitution – Article 226 – Attachment Order – Special

Court **– Attachment order of bank accounts and properties of petitioner was passed against the petitioner in a proceeding in which he was not even a party – Held – Attachment order can be passed by District Magistrate on complaints of depositors or otherwise – Such attachment order is an ad-interim order subject to judicial scrutiny by Special Court u/S 8 of the Adhiniyam and therefore principles of natural justice are not attracted before issuance of order of attachment – Principle of natural justice is codified in the shape of Section 8 of the Act and District Magistrate, after passing an order of attachment is required to apply to Special Court to make the order of attachment absolute and that is to be done only after issuing show cause notice to the person concerned – In the present case, petitioner has an alternate, efficacious and statutory remedy u/S 8 of the Act wherein he can raise all possible objections against attachment – Proceedings u/S 8 of the Act are already pending before the Special Court, hence interference declined – Petitions disposed of.**

(Paras 11 to 15)

निक्षेपकों के हितों का संरक्षण अधिनियम, म.प्र., 2000 (2001 का 16), धारा 4 व 8 एवं संविधान – अनुच्छेद 226 – कुर्की आदेश – विशेष न्यायालय – याची के विरूद्ध, याची के बैंक खाते एवं सम्पत्तियां कुर्क करने का आदेश एक ऐसी कार्यवाही में पारित किया गया जिसमें वह पक्षकार भी नहीं था – अभिनिर्धारित – कुर्की आदेश को जिला मजिस्ट्रेट द्वारा, जमाकर्ता की शिकायतों पर या अन्यथा, पारित किया जा सकता है – उक्त कुर्की आदेश, अधिनियम की धारा 8 के अंतर्गत विशेष न्यायालय द्वारा न्यायिक संवीक्षा के अध्यधीन एक अंतरिम आदेश है और इसलिए कुर्की आदेश जारी करने के पूर्व नैसर्गिक न्याय के सिद्धांत आकर्षित नहीं होते – नैसर्गिक न्याय का सिद्धांत, अधिनियम की धारा 8 के रूप में संहिताबद्ध है तथा कुर्की का आदेश पारित करने के पश्चात्, जिला मजिस्ट्रेट से यह अपेक्षित है कि कुर्की के आदेश को अंतिम करने के लिए विशेष न्यायालय को आवेदन करे और ऐसा केवल संबंधित व्यक्ति को कारण बताओ नोटिस जारी करने के पश्चात् किया जाना चाहिए – वर्तमान प्रकरण में, याची के पास अधिनियम की धारा 8 के अंतर्गत वैकल्पिक, प्रभावकारी एवं कानूनी उपचार है, जहाँ वह कुर्की के विरूद्ध सभी संभावित आक्षेपों को उठा सकता है – अधिनियम की धारा 8 के अंतर्गत कार्यवाहियां पहले से विशेष न्यायालय के समक्ष लंबित हैं, अतः मध्यक्षेप से इंकार किया गया – याचिकायें निराकृत।

Case referred:

AIR 1977 SC 965.

Vikas Rathi, for the petitioner.
G.P. Singh, G.A. for the respondent.

O R D E R

Sujoy Paul, J. :- Regard being had to the similitude of the questions involved, these matters are heard analogously and decided by this common order. This order will dispose of W.P. Nos.3990/2017, 3991/2017, 3992/2017 and 21248/2017.

2. Facts are taken from W.P. No.3990/2017. The petitioners, permanent residents of Indore, knocked the doors of this Court under Article 226 of the Constitution, feeling aggrieved by order dated 01.06.2016 passed by the Collector/District Magistrate, Sehore. The said authority by invoking Section 4 of *Madhya Pradesh Nikshepakon Ke Hiton Ka Sanrakshan Adhiniyam, 2000* (hereinafter referred to as "Adiniyam (sic : Adhiniyam)") decided to attach the bank accounts/properties of the petitioners.

3. The case of the petitioners is that except Heeralal Vaishnav, one of the writ petitioners in W.P. No.21248/2017, no other writ petitioners were arrayed as non-applicant before the learned District Magistrate. No notices were issued to the present petitioners. The District Magistrate on the basis of some investigation conducted behind the back of petitioners, decided to attach the properties of the petitioners.

4. Shri Vikas Rathi, learned counsel for the petitioners assailed this order by contending that (i) the petitioners have nothing to do with B.N. Gold Real Estate and Allied Ltd. They are neither Managing Director, partner, promoter or member of the said financial establishment. They have no nexus with the activities of the said company. Thus, the petitioners' property could not have been attached by the District Magistrate, (ii) the attachment order is passed without putting the petitioners to notice and, therefore, the principles of natural justice are grossly violated; (iii) in the criminal case instituted against the company, challan has been filed. Interestingly, neither in the FIR nor any other documents filed with challan, the names of the petitioners find place. In absence of any iota of material against the petitioners, the Collector has arbitrarily passed the order dated 01.06.2016 and attached the bank accounts and properties of the petitioners; (iv) reliance is placed on *Madhya Pradesh Nikshepakon Ke Hito Ka Sanrakshan Niyam, 2003* (hereinafter referred to as "the Niyam of 2003"). It is submitted that as per Rule 4, the competent authority/District Magistrate was obliged to examine the complainant and witnesses to reach to a conclusion that the petitioners are involved in any manner with the business/functions of the company. No such statements of witnesses were recorded and, therefore, the impugned order is bad in law.

5. *Per contra*, Shri G.P. Singh, learned Govt. Advocate for the respondents/State has opposed the said contention. By taking assistance from the return, it is contended that as per '*istagasa'* (Annexure-R/3), name of Heeralal finds place as non-applicant. The memorandum under Section 27 of the Evidence Act (Annexure-R/2) was prepared wherein the names of all the petitioners find place. On the basis

of an investigation report, the District Magistrate considered the report in the light of Section 4 of the Adhiniyam and *prima facie* opined that there are sufficient reasons for invoking Section 4 of the Adhiniyam. He submits that the petitioner has a remedy under Section 8 of the Adhiniyam and the interim/tentative order of the Collector is subject to judicial scrutiny by the Court of competent jurisdiction.

6. In the rejoinder submission, Shri Rathi, learned counsel for the petitioners submitted that although proceedings under Section 8 of the Adhiniyam were started before the Special Court, in view of the interim order passed in the present cases, the said Court did not proceed further. The said Court has also not issued any notice to the present petitioners and, therefore, the present petitioners have no other remedy but to approach this Court by way of the present writ petitions.

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

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

9. Before dealing with rival contention, it is condign to refer the relevant provisions of the Adhiniyam. Section 4 reads as under:

> **"4. Attachment of properties on default of return of deposits.** - Notwithstanding anything contained in any other law for the time being in force :-
>
> (i) where, upon complaints received from depositors or otherwise, the Competent Authority is satisfied that any financial establishment defaults the return of deposits in cash or kind, as promised, after maturity; or
>
> (ii) where the Competent Authority has reason to believe that any financial establishment is acting in a calculated manner with an intention to defraud the depositors,
>
> and, if the Competent Authority is satisfied that such financial establishment is not likely to return the deposits, the Competent Authority may, in order to protect the interests of the depositors of such financial establishment, pass an ad-interim order attaching the money or other property alleged to have been procured either in the name of the financial establishment or in the name of any other person or establishment, or if it transpires that such money or other property is not available for attachment or not sufficient for repayment of the deposits, such other property of the said financial establishment or the promoter, partner, director, manager or member of the said financial establishment, as the Competent Authority may think fit."

10. Section 8 of the Adhiniyam reads as under:

"8. Power of Special Court regarding attachment. - (1) Upon receipt of an application under Section 5, the Special Court shall issue to the financial establishment or to any other person whose property is attached by the Competent Authority under Section 4, a notice accompanied by the application, calling upon him to show cause on a date to be specified in the notice why the order of attachment should be made absolute.

(2) The Special Court shall also issue such notice to all such persons who have represented before it as having or likely to claim, any interest or title in the property of the financial establishment, calling upon such person to appear on the date as specified in the notice and make objection, if he so desires, to the attachment of the property or any portion thereof.

(3) Any person claiming an interest in the property attached or any portion thereof may, notwithstanding that no notice has been served upon him under this section make an objection as aforesaid to the Special Court at any time before an order is passed under sub-section (4) or sub-section (6).

(4) If no cause is shown and no objections are made on or before the specified date, the Special Court shall forthwith pass an order making the *ad-interim* order of attachment absolute.

(5) If a cause is shown or any objection is made as aforesaid, the Special Court shall proceed to investigate the same, and in so doing, as regards the examinations of the parties and in all other respects, the Special Court shall, subject to the provisions of this Act, follow the procedure and exercise all the powers of a Court in hearing a suit under the Code of Civil Procedure, 1908 (Central Act V of 1908) and any person making an objection shall be required to adduce evidence to show that at the date of attachment he had some interest in the property attached.

(6) After investigation under sub-section (5), the Special Court shall pass an order either making the *ad-interim* order of attachment absolute or varying it by releasing a portion of the property from attachment or cancelling the *ad-interim* order of attachment :

Provided that the Special Court shall not release from attachment any interest which it is satisfied that the financial establishment or the person referred to in sub-section (1) has in the property unless it is

> also satisfied that there will remain under attachment an amount or property of value not less than the value that is required for re-payment to the depositors of such financial establishment.
>
> (7) Where an application is made by any person duly authorised or specified by any other State Government under similar enactment empowering him to exercise control over any money or property or assets attached by the State Government, the Special Court shall exercise all its powers, as if such an application were made under this Act and pass appropriate order or direction on such application, so as to give effect to the provisions of such enactment."

11. A plain reading of Section 4 makes it clear that the competent authority is empowered to pass an interim order attaching the money and other property alleged to have been procured either in the name of financial establishment or in the name of any other person or establishment. Thus, Section 4, in no uncertain terms, gives power to the District Magistrate to attach the property of any person if it *prima fice (sic : facie)* transpires that the money or property is procured in the name of establishment or any person. A conjoint reading of Sections 4 and 8 makes it clear that the order of attachment passed by the Collector is of an interim nature. The District Magistrate after passing the order of attachment under Section 4 is required to apply to the designated special Court to make the order of attachment absolute. Sub-section (3) of Section 5 makes it obligatory on the part of the competent authority to prefer such application within 15 days from the date of attachment. Parties during the course of hearing fairly admitted that such application has already been filed by the District Magistrate before the Special Court and said Court is now considering the said application.

12. Section 8 makes it clear that special Court shall issue notice to 'any other person' whose property is being attached by the competent authority. A careful reading of various sub-sections of Section 8 makes it clear that the power of Special Court to issue notice to "any other person" is very wide and this power was not confined to the non-applicants alone. Sub-section (3) of Section 8 makes it clear that any person claiming interest in *the property attached* or any portion thereof may, notwithstanding that no notice is served upon him, make an objection to the Special Court at any time before an order is passed under other sub-section (4) of Section 6. Sub section (5) of Section 8 makes it obligatory for the Special Court to investigate the matter and while doing so, the said Court may examine the parties/witnesses in all respects. The Special Court is equipped with the procedural powers flowing from Code of Civil Procedure, 1908. "Any person" making an objection is obliged to adduce evidence to show whether he had some interest in the property on the date of attachment. Thus, principles of natural justice are codified in the shape of Section 8

of the Adiniyam (sic : Adhiniyam). Apart from this, Section 4 (i) permits the District Magistrate to take action on the basis of complaint received from depositors or otherwise. Clause (ii) of Section 4 clearly shows that power of attachment is an ad-interim order. Such ad-interim order needs ratification and is subject to judicial scrutiny by Special Court under section 8 of the Adhiniyam. Thus, Legislature has taken enough care to ensure that power under Section 4 is not abused or misused. In the event of any procedural flaw or illegality/irregularity in the action of attachment, the Special Court can examine the said aspects and if it is found that power of attachment is not used in accordance with law, can decline to make it absolute or revoke it. Since power of judicial review on the order of attachment is vested with the Special Court, the petitioners can raise all possible points before the said Court. Sub-section (6) of Section 8 clearly lays down that the Special Court may either make the interim order of attachment as absolute or vary it by releasing a portion of property from attachment or cancel the entire ad-interim order of attachment. Since the law makers have bestowed the power of judicial scrutiny to the Special Court, I find no reason to undertake that exercise at this stage.

13. In the considered opinion of this Court, the apprehension and grievance put forth by the petitioners in the present case is taken care of by the Legislature while inserting sub-section (3) in Section 8. Whether or not the petitioners are put to notice by the Special Court, the petitioners whose properties have been admittedly attached by the order passed under Section 4, can raise objection before the special Court and the Special Court is obliged to decide the said objection in accordance with law.

14. In the present case, admittedly, the criminal case is parallally (sic : parallelly) going on. At this stage, in the fitness of things, no opinion can be expressed whether the petitioners have any nexus or thread relation with the said company. It is for the competent Court to decide the said aspect after recording the evidence. The only grievance of the petitioners, at this stage, is relating to attachment of their property. As noticed, the order passed under Section 4 is a tentative/*prima facie* order which requires a stamp of approval on judicial scrutiny by the Special Court. Section 8 has taken care of all the grievances of the petitioners.

15. Accordingly, at this stage, when an application preferred under sub-section (3) of Section 5 is pending before the Special Court and order of the Collector has not been made absolute, I find no reason to interfere in this matter. The petitioners have an efficacious statutory remedy under sub-Section (3) of Section 8 to file objections before the special Court. This Court has no doubt that if such objections are filed by the petitioners, the competent Special Court will decide the same in accordance with law. The petitioners are unable to show any statutory provision or judgment which makes it obligatory for the District Magistrate to hear the petitioners before passing a *prima facie* order relating to attachment of bank accounts/property. The principles

of natural justice cannot be pressed into service in all situations. It depends upon the governing provision which is applicable in the facts and circumstances of a particular case. In *Chairman, Board of Mining Examination and Chief Inspector of Mines Vs. Ramjee*, AIR 1977 SC 965, the Supreme Court held as under:

> "Natural justice is no unruly horse, no lurking land mine, nor a judicial cureall. If fairness is shown by the decision maker to the man proceeded against, the form, features and the fundamentals of such essential processual propriety being conditioned by the facts and circumstances of each situation, no breach of natural justice can be complained of, unnatural expansion of natural justice, without reference to the administrative realities and other factors of a given case, can be exasperating. We can neither be finical nor fanatical but should be flexible yet found in this jurisdiction. No man shall be hit below the belt that is the conscience of the matter."

16. In view of the foregoing discussion, no case is made out for interference by this Court. Petitions are disposed of in view of the observations made hereinabove.

Order accordingly

I.L.R. [2018] M.P. 709
MISCELLANEOUS PETITION

Before Ms. Justice Vandana Kasrekar

M.P. No. 1522/2017 (Jabalpur) decided on 14 December, 2017

ALOK KHANNA …Petitioner

Vs.

M/S RAJDARSHAN HOTEL PVT. LTD. …Respondent

***A. Civil Procedure Code (5 of 1908), Order 21 Rule 37 – Execution Case – Issuance of Arrest Warrant – Show Cause Notice* – Trial Court allowed the application under Order 21 Rule 37 CPC filed by the Decree holder whereby arrest warrant was issued against the judgment debtor – Challenge to – Held – Before issuing the warrant of arrest, Court is required to issue show cause notice to the judgment debtor calling upon him to appear before the Court on a date specified in the notice and show cause why he should not be committed to civil prison – Further held – Rule 37 provides that notice shall not be necessary if the Court is satisfied, by affidavit or otherwise, that with the object of delaying the execution of the decree, the judgment debtor is likely to abscond or leave the local limits of the jurisdiction of the Court – In the present case, no such notice was issued before issuance of arrest warrant – Impugned order set aside.**

(Para 9 & 11)

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 21 नियम 37 – निष्पादन प्रकरण – गिरफ्तारी वारंट जारी किया जाना – कारण बताओ नोटिस – विचारण न्यायालय ने डिक्रीदार द्वारा आदेश 21 नियम 37 सि.प्र.सं. के अंतर्गत प्रस्तुत किये गये आवेदन को मंजूर किया, जिससे निर्णित ऋणी के विरूद्ध गिरफ्तारी वारंट जारी किया गया था – को चुनौती – अभिनिर्धारित – गिरफ्तारी का वारंट जारी करने से पूर्व, न्यायालय द्वारा निर्णित ऋणी को कारण बताओ नोटिस जारी करना अपेक्षित है, उसे नोटिस में विनिर्दिष्ट दिनांक को न्यायालय के समक्ष उपस्थित होने के लिए तथा कारण बताने के लिए कि क्यों न उसे सिविल कारागार के सुपुर्द किया जाए – आगे अभिनिर्धारित – नियम 37 उपबंधित करता है कि नोटिस आवश्यक नहीं यदि न्यायालय, शपथपत्र या अन्यथा द्वारा संतुष्ट होता है कि डिक्री के निष्पादन को विलंबित करने के उद्देश्य से, निर्णित ऋणी, न्यायालय की अधिकारिता की स्थानीय सीमाओं से फरार हो जाने या छोड़ जाने की संभावना है – वर्तमान प्रकरण में, गिरफ्तारी वारंट जारी करने से पूर्व ऐसा कोई नोटिस जारी नहीं किया गया था – आक्षेपित आदेश अपास्त।

***B. Civil Procedure Code (5 of 1908), Order 21 Rule 40 – Execution Case – Issuance of Arrest Warrant – Enquiry* – Held – After appearance of the judgment debtor in obedience to notice or after arrest, executing Court shall proceed to hear the decree holder and take all such evidences produced by him in support of his application and shall then give the judgment debtor an opportunity of showing cause why he should not be committed to civil prison – In the instant case, procedure prescribed under Order 21 Rule 40 has not been followed – No enquiry has been conducted before passing the impugned order – Procedural illegality is in the impugned order hence hereby set aside – Petition allowed.**

(Para 13)

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 21 नियम 40 – निष्पादन प्रकरण – गिरफ्तारी वारंट जारी किया जाना – जांच – अभिनिर्धारित – निर्णित ऋणी के नोटिस के पालन में या गिरफ्तारी के पश्चात्, उपस्थित होने के उपरांत, निष्पादन न्यायालय, डिक्रीदार को सुने जाने की कार्यवाही करे एवं उसके द्वारा उसके आवेदन के समर्थन में प्रस्तुत किये गये ऐसे सभी साक्ष्य लें और तब निर्णित ऋणी को कारण बताने का अवसर दे कि क्यों न उसे सिविल कारागार के सुपुर्द किया जाए – वर्तमान प्रकरण में, आदेश 21 नियम 40 के अंतर्गत विहित प्रक्रिया का पालन नहीं किया गया है – आक्षेपित आदेश पारित करने से पूर्व कोई जांच संचालित नहीं की गई है – आक्षेपित आदेश में प्रक्रियात्मक अवैधता है, अतः एतद् द्वारा अपास्त – याचिका मंजूर।

Cases referred:

AIR 1999 MP 195, 1998 (5) Kant LJ 389.

K.S. Jha, for the petitioner.
Vikram Johri, for the Caveator.

O R D E R

Vandana Kasrekar, J. :- The petitioner has filed the present petition, under Article 227 of the Constitution of India, challenging the order dated 13/11/2017 passed by XIII Additional District Judge, Bhopal in Execution Case No.85-A/2010.

2. Brief facts of the case are that the respondent had filed a civil suit for recovery of an amount of Rs.50,00,000/- against the petitioner before Additional District Judge Udaipur on the ground that respondent had granted a loan of Rs.50,00,000/- to the petitioner on short terms basis through six demand drafts on a condition that the loan would attract interest @ 12% per annum and in default thereof interest would be payable @ 24% per annum. The petitioner has paid only sum of Rs.2,00,000/- and no payment thereafter was made by the petitioner to the respondent. The petitioner filed a written statement and stated that no loan of Rs.50,00,000/- had ever been sought by the petitioner from the respondent and the amount of Rs.50,00,000/- paid by the respondent to the petitioner was by way of security in lieu of the amount payable by sister concerns of the respondent's company.

3. The Additional District Judge, Udaipur, Rajasthan had decreed the suit filed by the respondent vide judgment and decree dated 29/08/2007. Being aggrieved by that judgment and decree, the petitioner has preferred F.A.No.603/2007 along with an application for staying the execution of impugned decree passed by the Court of Rajasthan at Jodhpur. The High Court vide order dated 16/11/2010 has rejected the said application for stay. The respondent thereafter filed an application under Order 21 Rule 11 of the CPC for execution of the decree dated 29/08/2007. Initially the application for execution of the decree was filed before the Additional District Judge, Udaipur which was subsequently transferred to the Court at Bhopal. The petitioner also filed an application on 06/12/2010 under Order 21 Rule 26 of the CPC for staying the execution proceedings submitting that he does not possess any immovable property within the jurisdiction of Bhopal, but he is having an immovable property in the industrial area Mandideep, Tehsil Gauharganj District Raisen, whose current market value is of Rs.2,34,65,000/-. It was further stated that the said First Appeal is pending before the High Court, therefore, the aforesaid property be kept as security by the decree holder towards the decreetal amount. The respondent had filed an application under Order 21 Rule 41(3) of the CPC for examination of judgment-debtor and taking action against him since no affidavit as required under Order 41 Rule (2) filed by him.

4. The petitioner has filed reply to the said application and furnished the details of the property situated within the limits of Bhopal District and also furnished the details of bank accounts and the loan accounts of the petitioner. The respondent thereafter filed an application under Order 21 Rule 37 of the CPC for arrest and detention of the judgment debtor/petitioner in civil prison. The petitioner has filed reply to the said application.

5. The trial Court has allowed the application preferred by the respondent under Order 21 Rule 37 of the CPC and has directed for issuance of arrest warrant against the petitioner on the ground that (i) the property tendered by the petitioner as security does not belong to him, it is a property of M.P. Audyogik Vikas Nigam; (ii) The application for staying the execution proceedings has been rejected by the Rajasthan High Court; (iii) no efforts have been made by the judgment-debtor to make the payment since last 10 years. Being aggrieved by that order the petitioner has filed the present writ petition.

6. Learned counsel for the petitioner argues that the Executing Court has failed to consider the provision of Order 21 Rule 37(1) of the CPC. He submits that as per the said provision, the Executing Court ought not to have issued the warrant of arrest against the petitioner at the first instance and instead of show cause notice calling upon the petitioner to show cause why he should not be committed to civil prison, the executing Court without issuing any such show cause notice to the petitioner has directly issued the warrant of arrest against the petitioner. He further submits that as per the proviso to the said Rules, the requirement of a show cause notice can only be dispensed with if the executing Court is satisfied that the judgment-debtor with the object of delaying the execution proceedings is likely to abscond or leave the local limits of the jurisdiction of the Court. He submits that no such satisfaction is recorded by the Executing Court in the order. He further relied on the judgment passed by this Court in the case of *Subhash Chand Jain vs. Central Bank of India,* AIR 1999 MP 195 as well as the judgment passed by the Karnataka High Court in the case of *Sankappa Gangappa Ronad vs. Shivappa Dharmappa Kareseeri,* 1998(5) Kant LJ 389.

7. On the other hand, learned counsel for the respondent supports the order passed by the Executing Court. He submits that the petitioner has not deposited any amount in spite of decree passed by the Additional District Judge, Udaipur. He further submits that against the said order, he preferred first appeal before the High Court of Jodhpur in which an application for stay has been rejected, against which a SLP has been preferred before the Supreme Court which was also dismissed. In light of the aforesaid and as the SLP has already been dismissed by the Supreme Court, then the trial Court has rightly issued a warrant of arrest against the petitioner.

8. Heard learned counsel for the parties and perused the record. From perusal of the record it appears that Order 21 of the CPC deals with the Execution of Decrees and Orders. Order 21 Rule 37 of the CPC provides for discretionary power to permit judgment-debtor to show cause against detention in prison. Order 21 Rule 37 of the CPC reads as under :-

> "37. Discretionary power to permit judgment-debtor to show cause against detention in prison. - (1) Notwithstanding anything in these rules, where an application is for the execution of a decree for the

payment of money by the arrest and detention in the civil prison of a judgment-debtor who is liable to be arrested in pursuance of the application, the Court instead of issuing a warrant for his arrest, issue a notice calling upon him to appear before the Court on a day to be specified in the notice and show cause why he should not be committed to the civil prison:

Provided that such notice shall not be necessary if the Court is satisfied, by affidavit, or otherwise, that, with the object or effect of delaying the execution of the decree, the judgment-debtor is likely to abscond or leave the local limits of the jurisdiction of the Court.

(2) Where appearance is not made in obedience to the notice, the Court shall, if the decree-holder so requires, issue a warrant for the arrest of the judgment-debtor."

9. As per the said Rules, where an application is made by the decree holder for execution of the decree for payment of money, then in that case instead of issuance of warrant of arrest, show cause notice will be issued to the judgment-debtor calling upon him to appear before the Court on a date specified in the notice and show cause why he should not be committed to the civil prison. In the present case from perusal of the orders it reveals that no such notice was issued to the petitioner before issuance of warrant of arrest.

10. Rule 38 provides for Warrant for arrest to direct judgment-debtor to be brought up. The Karnataka High Court in the case of *Sankappa Gangappa Ronad* (supra) in para 8, 9 & 10 has held as under :-

"**8.** A reading of the Rule 37 and its proviso and Rule 38 reveals that, subject to what conditions the power to issue warrant of arrest has been provided under Rule 37. The exception created by the proviso to Rule 37 cannot be read as a general rule. It can be read as an exception to what is contained in the main clause. That for issuing directly the warrant without issuing the notice, the Court has first to satisfy, on the basis of an affidavit or other material which the decree-holder may produce to show, that the judgment-debtor on issuance of notice is likely to abscond or leave the local limits of the jurisdiction of the Court, then Court may issue the notice. This is a special condition. Issuance of show-cause notice and giving of opportunity to judgment-debtor as per Rule 37(1) is a rule to be followed in the initial stage and not the issuance of warrant. The order impugned, as has been quoted by me, does not reveal at all that the Court below has satisfied itself about this preliminary conditions of issuance of warrant, that the judgment-debtor is likely to abscond or run away from the local

limits of the jurisdiction of the Court itself. As no such thing appears from the order, the order cannot be said to have been issued in exercise of powers under the proviso or any exception nor stands covered by the proviso. Once this is not shown, general rule had to be followed. No such contention has been advanced by the decree-holder that the decree-holder had filed an application along with the affidavit alleging that there is likelihood of judgment-debtor running away from the local limits of the jurisdiction of the Court. When no such material is placed to the satisfaction of the Court, the duty of the execution Court as law ordains has been to issue a show-cause notice to the judgment-debtor to show-cause why in execution of decree he should not be arrested and put in civil prison. In this case, this mandatory provision of law has not been followed, really a good-bye has been given to it. It is tantamount to Court acting illegally as well as acting in excess of its jurisdiction in ordering the issuance of warrant of arrest against the judgment-debtor. When the law provides certain power of jurisdiction and prescribes certain conditions, then authorities are not expected and it is not open to them to act in breach of those conditions. It means this warrant of arrest has been ordered to be issued not in accordance with law, but in breach of law. No authority is entitled to deprive a citizen his right of liberty except in accordance with the provisions of law. When I so observe, I find support for my view from the decision of the Supreme Court in the case of *Jolly George Varghese and Another u Bank of Cochin,* and also from the decision of a Division Bench of this Court in the case of *K. Karunakar Shetty v Syndicate Bank, Manipal*. In paragraph 9 Hon'ble Mr. Justice Krishna Iyer in the case of *Jolly George Varghese*, has been pleased to observe as under:

"We concur with the Law Commission in its construction of Section 51, civil procedure code. It follows that quandum affluence and current indigence without intervening dishonesty or bad faith in liquidating his liability can be consistent with Article 11 of the Covenant, because then no detention is permissible under Section 51, Civil Procedure Code".

9. Justice Krishna Iyer further observes,

"The simple default to discharge is not enough. There must be some element of bad faith beyond mere indifference to pay, some deliberate or recusant disposition in the past or, alternatively, current means to pay the decree or a substantial part of it. The provision emphasises the need to establish not mere omission to pay but an attitude of refusal on demand verging on dishonest disowning of the obligation under the decree"

> **10.** In such circumstances, it can well be held that as provided by Order 21, Rule 37**,** it was utmost necessary for the Court before issuing any warrant of arrest to have issued a show-cause notice to the judgment-debtor and judgment-debtor could have placed his position and reasons or defence and the Court could have examined whether really there was a dishonest intention on the part of the judgment-debtor to run away from discharge of his obligation or that he has the intention to discharge the obligation no doubt, but because of the vagaries of life and in case he has become penniless, whether he was to be ordered to be arrested keeping in view the human considerations. So not following of Rule 37 itself renders the order impugned to be illegal, null and void and without jurisdiction. The order of arrest being in violation of Article 21 of the constitution as well can well be said to be without jurisdiction. The revision, as such, deserves to be allowed. The order dated 16- 4-1994 is hereby set aside. It is kept open to the execution Court to follow the necessary provisions of law and issue fresh notice and decree-holder any other step as well but according to law."

11. Thus, in light of the said judgment, before issuing the warrant of arrest, Court is required to issue show cause notice to the judgment-debtor. Rule 37 provides that notice shall not be necessary if the Court is satisfied, by affidavit, or otherwise, that, with the object or effect of delaying the execution of the decree, the judgment-debtor is likely to abscond or leave the local limits of the jurisdiction of the Court.

12. This Court in the case *Subhash Chand Jain* (supra) in para 6, 7 & 8 has held as under :-

> **"6.** On appearance of the judgment-debtor in obedience of notice or after arrest the proceedings are to take place in accordance with Rule 40 of Order 37, which reads thus :
>
> "40(1) When a judgment-debtor appears before the Court in obedience to a notice issued under Rule 37, or is brought before the Court after being arrested in execution of a decree for the payment of money, the Court shall proceed to hear the decree-holder and take all such evidence as may be produced by him in support of his application for execution and shall then give the judgment-debtor an opportunity of showing cause why he should not be committed to the civil prison.
>
> (2) Pending the conclusion of the inquiry under Sub-rule (1) the Court may, in its discretion, order the judgment-debtor to be detained in the custody of an officer of the Court of release him on his furnishing security to the satisfaction of the Court for his appearance when required.

(3) Upon the conclusion of the inquiry under Sub-rule (1) the Court may, subject to the provisions of Section 51 and to the other provisions of this Code, make an order for the detention of the judgment-debtor in the civil prison and shall in that event cause him to be arrested if he is not already under arrest."

7. From a bare reading of the relevant provisions quoted above, it is evident that when executing Court exercises discretion of issuing show cause against the detention in prison then executing Court has to follow the procedure laid down in Clause (1) of Rule 40 of Order 21 which provides that after notice issued under Rule 37; the Court shall proceed to hear the decree holder and to take all such evidence as may be produced by him in support of his application for execution and shall then give the judgment-debtor an opportunity of showing cause why he should not be committed to the civil prison. In the case in hand the executing Court after issuing show cause did not hold any enquiry as contemplated of Clause (1) of Rule 40 of Order 21 nor has complied the conditions laid down in proviso to Section 51 so as to record its reasons after its satisfaction for detaining or sending the judgment-debtor in civil prison.

8. Therefore, the order passed without following the mandatory provisions cannot be sustained and is quashed. The matter now shall go back to the executing Court for holding an enquiry as contemplated by Clause (1) of Rule 40 of Order 21 and to record its reasons after its satisfaction as required by proviso to Section 51 of the Code of Civil Procedure. The parties shall appear before the executing Court on 21-9-1998 of which notice shall not be given to the parties as they have been noticed here. If any of the parties fail to appear, the executing court shall proceed to decide the application for sending the applicant in prison in accordance with law. It is made clear that the executing Court shall pass the orders within a period of two months from the date of appearance of the parties."

As per the said judgment, if the judgment-debtor appear before the Court in obedience of notice or after arrest, the proceedings are to take place in accordance with Rule 40 of Order 37. In that case, as to make enquiry before issuance of warrant of arrest.

13. In the present case, the trial Court has not conducted any enquiry as contemplated under Order 21 Rule 40 of the CPC before passing the impugned order. The Order 21 Rule 40 of the CPC prescribes the procedure on appearance of judgment debtor in obedience to notice or after arrest. The aforesaid provision *inter alia* provides

that after appearance of judgment-debtor, executing Court shall proceed to hear the decree holder and take all such evidence produced by him in support of his application for execution and shall then give the judgment-debtor an opportunity of showing cause why he should not be committed to the civil prison. In the instant case, the procedure prescribed under Order 21 Rule 40 has not been followed. Thus, the impugned order suffers from procedural illegality as well as error apparent on the face of the record.

14. Accordingly, the present writ petition is allowed. The impugned order dated 13/11/2017 is hereby set aside. However, the Executing Court is directed to proceed with the matter in accordance with law.

Petition allowed

I.L.R. [2018] M.P. 717
MISCELLANEOUS PETITION
Before Mr. Justice Subodh Abhyankar
M.P. No. 518/2017 (Jabalpur) decided on 11 January, 2018

MOHANLAL & ors. …Petitioners
Vs.
SMT. MAYA & ors. …Respondents

***Civil Procedure Code (5 of 1908), Order 6 Rule 17 – Amendment in Written Statement – Reason for Delay* – Petition against rejection of application under Order 6 Rule 17 filed by the petitioner/defendant to amend the written statement – Held – In the instant case, plaintiff's evidence is already complete and closed – Reason assigned by defendant in the application for amendment was that the proposed amended facts came to mind only while preparing affidavit for evidence – Such reason does not qualify the definition of "due diligence" as provided under the proviso of Order 6 Rule 17 CPC – Further held – Even though amendment applications for the plaint and the written statement are to be considered on different yardsticks but still, the rigor of the proviso to Rule 17 of Order 6 CPC cannot be diluted even in those cases where amendment in written statement is being sought and it is necessary to see if the trial has already commenced or that defendant has made out a case that inspite of due diligence, defendant could not have raised the matter before the commencement of trial – No illegality or jurisdictional error in the impugned order – Petition dismissed.**

(Paras 7, 8 & 9)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 6 नियम 17 – लिखित कथन में संशोधन – विलंब हेतु कारण – लिखित कथन को संशोधित करने के लिए याची/प्रतिवादी द्वारा आदेश 6 नियम 17 के अंर्तगत प्रस्तुत किये गये आवेदन की खारिजी के विरूद्ध याचिका – अभिनिर्धारित – वर्तमान प्रकरण में, वादी का साक्ष्य

पहले ही पूर्ण एवं समाप्त हो चुका है – प्रतिवादी द्वारा संशोधन हेतु आवेदन में दिया गया कारण यह था कि प्रस्तावित संशोधित तथ्य, केवल साक्ष्य हेतु शपथपत्र तैयार करते समय ध्यान में आये थे – उक्त कारण, ''सम्यक् तत्परता'' की परिभाषा की अर्हता प्राप्त नहीं करता जैसा कि आदेश 6, नियम 17 सि.प्र.सं. के परंतुक के अंतर्गत उपबंधित है – आगे अभिनिर्धारित – यद्यपि, वाद पत्र एवं लिखित कथन हेतु संशोधन आवेदनों का विचार भिन्न मापदण्ड पर किया जाना होता है किंतु फिर भी आदेश 6 नियम 17 सि.प्र.सं. के परंतुक की कठोरता को कमजोर नहीं किया जा सकता यहां तक कि ऐसे प्रकरणों में भी जहां लिखित कथन में संशोधन चाहा गया है और यह देखना आवश्यक है कि क्या विचारण पहले ही आंरभ हो चुका है या यह कि प्रतिवादी ने प्रकरण साबित किया है कि सम्यक् तत्परता के बावजूद, प्रतिवादी, विचारण आरंभ होने के पूर्व मामले को नहीं उठा सकता था – आक्षेपित आदेश में कोई अवैधता या अधिकारिता की त्रुटि नहीं – याचिका खारिज।

Case referred:

(2009) 14 SCC 38.

J.L. Soni, for the petitioners.
S.D. Gupta, for the respondents.

(Supplied: Paragraph numbers)

O R D E R

Subodh Abhyankar J. :- This petition has been filed by the petitioners/ defendants No. 1 to 3 under Article 227 of the Constitution of India against the order dated 12.10.2017 passed in Civil Suit No.18A/17 by the First Civil Judge, Class I, Rajnagar, District Chhatarpur. In the aforesaid order, the learned Judge of the trial Court has dismissed the application of petitioners No.1 and 2 filed under Order 6, Rule 17 of the CPC for amendment in the written statement.

2. The petition is also filed against the order passed on an application filed by the petitioners/ defendants No. 5 to 7 under Order 6, Rule 17 of C.P.C. to amend their written statements.

3. The petitioners' contention is that respondent No.1 had filed a suit for declaration and permanent injunction against the petitioners/ defendants in respect of certain property situated at village Chak, Vikrampur, Tehsil Rajnagar, District Chhatarpur claiming certain share in the property amidst other reliefs. In the aforesaid suit, the plaintiff has already led her evidence and at the time when defendants' witnesses were to be examined, two separate applications were filed by defendants No. 1 to 3 and defendants No. 5 to 7 for amendment in the written statements giving details of certain facts. The aforesaid applications have been dismissed by the learned Judge of the trial Court vide order dated 12.10.2017. Learned counsel for the petitioners/

defendants has submitted that the order is contrary to law as no prejudice is caused to the respondents/ plaintiffs if defendants' applications are allowed. The learned counsel for the petitioners has also relied upon the decisions rendered by the Apex Court in the case of *Sushil Kumar Jain Vs. Manoj Kumar and another*, reported in (2009)14 SCC 38 as also the judgment of the co-ordinate Bench of this Court rendered in the case of *Smt. Urmila Vs. Govind Singh* passed in W.P. No. 18829/2013 and has vehemently argued that the parameters to consider an application filed under Order 6, Rule 17 of C.P.C. for amending the written statement are entirely different than the ones set out to consider an application to amend the plaint by the plaintiff.

4. On the other hand, learned counsel for the respondents/ plaintiffs has submitted that no illegality has been committed by the learned judge of the trial Court in passing the impugned order.

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

6. From the perusal of record, it appears that the impugned order has been passed by the learned Judge of the trial Court holding that the plaintiff has already closed her evidence on 14.09.2017 and the matter was fixed for defendants' evidence on 20.09.2017 on which date the application for amendment has been filed. In the aforesaid application, it is observed by the learned Judge of the trial Court that no specific reason has been assigned by the petitioners/ defendants to explain the delay which may be taken into consideration to allow the same.

7. On perusal of the application filed under Order 6, Rule 17 of CPC filed by the defendant reveals that the only reason assigned is that the said facts came to the defendant's mind only while preparing for the affidavit for evidence. The said reason, in the considered opinion of this Court does not qualify the definition of "due diligence" as provided under the proviso to Order 6, Rule 17 of C.P.C.

8. The judgments cited by the learned counsel for the petitioner/ defendants are distinguishable in as much as in both these judgments, the trial had not commenced whereas, in the case at hand the plaintiffs' evidence is already complete. This aspect of the law has also been dealt with succinctly by the Apex Court in the case of *Sushil Kumar Jain* (Supra). Relevant paras of the same read as under :-

> "18. Referring to the proviso to Order 6 Rule 17 CPC, the learned counsel for the respondents argued that the proviso clearly bars that any application for amendment either of plaint or of written statement can be allowed after trial has commenced unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of the trial. Therefore, the learned counsel for the respondents submitted that in view of the proviso to Order 6 Rule 17 CPC, the High Court as well as the Rent Controller had acted within their jurisdiction in rejecting the application

for amendment of the written statement on the ground that the trial had already commenced and therefore, no interference can be made in respect of the same. We are unable to agree with this submission of the learned counsel for the respondents.

19. In this case, in our view, the trial has not yet commenced. In para 17 of *Baldev Singh* this Court observed: (SCC pp. 504-05)

> "*17.* … It appears from the records that the parties have yet to file their documentary evidence in the suit. From the record, it also appears that the suit was not on the verge of conclusion as found by the High Court and the trial court. That apart, commencement of trial as used in the proviso to Order 6 Rule 17 in the Code of Civil Procedure must be understood in the limited sense as meaning the final hearing of the suit, examination of witnesses, filing of documents and addressing of arguments. As noted hereinafter, parties are yet to file their documents, we do not find any reason to reject the application for amendment of the written statement in view of the proviso to Order 6 Rule 17 CPC which confers wide power and unfettered discretion to the court to allow an amendment of the written statement at any stage of the proceedings."

20. In view of the aforesaid decision and in view of the admitted fact that not even the issues have yet been framed, documents have not yet been filed, evidence has not yet been adduced, we are of the view that the proviso to Order 6 Rule 17 CPC has no manner of application as the trial has not yet commenced."

(Emphasis Supplied)

9. Thus, it is apparent from the aforesaid dictum that even though the amendment applications for the plaint and the written statement are to be considered on different yardsticks, but still, the rigor of the proviso to the Rule 17 of Order 6 of CPC cannot be diluted even in those cases where the amendment in the written statement is being sought and it is necessary to see if the trial has already commenced or that the defendant has made out a case that inspite of due diligence, the defendant could not have raised the matter before the commencement of trial.

10. In the final analysis, in the considered opinion of this Court no illegality or jurisdictional error has been committed by the learned judge of the trial court in dismissing the applications for amendment in the written statements resultantly, the writ petition *sans* merits is liable to be and is hereby **dismissed**.

No costs.

Petition dismissed

I.L.R. [2018] M.P. 721
APPELLATE CIVIL
Before Mr. Justice Vivek Agarwal
F.A. No. 169/2003 (Gwalior) decided on 25 January, 2018

NAGAR PALIKA PARISHAD …Appellant
Vs.
ANIL KUMAR & ors. …Respondents

***Commercial Tax Act, M.P. 1994 (5 of 1995), Sections 2(c), 2(h) & 9 – Imposition of Export Tax – Municipal Limits* – Held – Mere physical location of branch outside the municipal limits could not have been construed to deem it to be an independent identity since for all accounting purposes, accounts of branch are to be accounted with the dealer i.e principal – Any transaction made by branch was in capacity of agent to principal whose office was located in the municipal limits and hence export will be deemed to have been made from territorial jurisdiction of municipality – Imposition of export tax and bill raised for recovery cannot be said to be illegal and without jurisdiction – Appeal allowed – Impugned judgment and decree set aside.**

(Para 8)

वाणिज्यिक कर अधिनियम, म.प्र. 1994 (1995 का 5), धाराएँ 2(सी), 2(एच) व 9 – निर्यात कर का अधिरोपण – नगरपालिका सीमाऐं – अभिनिर्धारित – मात्र नगरपालिका सीमाओं से बाहर शाखा की भौतिक अवस्थिति से उसे एक स्वतंत्र पहचान के रूप में समझे जाने का अर्थ नहीं लगाया जा सकता था, क्योंकि सभी लेखा प्रयोजनो हेतु, शाखा के लेखाओं का, डीलर अर्थात् प्रधान के साथ हिसाब होता है – शाखा द्वारा किये गये कोई संव्यवहार, प्रधान के अभिकर्ता की हैसियत में था, जिसका कार्यालय नगरपालिका सीमाओं में स्थित था और इस प्रकार निर्यात को नगरपालिका की क्षेत्रीय अधिकारिता से किया जाना समझा जाएगा – निर्यात कर का अधिरोपण एवं वसूली हेतु प्रस्तुत बिल अवैध एवं अधिकारिता के बिना होना नहीं कहा जा सकता – अपील मंजूर – आक्षेपित निर्णय एवं डिक्री अपास्त।

Anil Sharma, for the appellant.
R.D. Agrawal, for the respondent No. 1.

J U D G M E N T

Vivek Agarwal, J. :- This first appeal has been filed by the defendant being aggrieved by judgment and decree dated 19.12.2002 passed by the Court of Additional District Judge, Ganj Basoda, Distt. Vidisha, in civil suit No.2-A/1999 (Anil Kumar & Anr. Vs. Nagar Palika Parishad), whereby a suit for permanent injunction filed by the plaintiffs claiming injunction on recovery of export tax has been decreed

by the trial Court on the ground that plaintiffs were having two offices, namely one at Ganj Basoda in the name of Anil Hardware Stores Naya Bazar, Ganj Basoda and another at village Jiwajipur, Tyonda Road Basoda in the name of Deepak Fire Works and since the second office was outside the municipal limits, therefore, any transaction carried out by the said office namely Deepak Fire Works was not liable to be subjected to export tax inasmuch as export tax is leviable only on a entity situated within the municipal limits of the local body.

2. Learned counsel for the appellant submits that this judgment and decree suffers from basic infirmity inasmuch as both the firms Anil Hardware Stores Naya Bazar, Ganj Basoda and Deepak Fire Works at village Jiwajipur, Tyonda Road Basoda were situated within the municipal limits at Bada Bazar, Sawar Chowk, and therefore, levying of export tax cannot be faulted with and the plaintiffs are liable to pay the export tax. It is also submitted that admittedly levy of export tax of Rs.2,17,693/- was imposed on the firm which was reduced by the Collector to Rs.80,000/- and out of this, firm had already deposited a sum of Rs.55,000/-, that means plaintiffs had admitted their liability and paid the amount in part. It is also submitted that deficit court fee was paid, and therefore, in fact suit was not maintainable before the trial Court. It is submitted that actually valuation of the suit should have been made at Rs.80,000/-, but instead it was arbitrarily valued at Rs.55,000/- and this aspect too has been overlooked by the trial Court.

3. Learned counsel for respondent No.1 Shri R.D.Agrawal submits that impugned order does not suffer from any infirmity inasmuch as two entities as is apparent from the name are different and the entity namely Deepak Fire Works being outside the territorial jurisdiction of the municipality was not liable to pay any export tax inasmuch as export tax is payable on the entity falling within the municipal limits in terms of Section 127 of the Municipalities Act. In view of such submissions, he prays for dismissal of the appeal and affirming the judgment and decree passed by the trial Court.

4. This Court after going through the record and hearing the arguments, asked categorically whether M/s. Deepak Fire Works was branch of M/s. Anil Hardware Stores for the period under assessment or it was an independent entity and registered separately as a dealer having independent assessment. To this query, though there is no specific answer but the documents which have been filed before the trial Court by rival parties reveal that provisional certificate of registration was obtained in the name of M/s. Deepak Fire Works, Jiwajipur Tyonda Road, Ganj Basoda on 12.8.1999. There is a certificate of registration under the Central Sales Tax (Registration and Turnover) Rules, 1957 in the name of M/s. Anil Hardware Stores Basoda. This certificate is valid from September, 1968 until cancelled. There is an endorsement of adding Branch M/s. Deepak Fire Works, Basoda w.e.f. 1.2.1989. There is another

certificate of registration under Rule 8 in the name of M/s. Anil Hardware Stores, Basoda, which also makes a mention of addition of branch office as M/s. Deepak Fire Works, Basoda, w.e.f. 1.2.1989.

5. Office of Joint Chief Controller of Explosives had issued a licence for fire works, Chinese Crackers and sparklers in the name of Suresh Chand Jain of Anil Hardware Stores, Ganj Basoda. There is another communication dated 22.11.1989 issued by Deputy Chief Controller of Explosives on record which shows that District Magistrate, Vidisha, had granted a no objection certificate in respect of the site for the proposed fire works store house at village Jiwajipur Distt. Vidisha and therein it is mentioned that construction of store house should be completed in all respects and this office intimated without delay. It is further mentioned that a licence in form 21 of the Explosives Rules, 1983 will be granted on receipt of the completion report of the store house and forwarded to the Dy. Chief Controller of Explosives, Bhopal, for endorsement as required under rule 161(2) of the Explosives Rules, 1983. Thus, this communication makes it clear that there was no independent explosives licence in favour of M/s. Deepak Fireworks, otherwise the plaintiffs would have brought it on record. Further communication dated 22.11.1989 makes it clear that permission was granted for construction of a store house at village Jiwajipur Distt. Vidisha and when this licence alongwith permission to construct store house is read in conjunction with certificate of registration under the Sales Tax Act and the State Sales Tax Act, so also the provisional registration certificate issued to M/s. Deepak Fire Works on 12.8.1999, whereas the demand was raised in January, 1999, it is apparent that till the time of raising of the demand and for the period for which demand was raised, the entity of M/s. Deepak Fireworks was that of a branch of M/s. Anil Hardware Stores.

6. M.P. Commercial Tax Act, 1994 defines "business" in Section 2(c) as under :-

"2(c) Business includes-

(a) any trade, commerce, manufacture or any adventure or concern in the nature of trade, commerce or manufacture, whether or not such trade, commerce, manufacture, adventure or concern is carried on with a motive to make gain or profit and whether or not any gain or profit accrues from such trade, commerce, manufacture, adventure or concern and irrespective of the volume, frequency, continuity or regularity of such trade, commerce, manufacture, adventure or concern; and

(b) any transaction of sale or purchase of goods in connection with or incidental or ancillary to the trade, commerce, manufacture, adventure or concern referred to in sub-clause (a), that is to say -

(i) goods of the description referred to in sub-section (3) of Section 8 of the Central Sales Tax Act, 1956 (No. 74 of 1956), whether or not they are specified in the registration certificate, if any, of the dealer under the said Act and whether or not they are in their original form or in the form of second hand goods, unserviceable goods, obsolete or discarded goods, mere scrap or waste material; and

(ii) goods which are obtained as waste products or by-products in the course of manufacture or processing of other goods or mining or generation of or distribution of electrical energy or any other form of power;"

M.P. Commercial Tax Act, 1994 also defines "Dealer" in Section 2(h) as under :-

"(h) Dealer means any person who carries on the business of buying, selling, supplying or distributing goods, directly or otherwise, whether for cash, or for deferred payment or for commission, remuneration or other valuable consideration and includes -

(i) a local authority, a company, an undivided Hindu family or any society (including a co-operative society), club, firm or association which carries on such business;

(ii) a society (including a co-operative society), club, firm or association which buys goods from, or sells, supplies or distributes goods to, its members;

(iii) a commission agent, broker, a delcredere agent, an auctioneer or any other mercantile agent, by whatever name called, who carries on the business of buying, selling, supplying or distributing goods on behalf of the principal;

(iv) any person who transfers the right to use any goods for any purpose, (whether or not for a specified period) in the course of business to any other person;

Explanation - (I) Every person who acts as an agent of a non-resident dealer, that is as an agent on behalf of a dealer residing outside the State and buys, sells, supplies or distributes goods in the State or acts on behalf of such dealer as -

(i) a mercantile agent as defined in the Indian Sale of Goods Act, 1930 (III of 1930); or

(ii) an agent for handling goods or documents of title relating to goods; or

(iii) an agent for the collection or the payment of the sale price of goods or as a guarantor for such collection or payment, and every local branch of a firm or company situated outside the State.

shall be deemed to be a dealer for the purpose of this Act.

(II) The Central or a State Government or any of their departments or offices which, whether or not in the course of business, buy, sell, supply or distribute goods, directly or otherwise, for cash or for deferred payment, or for commission, remuneration or for other valuable consideration, shall be deemed to be a dealer for the purpose of this Act."

7. In view of such definition, it is apparent that since there is an endorsement in the registration certificate showing that Deepak Fireworks to be a branch, the dealer will be treated to be M/s. Anil Hardware Stores as it is branch of Anil Hardware Store till it attained independent identity by getting itself a provisional registration certificate in August, 1999, and therefore, by virtue of a branch of the dealer namely M/s. Anil Hardware Stores, it had no independent exclusive right to sell the crackers and it was assessable alongwith the principal i.e. M/s. Anil Hardware Stores, and therefore, irrespective of the fact that the office of the branch was outside the municipal limits, for the purpose of accounting the branch is to be clubbed with the principal and the principal was within the territorial jurisdiction of the municipality, and therefore, the assessment was rightly made and demand was rightly raised by the municipality which has not been appreciated by the Court below.

8. On the anvil of the above discussion, this Court is of the opinion that trial Court has erred in appreciating the evidence and documents on record and has wrongly decided issues No.1 and 2. Accordingly, the judgment and decree passed by the court below deserves to be set aside inasmuch as trial Court has failed to take into consideration the fact that M/s. Deepak Fireworks had no independent identity for the purpose of assessment for the period under consideration and it being a branch of M/s. Anil Hardware Stores, merely physical location of branch outside municipality limit could not have been construed to deem it to be independent identity since for all accounting purposes accounts of the branch are to be accounted with the dealer i.e. principal which is M/s. Anil Hardware Stores, the location of branch was immaterial and it will be deemed that any transaction made by the branch was in the capacity of the agent of the principal whose office was located within the municipal limits, and therefore, the export will be deemed to have been made from the local limits of the municipality. Therefore, bill raised for the recovery cannot be said to be illegal and without jurisdiction. Thus, the appeal is allowed. Impugned judgment and decree is set aside.

Appeal allowed

I.L.R. [2018] M.P. 726
APPELLATE CIVIL

Before Mr. Justice Rohit Arya

F.A. No. 236/2017 (Indore) decided on 30 January, 2018

AHILYA VEDAANT EDUCATION WELFARE SOCIETY & anr. …Appellants

Vs.

K. VEDAANT EDUCATION SOCIETY & anr. …Respondents

A. Trade Marks Act (47 of 1999), Section 142 – Groundless threats of Legal Proceedings – Injunction Suit – Maintainability – **Appeal against dismissal of suit of Appellant/plaintiff for permanent injunction seeking restraint order against Respondent/defendant for issuance of groundless threats, declaration and damages u/S 142 of the Act of 1999 – Held – Section 142 entitles the person to bring an action or proceeding for infringement whether the person making groundless threats of legal proceeding is or is not the registered user of the trade mark and bring a suit against the defendant unless the first mentioned person, defendant satisfies the Court that trade mark is registered and that the acts in respect of which proceedings were threatened, constitute, or if done, would constitute an infringement of trade mark – Trial Court has not properly appreciated the provisions of Section 142 of the Act of 1999 – Suit is maintainable, trial Court directed to decide the suit on merits – Appeal allowed.**

(Para 15 & 20)

क. व्यापार चिन्ह अधिनियम (1999 का 47), धारा 142 – विधिक कार्यवाहियों की आधारहीन धमकियां – व्यादेश वाद – पोषणीयता – आधारहीन धमकियां जारी करने के लिए प्रत्यर्थी/प्रतिवादी के विरूद्ध अवरोध आदेश, घोषणा एवं क्षतिपूर्ति चाहते हुए, 1999 के अधिनियम की धारा 142 के अंतर्गत, अपीलार्थी के स्थाई व्यादेश हेतु वाद की खारिजी के विरूद्ध अपील – अभिनिर्धारित – धारा 142 व्यक्ति को अतिलंघन के लिए कार्रवाई या कार्यवाही पेश करने हेतु हकदार बनाती है कि क्या वह व्यक्ति जो कि विधिक कार्यवाही की आधारहीन धमकी दे रहा है, व्यापार चिन्ह का रजिस्ट्रीकृत उपयोगकर्ता है या नहीं एवं प्रतिवादी के विरूद्ध एक वाद लाए जब तक कि पहला उल्लिखित व्यक्ति, प्रतिवादी, न्यायालय को संतुष्ट नहीं करता है कि व्यापार चिन्ह रजिस्ट्रीकृत है एवं यह कि वह कृत्य जिसके संबंध कार्यवाहियों की धमकी दी गई, गठित हुई या यदि की गई है, तो व्यापार चिन्ह का अतिलंघन गठित होगा – विचारण न्यायालय ने 1999 के अधिनियम की धारा 142 के उपबंधों का उचित रूप से मूल्यांकन नहीं किया – वाद पोषणीय है, विचारण न्यायालय को गुण–दोषों के आधार पर वाद का विनिश्चय किये जाने हेतु निदेशित किया गया – अपील मंजूर।

B. Civil Procedure Code (5 of 1908), Order 7 Rule 11 – Scope and Jurisdiction – **Law regarding scope and jurisdiction of the Court while dealing**

with application under Order 7 Rule 11 is no more *res integra* – Court is only required to look into the plaint averments to decide whether suit is barred by law under Order 7 Rule 11 CPC.

(Para 16)

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 11 – विस्तार एवं अधिकारिता – आदेश 7 नियम 11 के अंतर्गत आवेदन का निपटारा करते समय विस्तार एवं अधिकारिता से संबंधित विधि, अनिर्णीत विषय नहीं रहा – यह विनिश्चित करने के लिए कि क्या वाद, आदेश 7 नियम 11 सि.प्र.सं. के अंतर्गत, विधि द्वारा वर्जित है, न्यायालय द्वारा केवल वादपत्र के प्रकथनों का अवलोकन किया जाना अपेक्षित है।

Cases referred:

(2012) 8 SCC 701, (2007) 2 SCC 551, AIR 2015 SC 2485, (2005) 4 MPLJ 406, (2017) 5 SCC 345, AIR 1972 SC 2488.

Amit Agrawal assisted by *Rohit Mangal,* for the appellant.
R.S. Chhabra, for the respondents.

J U D G M E N T

Rohit Arya, J:- Heard on the question of admission and final disposal wilth the consent of parties. This appeal by plaintiff under section 96 CPC is directed against the order dated 18/05/2017 dismissing the suit No.172-A/2017 as barred by section 142 of the Trade Marks Act, 1999 (For short, 'the Act, 1999) while allowing application of defendants filed in that behalf under Order 7 rule 11 CPC.

2. Plaintiffs have filed a suit for permanent injunction seeking restraint order against defendants for issuance of groundless threats of legal proceedings, declaration and damages under section 142 of the Act, 1999 *inter alia* pleading in the suit that the plaintiff No.1 M/s Ahilya Vedaant Education Welfare Society; a registeres (sic : registered) society having its office at H-62, MIG Colony, Indore runs the school under the name "VEDAANTA THE GLOBAL SCHOOL". The plaintiff No.2 is President of the plaintiff No.1 society, (hereinafter referred to as 'the plaintiff') with the trade mark/trade name/ institution with mono since long continuously and uninterruptedly in distinctive getup, makeup and lettering style. The artistic features of the said trade mark are original artistic work (within the meaning of Indian Copyright Act,1957). The plaintiff is the owner and the proprietor of the copyright therein. The plaintiff has already filed application numbers 3450411, 3465105, 3465106 and 3467936 in class 41 for registration of the said representation of the trademark/tradename/institution name under the Act, 1999 in respect of educational services and the said applications are pending adjudication. The plaintiff has gained a valuable and vast recoginition under the said representation of the trade mark/trade name/institution name for the said services. The plaintiff has been promoting its services through various means and modes

including advertisements, distribution of trade literature and publicity materials, hoardings, etc., The plaintiff is also promoting its school and the educational services on the basis of said representation of the trade mark/trade name/institution name through social and electronic modes. Accordingly, the plaintiff has already spent substantial sum of money on publicity and trade promotion activities, etc., The plaintiff has pleaded that under the said representation of the trade mark/trade name/institution name, the plaintiff enjoys solid, enduring and indelible reputation at the national and international level.

3. In paragraphs 11, 12 and 13 of the plaint, it is pleaded that the defendant No.1 is a society and the defendant No.2 is its President (hereinafter referred to as 'the defendant'). The defendant claim to be the proprietor of the representation of the trade mark/trade name/institution name, "VEDAANT" alleged to be registered under the Act, 1999 in respect of play, pre-school, nursery school, kids club, etc., The defendant has been using entirely different representation of the trade mark/trade name/institution name in relation to the impugned services. Out of blue, the plaintiff received threats of dire consequences from the defendant in case the plaintiff could not stop using the representation of the trade mark/trade name/institution name. The defendnat No.2 has filed a wrongful police complaint at the Police Station, Kanadia, Indore claiming that it is the registered proprietor of the alleged representation of the trade mark/trade name/institution name, "VEDAANT" with further claim that plaintiff's representation of the trade mark/trade name/institution name "VEDAANTA THE GLOBAL SCHOOL" is similar to that of the defendant's representation of the trade mark/trade name/institution name. The defendant has been extending the threats to the plaintiff which tantamounts to an illegal, unlawful and groundless threats under the provisions of the Act, 1999. In paragraph 13, it is further pleaded that the plaintiff's said representation of the trade mark/trade name/institution name is completely different from the representation of the trade mark/trade name/institution name of the defendant. They are different in colour, combination, artistic work, strcuturally, phonetically and visually in every respect. The representation of the trade mark/trade name/institution name of the plaintiff and defendant are completely different and there is no confusion or deception of any kind of the general public and the beneficiary society. Despite such variation, the defendant has issued illegal, unlawful and groundless threats by which defaming the plaintiff in the society.

4. In paragraphs 15 and 25, it is pleaded that the plaintiff became aware of the defendant's illegal and unlawful registration of the impunged representation of the trade mark/trade name/institution name when the defendant started threatening the plaintiff by filing the aforesaid police complaint. The defendant's impugned activities tantamount to unfair and unethical trade practice and competition which on its face are illegal and contrary to law and, therefore, the plaintiff is aggrieved. The cause of action arose against the defendant in the last week of January, 2017 when the plaintiff came to know about the impugned police complaint through the telephonic call from

the Police Station, Kanadiya, Indore and also plaintiff received illegal and groundless threats from the defendant. With the aforesaid averments, the suit has been filed seeking a decree for declaration declaring that the plaintiff to be the proprietor of the representation of the trade mark/trade name/institution name in relation to the services described in the plaint including imparrting (sic : imparting) the educational services and also providing consultancy relating to educational servies and a decree of permanent injunction restraining the defendant from issuing such groundless threats as illegal, unlawful and unjustified.

5. The defendant at the first instance has filed an application under Order 7 rule 11 CPC *inter alia* contending that the suit under section 142 of the Act, 1999 is not sustainable in view of the fact that the first mentioned person "defendants" satisfies the Court that the trademark is registered and the acts in respect of which the proceedings were threatened, constitute or, if done, would constitute, an infringement of the trademark, referring to the averments made in paragraphs 11, 12, 13, 14 and 15 of the plaint.

6. The trial Court has justified rejection of the plaint on the premise that the trademark "Vedaant" with similar spelling since is registered in the name of the defendant, the use thereof by plaintiff for educational services; an unregistered trademark as apparent from the pleadings of the plaint tatanmount (sic : tantamount) to infringement of the registered trademark as contemplated under section 29 of the Act, 1999.

7. Learned senior counsel appearing for the plaintiff taking exception to the impugned order contends that the trial Court has not appreciated the contents of paragraphs 11, 12, 13, 15 and 18 of the plaint in right perspective, regard behing (sic : being) had to the provisions of section 142 of the Act, 1999. It is the case of the plaintiff that the defendant claim to be the proprietor of the representation of the trade mark/trade name/institution name "Vedaant" and the representation of the trademark as claimed by defendant is even otherwise entirely different in script, style, logo, colour scheme having altogether different get up in colour combination, artistic work, structurally, phonetically and visually. It is not capable of causing any kind of confusion or deception. Besides, specific pleadings have been made aginst the threat extended by defendant by filing a police complaint and the relief of declaration in relation to the services rendered under the trade mark alongwith permanent injunction against groundless threats of legal proceedings are pleaded. As such, the plaint averments are well in conformity with the provisions of section 142 of the Act, 1999 and its ingredients are fulfilled to bring an action against the defendant.

8. Threats of a persons with an action or proceeding for infringement of a trade mark which is registered or alleged to be registered either by means of circulars, advertisements or otherwise gives raise to a person aggrieved to bring an action against such person whether the person making threats is or is not the registered proprietor or the registered

user of the trade mark and may obtain a declaration to the effect that the threats are unjustifiable, and claim injunction against such continuance of the threats and may also recover damages. Threat perceptions are esentially questions of fact and can be addressed after parties go to the trial with their respective pleadings.

Likewise, the person against whom action is brought, i.e., the first person has right to satisfy the Court that the trade mark is registered and that the acts in respect of whcih (sic : which) the proceedings were threatened, constitute, or, if done, would constitute, an infringement of the trade mark (within the meaning of section 29 of the Act, 1999). Nevertheless, this exercise is also essentially a question of fact which can be addressed after parties go to the trial with their respective pleadings.

9. The "trade mark" as defined under section 2(zb) of the Act, 1999 involves various factors to be looked into to ascertain its capability of distinguishing the goods or services of one person from those of others graphically and may include shape of goods, their packaging and combination of colours, etc., As such, the defintion of trade mark is very wide and inclusive in nature.

10. The trial Court while rejecting the plaint has jumped to the conclusion that the alleged infringement of the registered trade mark on the basis of mere assertion of the defendant in the application applying the first principle but little understanding the dimensions and scope of section 142 of the Act, 1999 reached to such conclusion whereas it was required to record its satisfaction after parties place on record occular and documentary evidence for and against the alleged act of groundless threats of legal proceedings and also the alleged infringments (sic : infringements) of trade mark. The trial Court as a matter of fact remained oblivious of the principles underlying in Order 7 rule 11 CPC while rejecting the plaint. The Hon'ble Supreme Court in the cases of *Bhau Ram Vs. Janak Singh and others* (2012) 8 SCC 701*, Prem Lala Nahata and another Vs. Chandi Prasad Sikaria* (2007) 2 SCC 551*, P.V.Guru Raj Reddy, Rep. By GPA Laxmi Narayan Reddy and another Vs. P. Neeradha Reddy and Ors., etc.* AIR 2015 SC 2485, *Radhika Prasad Vs. Nuruddin Khan and others* (2005) 4 MPLJ 406. *Kuldeep Singh Pathania Vs. Bikram Singh Jaryal* (2017) 5 SCC 345 has ruled that only plaint averments are required to be seen by the trial Court to ascertain that the suit falls within the mischief of Order 7 rule 11(d) CPC as barred by law .

11. Section 142 of the Act, 1999 entittles (sic : entitles) the plaintiff to bring an action against the groundless threats of legal proceedings by a person making threats whether he is or he is not the registered proprietor or the registered user of the trade mark. Hence, the conclusion of the trial Court that since the defendant is a registered proprietor of the trade mark as asserted in the application under Order 7 rule 11 CPC, the use thereof by the plaintiff tantamount to infringement of trade mark. The trial Court dismissed the suit on totally erroneous conclusion based on misreading of

the provision of section 142 of the Act, 1999. With the aforesaid submissions, learned senior counsel prays for setting aside the impugned order.

12. *Per contra,* learned counsel for the respodents (sic : respondents) /defendant supports the impugned order with the contention that as the defendant satisfied the trial Court being a registered user of the trade mark, 'Vedaant" and the acts in respect of which the proceedings were thereatened (sic : threatened) constitutes infringement of the trade mark as claimed and reitereted in the application filed under Order 7 rule 11 CPC, the trial court was justified while dismissing the suit.

13. Before adverting to rival contentions, it is considered apposite to quote relevant parts of definition of section "2(zb) trade mark" and section 142 of the Act, 1999:

> **"2. (zb) "trade mark"** means a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colours; and—
>
> (i) in relation to Chapter XII (other than section 107), a registered trade mark or a mark used in relation to goods or services for the purpose of indicating or so as to indicate a connection in the course of trade between the goods or services, as the case may be, and some person having the right as proprietor to use the mark; and
>
> (ii) in relation to other provisions of this Act, a mark used or proposed to be used in relation to goods or services for the purpose of indicating or so as to indicate a connection in the course of trade between the goods or services, as the case may be, and some person having the right, either as proprietor or by way of permitted user, to use the mark whether with or without any indication of the identity of that person, and includes a certification trade mark or collective mark; (zc) "transmission" means transmission by operation of law, devolution on the personal representative of a deceased person and any other mode of transfer, not being assignment;"
>
> **"142. Groundless threats of legal proceedings.—** (1) Where a person, by means of circulars, advertisements or otherwise, threatens a person with an action or proceeding for infringement of a trade mark which is registered, or alleged by the first-mentioned person to be registered, or with some other like proceeding, a person aggrieved may, whether the

person making the threats is or is not the registered proprietor or the registered user of the trade mark, bring a suit against the first-mentioned person and may obtain a declaration to the effect that the threats are unjustifiable, and an injunction against the continuance of the threats and may recover such damages (if any) as he has sustained, unless the first-mentioned person satisfies the court that the trade mark is registered and that the acts in respect of which the proceedings were threatened, constitute, or, if done, would constitute, an infringement of the trade mark.

(2) ....

(3) ... ...

(4) ... ..."

(Emphasis supplied)

14. The word "trade mark" means a mark used in relation to goods or services for the purpose of indicating or so as to indicate a connection in the course of trade or rendering the services between them and some person having the right as proprietory right of mark. A trade mark is a composite frame revealing a mark capable of being represented graphically and also capable of distinguishing the goods or services of one person from those of others and may include the shape of goods, packaging, combilnation (sic : combination) of colours and the services to indicate to the eyes of the purchaser or hirer (services). The source of such goods or services which have come from and through which they pass on their way to the market; [Referred to; *Sumat Prasad Jain Vs. Sheojanan Prasad (Dead) by L.Rs., and State of Bihar,* AIR 1972 SC 2488)].

15. Section 142 of the Act, 1999 entitles the person to bring an action or proceeding for infringement whether the person making the groundless threats of legal proceedings is or is not the registered proprietor or registered user of the trade mark, bring a suit against the first mentioned person and may obtain a declation (sic : declaration) to the effect that the threats are unjustifiable, and an injunction against the continuance of the threats and may recover such damages (if any) as he has sustained, unless the first mentioned person satisfies the court that the trade mark registered and that the acts in respect of whcih (sic : which) the proceedings were threatened, constitute , or, if done, would constitute, an infringement of the trade mark.

(Emphasis supplied)

16. The law as regards the scope and jurisdiction of the Court while dealing with the application under Order 7 rule 11 CPC is no more *res integra.* The Court is required to look at the plaint averments to decide whether the suit is barred by law under Order 7 rule 11(d) CPC.

17. In the case in hand, plaintiff has prayed for permanent injunction restraining the defendant from issuing groundless threats of legal proceedings, with the pleadings that it runs Schools and other educational Institutions/services under the name Vedaanta Global School, with the trademark/trade name/ Institution name with mono specific since long, continuously and uninterruptedly in distinctive getup, make-up and lettering style. The artistic features of the said trade mark are original artistic work (within the meaning of Indian Copyright Act, 1957). The plaintiff is the owner and Proprietor of the copy right work. Plaintiff has already filed application under clause 41 for registration of the said representation of trademark/ trade name/ Institution name under the Act of 1999 in respect of educational services and the said application is pending adjudication. It is further pleaded that defendant claims to be Proprietor of the representation of trademark/ trade name/ Institution name "Vedaant", alleged to be registered under the Act of 1999 in respect of playgroup / pre-school / nursery school, kids club etc. It is also pleaded that defendant has been using entirely different representation of trademark/ trade name/ Institution name in relation to impugned services. There is no comparison between the two monograms in the context of shape, size, color continuation or graphics and it is not capable of causing any kind of confusion or deception in the minds of the public at large. Such groundless threats being issued by the defendant has given rise to filing of the instant injunction proceedings against the defendant. In the circumstances, in the opinion of this Court, sufficient relevant pleadings have been placed on record fufilling (sic : fulfilling) the requirement / ingredients of section 142 of the Act, 1999 to bring the action for injunction.

Nevertheless, the defendant may take recourse to satisfy the Court that the trademark is registered in its name and the acts in respect of which proceedings were threatened, constitute, or if done would constitute, infringement of trademark.

18. The aforesaid requirement of law contemplates that burden of proof first is on the plaintiff to establish groundless threats of legal proceedings by defendant, the first-mentioned person, by means of circulars, advertisements or otherwise alleging infringement of trade mark registered/unregistered. As such, there is certain ample scope of an enquiry by the Court through the process of trial. Likewise, the burden lies on the defendant, first-mentioned person to establish that the acts in respect of which the proceedings were threatened, constitute, or if done would constitute, infringement of trade mark by bringing relevant evidence on record through the process of trial. It is only thereafter the stage for recording satisfaction by the Court shall arrive to reach conclusion of infringement of trade mark under section 29 of the Act. 1999.

19. The trial Court appears to have been impressed with the contention of defendant that the trade mark "Vedaant" since is registered in the name of defendant though disputed and denied by plaintiff, therefore, the alleged use thereof by the plaintiff for educational services shall tantamount to infringment (sic : infringement) of trade mark as a result concluded that the suit is barred by law.

20. In the opinion of this Court, the trial Court has neither appreciated the provisions of section 142 of the Act, 1999 in right perspective nor applied the principles of settled law in the context of jurisdiction of the Court under Order 7 rule 11(d) CPC. Hence, the impugned order is palpably erroneous in the eyes of law and, therefore, cannot be sustained.

21. In view of the above, this appeal is allowed. The impugned order is set aside. The trial Court is directed to decide the suit on merits, in accordance with law.

22. Before parting with the case, it is considered apposite to observe that any observations on facts made in this order are only for the purpose of deciding this appeal. The trial Court shall decide the suit on merits independently.

Appeal allowed

I.L.R. [2018] M.P.734 (DB)
APPELLATE CRIMINAL

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

Cr.A. No. 2006/2004 (Jabalpur) decided on 4 January, 2018

MOHAMMAD FAIZAN & ors. …Appellants
Vs.
STATE OF M.P. …Respondent

***Penal Code (45 of 1860), Section 301 & 302/34 – Murder – Life Conviction – Doctrine of Transfer of Malice* – Held – Accused persons armed with Katar, iron rod and lathi, with common intention to kill, assaulted one Shameem but while causing injuries to him they killed one Rakesh who came to rescue Shameem – Further held – After running away from the spot the conduct of the appellants to come back again and to inflict multiple injuries by mean of deadly weapons demonstrate common intention of the appellants to commit murder – Supreme Court held that if accused persons were aiming at one person but killed other person, they would be punishable for committing offence of murder under the doctrine of transfer of malice a contemplated u/S 301 IPC – Trial Court rightly convicted the appellants – Appeal dismissed.**

(Paras 13, 14 & 15)

दण्ड संहिता (1860 का 45), धारा 301 व 302/34 – हत्या – आजीवन दोषसिद्धि – द्वेष के अंतरण का सिद्धांत – अभिनिर्धारित – अभियुक्तगण ने कटार, लोहे की रॉड एवं लाठी से सुसज्जित होकर, जान से मारने के सामान्य आशय के साथ एक शमीम पर हमला किया किन्तु उसे चोटें कारित करते समय, उन्होंने राकेश, जो शमीम को बचाने आया था, को जान से मार दिया – आगे अभिनिर्धारित – मौके से भाग जाने के पश्चात्, अपीलार्थीगण का पुनः वापस आने और घातक शस्त्रों के जरिए विभिन्न चोटें पहुँचाने का आचरण,

अपीलार्थीगण का हत्या कारित करने का सामान्य आशय दर्शित करता है – उच्चतम न्यायालय ने अभिनिर्धारित किया कि यदि अभियुक्तगण किसी एक व्यक्ति पर निशाना लगा रहे थे परंतु अन्य व्यक्ति को मार दिया, वे धारा 301 भा.दं.सं. के अंतर्गत अनुध्यात द्वेष के अंतरण के सिद्धांत के अंतर्गत हत्या का अपराध कारित करने के लिए दण्डित किये जाने योग्य है – विचारण न्यायालय ने अपीलार्थीगण को उचित रूप से दोषसिद्ध किया – अपील खारिज।

Case referred:

AIR 1991 SC 982.

Manju Khatri, amicus curiae for the appellants.
G.S. Thakur, G.A. for the State.

J U D G M E N T

The Judgment of the Court was delivered by **Vijay Kumar Shukla, J.:-** In the present appeal challenge is made to the order of conviction and sentence passed by the learned II Additional Judge to the Court of First Additional Session Judge, Sidhi in S.T. No.02/2004 [State vs. Mohd. Faizan and others] on 16-11-2004 whereby the accused-appellants have been sentenced under Section 302/34 IPC to undergo imprisonment for life and fine of Rs.10000/- each, in default of payment of fine amount, to suffer further rigorous imprisonment for six months each. They have also been convicted under Section 323/34 of IPC and sentenced to suffer rigorous imprisonment for 1 year each with the stipulation that both the sentences would run concurrently.

2. A criminal case was set in motion by the report lodged by PW-2, Sushil Kumar Sharma on 7-12-2003 at about 03:30 AM in the Police Station, Kotwali, District Sidhi at 01:45 AM alleging that when he was sleeping in the house, he heard the noise of the neighbours as they were shouting catching hold to miscreants. He came out from the house and found that his neighbours Rakesh Pandey, Anil Soni, Ashok Soni, Kamal Shrivastava and Jitendra Chaturvedi were present over there. At that time one boy was injured and blood was oozing from his head. He informed that he has been beaten by Mohd. Kalam, Meenu and Faizan. He stated his name as Shameem alias Dadu. Many persons of the crowd rushed to catch hold of the assailants. One of them had hit on his shoulder and the other persons caused injuries to him by means of sharpedged weapon – 'Katar' which had inflicted injuries into his veins and the thumb of the right leg. At that time the deceased – Rakesh Pandey tried to save the injured Shameem alias Dadu as the assailants were returned and again beating him. When the deceased was trying to save the injured, one of the assailants had given him a blow on his face with 'katar' and another had struck 'lathi' on his head. The other had caused grievous injuries on the chest of the deceased with full force. He was taken to the hospital and he was declared brought dead.

3. Shameem alias Dadu who was injured, disclosed the names of the assailants and accordingly the police report was lodged. The dead-body 'panchnama' was prepared and the injured Sushil Kumar Sharma and Shameem were sent for medical examination. The 'marg' intimation regarding death of Rakesh Pandey was got registered and the offence punishable under sections 307, 302 and 323/34 were instituted. The blood stained soil was seized and statements of prosecution witnesses were recorded. The investigating officer has also effected the seizure and memorandums were executed. After investigation the charge-sheet was filed to the competent court of jurisdiction which in turn, committed the matter for trial.

4. Charges were framed under sections 307, 323/34 and 302/34 of the Indian Penal Code by the trial Court and statements of prosecution witnesses were recorded under Section 313 of CrPC.

5. The charge framed against the accused persons was that they had formed an unlawful assembly in order to cause death of Mohd. Shameem. They shared common intention to cause death of Mohd. Shameem @ Dadu and in furtherance thereto injuries were inflicted to him with the help of a 'katar' by Mohd. Kalam and Mohd. Meenu, who caused injuries with the help of an iron rod and the accused - Mohd. Faizan had used a 'lathi'. They were further charged that in furtherance of their common intention to cause death of Shameem alias Dadu, they caused injuries to the deceased – Shushil Kumar Sharma, who strived to save the injured Shameem alias Dadu. The charge was also framed against the accused-appellants that while executing their common intention in order to cause death of Shameem alias Dadu, they caused murder of the injured Rakesh Pandey by inflicting grievous injuries to him by means of deadly weapons viz. 'katar', iron rod and 'lathi'. The counsel for the appellants submitted that the conviction of the appellants under Section 302/34 of IPC is bad in law that they had shared common intention to cause death of Rakesh Pandey, but according to the case of the prosecution they had intention to cause death of Shameem alias Dadu and not of the deceased - Sushil Kumar Sharma especially when they have been acquitted of the charge under Section 307/34 of IPC and convicted only for inflicting simple injury to Shameem.

6. Per contra, counsel for the State submitted that there is no illegality in the impugned judgment of conviction and order of sentence. It is submitted by him that the accused persons were armed with deadly weapons and had common intention to cause murder of Shameem alias Dadu and while causing injury to him they caused death of the deceased - Rakesh Pandey, who attempted to rescue the injured – Shameem alias Dadu. It is further submitted by him that since the common intention itself was to commit offence of murder, therefore, there is no illegality in the impugned order of conviction and sentence passed by the learned trial Judge.

7. The prosecution case is based on the testimony of injured PW-15, Mohd. Shameed and also PW-2, Sushil Kumar Sharma. The other prosecution witnesses,

namely, Jitendra Chaturvedi (PW-5), Siddhnath Chaturvedi (PW-7), Jai Prakash Tiwari (PW-11) have also supported the case of the prosecution .

8. Firstly, we would like to proceed to examine the testimony of Shameem alias Dadu (PW-15) who is an injured witness. He deposed that after closing the shop at about 08:00 PM, he was watching moovie from 09:00 to 12:00 O'clock and when he was coming back after watching the moovie, he was stopped by the accused persons – Mohd. Meenu, Mohd. Kalam and Mohd. Faizan. They had snatched his money ans (sic : and) attempted to take his wrist watch. Thereafter the accused persons fled away from the spot as one or two bikes passed through the spot. After some time, the accused persons came back and the accused Mohd. Meena had inflicted a blow on his head. Though some persons arrived at the spot but despite their alarm the accused persons remained continue to beat him. In para 2 of his deposition he says that all the three accused persons went to some distance but again returned and when the deceased - Rakesh Pandey was endeavouring to save him, he was hit on the head by some of the assailants, but since he was already injured and there was blood in his eyes, therefore, he could not identify that who had hit on the head of the deceased.

9. Another witness PW-2, Sushil Kumar Sharma, who has stated that when he was sleeping in the night, he heard the noise and came out and found that there was an injured person over there and three persons were running from the spot. He further stated that initially they had run away from the spot thereafter they again came back and one of them had given a 'lathi' blow on his head and he also received an iron rod blow on his right forehead. One of them had also caused injuries with the help of sharp-edged weapon, 'Katar'. Thereafter, the three accused persons again started beating the injured Shameem @ Dadu and at that time, Rakesh Pandey attempted to save him, however, the accused appellants by means of deadly weapons viz. 'katar', 'sabbal' and 'lathi' caused injuries to them. There was sufficient street-light and he had seen faces of the three accused persons. The names of the assailants were informed by the injured Shameem alias Dadu. Thereafter, they had gone to the Police Station immediately from the spot and a prompt FIR was lodged at the Police Station, vide Ex.P/3. Testimony of these two witnesses get further support with the evidence of PW-5, Jitendra Chaturvedi, who had also witnessed the incident and had seen that the appellants were causing injuries to Shameem @ Dadu and thereafter, they had also attacked on Sushil Kumar Sharma, PW-2 and when Rakesh Pandey strived to save the deceased, they also assaulted him. He deposed that the appellant – Mohd. Kalam was having a sharp-edged weapon like 'katar' and Mohd. Faizan was armed with a 'lathi' and the accused Mohd. Meena was carrying a sharp-edged weapon like 'sabal'. He had hit with the said weapon on the head of the deceased Rakesh Kumar Pandey.

10. PW-11, Jai Prakash Tiwari has also narrated the same incident with minor changes and has stated that Shameem was attacked by the accused persons and they had also caused injuries to Sushil Kumar Sharma, PW-2 and thereafter they had

attacked on the deceased – Rakesh Pandey, who was endeavouring to save the injured – Shameem alias. He has made a specific statement that Mohd. Kalam had caused injuries with the help of a 'katar' and the appellant – Mohd. Meena was also having some iron-like weapon and the accused Mohd. Faizan was armed with a 'lathi'. In para 2 of his deposition he has also stated that there was adequate light at the place of the occurrence as there was a tube-light which was on and even otherwise it was a moonlight and, therefore, he had identified all the accused persons. He also supported the seizure of the weapons which were recovered from the accused persons upon their disclosure statements.

11. The prosecution has examined Dr. S.B. Khare as PW-10, who had medically examined PW-2, Sushil Kumar Sharma and observed injuries on his head near temporal region and there was a lacerated wound at his left hand. He has also examined Mohd. Shameem @ Dadu and found five injuries on his person. Two injuries were on the head. One was near chin and the injury Nos.(iv) and (v) were on the left leg and on the back side. According to him the injury on the eye was simple in nature and as regards other injuries he advised for X-ray. All the injuries were found to be caused by hard and blunt objects.

12. Dr. K.L. Nigam has been examined by the prosecution, who conducted autopsy of the deceased. He found that there was lacerated wound on the scalp of the deceased the right parietal region having the size of 2" x ½" x 3/4" and there was fracture of bones and blood clots were also found. Other injuries were found on the right eye brow which was a transverse wound with the size of 1 ½" x ½" x ½". There was also an injury on the left knee of the size ½" x 1" . According to his opinion the injuries No.(i) and (ii) were caused by means of a blunt and hard object and the injury No. (ii) was inflicted by some sharp-edged weapon. The Injury No.(i) was sufficient to cause death in the ordinary course of nature. The autopsy report is Ex.P/15. The cause of death was coma because of injuries received at head of the deceased.

13. On the evaluation of the entire evidence of the present case, it is found that the accused appellants had common intention to kill Shameem alias Dadu (PW-15) and in furtherance thereto they caused various injuries to Sushil Kumar Sharma (PW-2). Initially they fled away from the spot and came back and then they caused multiple injuries to the deceased - Rakesh Pandey. After running away from the spot their conduct to come back again and to inflict multiple injuries by means of deadly weapons viz. 'katar', iron rod/'sabal' and 'lathi' vividly demonstrate common intention of the accused persons to cause murder. Even if the argument of the counsel for the appellants is accepted that the accused persons had only intention to kill Shameem @ Dadu and not Rakesh Pandey, the same cannot be accepted, in view of the provision of Section 301 of the IPC, which is reproduced hereunder:

> **"301. Culpable homicide by causing death of person other than person whose death was intended. -** If a person, by doing anything which he intends or knows to be likely to cause death, commits culpable homicide by causing the death of any person, whose death he neither intends nor knows himself to be likely to cause, the culpable homicide committed by the offender is of the description of which it would have been if he had caused the death of the person whose death he intended or knew himself to be likely to cause."

14. In the case of *Jaspal Singh and others vs. State of Punjab,* AIR 1991 SC 982 the Apex Court held that if the accused persons were aiming at one person but killed other person, would be punishable for commission of the offence of murder under the doctrine of transfer of malice, as contemplated under Section 301 of the IPC. In view of the aforesaid, the argument advanced on behalf of the accused appellants does not deserve acceptance.

15. In the present case testimony of injured witnesses Ramesh Kumar Sharma (PW-2) and Mohd. Shameem (PW-15) are well corroborated with the deposition of other prosecution witnesses Jitendra Chaturvedi (PW-5) and Jai Prakash Tiwari (PW-11). The ocular evidence is supported by medical evidence adduced by Dr. K.S. Nigam (PW-9) and Dr. S.B. Khare (PW-10). In addition to this, seizure of weapons utilised viz. iron rod, 'katar' and `lathi' from the exclusive possession of the accused appellants,*per se*, sufficient to prove their common intention to cause murder of Mohd. Shameem @ Dadu. Once the prosecution has established their common intention to kill Mohd. Shameem and while causing injuries to him they have lynched Rakesh Pandey, we do not find any illegality in the judgment of conviction and order of sentence by the learned trial Judge, in view of the doctrine of transfer of malice under Section 301 of the IPC.

16. In view of the preceding analysis, we do not find any illegality in the impugned judgment of conviction and sentence passed by the learned trial Judge against the appellants warranting any interference of this Court. Accordingly, the appeal is sans merit and is **dismissed**.

17. Before parting with the case, we must put on record our unreserved appreciation for the valuable assistance rendered by the learned *amicus curiae*. The High Court Legal Services Committee shall remit fees of *Rs.4000/- (Rs. four thousand only)* to the learned counsel who have assisted this Court.

Appeal dismissed

I.L.R. [2018] M.P.740 (DB)
APPELLATE CRIMINAL

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

Cr.A. No. 2113/2006 (Jabalpur) decided on 15 January, 2018

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

A. Penal Code (45 of 1860), Sections 302, 354 & 449, Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), Section 3(2)(v) and Evidence Act (1 of 1872), Section 32 – Dying Declaration – Child Witnesses – Conviction – Life Imprisonment – Appreciation of Evidence – **Murder of one Suggabai by knife blows inflicted by the appellant in front of two child witnesses – Held – Incident on 22.04.2005 and victim died on 24.04.2005 and during this period various dying declaration were recorded – Held – After the incident, police was called and Dehati Nalishi was registered which was considered to be the first dying declaration – After the incident, victim ran to her neighbours and narrated the whole incident, such statement is also covered u/S 32 of the Evidence Act – Subsequently, Dying Declaration was recorded by Tehsildar – Statement u/S 161 Cr.P.C. was also recorded which was her last statement and can be treated as dying declaration – No contradiction and omission in the said dying declarations and are duly supported by the eye witnesses Jyoti (*niece of deceased*) and Ritesh (*son of deceased*) both aged 12-13 yrs. and are competent to understand the happenings occurred before them – Dying Declarations found reliable – Further held – Conviction can be based on the testimony of child witnesses which also corroborates the dying declaration – Trial Court rightly convicted the appellant – Appeal dismissed.**

(Paras 8, 12, 14, 16 & 17)

क. दण्ड संहिता (1860 का 45), धाराएँ 302, 354 व 449, अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 3(2)(v) एवं साक्ष्य अधिनियम (1872 का 1), धारा 32 – मृत्युकालिक कथन – बालक साक्षी – दोषसिद्धि – आजीवन कारावास – साक्ष्य का मूल्यांकन – एक सुग्गाबाई की अपीलार्थी द्वारा दो बालक साक्षियों के सामने चाकू के वार करके हत्या – अभिनिर्धारित – घटना 22.04.2005 की एवं पीड़िता की मृत्यु 24.04.2005 को और इस अवधि के दौरान विभिन्न मृत्युकालिक कथन अभिलिखित किये गये थे – अभिनिर्धारित – घटना के पश्चात् पुलिस बुलायी गई और देहाती नालिसी पंजीबद्ध की गई जिसे प्रथम मृत्यु कालिक कथन माना गया था – घटना के पश्चात्, पीड़िता अपने पड़ोसियों के पास भागी और संपूर्ण घटना सुनायी, उक्त कथन भी साक्ष्य

अधिनियम की धारा 32 के अंतर्गत आच्छादित है – तत्पश्चात्, तहसीलदार द्वारा मृत्युकालिक कथन अभिलिखित किया गया था – धारा 161 दं.प्र.सं. के अंतर्गत भी कथन अभिलिखित किया गया जो कि उसका अंतिम कथन था और मृत्युकालिक कथन के रूप में माना जा सकता है – उक्त मृत्युकालिक कथनों में विरोधाभास एवं लोप नहीं और चक्षुदर्शी साक्षीगण ज्योति (मृतिका की भतीजी) एवं रितेश (मृतिका का पुत्र) दोनों की आयु 12–13 वर्ष है और उनके समक्ष घटित घटना को समझने में सक्षम है, के द्वारा सम्यक् रूप से समर्थित है – मृत्युकालिक कथन विश्वसनीय पाये गये – आगे अभिनिर्धारित – दोषसिद्धि, बालक साक्षियों के परिसाक्ष्य पर आधारित की जा सकती, जो मृत्युकालिक कथन की संपुष्टि भी करता है – विचारण न्यायालय ने अपीलार्थी को उचित रूप से दोषसिद्ध किया – अपील खारिज।

***B. Evidence Act (1 of 1872), Section 154 – Hostile Witness – Testimony – Effect* – Held – In the present case, Mesobai, neighbour of the deceased turned hostile but she partly supported the prosecution story, hence that part of her evidence can be relied upon her corroboration.**

(Para 18)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 154 – पक्षविरोधी साक्षी – परिसाक्ष्य – प्रभाव – अभिनिर्धारित – वर्तमान प्रकरण में, मृतिका की पड़ोसी, मेसोबाई पक्षविरोधी हो गई परंतु उसने आंशिक रूप से अभियोजन कथा का समर्थन किया है अतः उसके साक्ष्य के उस भाग पर संपुष्टि हेतु विश्वास किया जा सकता है।

***C. Criminal Practice – Adverse Inference* – Held – In the FSL report, human blood has been found on the knife and clothes of appellant – Appellant failed to explain the origin of blood stains on his clothes which he was wearing at the time of incident and on the knife recovered from him – Adverse inference can easily be drawn against him.**

(Para 22)

ग. दाण्डिक पद्धति – प्रतिकूल निष्कर्ष – अभिनिर्धारित – एफ एस एल प्रतिवेदन में चाकू एवं अपीलार्थी के कपड़ों पर मानव रक्त पाया गया है – अपीलार्थी अपने कपड़ो पर, जिन्हें वह घटना के समय पहने था, तथा उससे बरामद चाकू पर रक्त के धब्बों का स्त्रोत स्पष्ट करने में विफल रहा – उसके विरूद्ध प्रतिकूल निष्कर्ष आसानी से निकाला जा सकता है।

Cases referred:

AIR 2014 SC 3741, (1997) 5 SCC 341, 2015 SCC Online SC 500, (2014) 14 SCC 596, 2017 Cri.L.J. 352, (2014) 11 SCC 516, 2016 (4) SCC 358.

S.K. Gangrade, for the appellant.
Pradeep Singh, G.A. for the respondent/State.

J U D G M E N T

The Judgment of the court was delivered by:
Anjuli Palo, J.:- This appeal has been filed by the accused-appellant being aggrieved by the judgment dated 6.9.2006, passed by Special Judge, Betul, in Special Case No.97/2005, whereby the appellant has been convicted for offence punishable under Section 302 of the Indian Penal Code and sentenced to undergo RI for life.

2. In brief the prosecution case is that on 22.4.2005 at village Asari, Police Station Chicholi. Suggabai (since deceased) was alone in her house. Her niece Jyoti (PW1) was playing with the children of Suggabai outside of the house. They saw the appellant came to the house of Suggabai and caused fatal blows to her by means of knife. To save herself, Suggabai ran away towards the neighbour's house. She sustained several injuries. On the information of the incident, police came to the residence of Duklu Aadiwasi (neighbour of deceased). On the oral report of Suggabai, Dehati Nalishi (Ex.P7) lodged against the appellant under Sections 449 and 307 of IPC and section 3(1)(II) and 3 (2) (V) of SC/ST (Prevention of Atrocities) Act, 1989. Suggabai was brought to the hospital for treatment. Her statements under Section 161 of Cr.P.C and dying declarations under Section 32 of IPC have been recorded by the Competent Authorities. She died on 24.4.2005. Hence merg intimation was registered on the report of Ward Boy Surenderlal. The offence was converted into Section 302 of IPC. After due investigation, charge sheet has been filed before the concerned Court.

3. After committal of the case, trial was conducted by the trial Court. Charges have been framed under Section 449 302 and 354 of IPC read with Section 3 (2)(v) of SC/ST (Prevention of Atrocities) Act, 1989 against the appellant. The appellant abjured guilt and pleaded that he has been falsely implicated due to old enmity with the deceased. After considering the entire prosecution evidence, learned trial Court held the appellant guilty for committing the murder of deceased-Suggabai. He has been convicted for offence under Section 302 of IPC and sentenced him to life imprisonment.

4. The above findings and sentence have been challenged by the appellant on the grounds that the learned trial Court has wrongly relied on the evidence of Child witnesses Ku. Jyoti (PW1) and Ritesh (PW2), infact they are not the eye witnesses. The police registered a false criminal case against the appellant and he has wrongly been convicted by the learned trial court. Since the dying declarations of the deceased were not reliable, the findings of the learned trial Court are illegal, erroneous and contrary to the evidence, hence deserve to be set aside.

5. Learned Govt. Advocate has vehemently opposed the submissions of the appellant and contended that the learned trial Court has rightly held the appellant guilty for committing the aforesaid offences.

6. We have heard learned counsel for the parties at length and perused the record.

7. The point for consideration is that - whether the appellant has wrongly been convicted under Section 302 of IPC ?

8. The case is mainly based on various dying declarations of the deceased. The first dying declaration Dehati Nalishi (Ex.P7) registered by Sub. Inspector D.P. Mahore (PW12) is considered as dying declaration. He deposed that at the time of lodging of Dehati Nalisi by him, Suggabai was mentally conscious and capable of giving the statement. Dehati Nalisi is registered by him as per the statement given by Suggabai. In the cross-examination, his testimony is found unrebutted. In Dehati Nalishi (Ex.P7), Suggabai has clearly stated that the appellant came to her house at about 2.20 pm on the day of incident. She did not like him, hence she objected on which the appellant threw her on the cot. When she opposed, the appellant inflicted several blows by knife on her back and abdomen. He also threatened Suggabai to kill her. She somehow reached the house of Duklu Adiwasi. She had narrated the whole incident to Duklu and her wife Mesobai. Such statement is also covered under Section 32 of Indian Evidence Act.

9. It is true that Duklu (PW7) and his wife Mesobai (PW6) both turned hostile. But Mesobai (PW6) partly supported the prosecution story that, in afternoon Suggabai came to her house. She was in injured condition and was crying. Her son Ritesh and Jyoti also came with her. In para 4, she admitted that at that time Duklu (PW7) was present there. She further admitted that in presence of Mesobai (PW6), Suggabai has narrated the whole incident to Duklu and told that appellant has inflicted several blows of knife on her.

10. Mesobai (PW6) in para 6 has deposed that on the telephonic message to the police station, police came to the scene of occurrence and took injured Suggabai with them. D.P. Mahore (PW12), Sub-Inspector also corroborates the testimony and establishes that dying declaration (Delhati (sic : Dehati) Nalisi Ex.P7) of the deceased was recorded according to the statement given by Suggabai. S.I. R.D. Pal (PW5) establishes that in his presence Dehalti (sic : Dehati) Nalishi (Ex.P7) was signed by Suggabai, at that time he saw the injuries over the abdomen of Suggabai. Report (Ex.P8) was registered by him as per Dehati Nalishi (Ex.P7).

11. Dr. Rajendra Mousiq (PW10) deposed that he examined Suggabai at CHC, Chicholi on 22.4.2005 and found stab wounds over her abdomen. She was in a critical condition. Hence he referred her to the District Hospital, Betul. Dr. N.D. Chourasia (PW3) admitted and treated her at about 3.40 pm at the District Hospital, Betul. Her bed head ticket (Ex.P1) also corroborates the testimony of Dr. Chourasia and the prosecution story.

12. Head Constable Surendra Verma (PW11) has deposed that on 22.4.2005, he received a Tehrir (letter) (Ex.P5) from CHC Chicholi for recording dying declaration

of Suggabai, hence he sent a requisition to SDM, Betual (sic : Betul) for recording the dying declaration of Suggabai. Later dying declaration of Suggabai was recorded by the Tehsildar Shri B.L. Saxena (PW15). On the same date of the incident, statement of deceased Suggabai (Ex.P32) under Section 161 of Cr.P.C was recorded by Dy. S.P., B.S. Patel, (PW14). This was the last statement of the deceased Suggabai, hence can be treated as dying declaration under Section 32 of the Evidence Act. Both the witnesses have deposed that statement of Suggabai were duly recorded by them as narrated by her. According to the above witnesses, at the time of recording both dying declaration and statement (deemed as dying declaration) Suggabai was conscious and mentally fit to give the statement. Both the dying declarations (Ex.P32) and (Ex.P6) were recorded by investigating Officer, B.S. Patel (PW14) and Naib Tehsildar (PW15) have corroborative value. We do not find any contradiction and omission in the said dying declarations, hence are found reliable.

13. Dr. Rajendra Mousiq (PW10) in his cross-examination has deposed that on 22.4.2005 at about 3.00 pm he also recorded the dying declaration of Suggabai. According to him, Suggabai has stated that due to old enmity, the appellant caused knife injuries on her abdomen and her back side. Doctor has also stated that at that time she was capable to give the statement which was recorded as Ex.P34.

14. Narrations of all the dying declarations were duly supported by the eye witnesses. Jyoti (PW1) niece of deceased, Ritesh (PW2) son of deceased both aged about 12-13 years but are competent to understand the happenings, which happened before them. Learned counsel for the appellant has stated that the testimonies of child witnesses Ku. Jyoti and Ritesh cannot be accepted without corroboration of any independent witness. But we are not inclined to accept this contention because in the present case they were present at the house of the deceased. The incident also took place at their house and it was possible for them to see all the incidents happened in the house or out of the house. Their presence with Suggabai also corroborated by Mesobai.

15 In the case of *Raju @ Devendra Choubey Vs. State of Chhatisgarh* (AIR 2014 SC 3741), Hon'ble Supreme Court has held that if the incident occurred in a house, presence of child witness in the house is natural. He has no ulterior motive in identifying the accused. Similarly in the case of *Dattu Ramrao Sakhare Vs. State of Maharashtra* [(1997) 5 SCC 341], Hon'ble Supreme Court has held as under :-

> "A child witness if found competent to depose to the facts and reliable on such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers

> thereof. The evidence of a child witness and credibility thereof would depend upon the circumferences of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored."

16. *[See also Ranjeet Kumar Ram @ Ranjeet Kumar Das Vs. State of Bihar* [2015 SCC Online SC 500], *State of Rajasthan Vs. Chandgi Ram and Ors.* [(2014) 14 SCC 596] We do not find the testimony of child witnesses in the present case unreliable. They also corroborate the dying declarations.

17. Learned Counsel for the appellant has stated that the conviction cannot be based on the dying declaration of the deceased, but the dying declaration is a substantive piece of evidence, it may be the sole basis of conviction if found reliable as also held in the case of *Ramesh and others vs. State of Haryana* 2017 Cri.L.J. 352.

18. Learned counsel for the appellant has submitted that the prosecution case is not corroborated by the neighbours of the deceased. Earlier we considered the testimony of Mesobai (PW6) and found she partly supported the prosecution story, hence, that part of her evidence can be relied upon for corroboration. In case of *Ramesh and others Vs. State of Haryana* 2017 Cri.L.J. 352, the Supreme Court has also held that trend of witnesses turning hostile is due to various other factors. It may be fear of deposing against the accused/delinquent or political pressure or pressure of other family members or other such sociological factors. It is also possible that witnesses are corrupted with monetary considerations. The following reasons can be discerned which make witnesses retracting their statements before the Court and turning hostile:-

> (i) Threat/intimidation.
>
> (ii) Inducement by various means.
>
> (iii) Use of muscle and money power by the accused.
>
> (iv) Use of Stock Witnesses.
>
> (v) Protracted Trials.
>
> (vi) Hassles faced by the witnesses during investigation and trial.
>
> (vii) Non-existence of any clear-cut legislation to check hostility of witness.

Hence, it may be the reason that due to feeling of neighbourship or fear of the appellant, Mesobai (PW6) and her husband Duklu (PW7) turned hostile even then. The prosecution story is duly corroborated by other evidence, hence cannot be disbelieved.

19. In case of *Ramesh Vithal Patil Vs. State of Karnataka* (2014) 11 SCC 516 and in the case of *Sadhu Sharan Singh Vs. State of UP and Ors.* [2016 (4) SCC 358] it was held that

> "in present days, civilised people are generally insensitive to come forward to give any statement in respect of any criminal offence – Unless it is inevitable, people normally keep away from court, as they find it distressing and stressful – Though such kind of human behaviour is indeed unfortunate, but it is a normal phenomena – Such handicap of investigating agency cannot be ignored in discharging their duty. Prosecution case cannot be doubted on such ground alone – Entire case cannot be derailed on mere ground of absence of independent witness as long as evidence of eyewitness, though interested, is trustworthy." [See *also Appabahi and Anr. Vs. State of Gujrat* AIR 1988 SC 696].

20. Dr. N.D. Chourasia (PW3) conducted the autopsy of the deceased and found following injuries on her body :-

> "1. An incised wound 5x1x peritoneum deep at the abdomen.
>
> 2. An incised wound 4x1cmx into abdominal cavity.
>
> 3. An incised wound 5x1x7 cm over mid side of abdomen.
>
> 4. An incised wound 10x1x1 cm over left side of abdomen.
>
> 5. An incised wound 2x1x2 cm on lower back side.
>
> 6. An incised wound 2x1x5 cm left side lower back.
>
> 7. An incised wound 4x1/2 cm skin deep left side of chest.
>
> 8. Doctor found a large incised wound which was treated during operation to save the life of the deceased. A rubber tube was inserted in the abdomen of the deceased."

21. All the above injuries and the incised wounds were caused by sharp object. They were fatal in nature and sufficient to cause death of the deceased. All the injuries were ante-mortem in nature. In the opinion of Dr. N.D. Chourasia (PW3), Suggabai died due to shock and excessive bleeding. Thus, postmortem report (Ex.P3), was duly proved by him which establish the ocular evidence is duly corroborated by medical evidence.

22. A knife was seized by S.I, B.S. Patel (PW14) from the possession of the appellant. According to his memorandum (Ex.P21), seizure memo (Ex.P22) was prepared by B.S. Patel. A blood stained Khaki Pant and T. Shirt of the appellant have

been seized by the police by seizure memo (Ex.P23). Seized knife was sent for query to Dr. N.D. Chourasia (PW3), who has opined that the injuries found on the body of the deceased might have caused by the aforesaid knife. Query report is Ex.P4. All the seized articles marked as I.J. and K. sent for chemical examination. In the FSL report (Ex.P27), human blood has been found on the knife and clothes of the appellant. The appellant failed to explain the origin of human blood stains on his clothes and the knife recovered from him. Hence, adverse inference can easily be drawn against him that such knife was used by him to inflict blows on the deceased. Human blood stains were found on clothes, which he was wearing at the time of incident.

23. During the incident, the appellant himself sustained two abrasions as found by Dr.O.P. Yadav (PW9) on the right palm and right little finger. The above injuries show that while inflicting blows of knife to the deceased-Suggabai, when she resisted, such simple injuries were sustained to the appellant, which proves involvement with the crime.

24. After considering all the facts and circumferences, the evidence on record, we are of the opinion that, there is no ground or merit to interfere in the findings of learned trial Court. The learned trial Court has rightly convicted the appellant for committing murder of the deceased. The number of injuries, nature of injuries, place of injuries, used weapon and act of the appellant are the facts clearly establish the intention of the appellant, to cause the death of the deceased.

25. In view of the foregoing and in light of the principles laid down by the Hon'ble Supreme Court, we find that there is no case to interfere in the findings of the learned trial Court. This appeal against the conviction of the appellant, deserves to be dismissed. Hence, it is dismissed.

26. Copy of this judgment be sent to the trial Court for information and compliance alongwith the record immediately.

Appeal dismissed.

I.L.R. [2018] M.P.747 (DB)
APPELLATE CRIMINAL

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

Cr.A. No. 551/1995 (Jabalpur) decided on 18 January, 2018

KHEMCHAND KACHHI PATEL …Appellant

Vs.

STATE OF M.P. …Respondent

***Penal Code (45 of 1860), Section 302 and Evidence Act (1 of 1872), Section 6 – Murder – Life Conviction – Extra Judicial Confession – Admissibility in Evidence* – Husband assaulted his wife, inflicted number of injuries with sickle and also thrown a stone on her head – Wife died – Appellant's mother**

lodged the FIR – Held – From the Rojnamcha it is proved that husband / appellant himself had gone to police station on the date of incident and informed that he himself committed murder of the deceased/wife, which is subsequently corroborated by evidence of the SHO and report of mother of appellant – Such statement of appellant given to the Station Incharge is admissible u/S 6 of the Evidence Act – Such statement can also be treated as extra Judicial confession – Trial Court rightly convicted the appellant and awarded proper sentence – Appeal dismissed.

(Paras 18, 20 & 22)

दण्ड संहिता (1860 का 45), धारा 302 एवं साक्ष्य अधिनियम (1872 का 1), धारा 6 – हत्या – आजीवन दोषसिद्धि – न्यायिकेतर संस्वीकृति – साक्ष्य में ग्राह्यता – पति ने अपनी पत्नी पर हमला किया, हंसिये से कई चोटें पहुँचाई और उसके सिर पर एक पत्थर भी फेंका – पत्नी की मृत्यु हुई – अपीलार्थी की मां ने प्रथम सूचना प्रतिवेदन दर्ज किया – अभिनिर्धारित – रोजनामचा से यह साबित किया गया है कि पति/अपीलार्थी स्वयं घटना दिनांक को पुलिस थाना गया था और सूचित किया कि उसने स्वयं मृतिका/पत्नी की हत्या कारित की थी, तत्पश्चात् जिसकी संपुष्टि, थाना प्रभारी के साक्ष्य एवं अपीलार्थी की मां की रिपोर्ट से हुई है – अपीलार्थी का थाना प्रभारी को दिया गया उक्त कथन, साक्ष्य अधिनियम की धारा 6 के अंतर्गत ग्राह्य है – उक्त कथन को न्यायिकेतर संस्वीकृति के रूप में भी माना जा सकता है – विचारण न्यायालय ने अपीलार्थी को उचित रूप से दोषसिद्ध किया और उचित दण्डादेश प्रदान किया – अपील खारिज।

Cases referred:

AIR 1999 SC 3883, (2012) 11 SCC 768.

Pratibha Mishra, Amicus Curiae for the appellant.
A.N. Gupta, G.A. for the respondent/State.

J U D G M E N T

The Judgment of the Court was delivered by:
S.K.Gangele, J. :- The appellant has filed this appeal against the judgment dated 09.03.1995 passed by the Addl. Sessions Judge, Jabalpur in Session Trial No. 592/1992 whereby the appellant has been convicted under Sections 302 of the Indian Penal Code and sentenced to undergo life imprisonment.

2. The prosecution story in brief is that the appellant was living with his wife and two children. At around 7:30 pm in the evening on the date of incident i.e. 31.05.1992, the appellant returned to his house from the shop. He enquired from his wife Parvati (since deceased) about the meal. There was a quarrel on this ground because the meal was not cooked. Appellant had a suspicion about character of his wife. Thereafter, he had inflicted number of injuries by a sickle on person of the wife and

he had also thrown a stone on the head of his wife. She died. Shantibai (PW-1) mother of the appellant tried to save the deceased. Appellant bite her thumb. The report of the incident was lodged at 8:30 by Shantibai. Appellant himself reached at the Police Station, Lordganj and lodged the FIR (Exh. P/12-A). He was taken into custody. Police conducted investigation and filed charge-sheet. Appellant abjured guilt and pleaded innonce during trial.

3. Learned trial Court held the appellant guilty for committing offence under Section 302 of IPC and awarded sentence of life.

4. Shantibai (PW-1) who is the mother of the appellant turned hostile. She denied the fact that appellant had inflicted injury to the deceased. In her cross-examination, she deposed that she had seen the deceased Parvati lying dead. Thereafter, she went to Madan Mahal station to inform the appellant. She admitted the fact that there was blood on the clothes of the appellant.

5. B.P.Tiwari (PW-2), Photographer for Police Department deposed that, on receiving information, I went along with Incharge Police Station to the place of occurrence and I had taken photographs of the deceased which are Exh. P/1 to P/7 .

6. Tirath Prasad (PW-3) deposed that, I recorded Rojnamcha *sana* Exh. P/8. Thereafter, I sent the body of the deceased to Victoria Hospital. It is mentioned in the report lodged by Shantibai that there was a quarrel between husband and wife. The appellant had inflicted injuries to the deceased by a sickle.

7. Sheikh Abdulla (PW-4) turned hostile. He denied that any seizure was made before him. However, he admitted the fact that he had signed the seizure memo (Exh. P/10). He was declared hostile.

8. Govind Prasad (PW-5) also turned hostile. He admitted that seizure was made before him vide seizure memo (Exh. P/11) and I signed the same. He admitted his signatures on Exh. P/9 and P/10.

9. Dr. Jainarayan Sen (PW-6) deposed that, I examined Shantibai and noticed one lacerated wound of 1/2cmx1/2cm at the backside of head and one incised wound of teeth bite of 1/4cmx1/4cm on the right thumb.

10. Chandra Mohan Patel (PW-11) is the brother of the deceased. He deposed that, when deceased died she was living with appellant Khemchand. When I returned home at around 9:30 pm, Parvati was dead. Her body was lying at the *varanda* of the house. There were injuries on her body. The appellant was not there. Police had taken him. I signed Exh. P/17 and P/18.

11. Dr. D.K.Sakle (PW-12) deposed that, I performed postmortem of the deceased and noticed following injuries on her person :

(i) Skull is completely crushed with fracture of all the bones of the skull. Brain matter is lying outside the cranial cavity.

(ii) Lacerated wound of size 2"x1/2" above the left eye.

(iii) Seven stab wounds of size 3/4"x3/4" of variable depths present over the left side of the neck.

(iv) Five stab wounds of size 3/4"x3/4" of variable depths present on the left side of the chest.

(v) Six stab wounds of size 3/4"x3/4" of variable depths present over the left upper arm and elbow.

(vi) Four stab wounds of size 3/4"x3/4" of variable depths present to the left of backside of the chest.

(vii) Stab wound of size 3/4"x3/4"x skin deep present on the right side of the back of abdomen.

(viii) Lacerated wound of size 2"x1/2"x1/2" depth present over the left wrist.

12. Dr. Sakle further deposed that the head injuries were caused by hard and blunt object and incised injuries were caused by sharp edged cutting object. The injuries were ante-mortem in nature. The incised injury would be caused by sickle and lacerated wound by stone (*sill*). The injuries were sufficient to cause death.

13. Shri G.P.Shrivastav (PW-8) Investigating Officer deposed that, I was posted as Station House Officer Incharge on 31.05.1992 at Police Station Lordganj. Khemchand Patel S/o Dalchand Patel came to the police station to lodge a report. On his information, I lodged the report (Exh. P/12) and signed the same. I prepared a spot map Exh. P/13 and signed the same. I also seized articles vide seizure memo Exh. P/14 and signed the same. Plain and red earth was seized vide seizure memo (Exh. P/11) and I signed the same. The clothes of the deceased were also seized. On the memorandum of the appellant (Exh. P/9) a sickle was seized vide (Exh. P/11). I signed both the documents. I recorded the statement of Shantibai (Exh. P/1). Appellant was arrested vide arrest memo Exh. P/15. The seized articles were sent for chemical examination vide Exh. P/16. There is no other evidence except this.

14. Important piece of evidence document Exh. P/23 which is an information given by the appellant to Investigation Officer (PW-8). The time is recorded as 20:50. It is mentioned in the document Exh. P/23 that Khemchand Patel s/o Dalchand Patel aged 36 years reported that before some days, I had suspicion about character of my wife. She did not cook food. I asked her that why the food is not cooked. On this, there was a quarrel. Thereafter, I had inflicted injuries on my wife Parvati by a sickle. She fell down. Thereafter, I inflicted blow of a stone (sill) on the head of Parvati. Her brain came out. She is lying dead in the house. There is a signature of the appellant on the aforesaid document. It was recorded in Rojnamcha sana.

15. Shantibai (PW-1) mother of the appellant who lodged the report in which it is mentioned that the appellant had committed murder of the deceased, turned hostile.

16. Chandra Mohan Patel (PW-11) brother of the appellant, deposed that the deceased was his sister-in-law (*bhabhi*). She was living with the appellant Khemchand. I returned back at around 9:30 pm. At that time, she was dead and her body was lying in the *varanda* of the house. The appellant was at the police station. From the evidence of Chandra Mohan Patel (PW-11), this fact has been proved that the appellant was in the house at the time of incident.

17. G.P.Shrivastav (PW-8) Station House Incharge, Police Station, Lordganj in his evidence proved the fact that the appellant himself had come to the police station and Exh. P/12 was lodged and on his information a report was lodged. In his cross-examination, he admitted that on the information given by the appellant I lodged first information report and it was read over to the appellant and appellant signed the same.

18. From the document Exh. P/12 Rojnamcha Exh. P/23, this fact has been proved that the appellant himself had gone to the police station at around 08:50 pm on the date of incident and informed the Station Incharge that he himself committed murder of the deceased. The aforesaid statement of the appellant given to the Station Incharge soon before the evidence, is admissible under Section 6 of the Evidence Act.

19. The Hon'ble Supreme Court, in case of *Sukhar Vs. State of Uttar Pradesh* [AIR 1999 SC 3883] has held as under :

> "This Court in *Gentela Vijayavardhan Rao and Another V. State of A.P.* 1996 (6) SCC 241 considering the law embodied in Section 6 of the Evidence Act held thus: The principle of law embodied in Section 6 of the Evidence Act is usually known as the rule of res gestae recognised in English law. The essence of the doctrine is that a fact which, though not in issue, is so connected with the fact in issue "as to form part of the same transaction" becomes relevant by

itself. This rule is, roughly speaking, an exception to the general rule that hearsay evidence is not admissible. The rationale in making certain statement or fact admissible under Section 6 of the Evidence Act is on account of the spontaneity and immediacy of such statement or fact in relation to the fact in issue. But it is necessary that such fact or statement must be a part of the same transaction. In other words, such statement must have been made contemporaneous with the acts which constitute the offence or at least immediately thereafter. But if there was an interval, however slight it may be, which was sufficient enough for fabrication then the statement is not part of res gestae.

In another recent judgment of this Court in *Rattan Singh V. State of H.P.* 1997 (4) SCC 161, this Court examined the applicability of Section 6 of the Evidence Act to the statement of the deceased and held thus:.

The aforesaid statement of Kanta Devi can be admitted under Section 6 of the Evidence Act on account of its proximity of time to the act of murder. Illustration A to Section 6 makes it clear. It reads thus:

(a) A is accused of the murder of B by beating him. Whatever was said or done by A or B or the bystanders at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact.

(emphasis supplied)

Here the act of the assailant intruding into the courtyard during dead of the night, victims identification of the assailant, her pronouncement that appellant was standing with a gun and his firing the gun at her, are all circumstances so intertwined with each other by proximity of time and space that the statement of the deceased became part of the same transaction. Hence it is admissible under Section 6 of the Evidence Act."

20. The aforesaid statement can also be treated as extra judicial confession. The Apex Court in case of *Jagroop Singh Vs. State of Punjab,* (2012) 11 SCC 768 has held as under :

"The second circumstance pertains to extrajudicial confession. Mr. Goel, learned counsel for the appellant, has vehemently criticized the extra-judicial confession on the

ground that such confession was made after 18 days of the occurrence. That apart, it is submitted that the father of Natha Singh and grand-father of the deceased are real brothers and, therefore, he is an interested witness and to overcome the same, he has deposed in Court that he has strained relationship with the informant, though he had not stated so in the statement recorded under Section 161 of Cr.P.C.

The issue that emanates for appreciation is whether such confessional statement should be given any credence or thrown overboard. In this context, we may refer with profit to the authority in *Gura Singh v. State of Rajasthan* [12] wherein, after referring to the decisions in *Rao Shiv Bahadur Singh v. State of Vindhya Pradesh[13], Maghar Singh v. State of Punjab[14], Narayan Singh V. State of M.P.[15], Kishore Chand v. State of H.P. [16] and Baldev Raj v. State of Haryana[17],* it has been opined that it is the settled position of law that extra judicial confession, if true and voluntary, can be relied upon by the court to convict the accused for the commission of the crime alleged. Despite inherent weakness of extra-judicial confession as an item of evidence, it cannot be ignored when shown that such confession was made before a person who has no reason to state falsely and his evidence is credible. The evidence in the form of extra- judicial confession made by the accused before the witness cannot be always termed to be tainted evidence. Corroboration of such evidence is required only by way of abundant caution. If the court believes the witness before whom the confession is made and is satisfied that it was true and voluntarily made, then the conviction can be founded on such evidence alone. The aspects which have to be taken care of are the nature of the circumstances, the time when the confession is made and the credibility of the witnesses who speak for such a confession. That apart, before relying on the confession, the court has to be satisfied that it is voluntary and it is not the result of inducement, threat or promise as envisaged under Section 24 of the Act or brought about in suspicious circumstances to circumvent Sections 25 and 26.

Recently, in *Sahadevan & Another v. State of Tamil Nadu[18]*, after referring to the rulings in *Sk. Yusuf v. State*

> *of W.B.[19] and Pancho v. State of Haryana[20],* a two-Judge Bench has laid down that the extra- judicial confession is a weak evidence by itself and it has to be examined by the court with greater care and caution; that it should be made voluntarily and should be truthful; that it should inspire confidence; that an extra-judicial confession attains greater credibility and evidentiary value if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence; that for an extra-judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities; and that such statement essentially has to be proved like any other fact and in accordance with law."

21. In our considered opinion, before appreciation of evidence, it has to be kept in mind that the deceased was the wife of accused-appellant. She was living with the appellant. The mother of the appellant turned hostile which is a natural phenomenon. There is no other evidence. But this fact has been proved that the appellant was at his house at the time of incident. He himself went to the police station and narrated the incident. In his accused statement, the appellant stated that, I was at my shop. Mother informed me and thereafter, police came there. They had taken me to the police station. The statement of the appellant is contrary to the statement of Investigating Officer. There was no intention of the Investigating Officer to record information on behalf of the appellant because the appellant is the husband of the deceased. Nobody will falsely implicate a husband. The appellant produced a defence witness. However, version of the defence witness is not reliable. Shantibai (PW-1) mother of the appellant lodged a report in which name of the appellant as 'assailant' has been mentioned. Subsequently, she turned hostile to save her son.

22. In view of the evidence on record as discussed above, in our considered opinion, the Trial Court rightly held the appellant guilty for committing offence under Section 302 of the Indian Penal Code and awarded proper sentence. We do not find any merit in this appeal. It is hereby dismissed.

23. Appellant is on bail. His bail bonds are canceled and he is directed to surrender immediately before the concerned trial Court to undergo the remaining part of jail sentence as awarded by the trial Court, failing which the trial Court shall take appropriate action under intimation to the registry.

24. Copy of this judgment be sent to the Court below for information and compliance alongwith its record.

Appeal dismissed.

I.L.R. [2018] M.P.755
APPELLATE CRIMINAL

Before Mr. Justice S.C. Sharma

Cr.A. No. 774/1997 (Indore) decided on 18 January, 2018

SHYAM BIHARI …Appellant

Vs.

STATE OF M.P. …Respondent

***A. Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Sections 8/21, 42 & 50 – Conviction – Communication to Senior Officer – Search Procedure* – Brown Sugar was seized from appellant – Held – Rojnamcha entry reveals that no communication was made to senior officers before search and seizure, therefore there was no compliance of Section 42 of the Act of 1985 – Further held – For the purpose of search, offer was give to appellant, to be searched by a Gazetted Officer or by the officer who went for the search – It was the officer who went for the search has searched the appellant, thus there was a total non-compliance of Section 50 of the Act of 1985 – In view of the above non-compliance, conviction deserves to be and is accordingly set aside – Appeal allowed.**

(Paras 7, 9, 12 & 18)

क. स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धाराएँ 8/21, 42 व 50 – दोषसिद्धि – वरिष्ठ अधिकारी को संसूचना – तलाशी प्रक्रिया – अपीलार्थी से ब्राउन शुगर जब्त की गई थी – अभिनिर्धारित – रोजनामचा प्रविष्टी प्रकट करती है कि तलाशी एवं जब्ती के पूर्व वरिष्ठ अधिकारी को संसूचना नहीं दी गई थी, इसलिए 1985 के अधिनियम की धारा 42 का अनुपालन नहीं किया गया था – आगे अभिनिर्धारित – तलाशी के प्रयोजन हेतु अपीलार्थी को राजपत्रित अधिकारी द्वारा या तलाशी हेतु गये अधिकारी द्वारा तलाशी करवाने का प्रस्ताव दिया गया था – अधिकारी जो तलाशी हेतु गया था, के द्वारा अपीलार्थी की तलाशी ली गई अतः, 1985 के अधिनियम की धारा 50 का पूर्णतः अननुपालन हुआ था – उपरोक्त अननुपालन को दृष्टिगत रखते हुए, दोषसिद्धि अपास्त किये जाने योग्य है एवं तद्नुसार अपास्त की गई – अपील मंजूर।

***B. Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 8/21 – Malkhana Register – Evidence* – Held – As per prosecution, seized brown sugar was kept in Malkhana – During the trial, Malkhana Register was not marked as Exhibit, neither statement of any witness in respect of the same has been brought on record nor has been examined during trial – No evidence that alleged seized article was kept in Malkhana or in safe custody – Benefit has to be given to appellant.**

(Para 13 & 14)

ख. स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 8/21 – मालखाना पंजी – साक्ष्य – अभिनिर्धारित – अभियोजन के अनुसार, जब्तशुदा ब्राउन शुगर को मालखाने में रखा गया था – विचारण के दौरान, मालखाना पंजी को प्रदर्श अंकित नहीं किया गया था, इस संबंध में किसी साक्षी का न तो कथन अभिलेख पर लाया गया और न ही विचारण के दौरान परीक्षण किया गया है – कोई साक्ष्य नहीं कि अभिकथित जब्तशुदा वस्तु को मालखाना या सुरक्षित अभिरक्षा में रखा गया था – अपीलार्थी को लाभ देना होगा।

Cases referred:

(2009) 8 SCC 539, (2016) 14 SCC 358, 2013 (2) MPHT 43 (CG), (2011) 8 SCC 130, (2010) 12 SCC 495, (1994) 3 SCC 299, (1999) 6 SCC 172, (2014) 5 SCC 345, (2011) 1 SCC 609, 2009 (I) MPWN 58, Cr.A. No. 6/2005 decided on 05.12.2017.

L.C. Patne, for the appellant, appointed by the M.P. High Court Legal Services Committee.

Pushyamitra Bhargava, Dy. A.G. for the respondent-State.

(Supplied: Paragraph numbers)

O R D E R

S.C. Sharma , J.:- The present appeal has been filed u/S. 374 of the Code of Criminal Procedure, 1973 against the judgment of conviction dated 04/08/1997 passed by the learned Additional Sessions Judge, Indore in Session Case No. 545/1993 – *State of Madhya Pradesh Vs. Shyam Bihari,* convicting the appellant for an offence u/S. 8/21 of the Narcotics Drugs & Psychotropic Substances Act, 1985. The appellant has been sentenced to undergo 10 years RI and fine has been imposed to the tune of Rs.5.00 lacs with a default clause to undergo 3 years RI on account of non payment of fine.

2. As per the prosecution case, on 3/3/1993 at about 17:35, Sub Inspector posted at Police Station Pandrinath namely; R.V. Dahima received an information through some informant that one person whose name is Shyam Bihari is roaming near Jagran Press Macchi Bazar Masjid along with Brown Sugar. Based upon the information of the informant, an entry was made in the Rojnamcha Sanha at No.281 and after verifying the information secretly, as it was found to be true, another entry was made in the Rojnamcha Sanha at No. 282 on 3/9/1993, the police party along with two independent witnesses Ashok and Bherulal went to the spot in a police vehicle and accused appellant Shyam Bihari was found at the spot with a plastic bag. He was nabbed at the spot in front of panch witnesses and a specific question was asked, as required under the Act, whether he wants his search to be done by a Gazetted officer or by the Police Officer who has conducted the search. The appellant, as per the prosecution case, gave his consent to be searched by the Police Officer and upon search a packet was

recovered from him which was smelling like Brown Sugar. Total weight of the brown sugar seized from the appellant was 500 Grams and the FSL Unit was also informed on wireless. The technical officer of the FSL Mobile Unit reached the spot and after preliminary examination / analysis, it was informed to the Police Officer that it is *prima facie* brown sugar. The appellant was not having any license for keeping the brown sugar with him nor for selling brown sugar and out of 500 grams of brown sugar, 100 grams was kept in a small plastic packet and it was sealed at the spot only. The appellant was arrested and again entries were made in Rojnamcha Sanha. The C.S.P. was informed on wireless. The seized brown sugar was handed over to Head Moharir M.P. Singh for depositing in the Malkhana and a crime was registered at Crime No. 165/1993 for offence u/S. 8/18 of the NDPS Act, 1985.

3. The prosecution has produced as many as 12 witnesses. Constable Mulayan Singh (PW 1), Constable Nahar Singh (PW 2), Head Constable Ramashankar Shukla (PW 3), Devnath Pandey (PW 4), Radholal (PW 5), Ashok (PW 6), Bherulal (PW 7), Sub Inspector R. V. Dahima (PW 8), Head Constable Santosh (PW 9) Crime Branch, Asstt. Chemical Analyst Prakash Chandra Dubey (PW 10), Constable Rajlalan Mishra (PW 11) and Constable Pannalal (PW 12). After examination of the witnesses, the trial Court has arrived at a conclusion that the article recovered from the appellant is Brown Sugar. The statement of the prosecution witness Asstt. Chemical Analyst Prakash Chandra Dubey (PW 10) are on record. The Chemical Analyst Report is also on record as Ex.P/13 and the same establishes that it was brown sugar only. The statement of witnesses and the chemical analyst report has established it to be brown sugar.

4. The trial Court has again in respect of recovery of brown sugar, examined large number of witnesses namely; Constable Mulayan Singh (PW 1), Head Constable Ramashankar Shukla (PW 3), Devnath Pandey (PW 4), Sub Inspector R. V. Dahima (PW 8), Head Constable Santosh (PW 9) Crime Branch, Constable Rajlalan Mishra (PW 11) and Constable Pannalal (PW 12) who have supported the prosecution case. The seizure of brown sugar, the arrest of the appellant has been established, however, the two independent witnesses namely; Ashok (PW 6) and Bherulal (PW 7) have not supported the case of the prosecution in respect of seizure. They have categorically stated that no brown sugar was recovered in front of them from the appellant and they were called to the Police Station and were forced to sign the seizure memo.

5. The learned Court below, based upon the statement of aforesaid witnesses has held the seizure to be proved and also arrived at a conclusion that there was substantial compliance of Sec. 42 and Sec. 50 of the NDPS Act, 1985.

6. Section 42 and 50 of the NDPS Act, 1985 reads as under :

> 1[42. Power of entry, search, seizure and arrest without warrant or authorisation.

(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intellegence or any other department of the Central Government including paramilitary forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from persons knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act: Provided that if such officer has reason to believe that a search warrant or

authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior.]

50. Conditions under which search of persons shall be conducted.

(1) When any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female. 1[(5) When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which

> necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior.]

7. Mr. L. C. Patne, learned counsel for the appellant has vehemently argued before this Court that compliance of Sec. 42 and Sec. 50 have not been done and on account of non compliance of the mandatory provision, as contained u/S. 42(1)(2) and Sec. 50 of the Act, the entire trial stands vitiated and the conviction deserves to be set aside. Learned counsel for the appellant has drawn attention of this Court towards Ex.D/1 which is Rojnamcha Sanha and it certainly does not contain the fact that senior officers of the Department were informed before conducting search and seizure.

8. Learned counsel for the appellant has placed reliance upon the judgment delivered in the case of *Karnail Singh Vs. State of Haryana reported in* (2009) 8 SCC 539 and again upon the judgment delivered by the Hon'ble Supreme Court in the case of *Darshan Singh Vs. State of Haryana reported in* (2016) 14 SCC 358. Learned counsel for the appellant has also placed reliance upon the judgment delivered by the Chattisgarh High Court in the case of *Nasir Khan Vs. State of Chattisgarh reported in* 2013 (2) MPHT 43 (CG) and heavy reliance has been placed upon paragraphs 14 and 15 of the aforesaid judgment. Paragraphs 14 and 15 reads as under:

> 14. I have gone through the evidence of Sub Inspector T. Khakha (PW 7) and Head Constable Sundarlal Gorle (PW 1). It appears that Sub Inspector T. Khakha (PW 7) recorded the secret information received by him in writing, but he did not send it to any superior Officer. It is, therefore, clear that there was complete non compliance of Section 42 of the Act, 1985.
>
> 15. Mere writing the secret information is not sufficient for compliance of provision of Section 42(2) of the Act, 1985 in view of the law laid down by the Hon'ble Supreme Court in *Karnail Singh V. State of Haryana* (supra). In the instant case, Sub Inspector T. Khakha (PW 7) did not comply with the provision of Section 42 of the Act, 1985. Therefore, there is no illegality or irregularity in the finding recorded by the learned Special Judge that the prosecution did not comply with the provision of Section 42 of the Act, 1985. It is, therefore, clear that there has been complete non compliance with the provision of Section 42 of the Act, 1985 which vitiates the conviction.

9. Learned counsel for the appellant has again placed reliance upon the judgment delivered by the Hon'ble Supreme Court in the case of *Rajinder Singh Vs. State of*

Haryana reported in (2011) 8 SCC 130 and in the case of State of *Karnataka Vs. Dondusa Namasa Baddi reported in* (2010) 12 SCC 495. After taking into account the Rojnamcha entry as there was no communication to any senior officer, as reflected from the Rojnamcha entry, it can be safely gathered that there was no compliance of Sec. 42 of the NDPS Act keeping in view the judgment delivered by the Hon'ble Supreme Court, as referred above.

10. Learned counsel for the appellant also argued that there was no compliance of Sec. 50 of the Act. Learned counsel for the appellant has placed reliance upon the judgment delivered by the Hon'ble Supreme Court in the case of *State of Punjab Vs. Balbir Singh reported in* (1994) 3 SCC 299. Paragraphs 16, 18 and 25 reads as under :

> 16. One another important question that arises for consideration is whether failure to comply with the conditions laid down in Section 50 of the NDPS Act by the empowered or authorised officer while conducting the search, affects the prosecution case. The said provision (Section 50) lays down that any officer duly authorised under Section 42, who is about to search any person under the provisions of Sections 41, 42 and 43, shall, if such person so requires, take him without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate and if such requisition is made by the person to be *See *Brett v. Brett* (1 826) 3 Addams 210, 216 16 (1975) 2 SCC 482: AIR 1976 SC 263 searched, the authorised officer concerned can detain him until he can produce him before such Gazetted Officer or the Magistrate. After such production, the Gazetted Officer or the Magistrate, if sees no reasonable ground for search, may discharge the person. But otherwise he shall direct that the search be made. To avoid humiliation to females, it is also provided that no female shall be searched by anyone except a female. The words "if the person to be searched so desires" are important. One of the submissions is whether the person who is about to be searched should by himself make a request or whether it is obligatory on the part of the empowered or the authorised officer to inform such person that if he so requires, he would be produced before a Gazetted Officer or a Magistrate and thereafter the search would be conducted. In the context in which this right has been conferred, it must naturally be presumed that it is imperative

on the part of the officer to inform the person to be searched of his right that if he so requires to be searched before a Gazetted Officer or a Magistrate. To us, it appears that this is a valuable right given to the person to be searched in the presence of a Gazetted Officer or a Magistrate if he so requires, since such a search would impart much more authenticity and creditworthiness to the proceedings while equally providing an important safeguard to the accused. To afford such an opportunity to the person to be searched, he must be aware of his right and that can be done only by the authorised officer informing him. The language is clear and the provision implicitly makes it obligatory on the authorised officer to inform the person to be searched of his right.

18. Under the Act wide powers are conferred on the officers and deterrent sentences are also provided for the offences under the Act. It is obvious that the legislature while keeping in view the menace of illicit drug trafficking deemed it fit to provide for corresponding safeguards to chock the misuse of power thus conferred so that any harm to innocent persons is avoided and to minimise the allegations of planting or fabricating by the prosecution, Section 50 is enacted.

25. The question considered above arise frequently before the trial courts. Therefore we find it necessary to set out our conclusions which are as follows :

(1) If a police officer without any prior information as contemplated under the provisions of the NDPS Act makes a search or arrests a person in the normal course of investigation into an offence or suspected offences as provided under the provisions of CrPC and when such search is completed at that stage Section 50 of the NDPS Act would not be attracted and the question of complying with the requirements thereunder would not arise. If during such search or arrest there is a chance recovery of any narcotic drug or psychotropic substance then the police officer, who is not empowered, should inform the empowered officer who should thereafter proceed in accordance with the provisions of the NDPS Act. If he happens to be an empowered officer also, then from that stage onwards, he should carry out the investigation in accordance with the other provisions of the NDPS Act.

(2-A) Under Section 41(1) only an empowered Magistrate can issue warrant for the arrest or for the search in respect of offences punishable under Chapter IV of the Act etc. when he has reason to believe that such offences have been committed or such substances are kept or concealed in any building, conveyance or place. When such warrant for arrest or for search is issued by a Magistrate who is not empowered, then such search or arrest if carried out would be illegal. Likewise only empowered officers or duly authorized officers as enumerated in Sections 41(2) and 42(1) can act under the provisions of the NDPS Act. If such arrest or search is made under the provisions of the NDPS Act by anyone other than such officers, the same would be illegal.

(2-B) Under Section 41(2) only the empowered officer can give the authorisation to his subordinate officer to carry out the arrest of a person or search as mentioned therein. If there is a contravention, that would affect the prosecution case and vitiate the conviction.

(2-C) Under Section 42(1) the empowered officer if has a prior information given by any person, that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building etc. he may carry out the arrest or search without a warrant between sunrise and sunset and this provision does not mandate that he should record his reasons of belief. But under the proviso to Section 42(1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief.

To this extent these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial. (3) Under Section 42(2) such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision the same affects the prosecution case. To that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case.

(4-A) If a police officer, even if he happens to be an "empowered" officer while effecting an arrest or search during normal investigation into offences purely under the provisions of CrPC fails to strictly comply with the provisions 'of Sections 100 and 165 CrPC including the requirement to record reasons, such failure would only amount to an irregularity.

(4-B) If an empowered officer or an authorised officer under Section 41(2) of the Act carries out a search, he would be doing so under the provisions of CrPC namely Sections 100 and 165 CrPC and if there is no strict compliance with the provisions of CrPC then such search would not per se be illegal and would not vitiate the trial.

The effect of such failure has to be borne in mind by the courts while appreciating the evidence in the facts and circumstances of each case.

(5) On prior information the empowered officer or authorised officer while acting under Sections 41(2) or 42 should comply with the provisions of Section 50 before the search of the person is made and such person should be informed that if he so requires, he shall be produced before a Gazetted Officer or a Magistrate as provided thereunder. It is obligatory on the part of such officer to inform the person to be searched. Failure to inform the person to be searched and if such person so requires, failure to take him to the Gazetted Officer or the Magistrate, would amount to non-compliance of Section 50 which is mandatory and thus it would affect the prosecution case and vitiate the trial. After being so informed whether such person opted for such a course or not would be a question of fact.

(6) The provisions of Sections 52 and 57 which deal with the steps to be taken by the officers after making arrest or seizure under Sections 41 to 44 are by themselves not mandatory. If there is non-compliance or if there are lapses like delay etc. then the same has to be examined to see whether any prejudice has been caused to the accused and such failure will have a bearing on the appreciation of evidence regarding arrest or seizure as well as on merits of the case.

11. Learned counsel for the appellant has also placed reliance upon the judgment delivered in the case of *State of Punjab Vs. Baldev Singh reported in* (1999) 6 SCC 172; in the case of *State of Rajasthan Vs. Parmanand and another reported in* (2014) 5 SCC 345; and in the case of *Vijaysinh Chandubha Jadeja Vs. State of Gujarat reported in* (2011) 1 SCC 609. The judgment delivered in the case of *State of Rajasthan Vs. Parmanand and another* (supra), was delivered in almost similar circumstances. The Officers therein who went to search the accused therein gave him an option of search by one of the officers of the Department as well as by Magistrate and or by a Gazetted Officer and search was carried out by the Officer of the raiding party and in those circumstances the Hon'ble Supreme Court has held that the offer made to the accused for search by an officer of the search party was not in consonance with Sec. 50 of the Act.

12. In the present case, similar offer was given to the accused to be searched by a Gazetted officer or by the Officer who went for the search and it was the Officer who went for search has searched the accused. In the light of the aforesaid, it can safely be gathered that there was total non compliance of Sec. 50 of the Act.

13. The other important aspect of the case is in respect of seized brown sugar. The Malkhana register was not marked as Exhibit, nor the statement of any witness in respect of Brown Sugar which was kept in Malkhana has been brought on record (has not been examined). In almost identical case, the learned Single Judge in the case of *Bhadar Vs. State of Madhya Pradesh reported in* 2009 (I) MPWN 58 in paragraph 12 has held as under :

> 12. There is evidence that sample was sent to Government Opium and alkaloid works, Neemuch for chemical analysis and as per the report Ex.P/10, sample was found to be Charas. Though, it has been mentioned in Ex.P/9-C that sample seized from the appellant, Bhadar was sent for analysis and it was analysed. It is clear from Ex.P/7- C that on the same day two persons were apprehended and from them contraband articles were seized. One of them was Bhadar and the name of the second person was Athar Ali. It is also clear from Ex.P/7-C that samples were prepared from alleged seized contraband articles from both these persons. This fact is also clear from the evidence of S.J.Zafrin. There is no evidence that seized articles and sample was kept in custody of Malkhana Moharir of Kotwali Bhopal and the same sample which was prepared from the seized contraband article from the appellant Bhadar was sent for chemical analysis. There is no evidence that alleged seized

> contraband article and sample were kept in Malkhana Moharir from 4/8/1991 to 22/8/1991. Malkhana Moharir of Kotwali, Bhopal has not been examined. Copy of register of Malkhana Kotwali, Bhopal in which entries being made has not been produced and proved in evidence. There is no evidence that seized contraband article and sample were kept in safe custdoy from 4/8/1991 to 22/8/1991 hence, only on the basis of evidence of S.J.Zafrin and documents Ex.P/9-C and Ex.P/10, it cannot be held beyoud reasonable doubt that same sample which was prepared from alleged seized contraband article from the appellant, Bhadar was sent for chemical analysis and report Ex.P/10 pertains to the same sample. Consequently prosecution has failed to prove beyond reasonable doubt that seized article from the appellant was Charas. S.J.Zafrin seized the contraband article from the appellant and he conducted the investigation and lodged the FIR Ex.P/8 C. In *Megha Singh Vs. State of Haryana* (AIR 1995 SC 2339), it has been held that being a complainant, the same police should not have proceeded with the investigation of the case which suspects the fair and impartial investigation.

14. In the light of the aforesaid, in the present case also there is no evidence that the alleged seized article was kept in Malkhana. Malkhana Mohorir has not been examined. Copy of Malkhana register has not been produced establishing that there is no evidence that the seized article and sample were kept in safe custody and, therefore, the benefit has to be given to the appellant only.

15. A coordinate Bench of this Court in the case of *Santosh @ Surajpal Khalsa Vs. State of Madhya Pradesh (Criminal Appeal No. 6/2005, decied (*sic:*decided) on 5/12/2017)* in paragraphs 7 to 17 has held as under :

> 07. The point for consideration is whether the impugned judgment is contrary to the law and evidence on record ? The main thrust of the arguments raised by learned counsel for the appellant has been alleged non-compliance of Section 50 of 'the Act'. In this regard, attention of this Court is invited to memo Ex.D/1 as well as the testimony of Ranjitsingh Bhadoria (P.W.9) so also Constable-Rajendra Singh (P.W.1), who, as per prosecution, was a member of the trap party.
>
> 08. Section 50 of 'the Act' to the extent it is relevant reads thus:

"50. Conditions under which search of persons shall be conducted. (1) When any officer duly authorised under Section 42 is about to search any per Cr. A. No.6/2005 (Santosh vs. State of M.P.) 6 son under the provisions of Section 42 or Section 43, he shall, if such person as requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

xxx xxx xxx"

09. Section 50 (supra) clearly provides that when any officer duly authorized under Section 42 of 'the Act' is about to search any person under the provisions of Section 44 or Section 43 of 'the Act, he shall, if such person requires, take such person without unnecessary delay to the nearest Gazetted Officer of any departments mentioned in Section 42 or to the nearest Magistrate. The provisions of Section 50 were interpreted by a Constitution Bench of the apex Court in *State of Punjab vs. Baldev Singh,* 1999(6) SCC 172. The relevant observations run as under :

"(1) That when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the concerned person of his right under Sub-section (1) of Section 50 of being taken to the nearest Gazetted Officer or the nearest Magistrate for making the search. Cr.A. No.6/2005 (*Santosh vs. State of M.P.*) However, such information may not necessarily be in writing;

(2) That failure to inform the concerned person about the existence of his right to be searched before a Gazetted Officer or a Magistrate would cause prejudice to an accused;
(3) That a search made, by an empowered officer, on prior

information, without informing the person of his right that, if he so requires, he shall be taken before a Gazetted Officer or a Magistrate for search and in case he so opts, failure to conduct his search before a Gazetted Officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act;

xxx xxx xxx

(5) That whether or not the safeguards provided in Section 50 have been duly observed would have to be determined by the Court on the basis of evidence led at the trial. Finding on that issue, one way or the other, would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish, at the trial, that the provisions of Section 50, and particularly the safeguards provided therein were duly complied with, it would not be permissible to cut- short a criminal trial;

(6) That in the context in which the protection has been incorporated in Section 50 for the benefit of the person intended to be searched, we do not express any opinion whether the provisions of Section 50 are mandatory or directory, but, Cr.A. No.6/2005 (*Santosh vs. State of M.P.*) hold that failure to inform the concerned person of his right as emanating from Sub-section (1) of Section 50, may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law;

(7) That an illicit article seized from the person of an accused during search conducted in violation of the safeguards provided in Section 50 of the Act cannot be used as evidence of proof of unlawful possession of the contraband on the accused though any other material recovered during that search may be relied upon by the prosecution, in other proceedings, against an accused, notwithstanding the recovery of that material during an illegal search."

10. The matter was again considered by another Constitution Bench in the case of *Vijaysingh Chandhubha Jadeja* (supra), wherein it was held that Section 50 of 'the Act' casts a duty on the empowered officer to inform the suspect of his right to be searched in the presence of a gazette officer or a Magistrate, if he so desires. Answering the question as to whether a mere enquiry by the said officer as to whether the suspect would like to be searched in the presence of a Magistrate or a gazette officer can be said to be due compliance with the mandate of the said section; the apex Court held that provisions of Section 50(1) of 'the Act' make it imperative for the empowered officer to inform the person concerned about the existence of his right that if he so requires, he shall be searched before a gazette officer or a Magistrate, that failure to inform the suspect about the existence of his said right would cause prejudice to him, and Cr.A. No.6/2005 (*Santosh vs. State of M.P.*) in case he so opts, failure to conduct his search before a gazette officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from the person during a search conducted in violation of the provisions of Section 50 of 'the Act'. The Constitution Bench further held that the concept of substantial compliance with the requirement of Section 50 of 'the Act' is neither borne out from the language of Section 50(1) nor it is in consonance with the dictum laid down in *Baldev Singh's* case.

11. In *K. Mohanan vs. State of Kerala, 2*001(2) EFR Page-21, the apex Court held as under :

"6. If the accused, who was subjected to search was merely asked, whether he required to be searched in the presence of a gazette officer or a Magistrate it cannot be treated as communicating to him that he had a right under law to be searched so. What PW1 has done in this case was to seek the opinion of the accused whether he wanted it or not. If he was told that he had a right under law to have it (sic himself) searched what would have been the answer given by the accused cannot be gauged by us at this distance of time.

This is particularly so when the main defence adopted by the appellant at all stages was that Section 50 of the Act was not complied with."

12. In *State of Rajsthan vs. Parmanand & Anr.,* 2014 CRLJ 1756, the apex Court considered that if a bag carried by the suspect is searched and his person is also searched, Cr.A. No.6/2005 (*Santosh vs. State of M.P.*) whether Section 50 of 'the Act' will have application. The apex Court relying on *Dilip & Anr. Vs. State of MP, (*2007) 1 EFR (SC) 207, and *Union of India vs. Shah Alam & Anr.,* (2009) 16 SCC 644, held in this regard as under :

"12. Thus, if merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act will have no application. But if the bag carried by him is searched and his person is also searched, Section 50 of the NDPS Act will have application. In this case, respondent No.1 Parmanand's bag was searched. From the bag, opium was recovered. His personal search was also carried out. Personal search of respondent No.2 Surajmal was also conducted. Therefore, in light of judgments of this Court mentioned in the preceding paragraphs, Section 50 of the NDPS Act will have application."

13. In *Parmanand's case* (supra), the suspect was given an option of being searched before the Superintendent, who was a part of the raiding party. The apex Court held that it cannot be said to be proper compliance of Section 50. Relevant observations run as under:

"15. We also notice that PW-10 SI Qureshi informed the respondents that they could be searched before the nearest Magistrate or before a nearest gazette officer or before PW-5 J.S. Negi, the Superintendent, who was a part of the raiding party. It is the prosecution case that the respondents informed the officers that they would like to be searched before PW-5 J.S. Negi by PW-10 SI Cr.A. No.6/2005 (*Santosh vs. State of M.P.*) Qureshi. This, in our opinion, is again a breach of Section 50(1) of the NDPS Act."

14. The plea raised on behalf of the appellant requires to be examined in the light of aforementioned legal position.

Ranjitsingh Bhadoria (P.W.9) has deposed in para-9 that he informed the appellant that he has a right to be searched by gazetted officer or Magistrate or he can opt for being searched by himself i.e. Ranjitsingh Bhadoria (P.W.9). It has further been deposed that in this regard memorandum Ex.D/1 was prepared and that the appellant has given consent for being searched by him. The phraseology used in Ex.D/1 for eliciting consent of appellant is as under:-

''आपको सूचना दी जाती है । मुझ P.S.I. रणजीतसिंह भदौरिया को मुखबिर द्वारा सूचना मिली है कि आपके पास अवैध चरस है। इस बावत आपकी तलाषी ली जाना है । आपको विधिनुसार अधिकार है कि आप अपनी तलाषी किसी राजपत्रित अधिकारी या मजिस्ट्रेट से लिवा सकते हैं क्या आप मेरे द्वारा तलाशी लिये जाने के लिये सहमत है।

15. From the aforesaid, it is vividly clear that Ranjitsingh Bhadoria (P.W.9) had put before the appellant 3 options. One is with regard to search before the Magistrate, second is search before the gazetted officer and third option is search before himself. The third option given by Ranjitsingh Bhadoria (P.W.9) to the appellant in the light of the aforesaid legal position cannot be said to be in-conformity with legal position explained by Hon'ble apex Court with regard to compliance of Section 50 of 'the Act', therefore, it cannot be said that in the instant case Section 50 of 'the Act' was Cr.A. No.6/2005 (Santosh vs. State of M.P.) complied with in letter and spirit. In absence of compliance of Section 50 of 'the Act', the conviction recorded against the appellant cannot be sustained because the entire accusation against the appellant is based on the recovery of alleged 'Charas' from the possession of the appellant in personal search carried out by Ranjit Singh Bhadoria (P.W.9).

16. As regards compliance of Section 57 of 'the Act' Ranjitsingh Bhadoria (P.W.9) has admitted in para-63 that he has not sent any report under Section 57 of 'the Act' to the superior officer. Though in para 22, 23, this witness has stated that report Ex.P/23 was sent by the Station House Officer to Additional S.P. and C.S.P. Pandrinath, Indore, however,nothing in this regard has been deposed by Sachin Singh Chouhan (P.W.6), the then Station House Officer, Police Station-Chandan Nagar. Again there is no evidence on record

> that in fact Ex.P/23 was as a matter of fact delivered to Additional S.P. and C.S.P. In these premises, it cannot be said that Section 57 of 'the Act' was complied with.
>
> 17. In view of the non-compliance of Section 50 of 'the Act', the conviction and sentence recorded against the appellant cannot be maintained. Accordingly, this appeal is hereby allowed. Appellant is in jail. If not required to be detained in any other case, he should be released forthwith from the custody.

16. In the light of the aforesaid judgment also the accused therein was searched by the Inspector of Police and he was a member of the search party, an option was given to the accused to be searched by a Gazetted Officer or by a Sub Inspector of Police and in those circumstances it has been held that the third option given to the accused can never be said to be in conformity with the statutory provisions as contained u/S. 50 of the Act.

17. Mr. Pushyamitra Bhargava, learned Dy. Advocate General has vehemently opposed the contention of the learned counsel for the appellant. Learned counsel for the respondent has read out the statement of each and every witnesses before this Court. He has argued that there was compliance of Sec. 42 and Sec. 50 of the NDPS Act and mere deviation in respect of compliance of Sec. 42 and Sec. 50 of the Act will not give any benefit to the appellant as there was recovery of brown sugar weighing about 500 grams from the appellant which was recovered from him in front of independent witnesses. He has also argued that during trial there was no defence taken by the appellant in respect of Sec. 42 and Sec. 50 of the NDPS Act. He has prayed for dismissal of the appeal.

18. This Court, in the light of the fact that non-compliance of Sec. 42 and Sec. 50 of the NDPS Act has been established, is of the considered opinion that the conviction of the appellant deserves to be set aside and is accordingly set aside. He is already on bail. The bail bonds stands discharged. The fine amount, if any, deposited be refunded back to the appellant.

19. Before parting, this Court would like to appreciate the hardwork done by Mr. L. C. Patne, Advocate, who has appeared in the matter on behalf of the appellant as he was engaged by the Legal Services Authority. It has also been brought to the notice of this Court that he does not accept the remuneration given by the M. P. Legal Aid Services Authority while doing such cases. This Court really appreciates the gesture shown by the learned counsel who is otherwise a very busy counsel and who has taken all pains by preparing the matter and has argued the matter finally before this Court.

Appeal allowed.

I.L.R. [2018] M.P.773 (DB)
APPELLATE CRIMINAL

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

Cr.A. No. 1014/1995 (Jabalpur) decided on 24 January, 2018

DUKHIRAM @ DUKHLAL …Appellant

Vs.

STATE OF M.P. …Respondent

***Penal Code (45 of 1860), Section 302 & 304 Part I and Criminal Procedure Code, 1973 (2 of 1974), Sections 96, 97, 99 & 100 – Murder – Conviction – Right of Private Defence* – Incident is said to have taken place in open place – When appellant inflicted axe blows to deceased, at that point of time there was no danger to the body of the appellant as he was standing about 20-25 feet away, so right of private defence is not available to the appellant – Apex Court held that right of private defence be used as preventive right and not punitive right – Further held – Appellant inflicted a blow of axe on the neck of the deceased who was armed with lathi – Appellant himself received injuries on his head and hence the offence committed would fall u/S 304 Part I IPC – Conviction u/S 302 set aside – Appellant convicted u/S 304 Part I IPC – Appeal partly allowed.**

(Paras 17, 21, 22, 23 & 24)

दण्ड संहिता (1860 का 45), धारा 302 व 304 भाग I एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 96, 97, 99 व 100 – हत्या – दोषसिद्धि – प्राईवेट प्रतिरक्षा का अधिकार – कथित रूप से घटना एक खुले स्थान पर घटित हुई – जब अपीलार्थी ने मृतक पर कुल्हाड़ी से वार किये तब उस क्षण अपीलार्थी के शरीर को कोई खतरा नहीं था क्योंकि वह लगभग 20–25 फीट दूर खड़ा था, इस तरह अपीलार्थी को प्राईवेट प्रतिरक्षा का अधिकार उपलब्ध नहीं है – सर्वोच्च न्यायालय ने अभिनिर्धारित किया कि प्राईवेट प्रतिरक्षा के अधिकार का उपयोग निवारक अधिकार के रूप में किया जाना चाहिए और न कि दण्डात्मक अधिकार के रूप में – आगे अभिनिर्धारित – अपीलार्थी ने मृतक, जो कि लाठी से सुसज्जित था, पर कुल्हाड़ी का वार किया – स्वयं अपीलार्थी को उसके सिर पर चोटें आयी और इसलिए कारित किया गया अपराध धारा 304 भाग–I भा.दं.सं. के अंतर्गत आयेगा – धारा 302 के अंतर्गत दोषसिद्धि अपास्त – अपीलार्थी को धारा 304 भाग–I भा.दं.सं. के अंतर्गत दोषसिद्ध किया गया – अपील अंशतः मंजूर।

Cases referred:

AIR 1973 SC 473, (1973) 1 SCC 347, (2010) 2 SCC 333, (2017) 2 SCC 737, (2016) 13 SCC 171, (2014) 7 SCC 323.

None appears for the appellant even when the case is called in second round.
Abhishek Tiwari, Amicus Curiae for the appellant.
Pradeep Singh, G.A. for the respondent/State.

J U D G M E N T

The Judgment of the court was delivered by:
S.K. Gangele, J.:- The prosecution story in brief is that on 6.7.1994 the appellant had taken out Jarawa, (article used in fencing field) and kept the jarawa in his badi, (courtyard). On this act Maghdhu and Pahadi Singh came at the house of Dukhiram and asked the reason for collecting Jarawa. Dukhiram replied that Maghdhu had also taken his Praya (straw), hence, I had brought his Jarawa and kept it in my badi, (courtyard). Dukhiram abused Maghdhu and said that it is all being done by Jageshwar and I would not let him live. After sometime, Dukhiram brought an axe from his house and started to abuse in front of the house of Jageshwar. Jageshwar asked him not to do so. Dukhiram said that it is all being done by you and I would not let you live and tried to attack him with axe. Jageshwar catch hold his axe and Maghdhu tried to pacify the quarrel. In the course of scuffle Dukhiram gave a blow of axe on the neck of Jageshwar. He fell down on the spot and died. The family members of the deceased were also present on the spot. Maghdhu, Pahadi, Rambai (PW-4) and Sukwariya bai saw the incident. Rammu Singh lodged the report at the Police Station, Nouroujabad at around 8 o'clock in the morning. Thereafter, the Police registered the offence and conducted investigation. The charge sheet was filed. The present appellant abjured the guilt during trial. The trial court held the appellant guilty for commission of offence punishable under Section 302 of IPC and awarded jail sentence of Life with fine of Rs.5000/-.

2. Learned counsel for the appellant has submitted that the appellant himself received injuries on his head. The prosecution did not explain the injuries. The deceased and the prosecution parties were aggressor and the appellant acted in private defence. The trial court has committed error in convicting the appellant for commission of offence punishable under Section 302 of IPC. In alternate, learned counsel for the appellant has submitted that there was no intention on the part of the appellant to kill the deceased. The incident had taken place all of sudden in the heat of passion, hence, alleged offence said to be committed by the appellant would fall under Section 304, Part A of IPC. In support of his contentions, learned counsel for the appellant relied on the following judgments of the Apex Court:-

(a) *Deo Narain Vs. State of U.P.* reported in AIR 1973, SC page 473, (1973) 1 SCC 347.

(b) *Darshan Singh Vs. State of Punjab and Another* reported in (2010) 2 SCC 333,

(c) *Suresh Singhal Vs. State (Delhi Administration)* reported in (2017) 2 SCC 737,

(d) *Bhagwan Sahai and another Vs. State of Rajasthan* reported in (2016) 13 SCC 171.

3. Learned counsel for the State has submitted that as per evidence produced by the prosecution, this fact has been established that after the quarrel the deceased was standing at a distance and in that event the appellant had inflicted a blow on the neck of the deceased after snatching a tangi. The intention and motive to kill a person could be developed at the time of incident, hence, the trial court has rightly held the appellant guilty for commission of offence punishable under Section 302 of IPC. In view of the injuries sustained by the deceased, the appeal is liable to be dismissed.

4. Evidence of PW-1, PW-2, PW-3 and PW-4 is vital to consider the fact that whether the appellant is eligible to get the benefit of right of private defence.

5. **PW-1, Rammu Singh,** deposed that on 6th June 1994, I was brushing my teeth. (month of June is typing error because the date of incident is 6.7.1994). The house of the accused is adjacent to my house. I went to the place where Dukhilal lad kept the jarawa. (used for fencing of field). Dukhilal was ploughing his land. I asked the appellant, that why he had kept the Jarawa of other person. He told me that in the month of Aghan Jageshwar and Maghdhu had taken two begs of jarawa and that is why I had taken their jarawa. I pacified the aforesaid person and came back to my house. Dukhilal came to the house of Jageshwar and abused him. Both were entangled with each other. Dukhilal had tangi (axe) in his hand and Jageshwar was holding a danda of bamboo tagged with a iron nail on it. They were beating each other. They reached at the house of Yayankat fighting with each other. Maghdhu gave a blow of danda at the accused. Kchhetrapal catch his lathi. Kchhetrapal and Maghdhu were entangled with each other. When I reached there, I saw that the face of Jageshwar was towards west side and the face of Dukhiram at the east side. I asked Jageshwar to leave from there. He was standing at a distance of 20-25 feet away. I had taken tangi from Dukhiram. In order to stop him. The accused pushed me and snatched tangi. He reached near Jageshwar with Tangi. The accused, Dukhilal had given a blow of tangi on the neck of Jageshwar. After that Jageshar fell down. Dukhilal said that he wanted to kill Maghdhu and after saying that he jumped towards Maghdhu with tangi. In the meanwhile, father of Dukhilal came and then father of Dukhilal and I overpowered the accused, Dukhilal. The deceased was died. I lodged report of the incident at Police Station, Nourojabad, which is Ex. P- 1. The Police came on the spot and prepared the spot map and I signed the same, (Ex.P-2). I also signed Ex. P-3, Naksha Panchanama.

6. **PW-2, Pahadi** is another witness. He deposed that I was standing near my house Maghdhu called me and Rammu Singh and Maghdhu told me that accused-appellant, Dukhilal had taken my Jarawa. I and Rammu Singh went to the house of Dukhilal. I asked Dukhilal why he had brought jarawa. He replied to return my Pyara (straw), I would return back the jarawa. I said that if your dispute is not resolved by us then you can take help of others. Thereafter, I went to my house. Subsequently, I came to know that accused-appellant, Dukhilal had killed Jageshwar.

7. **PW-3, Maghdhu,** is another eye witness. He deposed that at around 7.30 or 7 o'clock in the morning the accused- appellant, Dukhilal had taken my jarawa. I had brought Rammu and Pahadi and informed them. The accused-appellant had placed jarawa in his badi, (courtyard). Pahari asked Dukhilal why you had brought the jarawa of Maghdhu. The appellant replied that Maghdhu had taken two bundles of Kodo, hence, I had taken jawara in lieu of that. After half an hour, quarrel began between Jageshwar and Dukhilal. They were entangled with each other. Dukhilal was having Tangi and Jageshwar was having Penari. I tried to pacify the quarrel. Kchhetrapal caught me. Rammu came to rushed to pacify the quarrel and tried to separate Dukhilal and Jageshwar. They were separated from each other. After that, accused-appellant, Dukhilal caused injuries on the neck of Jageshwar by tangi (axe). In cross examination, he denied the fact that he had inflicted a blow of danda on the head of appellant.

8. **PW-4, Rambai** is the daughter of the deceased. She deposed that the appellant was abusing my father and thereafter both my father and the appellant were entangled with each other. I was shouting to save my father. Meanwhile, Rammu Seth rushed to the place of incident. Rammu had separated my father and my father was standing at a distance of twenty hands. In the meanwhile, Rammu caught hold Dukhilal. The accused-appellant, Dukhilal got himself set free from Rammu and caused injuries on the neck of my father, who was standing twenty hands away. My father fell down and died on the spot.

9. **PW-7,** prepared the spot map.

10. **PW-5, Dr. S.K. Namdeo** performed autopsy of the deceased. He deposed that he noticed one incised injury on the neck of the deceased 7x3x2" Due to the aforesaid injury skin of the neck, Carotid artery and Carotid Vain were cut. The injury was caused by sharp edged weapon. The deceased had died due to aforesaid injury.

11. **PW-8, V.P. Singh** is the Investigating Officer. He deposed that I was posted on 6.7.1994 at Police Chouki, Nourojabad. The report (Ex-1) of the incident was lodged by Rammu at the Police Station. I singed (sic : signed) the same. Thereafter, offence was registered. The merge was also registered. I reached at the spot on the same day and prepared the Panchnama of the dead body, (Ex. P-2). Thereafter, the dead body was sent for postmortem. I prepared the spot map, (Ex. P-3). The appellant was arrested on the same day. On his memorandum from the house of the appellant an axe was seized, vide seizure memo, Ex. P-5. I signed both the documents. I seized a shirt of the accused-appellant, vide (Ex. P-6) and I signed the same. The plain earth and red earth was seized, vide, Ex. P-7. I signed the same. I recorded the statements of witnesses, namely Rammu Singh, Maghdhu, Pahadi, Rambai, Sukhbariya, Fulbai, Rajendra and Gangubai. FIR is Ex. P-1, which was lodged by Rammu Singh Rathore, vide Ex. P-1 at 8.30 in the morning on the same. In the FIR it is mentioned that the

appellant had inflicted a blow of axe on the neck of the deceased and due to aforesaid injury the deceased was died.

12. From the statements of eye witnesses, PW-1, PW-3, PW- 4 and the FIR which was lodged promptly this fact has been proved that the appellant had inflicted a blow of axe on the neck of the deceased. The Doctor who performed the postmortem of the deceased verified this fact that death of the deceased was the cause of aforesaid injury, which was ante -mortem in nature, hence, it is established that the appellant had killed the deceased.

13. Now the next question is whether the appellant is entitled the right of private defence. Learned counsel for the appellant has placed reliance on two judgments of Hon'ble Apex court in *Deo Narain Vs. State of U.P.* reported in AIR 1973, SC page 473, (1973) 1 SCC 347 in this regard. It is a fact that the accused is entitled to get benefit of right to private defence in accordance with provisions of Section 96 and 97 of IPC.

> **Section 96. Things done in private defence:-**
>
> Nothing is an offence which is done in the exercise of the right of private defence.
>
> **Section 97. Right of private defence of the body and of property:**
>
> Every person has a right, subject to the restrictions contained in Section 99, to defend -
>
> *First.* - His own body, and the body of any other person, against any offence affecting the human body;
>
> *Secondly.* - The property, whether movable or immovable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass.

14. Section 100 of IPC justifies killing of any assailant when apprehension of any crime enumerated in this Clause exists. Hon'ble Supreme Court in *Darshan Singh Vs. State of Punjab and Another* reported in (2010) 2 SCC 333 has held as under :-

> **23.** It is settled position of law that in order to justify the act of causing death of the assailant, the accused has simply to satisfy the court that he was faced with an assault which caused a reasonable apprehension of death or grievous hurt.

> The question whether the apprehension was reasonable or not is a question of fact depending upon the facts and circumstances of each case and no strait-jacket formula can be prescribed in this regard. The weapon used, the manner and nature of assault and other surrounding circumstances should be taken into account while evaluating whether the apprehension was justified or not?

15. Hon'ble Apex Court further in *Sumer Singh Vs. Surajbhan Singh and others* reported in (2014) 7 SCC 323 has again considered the point of Right to Private Defence and has held that even if an accused has not claimed right to exercise private defence in his statement under Section 131 of Cr.P.C., the court can consider it from facts and evidence of the case.

16. The Apex Court in *Deo Narain Vs. State of U.P.* reported in AIR 1973, SC page 473, (1973) 1 SCC 347 has in regard to Right to Private Defence has held as under :-

> "The threat, however, must reasonably give rise to the present and imminent, and not to remote or distant, danger. This right rests on the general principle that where a crime is endeavored to be committed by force, it is lawful to repel that force in self-defence. To say that the appellant could only claim the right to use force after he had sustained a serious injury by an aggressive wrongful assault it section. The right of private defence is available for protection against apprehended unlawful aggression and not for punishing the aggressor for the offence Committed by him. It is a preventive and not a punitive right. The right to punish for the commission of offences vests in the State (which has a duty to maintain law and order) and not in private individuals. If, after sustaining a serious injury there is no apprehension of further danger to the body then obviously the right of private defence would not be available. In our view, therefore, as soon as the appellant reasonably apprehended danger to his body even from a threat on the part of the party of the complainant to assault him for the purpose of forcibly taking possession of the plots in dispute or of obstructing their cultivation, he got the right of private defence and to use adequate force against the wrongful aggressor in exercise of that right. There can be little doubt that on the conclusions – of the two courts below that the party of complainant had deliberately come to forcibly prevent or obstruct the possession of the accused

persons and that this forcible obstruction and prevention was unlawful, the appellant could reasonably apprehend imminent and present danger to his body and to his companies."

17. Hon'ble Court, Supreme Court in the aforesaid judgment has specifically held that if after sustaining a serious injury, there is no apprehension of any further danger to the body, then obviously right to private defence would not be available. The Apex court has further held the right of private defence be used as preventive right and not punitive right.

18. The Apex court further in *Suresh Singhal Vs. State (Delhi Administration)* reported in (2017) 2 SCC 737 has considered the principle of right to private defence and held as under :-

PRIVATE DEFENCE

20. With regard to the evidence that the appellant was being assaulted and in fact attempted to be strangulated, it needs to be considered whether the appellant shot the deceased in the exercise of his right of private defence. Such a right is clearly available when there is a reasonable apprehension of receiving the injury.

21. The right of private defence is contemplated by Section 97 of IPC which reads as follows:-

".Section 97 Right of private defence of the body and of property.— Every person has a right, subject to the restrictions contained in section 99, to defend—

First — His own body, and the body of any other person, against any offence affecting the human body;

Secondly —The property, whether movable or immovable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass."

22. In Darshan Singh vs. State of Punjab and Another [1], this court laid down the following principles which emerged upon the careful consideration and scrutiny of a number of judgments as follows:-

"58. The following principles emerge on scrutiny of the following judgments:

(i) Self-preservation is the basic human instinct and is duly recognised by the criminal jurisprudence of all civilised countries. All free, democratic and civilised countries recognise the right of private defence within certain reasonable limits.

(ii) The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger and not of self-creation.

(iii) A mere reasonable apprehension is enough to put the right of self- defence into operation. In other words, it is not necessary that there should be an actual commission of the offence in order to give rise to the right of private defence. It is enough if the accused apprehended that such an offence is contemplated and it is likely to be committed if the right of private defence is not exercised.

(iv) The right of private defence commences as soon as a reasonable apprehension arises and it is coterminous with the duration of such apprehension.

(v) It is unrealistic to expect a person under assault to modulate his defence step by step with any arithmetical exactitude.

(vi) In private defence the force used by the accused ought not to be wholly disproportionate or much greater than necessary for protection of the person or property.

(vii) It is well settled that even if the accused does not plead self- defence, it is open to consider such a plea if the same arises from the material on record.

(viii) The accused need not prove the existence of the right of private defence beyond reasonable doubt.

(ix) The Penal Code confers the right of private defence only when that unlawful or wrongful act is an offence.

(x) A person who is in imminent and reasonable danger of losing his life or limb may in exercise of self-defence inflict any harm even extending to death on his assailant either when the assault is attempted or directly threatened."

23. Having regard to the above, we are of the view that the appellant reasonably apprehended a danger to his life when the deceased and his brothers started strangulating him after

> pushing him to the floor. As observed by this Court a mere reasonable apprehension is enough to put the right of self-defence into operation and it is not necessary that there should be an actual commission of the offence in order to give rise to the right of private defence. It is enough if the appellant apprehended that such an offence is contemplated and is likely to be committed if the right of private defence is not exercised.

19. In the light of aforesaid principles of law laid down by Hon'ble Apex Court, we would like to consider the facts of the case.

20. This fact has been established by the prosecution witnesses that the appellant had taken out jarawa and kept it in his bari, (courtyard). Thereafter, Maghdhu and Pahari had gone to the house of the appellant and questioned him why he had taken out jarawa. He told them that Maghdhu had taken two bundles of pyara (straw) of kodo, hence, the appellant had taken the jarawa. Thereafter, there was quarrel between them. The witnesses have clearly deposed that there was scuffle between the appellant and the deceased. The deceased was armed with lathi of bamboo fitted with iron crunch over it. The appellant had also received injuries on his head. It is verified by the Doctor, PW-5, who examined the appellant on 6.7.1994. He deposed that he noticed lacerated wound on the middle of the head 1/8x1.8" and one abrasion on left knee. The injuries were caused by hard and blunt object.

21. PW-1 deposed that Maghdhu had inflicted a blow of lathi on the head of the deceased when the deceased was standing at a distance of 20-25 feet. After sometime, Dukhiram brought an axe from his house. In the course of scuffle, Dukhiram received injuries on his head. Thereafter, Dukhiram gave a blow of axe on the neck of Jageshwar. Jageshwar fell down at the spot and died.

22. The incident is said to have taken place in the open place. In view of aforesaid facts and judgments of the Apex court reported in *Deo Narain Vs. State of U.P.* reported in AIR 1973, SC page 473, (1973) 1 SCC 347, if there is no serious appreciation to the danger to the body then obviously then right of private defence would not be available to the appellant. The appellant had inflicted blow of Tangi on the neck of the deceased. At that time, there was no danger to the body of the appellant, hence, in our opinion in view of the facts of the case right of private defence is not available to the appellant.

23. Now what offence the appellant has caused. Hon'ble Supreme Court in *Suresh Singhal Vs. State (Delhi Administration)* reported in (2017) 2 SCC 737 has held that if an accused may cause an assault and he may have appreciation that he may be assaulted without taking undue advantage cause injuries, the accused would be liable to be punished for commission of offence punishable under Section 304, Part I of IPC.

24. In the present case the appellant inflicted a blow of tangi on the neck of the deceased. He himself received injuries. The deceased was armed with lathi, hence, in our opinion the offence committed by the appellant would fall under Section 304, Part I of IPC.

25. Consequently, the appeal filed by the appellant is partly allowed. The conviction and jail sentence awarded by the trial court is **set aside** and the appellant is convicted for commission of offence punishable under Section 304, Part -I of IPC. He is sentenced to RI ten years. The appellant is on bail. His bail bonds are hereby cancelled. He is directed to surrender before the trial court to suffer remaining part of jail sentence. Copy of this judgment be sent to the trial court.

Appeal partly allowed.

I.L.R. [2018] M.P. 782 (DB)
APPELLATE CRIMINAL

Before Mr. Justice J.K. Maheshwari & Mr. Justice J.P. Gupta

Cr.A. No. 3/2008 (Jabalpur) decided on 9 March, 2018

PRABHULAL & ors. …Appellants

Vs.

STATE OF M.P. …Respondent

***A. Penal Code (45 of 1860), Sections 302, 304 Part II & 323/34 – Conviction – Life Imprisonment – Appreciation of Evidence – Common Intention* – Dispute regarding possession of the land – Appellants were grazing their cattle over the land in dispute when the complainant party objected and sudden altercation started – Parties of both sides were injured and one person (Jeevan) died – Held – Death of deceased was caused because of penetration wound/stab on chest which was homicidal in nature as proved by the prosecution by medical evidence – No material contradictions and omissions in statement of prosecution witnesses – Incident had taken place suddenly without any premeditation and in the heat of passion – Appellants assaulted simultaneously but it does not mean that they started assaulting with common intention to cause death of the deceased and therefore in such circumstances all the accused persons are responsible for their individual acts – Appellants cannot be convicted for committing murder as there was no intention to cause death or to cause any injury which may be sufficient to cause death – It is not a case of murder but it is a case of culpable homicide not amounting to murder – Only appellant Prem Singh inflicted fatal injury and therefore he is liable to be convicted u/S 304 Part II IPC – Rest of the appellants/accused be convicted u/S 323 IPC – Appeal partly allowed.**

(Paras 9, 13, 18 & 19)

क. *दण्ड संहिता (1860 का 45), धाराएँ 302, 304 भाग II व 323/34 – दोषसिद्धि – आजीवन कारावास – साक्ष्य का मूल्यांकन – सामान्य आशय* – भूमि के कब्जे से संबंधित विवाद – विवादित भूमि पर अपीलार्थीगण अपने पशु चरा रहे थे जब परिवादी पक्ष ने आक्षेप लिया और अचानक कहासुनी शुरू हुई – दोनों ओर के पक्षकारों को चोटें आयी और एक व्यक्ति (जीवन) की मृत्यु हुई – अभिनिर्धारित – मृतक की मृत्यु, सीने पर भेदन घाव/घोंपने के कारण कारित हुई थी जो कि मानव–वध स्वरूप की थी जैसा कि अभियोजन द्वारा चिकित्सीय साक्ष्य द्वारा सिद्ध किया गया – अभियोजन साक्षियों के कथन में कोई तात्विक विरोधाभास एवं लोप नहीं – घटना बिना पूर्व चिंतन के अचानक एवं भावनावेग में घटित हुई थी – अपीलार्थीगण ने एक साथ हमला किया था किंतु इसका अर्थ यह नहीं कि उन्होंने सामान्य आशय से मृतक की मृत्यु कारित करने के लिए हमला आरंभ किया था और इसलिए उक्त परिस्थितियों में सभी अभियुक्त व्यक्ति अपने अपने व्यक्तिगत कृत्य के लिए उत्तरदायी हैं – अपीलार्थीगण को हत्या कारित करने के लिए दोषसिद्ध नहीं किया जा सकता क्योंकि मृत्यु कारित करने या ऐसी कोई चोट कारित करने का आशय नहीं था जो मृत्यु कारित करने के लिए पर्याप्त हो सकती थी – यह हत्या का प्रकरण नहीं बल्कि हत्या की कोटि में न आने वाला आपराधिक मानव वध का प्रकरण है – केवल अपीलार्थी प्रेम सिंह ने घातक चोट पहुँचाई इसलिए वह धारा 304 भाग II भा.दं.सं. के अंतर्गत दोषसिद्ध किये जाने योग्य है – शेष अपीलार्थीगण/अभियुक्त को धारा 323 भा.दं.सं. के अंतर्गत दोषसिद्ध किया जाए – अपील अंशतः मंजूर।

B. ***Criminal Practice – Hostile Witness – Testimony*** **– Held – Testimony of the hostile witness cannot be totally discarded merely on the ground that he been declared hostile – It can be used for the purpose of corroboration of testimony of other witnesses.**

(Para 13)

ख. *दाण्डिक पद्धति – पक्षविरोधी साक्षी – परिसाक्ष्य* – अभिनिर्धारित – मात्र इस आधार पर कि उसे पक्षविरोधी घोषित किया गया है, पक्षविरोधी साक्षी के परिसाक्ष्य को पूर्ण रूप से अस्वीकार नहीं किया जा सकता – अन्य साक्षियों के परिसाक्ष्य की संपुष्टि के प्रयोजन हेतु उसका उपयोग किया जा सकता है।

C. ***Criminal Practice – Medical & Ocular Evidence – Inconsistency – Effect*** **– No injury on the head of the deceased which may be caused by sharp object – Witnesses stated that appellant/accused was armed with farsi and assaulted on head of the deceased – Held – Such contradiction is immaterial as there is injury on the head of the deceased and it may be possible that at the time of incident, weapon was not in the sharp condition, it might have been in blunt condition – It cannot be said that medical evidence is inconsistent with ocular evidence.**

(Para 13)

ग. *दाण्डिक पद्धति – चिकित्सीय एवं चाक्षुष साक्ष्य – असंगति – प्रभाव* – धारदार वस्तु से कारित की जा सकने वाली कोई चोट मृतक के सिर पर नहीं – साक्षियों

का कथन है कि अपीलार्थी/अभियुक्त फर्सी से सुसज्जित था और मृतक के सिर पर वार किया – अभिनिर्धारित – उक्त विरोधाभास महत्वहीन है क्योंकि मृतक के सिर पर चोट है और यह संभव हो सकता है कि घटना के समय शस्त्र धारदार स्थिति में नहीं था, हो सकता है भोथरी स्थिति में रहा हो – यह नहीं कहा जा सकता कि चिकित्सीय साक्ष्य, चाक्षुष साक्ष्य के साथ असंगत है।

D. Penal Code (45 of 1860), Section 97 – Private/Self Defence – **Dispute relating to possession over land – Injuries caused to members of both the parties – Held – As the appellants assaulted the complainant party over the disputed land but has failed to prove the title on the said property and even there is no material or evidence to the effect that injuries caused to appellants were during the altercation – Plea of right to private defence is not available to appellants.**

(Para 15 & 16)

घ. दण्ड संहिता (1860 का 45), धारा 97 – प्राईवेट/स्वयं की प्रतिरक्षा – भूमि पर कब्जे से संबंधित विवाद – दोनों पक्षकारों के सदस्यों को चोटें कारित हुई – अभिनिर्धारित – चूंकि अपीलार्थीगण ने विवादित भूमि पर परिवादी पक्षकार पर हमला किया परंतु उक्त संपत्ति पर स्वत्व सिद्ध करने में विफल रहे हैं तथा इस प्रभाव की कोई सामग्री एवं साक्ष्य भी नहीं है कि अपीलार्थीगण को कारित चोटें, कहासुनी के दौरान की है – अपीलार्थीगण को प्राईवेट प्रतिरक्षा के अधिकार का अभिवाक् उपलब्ध नहीं है।

Case referred:

(2016) 15 SCC 471.

A.K. Jain, for the appellants-accused.
Sourabh Shrivastava, Dy. G.A. for the respondent-State.

J U D G M E N T

The Judgment of the Court was delivered by:
J.P. Gupta, J. :- The appellants have preferred the present appeal being aggrieved by the impugned judgment dated 28.11.2007 passed by the First Additional Sessions Judge, Raisen in S.T. No.188/06 whereby the each of the appellants has been convicted for committing murder of Jeevan under Section 302/34 of IPC and sentenced to imprisonment for life along with fine of Rs.1000/-; in default of payment of fine further RI for 1 month and they have been further convicted for causing injury to Chothmal and Roop Singh under Section 323/34 of IPC and sentenced to undergo RI for 3 months/- Both the sentences are directed to run concurrently.

2. In this case, it is uncontroversial that appellants no. 2, 3 and 4 are the sons of appellant no.1. Deceased Jeevan is the son of injured Chothmal (PW-1) and brother of Roop Singh (PW-4) and the incident had taken place on account of the dispute with regard to possession over the land where the incident took place.

3. In brief, the relevant facts of the case are that on 6.10.2006 at about 8 am in village Tijalpur, the appellants were grazing their cattle in the agriculture field, about which, the complainant party was claiming right of the possession on the basis of the lease given by Shivcharan (PW-13) and deceased Jeevan, his father Chothmal (PW-1) and his brother Roop Singh (PW-4) went to the field and seeing that the appellants were grazing their cattle on the field tried to prevent the appellants from grazing their cattle, on which, crop of Soyabean was standing but the appellants instead of stopping themselves made assault on deceased Jeevan, Chothmal (PW-1) and Roop Singh (PW-4). At the time of incident, appellant Prabhu asked other accused persons to beat the complainant party saying "*Maro Salon Ko*" then appellant/accused Prem Singh assaulted deceased Jeevan with ballam on left side of his chest and appellant / accused Hukum Singh assaulted deceased Jeevan with farsi and caused injury on his head and appellants /accused Prabhu and Prem Singh also assaulted deceased Jeevan with lathis and the appellants also assaulted Chothmal (PW-1) and Roop singh (PW-4) and also caused injury to them. Deceased Jeevan fell down on the field and the appellants / accused fled away from the spot. Thereafter, when deceased Jeevan was being taken to police station he died on the way and thereafter, he was shifted to the hospital.

4. On the same day at 9:30 am Chothmal (PW-1) lodged the report in the Police Station Salamatpur, District Raisen. After recording merg intimation Ex.P/2, FIR Ex.P/1 was recorded at crime no. 138/06 under Section 302/ 34 of the IPC against the appellants / accused. Dead body of the deceased was sent for postmortem examination and as per the medical report, nature of the death was homicidal and Chothmal (PW-1) and Roop Singh (PW-4) were also medically examined. During the investigation, the appellants were arrested and on their instance, the weapons used in the commission of offence were recovered and were sent for FSL, on which, presence of blood stains was established. After investigation was over, the police filed a charge sheet against the appellants / accused before the Court of CJM, Raisen, who on its turn committed the case to the court of Sessions Judge, Raisen for trial and after getting the case on transfer, learned First Additional Sessions Judge tried the case.

5. The learned trial Court framed charges for the offences under Section 302/34 in alternative Section 302 of the IPC and under Section 323/34 (on 2 counts) of the IPC against the appellants. The appellants / accused abjured their guilt and claimed to be tried. Their defense was that the disputed land belongs to Halke who is brother of appellant no. 1 Prabhulal and he obtained that land on lease from his brother Halke and he was in possession of the land and on the land, at the time of incident, grass was standing and they were grazing their cattle. At that moment deceased Jeevan, his father Chothmal (PW-1) and brother Roop Singh (PW-4) came with lathis and prevented the appellants from grazing their cattle and started beating them and when they tried to run in order to save themselves, deceased Jeevan again assaulted them.

In defence they dealt a lathi blow which landed on the head of the deceased and he fell down on the bakkar (an agricultural instrument) and a sharp part of bakkar inserted in the chest of the deceased. Earlier the land was taken by the deceased on lease, therefore, he had enmity with the appellants and in the incident they had also received injuries. Accordingly, they have not committed any offence. Deceased Jeevan died accidently and they assaulted the deceased in their defence to save their lives. Learned trial court after completion of the trial convicted and sentenced the appellants as mentioned earlier.

6. The finding of the learned trial court is mainly based on the statements of Chothmal (PW-1) and Roop Singh (PW-4) who are the injured eye witnesses and supported by the statement of Laxman (PW- 3) and the medical evidence and circumstances of the recovery of the weapons from the appellants. The aforesaid finding has been assailed in this appeal on the ground that the statements of Chothmal (PW-1) and Roop Singh (PW-4) are full of material contradictions and omissions and also contradictory with the previous statements given by the appellants and the medical evidence. The appellants / accused have also received injuries during the incident but both the witnesses have denied the aforesaid fact. No explanation has been given about the injuries of the appellants / accused. The evidence with regard to recovery of the weapons is also not significant as the weapons have been recovered from an open place and they have not been sent for the opinion of the medical expert about the fact that the injuries may be caused by the weapons recovered. Further, the facts and circumstances of the case do not show that the injuries sustained by the deceased were sufficient to cause his death in ordinary course of nature. Apart from it, the prosecution has also failed to prove any right of the deceased over the disputed land and the appellants have assaulted the deceased and the witnesses in exercise of their right of self defense of person or property. Therefore, they cannot be held guilty for any offence.

7. On behalf of the appellants it has also been contended that all the appellants / accused cannot be held guilty for the death of deceased Jeevan as there is no fact and circumstance to prove that appellants / accused Prabhulal, Hukum and Ritesh had a common intention with appellant / accused Prem Singh who assaulted the deceased with ballam and caused deadly injuries to the deceased. The incident had taken place suddenly without any premeditation and as per the prosecution story, the deceased rushed to assault the appellants and then the appellants / accused assaulted the deceased and his father and brother and caused injury then all the appellants / accused are personally responsible for their individual act. No vicarious liability can be fastened on all the appellants / accused persons with regard to each other act because there was no common intention to cause death of deceased Jeevan. Further, it has been contended that appellant / accused Prem Singh cannot be convicted under Section 302 of the IPC as the incident had taken place suddenly without any premeditation in the heat of passion without taking undue advantage and also in exercise

of right of their private defence, about which, it can be said that it was an excessive act even then appellant / accused Prem Singh may be hardly convicted for commission of offence under Section 304 Part-II of the IPC. Hence, accordingly their conviction and sentence be modified.

8. Learned Govt. Advocate appearing for the respondent/State has argued in support of the impugned judgment and stated that the finding of conviction and sentence of the learned trial court is in accordance with law. Hence, the appeal be dismissed.

9. Having considered the rival contentions of both the parties and on perusal of the record, in the opinion of this court, it is not controversial in this case that the death of the deceased was caused because of penetration wound / stab wound on the left side of the chest and nature of the death was homicidal and this fact has been proved by the prosecution by medical evidence and in this regard, Dr. A. K. Diwan (PW-6) has found following injuries on the body of the deceased :-

> (1) Lacerated wound 4X1 cm X 5 mm X 5 mm on the left side of head on the temporal parietal region.
>
> (2) Lacerated wound 4 cm X 5 mm X 5 mm on the occipital region.
>
> (3) Penetrating wound (stab wound) 1 cm X 5mm on the 4th I.C.S. on the left side adjacent to sternum deep into mediastinal cavity.
>
> (4) Blood was coming from nose and mouth.
>
> All the injuries were ante-mortem. Clotted blood was adhered to the surface.

Further, Dr. A. K. Diwan (PW-6) has found following injuries on internal examination on the body of the deceased:-

> Brain and its membrane were pale. Blood was found in throat and wind pipe. No injury was found on right lung. One lacerated wound 2 cm x 5 mm x 5 mm in medial lope of left lung near sternum. Left mediastinal cavity was full of blood. Pericardium was also full of blood. Both chamber of heart were empty. 1 cm stab wound was found in diameter interiorly over the ascending aorta of heart which comes in the category of stab injury.
>
> There was small amount of food matter in stomach. There was semi digested food matter in small intestine.

After examination, all seized shirt, baniyan, angochha, underwear and trouser were handed over in a sealed cover to the accompanying Police Constable.

According to opinion of Dr. A. K. Diwan (PW-6), mode of death was syncope. Cause of death was extensive hemorrhage due to the injury to the ascending aorta and duration of the death was within 12 hours of the postmortem which was done at 11:55 am on 6.10.2006.

The statement of the aforesaid medical expert has remained unimpeachable. Therefore, there is no hesitation to hold that nature of the death of the deceased was homicidal.

10. As per the prosecution story, at the same time, Chothmal (PW-1) and Roop Singh (PW-4) have also received injuries in the incident and they were medically examined by Dr. S. K. Rai (PW-5) who found following injuries :-

Injured Chouthmal :-

(1) Contusion; abrasion; red tender swelled size 3X2cm x skin deep right forearm lower 1/3rd post aspect.

(2) Contusion; abrasion; red tender swelled size 3X1cm x skin deep left forearm lower 1/3rd adjacent to left wrist joint lateral aspect.

(3) Abrasion; contusion; red tender swelled size 2X2cm right leg aspect lower 1/ 3rd.

According to opinion of Dr. S. K. Rai (PW-5), all the injuries were simple in nature and caused by hard and blunt object. The duration of the injuries was within 24 hours of the examination which was done at 9:50 am on 6.10.2006.

Injured Roop Singh:-

(1) Lacerated wound red tender swelled size 6cmX1/2cmXskin deep horizontally vertex bone region.

(2) Lacerated wound red tender swelled size 1/2cmX1/2cm size left thigh anterior aspect lower 1/3rd .

According to opinion of Dr. S. K. Rai (PW-5), all the injuries were simple in nature and caused by hard and blunt object. The duration of the injuries was within 24 hours of the examination which was done at 9:40 am on 6.10.2006.

11. Dr. S. K. Rai (PW-5) has also examined the appellants / accused; Hukum Singh, Ritesh and Prem Singh and found following injuries on the person of the appellants / accused :-

Appellant - Hukum Singh:-

(1) Abrasion bluish tender swelled size 1 cm X 1 cm vertex bone region.

(2) Contusion abrasion size 2 cm X 2 cm left hand dorsal aspect.

According to opinion of Dr. S. K. Rai (PW-5), all the injuries were simple in nature and caused by hard and blunt object. The duration of the injuries was within 72 hours of the examination which was done at 2:50 pm on 7.10.2006.

Appellant –Prabhulal:-

(1) Contusion blue tender swelled size 0.6 cm X 2 cm left shoulder tip.

(2) Contusion blue tender swelled size 9 cm X 3 cm left arm later aspect.

(3) Contusion left elbow blue tender swelled size 0.8 cm X 6 cm left elbow joint.

(4) Contusion bluish tender swelled vertex bone region.

According to opinion of Dr. S. K. Rai (PW-5), all the injuries were simple in nature and caused by hard and blunt object. The duration of the injuries was within 72 hours of the examination which was done at 2:45 pm on 7.10.2006.

Appellant –Ritesh:-

(1) Contusion bluish tender swelled size 2 cm X 2 cm vertex bone region

(2) Abrasion; contusion blue tender swelled size 4 cm X 2 cm right leg cut aspect middle 1/3 rd.

(3) Abrasion blue tender swelled size 7 cm X 2 cm left knee joint longitudinal.

According to opinion of Dr. S. K. Rai (PW-5), all the injuries were simple in nature and caused by hard and blunt object. The duration of the injuries was within 72 hours of the examination which was done at 2:20 pm on 7.10.2006.

12. The aforesaid statement of Dr. S. K. Rai (PW-5) establishes the fact that Chothmal (PW-1) and Roop Singh (PW-4) have also sustained the aforesaid injury.

13. The finding that the appellants / accused caused the aforesaid injuries to deceased Jeevan and Chothmal (PW-1) and Roop Singh (PW-4) is based on the

statements of Chothmal (PW-1) and Roop Singh (PW-4). Having gone through their statements it is found that they have categorically stated that at the time of incident the appellants/accused were grazing their cattle on the disputed land which was taken by deceased Jeevan on lease from Shivcharan and when the appellants/ accused were prevented from grazing their cattle, they assaulted the complainant party. Appellant/ accused Prem Singh assaulted with ballam and caused injury on the left side of chest of deceased Jeevan and appellant / accused Hukum assaulted with farsi and caused injury on the head of the deceased and appellants/accused Prabhulal and Ritesh also assaulted with lathis and when Chothmal (PW-1) and Roop Singh (PW-4) tried to rescue the deceased then appellants / accused also assaulted them and caused injuries and they also received injuries on their head, leg and back and when the deceased fell down, the appellants / accused fled away from the spot and Chothmal (PW-1) lodged report Ex.P/1 in Police station Slamatpur, District Raisen. There are no material contradictions and omissions in their statements. Other witness Laxman Singh (PW-3) has also supported their version. However, this witness has been declared hostile but merely on this ground his testimony cannot be discarded. It can be used for the purpose of corroboration of testimony of Chothmal (PW-1) and Roop Singh (PW-4). So far as the medical evidence is concerned, there was no injury on the head of the deceased which may be caused by sharp object. While Chothmal (PW-1) and Roop Singh (PW- 4) have stated that appellant / accused Hukum Singh was armed with farsi and assaulted on the head of the deceased. Therefore, on the basis of these inconsistencies, it has been contended that the testimony of the aforesaid witnesses is contradictory to the medical evidence. But, in view of this court, the aforesaid contradiction is immaterial as there is injury on the head of the deceased and it may be possible that at the time of incident the weapon which was used was not in sharp condition it might have been in blunt condition. The weapon was not sent to the doctor for opinion that by the weapon injuries were caused may not be caused then it can be said that the medical evidence is inconsistent with the ocular evidence. The medical evidence is an opinion of the expert and if the same is otherwise explainable, the testimony of the eye witnesses cannot be discarded on the basis of medical evidence.

14. So far as the recovery of weapons are concerned, Investigating officer Umrao Singh (PW-14) has stated that during the investigation he recovered the weapon on the instance of the appellants / accused and sent to FSL and as per the FSL report Ex.P/30, there was presence of blood on the weapon but the alleged recovered weapon has not been produced before the court while recording of the statement with a view to identify the weapon as the actual recovered weapon from the possession of the appellants / accused. On account of the aforesaid infirmity, the evidence of recovery of the weapons has no use. But other wisely the testimony of Chothmal (PW-1) and Roop Singh (PW-4) are reliable and credible and also supported by the testimony of Laxman (PW-3) and Dr. A. K. Diwan (PW-6) and Dr. S. K. Rai (PW-5) and statement

of Chothmal (PW-1) and also gets corroboration from the FIR Ex.P/1 which has been proved by I.O. Umrao Singh (PW-14) and this evidence establishes the fact that appellant / accused Prem Singh assaulted the deceased with ballam and caused injury deadly on the left side of his chest and at that time, appellant / accused Hukum Singh also assaulted the deceased with farsi and caused injury on his head and Chothmal (PW-1) and Roop Singh (PW-4) were also assaulted and received injuries which were simple in nature.

15. Now the question is that whether the appellants/ accused assaulted the deceased and the witnesses in exercise of right of their self defence. As per the statement of Dr. S. K. Rai (PW-5), appellants / accused Prabhulal, Hukum Singh and Ritesh have received injuries at the time of incident. But, there is no evidence or material to establish the fact that the injuries were received in the incident. Witnesses Chothmal (PW-1) and Roop Singh (PW-4) have denied the fact that they caused any injury to the appellants. They have also denied the fact that they saw any injury on the person of the appellants. The nature of the injury shows that the injuries were not noticeable. Therefore, it cannot be said that the witnesses are lying or hiding genesis of the incident. In the circumstances, it cannot be said that the appellants / accused acted in exercise of right of their self defence as there is no material or circumstance to draw inference that the aforesaid incident had taken place or appellants / accused assaulted with a view to defend themselves.

16. So far as the exercise of right to self defence of person or property is concerned, the appellants have failed to prove their right over the property. As per the prosecution story, the disputed land belongs to Shivcharan (PW-13) but Shivcharan (PW-13) has stated that the disputed land was not belonging to him and the land belongs to his brother and he has never given the disputed land to any person. There is no other evidence on record to establish legal possession of the appellants on the land in question and in absence of it, the appellants / accused had no right to claim possession on the land. They assaulted the deceased, his father Chothmal (PW-1) and Roop Singh (PW-4) with a view to secure their possession over the land. Hence, the aforesaid contention has no substance.

17. Now, the question is that what offence has been committed by the appellants / accused. In this regard, medical expert Dr. A. K. Diwan (PW-6) has not stated in his testimony that the injury caused to deceased Jeevan was sufficient to cause his death in ordinary course of nature and according to him, the cause of death was the injury sustained on the left side of the chest which was caused by appellant / accused Prem Singh and rest of the injuries are simple and according to him, the same were caused by hard and blunt object. It is also clear that when the appellants / accused were grazing their cattle on the field, deceased Jeevan and his father Chothmal (PW-1) and his brother Roop Singh (PW-4) reached there and when they prevented the

appellants / accused from grazing their cattle, the incident took place. Hence, the incident had taken place suddenly without any premeditation and in the heat of passion. Appellant / accused Prem Singh has not caused any other injury to the deceased, therefore, it cannot be said that he took any undue advantage or acted in cruel manner. Hence, the appellants cannot be convicted for committing murder of the deceased Jeevan as there was no intention to cause death of the deceased or to cause any such injury which may be sufficient to cause death. They had simple knowledge of the fact that by causing the aforesaid injury it is likely to cause death of the deceased. Hence, it is not a case of murder but it is a case of culpable homicide not amounting to murder.

18. Now the question is that whether appellant / accused Prabhulal, Hukum and Ritesh had common intention with Prem Singh to cause death of the deceased. The incident had taken place suddenly without any premeditation. They have assaulted simultaneously but it does not mean that they started assaulting with common intention to cause death of the deceased. In such circumstances, all the accused persons are responsible for their individual act. Hon'ble the Apex court in the case of *Balu vs. state (UT of Pondicherry)* (2016) 15 SCC 471 has held as under:-

> Quarrel in respect of chit transaction between rival parties – During settlement talks, accused (five in number including both appellants-accused), on hearing that their friend was being badly injured by complainant party, allegedly attacked deceased and others, resulting in his death and injuries to rest— However, facts and circumstances of case show that attack was not a premeditated one nor was there a prior concert- Incident arose suddenly – No doubt, common intention could develop even on the spur of moment, but herein, the way occurrence took place, there could not have been common intention between accused- Totality of circumstances must be taken into consideration in order to arrive at a conclusion that appellants had a common intention to commit offence under which they were convicted— Appellants were not armed and admittedly they are said to have removed sticks from bullock cart standing nearby, and on exhortation by one of accused, appellants had attacked deceased- There may be similar intention in minds of assailants to attack, but it cannot be said that appellants acted in furtherance of common intention to attract constructive liability under section 34- Facts and circumstances do not give rise to inference of preconcert.

Appellants had attacked deceased with sticks on his face, who sustained nasal bone fracture due it – But it cannot be said to be an act in furtherance of common intention to commit murder of deceased along with other accused- They are random individual acts done without meeting of minds – Appellants can be held liable only for their individual acts- Modification of conviction of appellants by High Court to Ss. 302/34, without recording any finding as to how appellants shared common intention, to establish their constructive liability to sustain conviction under Ss. 302/34, cannot be sustained.

19. In view of the aforesaid legal position, in our view also, all the appellants / accused cannot be held guilty for sharing common intention for committing murder of deceased Jeevan which has been done by Prem Singh. Therefore, only appellant / accused Prem Singh can be held guilty for committing culpable homicide not amounting to murder of deceased Jeevan and rest of the appellants / accused can be held guilty for causing simple injuries to the deceased Jeevan under Section 323 of the IPC and appellant / accused Prabhulal, Hukum Singh and Ritesh can also be held guilty for causing simple injuries to Chothmal (PW-1) and Roop Singh (PW-4) under Section 323 IPC (on two counts).

20. In view of the aforesaid discussion, the appeal is partly allowed. By setting aside the conviction and sentence awarded by the trial court, we convict the appellant / accused Prem Singh under Section 304 Part-II of the IPC and sentenced him to undergo RI for 10 years and we hold Prabhulal, Hukum Singh and Ritesh guilty for committing offence under Section 323 of IPC with regard to causing injuries to the deceased Jeevan and sentenced to undergo RI for 1 year. The appellants/accused Prabhulal, Hukum Singh and Ritesh have also been held guilty under Section 323 of IPC (on two counts) for causing injuries to Chothmal (PW-1) and Roop Singh (PW-4) and their sentence to undergo RI for 3 months as directed by the trial Court is hereby confirmed with a direction that all the sentences shall run concurrently.

21. It is also brought to our notice that in this case appellants/accused No. 2 & 4 Hukum and Prem Singh are in custody since 7.10.2006 and appellants / accused No.1 & 3 Prabhulal and Ritesh are on bail. All the appellants / accused have already completed the aforesaid sentenced. Hence, appellants / accused No. 2 & 4 Hukum and Prem Singh are directed to be released forthwith if not required to be detained in any other case. Appellants / accused No.1 & 3 Prabhulal and Ritesh are on bail, their bail bonds stand discharged.

22. A copy of this order be sent to the trial court and the jail authorities concerned for information and necessary action.

Appeal partly allowed.

I.L.R. [2018] M.P. 794
ARBITRATION CASE

Before Mr. Justice Hemant Gupta, Chief Justice

Arb. Case No. 56/2016 (Jabalpur) decided on 11 January, 2018

UTTARAKHAND PURV SAINIK KALYAN NIGAM LIMITED (M/S) …Applicant

Vs.

NORTHERN COAL FIELD LIMITED …Non-applicant

***A. Arbitration and Conciliation Act (26 of 1996), Section 11(6) & 21 – Appointment of Arbitrator* – Held – Section 21 of the Act of 1996 deals with appointment of Arbitrator without intervention of the Court whereas appointment of Arbitrator with the intervention of the Court is contemplated u/S 11(6) of the Act of 1996.**

(Para 13 & 14)

क. माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 11(6) व 21 – मध्यस्थ की नियुक्ति – अभिनिर्धारित – 1996 के अधिनियम की धारा 21, मध्यस्थ की न्यायालय के मध्यक्षेप के बिना नियुक्ति से संबंधित है जबकि न्यायालय के मध्यक्षेप से मध्यस्थ की नियुक्ति, 1996 के अधिनियम की धारा 11(6) के अंतर्गत अनुध्यात है।

***B. Arbitration and Conciliation Act (26 of 1996), Section 11(6) and Limitation Act (36 of 1963), Article 137 & Section 15(2) – Limitation – Period of Notice – Exclusion* – Held – If intervention of court is necessitated then such petition has to be filed within the period of limitation – Since there is no specific period of limitation prescribed for application u/S 11 of the Act of 1996, therefore as per Article 137, period of limitation will be three years from the date right to apply accrues – Limitation does not start from the date of notice but from the date when cause of action arises – Period of notice is to be excluded for computing the period of limitation in terms of Section 15(2) of the Limitation Act, 1963 – In the instant case, date of agreement was 21.12.2010, final payment according to agreement was made in the year 2011, notice for appointment of Arbitrator was issued on 29.05.2013 – Hence, cause of action accrued in the year 2011 and petition was filed before this Court on 20.09.2016, much beyond the period of three years, which is barred by limitation – Dispute cannot be referred to Arbitration – Petition dismissed.**

(Paras 16, 17, 19 & 20)

ख. माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 11(6) एवं परिसीमा अधिनियम (1963 का 36), अनुच्छेद 137 व धारा 15(2) – परिसीमा – नोटिस की अवधि –

अपवर्जन – अभिनिर्धारित – यदि न्यायालय का मध्यक्षेप आवश्यक हो जाता है तब उक्त याचिका को परिसीमा की अवधि के भीतर प्रस्तुत करना होता है – चूंकि 1996 के अधिनियम की धारा 11 के अंतर्गत आवेदन हेतु कोई विनिर्दिष्ट अवधि विहित नहीं है अतः अनुच्छेद 137 के अनुसार परिसीमा की अवधि, आवेदन करने का अधिकार प्रोद्भूत होने की तिथि से तीन वर्ष होगी – परिसीमा की अवधि, नोटिस की तिथि से आरंभ नहीं होगी बल्कि वाद कारण उत्पन्न होने की तिथि से होगी – परिसीमा अधिनियम, 1963 की धारा 15(2) की शर्तों में, परिसीमा की अवधि की गणना हेतु नोटिस की अवधि का अपवर्जन किया जाना चाहिए – वर्तमान प्रकरण में, करार की तिथि 21.12.2010 थी, करार के अनुसार अंतिम भुगतान वर्ष 2011 में किया गया था, मध्यस्थ की नियुक्ति हेतु नोटिस, 29.05.2013 को जारी किया गया था – अतः, वाद कारण वर्ष 2011 में प्रोद्भूत हुआ तथा इस न्यायालय के समक्ष याचिका 20.09.2016 को प्रस्तुत की गई थी, तीन वर्षों की अवधि से काफी परे, जो कि परिसीमा द्वारा वर्जित है – विवाद को माध्यस्थम् हेतु निर्देशित नहीं किया जा सकता – याचिका खारिज।

Cases referred:

(1988) 2 SCC 338, (1993) 4 SCC 338, (1996) 2 SCC 216, (2005) 8 SCC 618.

Vinod Kumar Dubey, for the applicant.
Greeshm Jain, for the non-applicant.

O R D E R

Hemant Gupta, C. J.:- The petitioner seeks appointment of an Arbitrator to refer the dispute arising out of the agreement Annexure P-1.

2. The date of agreement is said to be 18th August, 2010 by the petitioner but in the reply filed, the stand of the respondent is that the said agreement is dated 21st December, 2010. The nature of the said agreement is that of principal letter of allotment under which many agreements were executed by many other parties, but in respect of the petitioner, an agreement was executed on 21st December, 2010 and the petitioner was to execute contract of security coverage at NCL HQ, Nigahi, Khadia, Jayant, Krishnashila and IWSS upto 30th June, 2011.

3. The petitioner served a notice of demand on 29th May, 2013 to seek an appointment of an Arbitrator in terms of agreement between the parties. The Arbitrator was not appointed but the petitioner sought invocation of jurisdiction of this Court by filing the present petition on 20th September, 2016.

4. Mr. Jain, learned counsel appearing for the respondent raised an objection that the present application filed by the petitioner is barred by limitation. It is argued that in terms of Section 43 of the Arbitration and Conciliation Act, 1996, (hereinafter referred to as 'the Act'), the Limitation Act, 1963 apply to Arbitration proceedings as it applies to proceedings in Court, therefore, it is argued that in terms of Article 137 of Schedule I of the Limitation Act, 1963 (for short 'the Limitation Act'), an application

before this Court could be filed only within a period of three years of the date to apply arises, excluding the period of notice required for raising a dispute. Since the petitioner has invoked the jurisdiction of this Court on 20th September, 2016, therefore, the application filed by the petitioner is barred by limitation.

5. On the other hand, learned counsel for the petitioner relies upon Section 21 read with sub-section (2) of Section 43 of the Act to contend that arbitration proceedings will commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent. It is, thus, argued that since the petitioner has raised the dispute on 29.05.2013, therefore, the present petition would be deemed to be within the period of limitation.

6. Before the respective arguments of the learned counsel for the parties are examined, certain provisions of the Act are required to be extracted. Thus, the provisions of Section 21 and 43 of the Act read as under:-

> **"21. Commencement of arbitral proceedings –** Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."
>
> xxx xxx
>
> **"43. Limitations.** – (1) The Limitation Act, 1963 shall apply to arbitrations as it applies to proceedings in Court.
>
> (2) For the purposes of this section and the Limitation Act, 1963, an arbitration shall be deemed to have commenced on the date referred in section 21.
>
> (3) Where an arbitration agreement to submit future disputes to arbitration provides that any claim to which the agreement applies shall be barred unless some step to commence arbitral proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies, the Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any, as the justice of the case may require, extend the time for such period as it thinks proper.
>
> (4) Where the Court orders that an arbitral award be set aside, the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in

computing the time prescribed by the Limitation Act, 1963 for the commencement of the proceedings (including arbitration) with respect to the dispute so submitted."

7. The provisions of the Limitation Act as are relevant for the purposes of the present petition, read as under:-

"15. Exclusion of time in certain other cases –

(1) *** ***

(2) In computing the period of limitation for any suit of which notice has been given, or for which the previous consent or sanction of the Government or any other authority is required, in accordance with the requirements of any law for the time being in force, the period of such notice or, as the case may be, the time required for obtaining such consent or sanction shall be excluded."

8. The argument of the learned counsel for the petitioner is that in terms of Section 21 of the Act, arbitration proceedings commence on the date on which the notice to arbitration is received by the respondents, therefore, once the arbitration proceedings have commenced, there is no question of bar of limitation.

9. In terms of Section 43 of the Act, the period of limitation contemplated under Article 137 of the schedule to the Limitation Act is applicable to the proceedings under the Act. In *Major (Retd.) Inder Singh Rekhi vs. Delhi Development Authority,* (1988) 2 SCC 338, the question was whether the application to seek appointment of an arbitrator was within period of limitation. The Court held that the limitation for all applications before the civil court is three years in terms of Article 137 of the schedule to the Limitation Act. The Court held, thus:-

"3. The question is, whether the High Court was right in upholding that the application under Section 20 of the Act was barred by limitation. In view of the decision of this Court in *Kerala State Electricity Board v. T.P.K.K. Amsom and Besom, Kerala AIR 1977 SC 282,* it is now well settled that Article 137 of the Limitation Act, 1963 would apply to any petition or application filed in a civil court.....

4. …….A dispute arises where there is a claim and a denial and repudiation of the claim. The existence of dispute is essential for appointment of an arbitrator under Section 8 or a reference under Section 20 of the Act. See *Law of Arbitration* by R.S. Bachawat, first edition, page 354. There

> should be dispute and there can only be a dispute when a claim is asserted by one party and denied by the other on whatever grounds. Mere failure or inaction to pay does not lead to the inference of the existence of dispute. Dispute entails a positive element and assertion of denying, not merely inaction to accede to a claim or a request. Whether in a particular case a dispute has arisen or not has to be found out from the facts and circumstances of the case."

10. In *Panchu Gopal Bose vs. Board of Trustees for Port of Calcutta* (1993) 4 SCC 338, it has been held that the provisions of Limitation Act would apply to the arbitrations and cause of arbitration for the purposes of limitation shall be deemed to have accrued to the party in respect of any such matter at the time it should have been accrued, but for the contract. It was held to the following effect:

> "7. …. It would, therefore, be clear that the provisions of the Limitation Act would apply to arbitrations and notwithstanding any term in the contract to the contrary, cause of arbitration for the purpose of limitation shall be deemed to have accrued to the party in respect of any such matter at the time when it should have accrued but for the contract. Cause of arbitration shall be deemed to have commenced when one party serves the notice on the other party requiring the appointment of an arbitrator….
>
> *** *** ***
>
> **9.** In *Pegler v. Railway Executive 1948 AC 332,* House of Lords held that just as in the case of actions the claim is not to be brought after the expiration of a specified number of years from the date on which the cause of action accrued, so in the case of arbitrations, the claim is not to be put forward after the expiration of the specified number of years from the date when the claim accrued. While accepting the interpretation put up by Atkinson, J. as he then was in the judgment under appeal, learned Law Lords accepted the conclusion of Atkinson, J. in the language thus: "the cause of arbitration" corresponding to "the cause of action" in litigation "treating a cause of arbitration in the same way as a cause of action would be treated if the proceeding were in a court of law".
>
> *** *** ***

> **11.** Therefore, the period of limitation for the commencement of an arbitration runs from the date on which, had there been no arbitration clause, the cause of action would have accrued. Just as in the case of actions the claim is not to be brought after the expiration of a specified number of years from the date on which the cause of action accrued, so in the case of arbitrations, the claim is not to be put forward after the expiration of the specified number of years from the date when the claim accrued."

11. In *State of Orissa and another vs. Damodar Das,* (1996) 2 SCC 216, Article 137 of the Schedule to the Limitation Act has been applied in relation to an application under Section 20 of the Arbitration Act, 1940 and it was held, thus:

> **"6.** In *Law of Arbitration* by Justice Bachawat at p.549, commenting on Section 37, it is stated that subject to the Limitation Act, 1963, every arbitration must be commenced within the prescribed period. Just as in the case of actions the claim is not to be brought after the expiration of a specified number of years from the date when the cause of action accrues, so in the case of arbitrations the claim is not to be put forward after the expiration of a specified number of years from the date when the claim accrues. For the purpose of Section 37(1) 'action' and "cause of arbitration" should be construed as arbitration and cause of arbitration. The cause of arbitration arises when the claimant becomes entitled to raise the question, that is, when the claimant acquires the right to require arbitration. An application under Section 20 is governed by Article 137 of the schedule to the Limitation Act, 1963 and must be made within 3 years from the date when the right to apply first accrues. There is no right to apply until there is a clear and unequivocal denial of that right by the respondent. It must, therefore, be clear that the claim for arbitration must be raised as soon as the cause for arbitration arises as in the case of cause of action arisen in a civil action."

12. In *SBP & Co. vs. Patel Engineering Ltd. and another,* (2005) 8 SCC 618, the Supreme Court held that the power exercised by the Chief Justice or his designate is a judicial power. An application to the Chief Justice is an application to the Civil Court. Such application is governed by the provisions of Code of Civil Procedure.

13. The appointment of an Arbitrator under Section 8 of the Arbitration Act, 1940 is without intervention of Court under Chapter-II thereof whereas reference to arbitration and appointment of an Arbitrator under Chapter-III is through the intervention of the Court. On the other hand, Section 11 of the Act is amalgamation of both the Chapters in respect of appointment of Arbitrators. The intervention of the Court is not envisaged under the Act if the parties adhere to the terms of agreement. It is only in the event of failure to appoint an Arbitrator in terms of the agreement the aggrieved party seeks redressal under Section 11 of the Act.

14. In my opinion, provisions of Section 21 are in relation to arbitration without the intervention of the Court. But, if intervention of the Court is necessitated, such petition has to be filed within the period of limitation. It has been held in the aforesaid judgments that the period of limitation is for all applications filed before the Civil Court. Since there is no specific period of limitation prescribed for such like application under Section 11 of the Act, therefore, as per Article 137, the period of limitation is three years from the date right to apply accrues.

15. The argument that only notice is required to be served when the cause of arbitration arises and subsequently such aggrieved party can seek intervention of the Court for appointment of an Arbitrator at any point of time is not tenable. The cause of action if once arisen cannot be interrupted and give rise to another period of limitation. Once limitation begins to run, it cannot be stopped. Therefore, once the cause of arbitration has accrued to a party, such party must invoke the jurisdiction of the Court to seek appointment of an Arbitrator within three years, but by excluding 30 days' notice period as warranted under Section 15(2) of the Limitation Act.

16. The right to apply accrues when the cause of action accrues. To constitute a cause of action, firstly there has to be existence of right and secondly its infringement or threat of infringement. The cause of action denotes and determines the starting point of limitation. Such cause of action in relation to arbitration proceedings is said to be cause of arbitration as held in *Panchu Gopal Bose's case* (supra). The question as to when right to sue accrues depends on the facts of each case, as when the right is asserted or denied or when the right to claim ascertained amount arises.

17. The cause of action to seek appointment of an arbitrator does not accrue with the issue of the notice. To seek appointment of an Arbitrator, the notice is required to be served in terms of sub clause (4) of Section 11 of the Act. It is step in aid to seek appointment of an arbitrator. The right to apply for cause of arbitration will accrue prior thereto and in pursuance of such right, a notice is required to be served. Therefore, the starting period of limitation in terms of Article 137 of the Limitation Act would be prior to the serving of notice. It is from the said date, the aggrieved party has to seek intervention of the Court within three years. Since, the right to apply to the Court in terms of sub-section (6) arises only after expiry of 30 days of serving of a notice,

therefore, such 30 days are required to be excluded while determining the period of limitation in terms of Section 15(2) of the Limitation Act. Such interpretation is by harmonious construction of Section 21, Section 43 and Section 11 of the Act.

18. It would be matter of determination as to when cause to seek appointment of an arbitrator would arise. It would be cause of action to invoke the jurisdiction of the civil court under Section 11 of the Act, which would be relevant to determine the period during which, the aggrieved party can approach High Court in terms of Section 11(6) of the Act. But to hold that there would be no period of limitation to invoke jurisdiction of civil court is not acceptable after serving of notice contemplated under Section 11(4) of the Act. To say, there is no period of limitation to seek appointment of an arbitrator is not correct.

19. Keeping in view the aforesaid principle, the cause of arbitration arose to the petitioner in the present case in the year 2011 as according to the averments made by the respondents in their return in para 7, the work of the petitioner was completed in the year 2011 and all necessary payments were made to the petitioner including refund of security deposit in the year 2011 itself. The petitioner has not chosen to file any rejoinder to dispute the said fact. Thus, when final payment was made in the year 2011 and the right to dispute the balance claim, if any, arises on the said date but the petitioner has chosen to file the present petition on 20th September, 2016. Such petition is much beyond the period of three years even by excluding 30 days period required to be excluded in terms of Section 15 of the Limitation Act.

20. In view of the above, the jurisdiction of the Court under Section 11(6) of the Act has to be invoked within a period of three years excluding the period of notice, failing which the dispute cannot be referred to an Arbitrator through the intervention of the Court.

21. In view of the said fact, I find that the dispute raised by the petitioner is beyond the period of limitation and thus, not arbitral at the instance of the petitioner.

Dismissed.

Order accordingly.

I.L.R. [2018] M.P. 801
CIVIL REVISION

Before Mr. Justice Sujoy Paul

C.R. No. 562/2017 (Jabalpur) decided on 25 January, 2018

MANOJ PATEL & ors. …Applicants

Vs.

SMT. SUDHA JAISWAL & ors. …Non-applicants

***Civil Procedure Code (5 of 1908), Order 12 Rule 6 – Judgment on Admission of Fact* – Held – If the admission of other party is plain and**

unambiguous entitling the former to succeed, the provision should apply – Wherever there is a clear admission of fact in the face of which, it is impossible for the party making such admission to succeed, Order 12 Rule 6 can be pressed into service – The expression "otherwise" used in the provision makes it clear that such inference can be drawn from affidavits etc. also – Object of this provision is to enable a party to obtain speedy judgment – Further held – A partial decree based on admission made in written statement can also be passed provided admission is complete and sufficient – Impugned order is set aside – Matter remitted back to Trial Court to reconsider the application – Petition allowed.

(Para 10 & 13)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 12 नियम 6 – तथ्य की स्वीकृति पर निर्णय – अभिनिर्धारित – यदि अन्य पक्षकार की स्वीकृति, स्पष्ट एवं असंदिग्ध है जो पहले वाले को सफल बनाने हेतु हकदार बनाती है तब उपबंध लागू होना चाहिए – जहां कहीं भी तथ्य की स्पष्ट स्वीकृति है जिसके सामने उक्त स्वीकृति करने वाले पक्षकार के लिए सफल होना असंभव है, आदेश 12 नियम 6 को लागू किया जा सकता है – उपबंध में प्रयुक्त अभिव्यक्ति ''अन्यथा'', यह स्पष्ट करती है कि उक्त निष्कर्ष को शपथपत्रों इत्यादि से भी निकाला जा सकता है – इस उपबंध का उद्देश्य, पक्षकार को शीघ्र निर्णय अभिप्राप्त करने के लिए समर्थ बनाना है – आगे अभिनिर्धारित – लिखित कथन में की गई स्वीकृति के आधार पर आंशिक डिक्री भी पारित की जा सकती है बशर्ते स्वीकृति पूर्ण एवं पर्याप्त हो – आक्षेपित आदेश अपास्त – मामला विचारण न्यायालय को आवेदन का पुनर्विचार करने हेतु प्रतिप्रेषित किया गया – याचिका मंजूर।

Cases referred:

AIR 2000 SC 2740, 2000 (7) SCC 120, 2002 AIHC 1101 (Rajasthan), AIR 2005 SC 2765.

Rajesh Choudhary, for the applicants.
R.C. Khare, for the non-applicants No. 1 & 2.

O R D E R

Sujoy Paul, J.:- This revision takes exception to the order dated 03.08.2017, passed in Civil Suit No.121-A/2017, by the learned 1st Civil Judge (Class-II), Jabalpur whereby the application preferred by the applicants/plaintiffs under Order 12 Rule 6 CPC was disallowed.

2. Briefly stated, the facts are that the suit land is allegedly purchased by the applicants/plaintiffs through a registered sale deed dated 09.05.1989 from one Shri Pratap Bhanu. The legal heirs of Shri Pratap Bhanu sold the said land to the respondent

No.1/defendant No.1 on 05.05.2009. This could be done by them because corresponding entry could not be made in the revenue records in favour of applicants after execution of registered sale deed dated 09.05.1989.

3. The applicants soon after receiving the information of second sale deed dated 05.05.2009, filed civil suit which was registered as C.S. No.121-A/2017. The applicants prayed for a declaration that the sale deed dated 05.05.2009 be declared as null and void.

4. Mr. Choudhary, learned counsel for the applicants submits that since suit was at very initial stage and issues were not framed, the applicants filed an application under Order 6 Rule 17 CPC. In this application it was pointed out that Shri Pratap Bhanu had four children including Ms. Sunita. The sale deed was executed by three legal heirs and said deed did not contain the signature of Ms. Sunita. The said amendment application was allowed by the Court below. In turn, the consequential amendment (Annexure-P/5) was made by the other side.

5. After the consequential amendment was allowed by the Court below, the applicants preferred an application under Order 12 Rule 6 CPC praying for decision of suit on admission regarding defective/incompetent sale deed. The said application was rejected by the Court below by impugned order dated 03.08.2017. Mr. Choudhary, learned counsel for the applicants contended that a conjoint reading of amended portion of plaint and consequential reply leaves no room for any doubt that the sale deed dated 05.05.2009 is void and a nullity. Thus, the Court below should have allowed the application preferred under Order 12 Rule 6 CPC. In support of said contention reliance is placed on AIR 2000 SC 2740, *(Uttam Singh Duggal and Co. Ltd. vs. Union of India and others)*.

6. *Per-contra,* Mr. Khare, learned counsel for the respondents No.1 & 2 supported the impugned order. He submits that Order 12 Rule 6 CPC is not attracted at this stage. The plaintiffs are yet to prove their case by leading evidence that they are holding the title which is flowing from the earlier sale deed. Thereafter only the declaration regarding title can be made. At this stage, there is no clinching material on the basis of which judgment can be passed.

7. No other point is pressed by the parties.

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

9. Before dealing with the rival contentions of the parties, it is apposite to quote Order 12 Rule 6 CPC, which reads as under:

> ***"Order 12 Rule 6. Judgment on admissions.-*** *(1) Where admissions of fact have been made either in the pleading*

or otherwise, whether orally or in writing, the court may at any stage of the suit, either on the application of an party or of its own motion and without waiting for the determination of any other question between the parties, make such Order or give such judgment as It may think fit, having regard to such admissions.

(2) Whenever a judgment is pronounced under sub-rule (1) a decree shall be drawn up in accordance with the judgment and the decree shall bear the date on which the judgment was pronounced."

(Emphasis Supplied)

10. The objects and reasons while amending Rule 6 of Order 12 CPC contains a statement that "where a claim is admitted, the court has jurisdiction to enter a judgment for the plaintiff and to pass a decree on admitted claim. The object of the Rule is to enable the party to obtain a speedy judgment at least to the extent of the relief to which according to admission of defendant, the plaintiff is entitled". The object and purpose of the said provision is to enable a party to obtain speedy judgment. Where a party made a plain admission entitling the former to succeed, the provision should apply and it should also apply wherever there exists a clear admission of fact in the face of it. It is impossible for the party making such admission to succeed. The court can draw inference on the basis of pleadings available in the case and the expression "otherwise" used in Rule 6 of Order 12 CPC makes it clear that such inference can be drawn from affidavits etc. also. I find support in my view from the judgment of Supreme Court reported in 2000 (7) SCC 120 (*Uttam Singh Duggal & Co. Ltd. vs. United Bank of India and others*). This is equally settled that as per enabling provision of Order 12 Rule 6 CPC, a partial decree based on admission made in the written statement can also be passed provided admission is complete and sufficient [see *Ankit Udyog vs. Laxman Prasad,* 2002 AIHC 1101 (Rajasthan)].

11. In the instant case, plaintiff has prayed for a declaration that the sale-deed dated 5.5.2009 be declared as null, void and inoperative. In addition, permanent injunction is prayed for against the defendants for not alienating, transferring or mortgaging the suit property.

12. The applicants during the course of arguments referred the revenue entry Annexure P/2 which contains the names of dependents of Pratap Bhanu which includes the name of Sunita. In view of amended pleadings of the parties, the applicants contended that since admittedly Sunita is not signatory to the sale-deed dated 5.5.2009, the sale-deed, on the basis of such admission, can be declared as null and void. In the

impugned order, the court below opined that the main question in the case is whether dependents of Pratap Bhanu had authority to sell the suit land or not. Whereas in the application filed under Order 12 Rule 6 CPC, the applicant contended that in view of categorical admission putforth in the shape of consequential amendment, the judgment can be passed.

13. Thus, the core issue was whether on the basis of rival pleadings the judgment could have been passed or not. In the case of *Uttam Duggal vs. Union of India* (supra), the Apex Court again considered the object of Order 12 Rule 6 CPC and opined that the provision cannot be unduly narrowed down because the object is to enable a party to obtain speedy judgment. If the admission of other side is plain and unambiguous entitling the former to succeed, it should apply. Wherever there is a clear admission of fact in the face of which, it is impossible for the party making such admission to succeed, the Order 12 Rule 6 CPC can be pressed into service.

14. The court below in the impugned order dated 13.8.2017 has not dealt with this aspect with accuracy and precision. The court below has not taken pain to consider the nature and effect of alleged admission by the defendants in their consequential amendment. The court below was required to examine whether such an admission is unconditional, unequivocal and is sufficient to draw an inference at this stage that sale-deed dated 5.5.2009 is null and void. There is no analysis on this aspect in the impugned order. In this view of the matter, in my view, the decision making process adopted by court below was not in consonance with the mandate of Order 12 Rule 6 CPC. The court below has missed the real point i.e. whether the alleged admission in consequential amendment is sufficient to pass judgment or not. The court below reached to a conclusion that in the instant case the alleged admission is not similar in nature qua the case of *Charanjeet Lal Mehta vs. Kamal Saroj,* AIR 2005 SC 2765. The court below has not examined and answered the question whether the amended pleadings are sufficient to pass judgment and decree in the facts and circumstances of the present case. Needless to mention whether or not such amended pleadings are sufficient to draw the conclusion of admission or not, the court below has to assign adequate reasons therefor.

15. Resultantly, the order dated 3.8.2017 cannot be countenanced. The said order is accordingly set aside. The matter is remitted back before the court below to rehear the parties on the pending application filed under Order 12 Rule 6 CPC and pass a fresh order in accordance with law. It is made clear that this court has not expressed any opinion on the merits of the case.

Petition is allowed to the extent indicated above.

Revision allowed.

I.L.R. [2018] M.P. 806
CIVIL REVISION

Before Mr. Justice Vijay Kumar Shukla

C.R. No. 201/2016 (Jabalpur) decided on 1 February, 2018

BHANU SHANKAR RAIKWAR …Applicant

Vs.

VIJAY SHANKAR RAIKWAR & ors. …Non-applicants

***Civil Procedure Code (5 of 1908), Section 11 & Order 21 Rule 89 & 90 – Execution Proceedings – Principle of Res Judicata* – In an execution proceedings, an application/objection was filed under Order 21 Rules 89 & 90, which was rejected by the trial Court – When challenged further, the same was dismissed by the High Court as well as by the Supreme Court – Subsequently, another application was moved by the present applicant under the same provision before the trial Court which was also dismissed – Challenge to – Held – Principle of *res judicata* would apply in the execution proceedings – Objections raised by the applicants in a subsequent application on same set of facts is barred by the principle of constructive *res judicata* – Further held – Even if the same objections have not been decided expressly in previous round of litigation, the same shall be deemed to be barred by the principle of constructive *res judicata* – Revision dismissed.**

(Para 11 & 16)

सिविल प्रक्रिया संहिता (1908 का 5), धारा 11 व आदेश 21 नियम 89 व 90 – निष्पादन कार्यवाहियां – पूर्व न्याय का सिद्धांत – निष्पादन कार्यवाहियों में, आदेश 21 नियम 89 व 90 के अंतर्गत आवेदन/आक्षेप प्रस्तुत किया गया था जिसे विचारण न्यायालय द्वारा अस्वीकार किया गया – जब आगे चुनौती दी गई, उच्च न्यायालय के साथ ही उच्चतम न्यायालय द्वारा उक्त को खारिज किया गया – तत्पश्चात्, वर्तमान आवेदक द्वारा विचारण न्यायालय के समक्ष, उसी उपबंध के अंतर्गत अन्य आवेदन प्रस्तुत किया गया, जिसे भी खारिज किया गया – को चुनौती – अभिनिर्धारित – निष्पादन कार्यवाहियों में पूर्व न्याय का सिद्धांत लागू होगा – आवेदकों द्वारा समान तथ्यों के समूह पर एक पश्चात्वर्ती आवेदन में उठाये गये आक्षेप आन्वयिक पूर्व न्याय के सिद्धांत द्वारा वर्जित हैं – आगे अभिनिर्धारित – यदि पूर्वतर वाद क्रम में समान आक्षेपों को अभिव्यक्त रूप से विनिश्चित नहीं किया गया है, उक्त को आन्वयिक पूर्व न्याय के सिद्धांत द्वारा वर्जित माना जाएगा – पुनरीक्षण खारिज।

Cases referred:

(2008) 13 SCC 113, AIR (32) 1945 Nagpur 95, AIR 1962 Patna 72, AIR 1980 Patna 197, AIR 1953 SC 65, AIR 1969 MP 35.

A.K. Jain, for the applicant.

Makbool Khan, for the non-applicant No. 4.

O R D E R

V.K. Shukla, J.:- The present revision filed under Section 115 of the Code of Civil Procedure, 1908 [hereinafter referred to as 'the CPC'] takes exception to the order dated 10-05-2016 passed by the learned XII Additional District Judge, Jabalpur in Execution Case No.56-A/99 [*Vijay Shankar Raikwar vs. Ravi Shankar and others*] whereby the learned Court below has rejected the application filed by the applicant under Section 47 read with Order 21 Rule 90 of the CPC.

2. The factual expose adumbrated in a nutshell are that the respondent/plaintiff Vijay Shankar Rai filed a suit for partition claiming 1/5th share in the suit property and also for obtaining possession of his share against the respondents – Ravi Shankar, Bhanu Shankar, Vijay Shankar, Smt. Manorama and Smt. Madhubala arraying them as parties. The said suit was decreed by the learned trial Court on 4-02-2002. After passing of the preliminary decree when a decree for partition was put to execution, a Commissioner was appointed, but the property in question could not be partitioned. The Commissioner submitted a report to the Court to the effect that it is not possible to partition 1/5th share and to deliver separation of the suit property to the plaintiff. Eventually, the disputed property was firstly attached and thereafter put for sale by way of auction.

3. After the property in question was auctioned, the present applicants had filed objection under Order 21 Rules 89 & 90 of the CPC to set aside the auction sale. The said objection was rejected by the Executing Court by order dated 18-7-2011. Against the said order, an appeal was preferred before this Court which was registered as M.A. No.4455/2011 and the same was dismissed by order dated 22-11-2012.

4. The order passed in the appeal was challenged before the Apex Court by filing an SLP which also faced dismissal by order dated 15-4-2014.

5. Thereafter, again an application under Section 47 read with Order 21 Rule 90 of the CPC was filed in the execution case, challenging the auction of the property in question and raising an objection that the said auction be not confirmed. By the impugned order the said application has been rejected on the ground that the applicants had raised the same objection in the previous applications which were dismissed by this Court in M.A. No.4455/2011 by order dated 22-11-2012 and the SLP was also dismissed by the Supreme Court. Therefore, the application is barred by the principle of constructive *res judicata* and the applicants are estopped from challenging the auction again.

6. Counsel appearing for the applicants submitted that the auction could not have been held, as in case of partition decree, the decree cannot be executed by attachment of the property in question and the same cannot be sold by auction. He strenuously urged that the entire sale of the property was a nullity, as no notice was served as

envisaged under Order 21 Rule 54(1-A) CPC in Appendix and Forms 24 and 29. It is vehemently urged by him that valuation of the property was also not done as per proviso to sub-rule (2) of Rule 26 and Order 21 of the CPC, therefore, the auction without valuation of the property was also bad in law. It is contended by him that the provisions of Rules 205 and 208 of the M.P. Civil Courts Rules & Orders have not been followed before the auction was held. It is putforth by the learned counsel for the applicants that the previous application filed under Order 21 Rule 89 of the CPC was dismissed because the applicants failed to deposit 5% of the auction amount and the validity of the auction has not been examined. It is contended by him that since the auction is nullity, therefore, the principle of *res judicata* would not apply.

7. To bolster his submissions, learned counsel for the applicants has relied on the judgment of the Supreme Court rendered in the case of *Mahakal Automobiles and another vs. Kishan Swaroop Sharma,* [(2008) 13 SCC 113, para 13] and submitted that if the three conditions mentioned in the auction of the attached property viz. (a) attachment of the immovable property; (b) proclamation of sale by public auction; and (c) sale by public auction are not followed, then the said auction has to be treated as nullity. It is further contended that since the auction sale was a nullity, therefore, the subsequent application is sustainable. It is vehemently urged by him that the principle of *res judicata* would not apply in the execution proceeding, in view of the provisions of Order 21 Rules 89 and 90 of the CPC, being the different provisions. The previous application was filed under Order 21 Rule 89 and not Rule 90 of the CPC.

8. Combating the aforesaid submissions counsel for the non-applicants submitted that the applicants have raised all the points in the previous application. The application was not filed under Order 21 Rule 89 of the CPC only but the same was filed also under Order 21 Rule 90. It is further contended by him that the points were raised in the Misc. Appeal as well as SLP before the Apex Court. Since the objection of the applicants has been considered and decided and the Misc. Appeal and SLP have been dismissed, therefore, the same objection cannot be reiterated time and again. He further submitted that the applicants are the judgment-debtors and they are adopting dilatory tactics in the matter in respect of confirmation of sale. The sale has already taken place on 31st March 2011 and he has also deposited auction amount, but the same could not be confirmed because of interim order passed by this Court.

9. To appreciate the rival submissions raised at the Bar, it is apposite to refer the first point raised in the case – that whether the principle of res judicata would apply in execution proceedings or not.

10. In the case of *Fatimabi w/o Noor Mohammad and other vs. Mt. Tukobai w/ o Kesheo Wani and others,* AIR (32) 1945 Nagpur 95*,* the Court held that the execution proceedings are a continuance of a suit and a next friend or guardian, after a decree is passed, cannot enter into a compromise or an adjustment of the decree

without the sanction of the Court. A specific question was framed for consideration before the Full Bench of the Patna High Court regarding extent, scope and applicability of doctrine of *res judicata* in execution cases. In the case of *Baijnath Prasad Sah vs. Ramphal Sahni and another,* AIR 1962 Patna 72, in a majority view Justice Untwalia authored that the principle of constructive *res judicata* would apply to execution proceedings. In a similar situation, it was held that if the plea of transaction being void, not raised by the party at proper stage, the party will be barred from raising the plea subsequently under the principle of constructive *res judicata* under Section 11 of the CPC. The relevant portion of the said judgment is extracted hereunder:

> "The doctrine of res judicata is very much wider in scope than Section 11. It applies to execution proceedings. If a party takes an objection at a certain stage of a proceeding and does not make another objection which it might and ought to have taken at the same stage, it must be deemed the Court has adjudicated upon the other objection also and has held against it. This principle of constructive res judicata has been extended further. If a party has knowledge of a proceeding, and having had an opportunity when it might and ought to have raised an objection, it does not do so, it cannot be allowed to raise that objection subsequently, if the Court passes an order which it could not have passed in case that objection had succeeded, on the ground that it must be deemed to have been raised by the party and decided against it. Though a transaction is void if a certain provision of law applies, it is for the court to decide whether that provision is applicable. Once a competent court has given a decision, holding expressly or by implication, that provision of law is inapplicable and the transaction is not void, that decision operates as res judicata between the parties. So also if an order of the court is deemed to have decided the question, the order is binding upon the parties."
>
> *(quoted from the placitum)*

11. The above Full Bench decision has been further followed by a Division Bench of the Patna High Court in the case of *Ramrup Rai vs. Mst. Gheodhari Kuer and others,* AIR 1980 Patna 197, wherein it is held that in spite of service of notice, the judgment-debtor fails to raise an objection which he might and ought to have raised at that stage, the Court in passing the order for execution of the decree must be deemed to have decided the objection against him. Ordinarily the court does not pass an express order to the effect that the decree be executed. That order is implied in the

order for the issue of attachment. The relevant portion of para 7 of the judgment is reproduced hereunder:

> " If in spite of service of notice, the judgment-debtor fails to raise an objection which he might and ought to have have raised at that stage, the Court in passing the order for execution of the decree must be deemed to have decided the objection against him. Ordinarily the court does not pass an express order to the effect that the decree be executed. That order is implied in the order for the issue of attachment. **AIR 1962 Pat 72.**"

Thus, it is held that the principle of *res judicata* would apply in the execution proceedings.

12. Before adverting to consider the second issue raised by the counsel appearing for the applicants that in a case of nullity, the principle of constructive res judicata would not apply, I think it apt to refer certain paras from the pleadings. In the present case, the first objection was filed by the applicants on 11-5-2010. On a bare perusal of the objection it is found that the application was filed under Order 21 Rules 89 and 90 of the CPC read with Section 151 of the CPC. Paras 1 to 3 of the said application are reproduced hereunder:

> "1– यह कि प्रकरण में विवादित संपत्ति ब्लाक नंबर 79, प्लाट नंबर 1028 एरिया 1128 वर्गफुट में निर्मित भवन मकान नंबर 274, राममनोहर लोहिया वार्ड जबलपुर एवं भूखण्ड खसरा नंबर 74, एरिया 4715 वर्गफुट स्थित मकान नंबर 184, कस्तूरा गांधी वार्ड जबलपुर को नीलाम करने का आदेश माननीय न्यायालय द्वारा किया गया था, तथा सेलअमीन को मौके पर दिनांक 30–03–2011 को 11 बजे उक्त संपत्ति को नीलाम करने का आदेश दिया गया था।
>
> 2– यह कि न्यायालय द्वारा उक्त दोनों मदयून डिक्रीगण को भी नीलामी में भाग लेने का अधिकार दिया गया था।
>
> 3– यह कि नीलामी की कार्यवाही के संबंध में सेलअमीन द्वारा केवल मकान नबंर 274, राममनोहर लोहिया वार्ड जबलपुर के संबंध में नीलामी की कार्यवाही का विवरण पेश किया गया है एवं यह बताया गया है कि श्रीमति अंजू यादव पति श्री संजय यादव निवासी–290, कमरचौक जबलपुर ने सबसे अधिक बोली लगाई तथा उनके नाम पर बोली खत्म की गई है उनकी बोली 28,01,100/– अंकन अठाईस लाख ग्यारह सौ बताई गई है।"

13. The objection of the applicants has been mentioned in the first para of the order dated 18-7-2011 passed by the Executing Court. In the appeal also, this Court has considered various objections raised by the applicants that in case of a decree for

partition, there is no judgment-debtor and also in para 11 of the order, this Court has considered the application filed under Order 21 Rules 89 & 90 of the CPC.

14. A copy of the SLP along with the order passed thereon by the Apex Court has also been placed on record by the respondents and attention of this Court was drawn to para 2.4 of the application. The same being relevant for the present purpose, is reproduced hereunder:

> "2.4 Whether the Hon'ble High Court was justified in upholding the dismissal of an application filed by the Petitioner under Order 21 Rule 89 and 90 of the Code of Civil Procedure seeking setting aside of the auction sale on the ground of material irregularity and fraud on the ground of non payment of 5% of the purchase money?"

15. Thus, on a bare perusal of the record and on scanning of the pleadings made in the application, order passed and the SLP filed before the Apex Court, it is graphically clear that the applicants have raised objections under Order 21 Rules 89 and 90 of the CPC. The objection was rejected by the Trial Court by order dated 18-7-2011 and thereafter appeal filed before this Court was also dismissed vide order passed in M.A. No.4455/2011, dated 22-11-2012. The applicants also visited to the Apex Court in an SLP, which also stood dismissed on 15-4-2014. Therefore, the contention of the applicants cannot be examined at this stage, that the auction in question was not in conformity with the conditions laid down in the case of *Mahakal Automobiles & another* (supra).

16. In view of the obtaining factual matrix, I am of the considered view that the objection being raised by the applicants in a subsequent application on same set of facts, under Order 21 Rule 90 of the CPC is barred by the principle of constructive *res judicata*. Even if the same objections have not been decided expressly in the previous round of litigation, the same shall be deemed to be barred by the principle of constructive *res judicata*. Even an illegal order is binging (sic : binding) on the parties. This view of mine gets fortified by the judgment passed by the Hon'ble Supreme Court in the case of *Mohanlal Goenka vs. Benoy Kishna Mukherjee and others,* AIR 1953 SC 65 where the Apex Court held that if an objection was raised but was not decided by the Executing Court, yet it was held that it was a *res judicata* by reason of explanation (4) to Section 11 of the CPC.

17. In the case of *Baijnath Prasad Sah* (supra) the Full Bench of Patna High Court held that if the judgment-debtor fails to raise an objection which he ought to have raised, the Court passing the order for execution of the decree must be deemed to have decided all the objections.

18. A Division Bench of this Court in the case of *Piarelal Khuman vs. Bjhagwati Prasad Kanhayalal and others,* AIR 1969 MP 35 relying on the principles laid down in the cases of *Mohanlal Goenka* (supra) and *Baijnath Prasad Sah* (supra), reiterated the same law in the following terms :

> "30. Turning now to the case of those judgment-debtors who did not object to the proceedings in execution, the contention is that they are not bound by the decision of the executing court. It is clear from the cases cited earlier that the rule of constructive res judicata applies to execution proceedings also and a plea on which the judgment-debtors could have objected to the execution cannot later be raised if there is omission to raise it at the proper occasion. We may only refer to Mohanlal Goenka's case, AIR 1953 SC 65 (supra) in which an objection was raised but was not decided by the executing Court and yet it was held that it was res judicata by reason of Explanation 4 to Section 11 of the CPC. In the case of Baijnath Prasad Sah (supra), no objection was raised by the judgment-debtor but it was held that as the Court proceeded with execution, the point impliedly decided and the judgment-debtor could not raise it later."

19. Considering the facts, circumstances of the case in proper perspective and in view of the enunciation of law governing the field, the instant revision sans substance, deserves to and is hereby **dismissed**. However, there shall be no order as to costs.

Revision dismissed.

I.L.R. [2018] M.P. 812
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice Sushil Kumar Palo
M.Cr.C. No. 5602/2017 (Jabalpur) decided on 10 January, 2018

SHYAMA PATEL (SMT.) …Applicant
Vs.
MEHMOOD ALI & anr. …Non-applicants

Negotiable Instruments Act (26 of 1881), Section 138 and Criminal Procedure Code, 1973 (2 of 1974) – Practice and Procedure – Amendment in Complaint **– Petitioner/Complainant filed a case against the Respondent/ Accused u/S 138 of the Act of 1881 – Subsequently, complainant filed an application seeking amendment in the complaint regarding a typographical error, which was allowed by the JMFC – Accused filed a revision and the same was allowed – Complainant filed this petition – Held – Though there is no provision in the Criminal Procedure Code for amendment of the pleadings, the Apex Court has held that every Court whether civil or criminal possesses inherent powers to do right and to undo a wrong in course of administration of justice – In the present case, the year was wrongly mentioned as 2013 in**

place of 2014, it is a clerical/typographical error which can be corrected – Impugned order set aside and the one passed by the JMFC is restored – Petition allowed.

(Para 9 & 13)

परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2) – पद्धति एवं प्रक्रिया – परिवाद में संशोधन – याची/परिवादी ने प्रत्यर्थी/अभियुक्त के विरूद्ध, 1881 के अधिनियम की धारा 138 के अंतर्गत प्रकरण प्रस्तुत किया – तत्पश्चात्, परिवादी ने परिवाद में मुद्रण त्रुटि से संबंधित संशोधन चाहते हुए एक आवेदन प्रस्तुत किया जिसे न्यायिक दण्डाधिकारी प्रथम श्रेणी द्वारा मंजूर किया गया – अभियुक्त ने एक पुनरीक्षण प्रस्तुत किया एवं उक्त को मंजूर किया गया था – परिवादी ने यह याचिका प्रस्तुत की – अभिनिर्धारित – यद्यपि दण्ड प्रक्रिया संहिता में अभिवचनों के संशोधन हेतु कोई उपबंध नहीं है, सर्वोच्च न्यायालय ने अभिनिर्धारित किया है कि प्रत्येक न्यायालय, चाहे सिविल या दाण्डिक, को न्याय के प्रशासन के क्रम में सही करने एवं गलत को सुधारने की अंतर्निहित शक्तियां है – वर्तमान प्रकरण में, वर्ष को 2014 के स्थान पर 2013 के रूप में गलती से उल्लिखित किया गया था, यह एक लिपिकीय/मुद्रण त्रुटि है, जिसे सुधारा जा सकता है – आक्षेपित आदेश अपास्त एवं न्यायिक दण्डाधिकारी प्रथम श्रेणी द्वारा पारित आदेश पुनःस्थापित किया गया – याचिका मंजूर।

Cases referred:

2002 (5) MPLJ 178, 2010 (II) MPJR 228, 2004 (2) JLJ 234 SC, 2004 (2) DCR 158, 2009 (1) DCR 363, M.Cr.C. No. 2907/2007 decided on 18.09.2008.

P.C. Paliwal, for the applicant.
Shailendra Singh, for the non-applicant No. 1.
Vivek Lakhera, G.A. for the non-applicant No. 2-State

S.K. Palo, J.:- This petition under Section 482 of the Cr.P.C. has been filed to assail the order dated 10.02.2017, passed by Sessions Judge, Shahdol, in Criminal Revision No.78/2015, whereby the order dated 27.07.2015 passed by the learned JMFC, Shahdol, in Criminal Case No.1957/2014, for offence under Section 138 of the Negotiable Instruments Act, has been set aside wherein the learned JMFC had allowed certain amendments in the complaint.

(2) The complaint filed by the complainant/petitioner against the respondent-accused for offence under Section 138 of the NI Act, alleging the dishonour of the cheque. In the complaint case, the petitioner moved an application for amendment at paragraph-5 and other parts claiming that the date mentioned in the complaint dated 28.05.2013 has been erroneously typed, because of typographical mistake, which ought to have been 28.05.2014. The same was allowed by the learned JMFC vide order dated 27.07.2015 and amendment was carried out.

(3) The accused-respondent preferred criminal revision before the learned Sessions Judge, Shahdol, the same was allowed on 10.02.2017 and the order dated 27.07.2015 has been set aside, holding that the complainant is not entitled to make any amendment in the complaint under Section 138 of the NI Act.

(4) Therefore, the petitioner/complainant preferred this petition under Section 482 of the Cr.P.C. requesting to set aside the order passed by the revisional Court and to restore the order passed by learned JMFC on 27.07.2015. It is claimed that in the criminal complaint case by inadvertent mistake cheque dated 28.05.2013 has ought to have been 28.05.2014. It is a clerical and typographical error, therefore, the petitioner submits that the order passed by the revisional Court is not good in the eyes of law.

(5) Per contra, learned counsel for the respondent-accused submits that in a criminal case there is no provision of amendment in the complaint. The amendment when carried out will adversely affect the interest of the accused and such amendment, therefore, is not maintainable.

(6) Learned counsel for the respondent-accused placed reliance on *Kunstocom Electronics Vs. State of M.P.,* 2002 (5) MPLJ 178, *in which it has been held that, "there is no provision to amend the pleadings in the Criminal Procedure Code giving right to the parties to file an application for amendment in the pleadings and give power to the lower Court to allow the same."*

(7) But the above view of this Court has been dissented in the case of *Pt. Gorelal and another Vs Rahul Punjabi,* 2010 (II) MPJR 228, and held that *"if the Court whether the civil or criminal possesses inherent power to do right and to undo a wrong in course of administration of justice and the amendment allowed by the JMFC was maintained".*

(8) In the case of *Pt. Gorelal* (Supra), Co-ordinate Bench of this Court has referred the cases of *"Kunstocom Electronics"* (Supra).

(9) In the case of *State of M.P. Vs. Awadh Kishore Gupta,* 2004(2) JLJ 234 SC, the Apex Court has held that "*every Court whether civil or criminal possesses inherent power to do right and to undo a wrong in course of administration of justice.*"

(10) Reliance has also been placed in the matter of *Bhim Singh Vs. Kan Singh,* 2004(2) DCR 158, wherein in a prosecution u/s 138 of the Negotiable Instruments Act, Rajasthan High Court has held that *"application for amendment of cheque number and date of information by bank on ground of typographical mistake which was allowed by the trial Court, it was held that trial Court has inherent power to rectify such typographical mistakes to do justice."*

(11) It would be appropriate to mentioned here a decision rendered in the matter of *Babli Majumdar Vs. State of West Bengal,* 2009(1) DCR 363, wherein a case u/w (sic : u/s) 138 of the Negotiable Instruments Act, wherein wrong cheque number was mentioned, Calcutta High Court held that *"wrong number on dishonour cheque is of no relevance for the drawer to pay the amount covered by such cheque;"*

(12) In the case of *Pradeep Premchandani Vs. Smt. Neeta Jain in M.Cr.C. No.2907/2007 decided on 18.09.2008,* wherein this Court has held that *"so far as wrong mention of the cheque number either in the notice or in the complaint are concerned, the Court would always have the jurisdiction to look into the fact and do complete justice in the matter."*

(13) In view of the circumstances prevailing in the case and the legal analysis expressed as above, this petitions is **allowed**. The year wrongly mentioned as 2013 in place of 2014 is a clerical error. The same typographical error can be corrected. The view expressed in the case of *"State of M.P. Vs. Awadh Kishore Gupta"* (Supra) is followed. The order impugned dated 10.02.2017 passed by the Sessions Judge, Shahdol, in Criminal Revision No.78/2015, is set aside and the order passed by learned JMFC dated 27.07.2015 is restored.

Certified copy as per rules.

Application allowed.

I.L.R. [2018] M.P. 815
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice Atul Sreedharan
M.Cr.C. No. 8987/2010 (Jabalpur) decided on 18 January, 2018

VINAY SAPRE …Applicant
Vs.
STATE OF M.P. …Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 468 & 473, Forest Act (16 of 1927), Sections 41, 42 & 76 and Van Upaj Vyapar (Viniyaman) Adhiniyam, M.P. (9 of 1969), Section 5 & 16 – Limitation – Delay in taking Cognizance **– Offence was registered against the petitioner in the year 2002 and challan was filed in the year 2007, after five years – Trial Court took cognizance of the matter and registered the case on 10.08.2007 itself and thereafter issued notice to petitioner to decide the application u/S 473 Cr.P.C. for condonation of delay – Challenge to – Held – Limitation provided u/S 468(2)(c) is three years – Court shall without taking cognizance of the offence, must first of all issue notice to the prospective accused and hear him on the**

issue of condoning the delay in taking cognizance, otherwise it would be a violation of natural justice – Court taking cognizance of the offence before condoning the delay fell foul of the mandate of Section 468 Cr.P.C. – Further held – In the instant case, presently 15 years has lapsed and now interest of justice would not be served if petitioner is sent back to stand trial – Proceedings pending before the JMFC stands quashed – Petition allowed.

(Paras 8, 11, 12, 13 & 14)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 468 व 473, वन अधिनियम (1927 का 16), धाराएँ 41, 42 व 76 एवं वन उपज व्यापार (विनियमन) अधिनियम, म.प्र. (1969 का 9), धारा 5 व 16 – परिसीमा – संज्ञान लेने में विलंब – याची के विरूद्ध वर्ष 2002 में अपराध पंजीबद्ध किया गया था और चालान वर्ष 2007 में प्रस्तुत किया गया, पांच वर्ष पश्चात् – विचारण न्यायालय ने मामले का संज्ञान लिया और 10.08.2007 को ही प्रकरण पंजीबद्ध किया एवं तत्पश्चात् विलंब के लिए माफी हेतु धारा 473 दं.प्र.सं. के अंतर्गत आवेदन का विनिश्चय करने के लिए याची को नोटिस जारी किया – को चुनौती – अभिनिर्धारित – धारा 468(2)(सी) के अंतर्गत उपबंधित परिसीमा तीन वर्ष है – न्यायालय को अपराध का संज्ञान लिये बिना, सर्वप्रथम पूर्वेक्षित अभियुक्त को नोटिस जारी करना होगा तथा उसे संज्ञान लेने में विलंब के लिए माफी के विषय पर सुनेगा, अन्यथा यह नैसर्गिक न्याय का उल्लंघन होगा – विलंब माफ करने के पूर्व, न्यायालय द्वारा अपराध का संज्ञान लिया जाना, धारा 468 दं.प्र.सं. की आज्ञा के चंगुल में फँस गया है – आगे अभिनिर्धारित – वर्तमान प्रकरण में, अभी 15 वर्ष व्यपगत हुए हैं और अब न्याय का हित पूरा नहीं होगा यदि याची को विचारण का सामना करने के लिए वापस भेजा जाता है – न्यायिक दण्डाधिकारी प्रथम श्रेणी के समक्ष लंबित कार्यवाहियां अभिखंडित की गई – याचिका मंजूर।

Cases referred:

(1995) 1 SCC 42, (2014) 2 SCC 62.

Sourabh Tiwari and *Gaurav Tiwari,* for the applicant.
Arvind Singh, G.A. for the non-applicant.

O R D E R

Atul Sreedharan, J.:- The present petition has been filed by the petitioner herein against the order passed by the trial court dated 19.7.2010 in Criminal Revision No.277/2009. The order was passed by the learned Second Additional District Judge, Khurai, District Sagar, in *Vinay Sapre Vs. State of Madhya Pradesh* (Forest Department through Forest Range Officer, Khurai, District Sagar). By the impugned order, the learned Court of Sessions upheld the order dated 31.8.2009 passed by the learned Judicial Magistrate First Class, Khurai, District Sagar, by which delay in taking cognizance was condoned under Section 473 Cr.P.C. By this petition, the petitioner has sought quashment of the proceedings pending before the lower court.

2. The brief facts essential to appreciate the instant case are as follows. It is alleged by the respondent that on 25.6.2002, at the Sagar Naka barrier in Khurai, the petitioner herein was carrying wood in his tractor-trolley without licence. The forest authorities registered POR No.1272/2011 on 25.6.2002 itself against the petitioner herein. The charge-sheet was filed on 10.8.2007 after a passage of five years from the registration of the POR against the petitioner herein. On 10.8.2007 itself, the case was registered against the petitioner and notice was issued to him for deciding an application under Section 473 Cr.P.C, filed by the respondent for condonation of delay in taking cognizance of the offences. The offences against the petitioner herein were under Sections 41 and 42 read with Section 76 of the Indian Forest Act, 1927 and under Sections 5 and 16 of the Madhya Pradesh Van Upaj (Vyapar Viniyaman) Adhiniyam, 1969. The petitioner appeared before the learned trial court and opposed the application for condonation of delay and vide order dated 31.8.2009, the learned Court of the Judicial Magistrate First Class, Khurai, condoned the delay. The maximum punishment that the petitioner herein could have faced for the said offences was two years imprisonment.

3. Learned counsel for the petitioner has argued that cognizance ought to have been taken latest by 25.6.2005 as the period of limitation provided under Section 468(2)(c) Cr.P.C is three years, where the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years. The commencement of the period of limitation as per Section 469(1) Cr.P.C, is from the date of the offence or where the commission of the offence was not known to the person aggrieved by the offence or to any police officer, the first day on which such offence comes to the knowledge of such person or to any police officer. The undisputed fact in this case is that, the date of the offence, the knowledge about the commission of the offence and the identity of the offender were all known on 25.2.2002 itself.

4. Learned counsel for the petitioner has drawn the attention of this court to the order dated 10.8.2007 passed by the Court of the learned Judicial Magistrate First Class, Khurai, District Sagar. The order clearly reflects that the case was filed before it on 10.8.2007 and it had directed that the case be registered on the same date. In fact, the learned court below had taken cognizance of the offence on 10.8.2007. In order to further strengthen this contention, the learned counsel for the petitioner has drawn the attention of this court to the order dated 31.8.2009 at page 76 in which the learned court below, while deciding the application under Section 473 Cr.P.C., has categorically held that the cognizance was taken on 10.8.2007 itself.

5. Learned counsel for the State, while opposing the instant petition, has argued that the issue raised by the petitioner herein can be decided by the trial court itself in the course of the trial. He has further argued that the impugned order dated 19.7.2010, clearly observes that the petitioner herein was given notice by the respondent-State

of the date on which they were going to file the charge-sheet before the trial court and despite that, the petitioner herein did not appear before the trial court to challenge the taking of cognizance on the grounds of delay.

6. Heard the learned counsels for the parties and perused the documents filed along with the petition. The undisputed facts in this case are that the incident occurred on 25.6.2002 and the respondent-State was well aware of the offence and the offenders on 25.6.2002 itself. It is also undisputed that the charge-sheet was filed on 10.8.2007 after a delay of five years. It is also undisputed that cognizance was taken on the same day on which the charge-sheet was filed i.e. 10.8.2007 as it is borne out in the order of the trial court dated 31.8.2009. Lastly, it is undisputed that the opportunity to oppose the application under Section 473 Cr.P.C. was granted to the petitioner herein only after the cognizance was taken.

7. The short point that arises for consideration before this court is whether the procedure adopted by the learned Judicial Magistrate First Class, Khurai, District Sagar, of taking cognizance first and thereafter hearing the parties and condoning the delay under Section 473 Cr.P.C. was appropriate. If the said procedure is adopted was not appropriate then, should the matter be remanded to the trial court following the judgment of the Supreme Court in *State of Maharashtra Vs. Sharadchandra Vinayak Dongre* (1995) 1 SCC 42 or should the case against the petitioner herein be quashed, if the interest of justice so demands?

8. Section 468 Cr.P.C. provides for a balance between the right of an aggrieved victim to prosecute the offender and the right of the offender to a speedy trial. Section 468 Cr.P.C. commences with a negative mandate that, no court shall take cognizance of an offence specified in sub-section (2) after the expiry of the period of limitation. The period of limitation is provided in sub-section (2) of Section 468 and, in the light of the factual circumstances of the petitioner's case which is covered by Clause (c) of sub-section (2), cognizance ought to have be taken within a period of three years, as the offence alleged against the petitioner herein is punishable with imprisonment for a maximum term of two years. Section 473 Cr.P.C. provides for the extension of the period of limitation in certain cases, which can be exercised by the learned trial court, under two circumstances. Firstly, where the trial court is satisfied that in the facts and circumstances of the given case the cause of delay has been properly explained and, secondly, that it is necessary to do so in the interest of justice. Thus, the delay can be condoned in either of the two situations. This legal proposition has rightly been appreciated by the learned Judicial Magistrate First Class, Khurai, District Sagar, as is reflected in his order dated 31.8.2009. However, where the Ld. Court below erred was that it had taken cognizance of the offence, before condoning the delay under Section 473 Cr.P.C. This, in the humble opinion of this Court, fell foul of the mandate of Section 468 Cr.P.C.

9. In this regard, it would be relevant to refer to the judgment of the Supreme Court in *State of Maharashtra Vs. Sharadchandra Vinayak Dongre* – (1995) 1 SCC 42 , where the Supreme Court dealt with the ambit, scope and the procedure to be adopted by the trial court, where it is called upon to take cognizance of an offence beyond the period of limitation. In the case of *Sharadchandra Vinayak Dongre,* the officers of the Excise Department of the State of Maharashtra, along with the officers of the Sales Tax and Income Tax Departments, had carried out surprise raids at the brewery of M/s. Doburg Lager Breweries Pvt. Ltd., on the ground that the brewery had committed offences relating to manufacture and sale of beer without payment of excise duty. The cases were registered against the brewery on 22.11.1985 and five charge-sheets were filed on 21.11.1986 before the Chief Judicial Magistrate, Satara. The prosecution filed an application for condonation of delay, if any had occurred in taking cognizance. The respondent challenged before the High Court, the order of the Chief Judicial Magistrate, Satara, allowing the condonation of delay on 21.11.1986 and taking cognizance on the same day. The High Court quashed the proceedings against the brewery on the ground that the delay could not have been condoned under Section 473 Cr.P.C. without notice to the accused and behind their back and also without recording any reason for the condonation of delay. The Supreme Court held that the appreciation of the law by the High Court was correct. However, it held that the High Court erred in quashing the proceedings and that it would have been appropriate for the High Court to have remanded the matter to the trial court to decide the application under Section 473 Cr.P.C afresh, after giving an appropriate notice to the accused.

10. The judgment of the Supreme Court in *Sharadchandra Vinayak Dongre* (supra), was followed by the Supreme Court in *Sara Mathew Vs. Institute of Cardiovascular Diseases* (2014) 2 SCC 62. In that case, the Supreme Court was dealing with the issue of condonation of delay in a complaint case. In paragraph 35, the Supreme Court held that if the complaint is filed after the period of limitation, then it is open to the complainant to make an application for condonation of delay under Section 473 Cr.P.C and that, the court will have to issue notice to the accused and after hearing the accused and the complainant decide whether to condone the delay or not.

11. In the present case, it is undisputed that cognizance of the offence itself was taken on the date on which the charge-sheet was filed without considering the application under Section 473 Cr.P.C., which could not have been done in view of Section 468 Cr.P.C. The opportunity given to the accused to oppose this application under Section 473 Cr.P.C. after cognizance was taken was grossly misplaced as the court could not have reviewed its order of taking cognizance and summoning the accused/petitioner even if it had come to the conclusion, that the application under

Section 473 Cr.P.C deserved to be dismissed. In such a case, it would have led to anomalous situation, where the trial court, though was of the opinion that the delay ought not to be condoned, could not reverse its order taking cognizance in view of Section 362 Cr.P.C. which prohibits review of its previous order.

12. Thus, where taking of cognizance in a particular case is delayed on account of the delay in filing of the charge-sheet by the police or in filing of the complaint case by the complainant, the court without taking cognizance of the offences, must first of all issue notice to the prospective accused and hear him on the issue of condoning the delay in taking cognizance. It is trite law that a case where Section 468 Cr.P.C. becomes applicable, the accused gets a valuable entitlement not to be prosecuted for the said offence. That entitlement, before it is waived by resorting to procedure under section 473 Cr.P.C., the prospective accused must be heard. Else, it would be a violation of natural justice. This right is quite akin to the right of an accused to be heard in a revision petition preferred by a complainant where the complaint has been dismissed under Section 203 Cr.P.C. by the trial court without issuing process to the accused.

13. The only question now remaining before this court is whether, under the circumstances, it should remand the case to the trial court to commence afresh from the stage of issuing notice to the petitioner herein, and hear him on the issue of condonation of delay before taking cognizance, as has been suggested by the Supreme Court in the case of *Sharadchandra Vinayak Dongre* (supra) or should the case be quashed completely? In the case of *Sharadchandra Vinayak Dongre* (supra) the factual aspects go to show that the offence came to the notice of the agency in the year 1985 and the charge-sheet was filed in the year 1986 itself and that the period between the investigation and the filing of the charge-sheet was not inordinately long. However, in the instant case, the case was registered against the petitioner herein in the year 2002 and the charge-sheet was filed in the year 2007. The application under Section 473 Cr.P.C. was decided in the year 2009 and in the year 2010 the petitioner herein has filed the present petition for quashing in which the proceedings before the trial court were stayed in the year 2013. This court fails to see how the interest of justice would best be served in sending the petitioner back to stand trial from the stage of consideration of the application under Section 473 Cr.P.C, after the passage of 15 years, in an offence related to the transportation of wood without licence.

14. Under the circumstances, the petition filed by the petitioner herein succeeds and the proceedings pending against him in Criminal Case No.759/2007 before the Court of the Learned Judicial Magistrate First Class, Khurai, District Sagar, stands quashed.

Application allowed.

I.L.R. [2018] M.P. 821
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice S.K. Awasthi
M.Cr.C. No. 7890/2013 (Indore) decided on 15 February, 2018

M.P. MANSINGHKA …Applicant
Vs.
DAINIK PRATAH KAAL & ors. …Non-applicants

***A. Penal Code (45 of 1860), Section 499 (Exception 4) & 500 – Defamation – Newspaper Publication of Court Proceedings* – Held – A report which substantially deals with contentions of both the parties and if author and newspaper records its own opinion about the controversy can, in no manner be held to be punishable u/S 499 IPC but it is not at all permitted to publish a report which only refers to a version of one side and completely omits the defence of the other side – Inaccurate and selective reporting of Court proceedings are not protected by virtue of Exception 4 to Section 499 IPC and if such reporting are permitted, Courts will be undermining the rights of other party which is to lead life with dignity – Photograph of applicant was also published alongwith one sided narration which amounts to defamation – Conduct of respondents cannot be given benefit of Exception 4 to Section 499 IPC – Impugned order set aside – Magistrate directed to reconsider the case – Application allowed.**

(Paras 9, 12 & 13)

क. दण्ड संहिता (1860 का 45), धारा 499 (अपवाद 4) व 500 – मानहानि – न्यायालयीन कार्यवाहियों का समाचार पत्र में प्रकाशन – अभिनिर्धारित – एक प्रतिवेदन जो सारतः दोनों पक्षकारों के तर्कों से संबंधित है तथा यदि लेखक एवं समाचार पत्र विवाद के बारे में अपनी राय अभिलिखित करते हैं, किसी भी ढंग में भारतीय दंड संहिता की धारा 499 के अंतर्गत दण्डनीय अभिनिर्धारित नहीं किये जा सकते परंतु ऐसा प्रतिवेदन प्रकाशित करने की बिल्कुल भी अनुमति नहीं है जो केवल एक पक्ष के विवरण को संदर्भित करे तथा दूसरे पक्ष के बचाव का पूर्ण रूप से लोप करे – न्यायालय की कार्यवाहियों की त्रुटिपूर्ण एवं चुनिंदा रिपोर्टिंग भारतीय दण्ड संहिता की धारा 499 के अपवाद 4 के आधार पर संरक्षित नहीं है, और यदि ऐसी रिपोर्टिंग की अनुमति दी गई, तो यह, अन्य पक्षकार के गरिमा के साथ जीवन जीने के अधिकारों को न्यायालय द्वारा कमजोर करना होगा – आवेदक की फोटो भी एक तरफा वर्णन के साथ प्रकाशित की गई थी जो मानहानि की कोटि में आता है – प्रत्यर्थीगण के आचरण को भारतीय दण्ड संहिता की धारा 499 के अपवाद 4 का लाभ नहीं दिया जा सकता – आक्षेपित आदेश अपास्त – मजिस्ट्रेट को प्रकरण पर पुनर्विचार करने हेतु निदेशित किया गया – आवेदन मंजूर।

***B. Criminal Procedure Code, 1973 (2 of 1974), Section 204 – Issuance of Process – Practice and Procedure* – Held – At the stage of considering the issuance of process to accused person, Court is not required to see that if there is sufficient ground for conviction.**

(Para 18)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 204 – आदेशिका जारी की जाना – पद्धति एवं प्रक्रिया – अभिनिर्धारित – अभियुक्त को आदेशिका जारी करने का विचार किये जाने के प्रक्रम पर, न्यायालय द्वारा यह देखा जाना अपेक्षित नहीं है कि क्या दोषसिद्धि हेतु पर्याप्त आधार हैं।

Cases referred:

1973 Cr.L.J. 1637 (Rajasthan), (2002) 1 SCC 241.

V.K. Jain with *Govind Raikwar,* for the applicant.
A.S. Parihar, for the non-applicant No. 1.
T.C. Jain, for the non-applicant No. 3.

S.K. Awasthi, J.:- Heard. The applicant has taken exception to the order dated 12.06.2013 passed in Cr.R.No.17/2013 by the First Additional Sessions Judge,Shajapur, District. Shajapur, by which the revisional Court has upheld the order dated 24.01.2012 passed by the Court of Judicial Magistrate First Class, Shajapur in an unregistered complaint case.

2. The question which arises for consideration is whether the front page contents of news paper Dainik Prathakaal on 12.04.2009 are sufficient for issuing process under Section 204 of C.P.C. for commission of offence punishable under Section 500 of IPC?

3. The facts leading to filing of the present application under Section 482 of Cr.P.C. are that the front page of the news paper indicated above published a piece of news with respect to the present applicant, which apparently indicated about the trial pending before the Court at District Bundi (Rajasthan) at the behest of respondent No.3. The same also reported series of orders passed against the present applicant by the Court. It is worthy to note that the front page also reflected the photograph of the present applicant.

4. The applicant feeling aggrieved by the contents of the front page of the news paper published by the respondent No.1 on 12.04.2009 proceeded to lodge a complaint with Press Council of India had also filed a complaint before the Court of Judicial Magistrate First Class, Shajapur, primarily on the ground that the contents of the front page of the news paper resulted on loss of reputation and the same are sufficient

for satisfying the ingredients of Section 499 of IPC. In order to substantiate the ground canvassed the complaint, the applicant pointed out the factual scenario with respect to the allegations printed on the front page of the news paper on 12.04.2009 and also submitted that at no point of time the Court had ever seized the bank account of the applicant nor that there was any order by any Court regarding attachment of his property. He further pointed out that the aspersions leveled on him are directed to defame him in the eye of general public which was the reasons for even publishing his photograph on the front page with the contents of report which brands the present applicant as a person who has cheated the people of crores of rupees and his passport has been ordered to be suspended to prevent him from travelling Abroad. However, the Court of Judicial Magistrate First Class did not issue process against the accused person on the ground that the alleged publication was reporting of the Court proceedings and the same falls under Exception 4 of Section 499 of IPC, therefore, the present applicant filed revision application before the Sessions Court, which came to be decided on 12.06.2013. Although vide such order the revisional Court adopted the reasoning of the Court of Judicial Magistrate First Class and rejected that revision application by following the principle laid down in the case of *K.Narendra vs. Amrit Kumar* reported in 1973 Cr.L.J. 1637 (Rajasthan).

5. The applicant being aggrieved by the order dated 12.06.2013 has approached this Court under Section 482 of Cr.P.C.

6. The learned counsel for the applicant submits that the Courts below have ignored the fact that the Press Council of India vide its decision dated 30.07.2010 has arrived at the definite conclusion that the publication carried out in the news paper was clearly violating all norms and ethics of paper publication and the conduct of the Editor in not doing verification of the contents of the report cannot be justified, therefore, he submitted that the Inquiry Committee of the Press Council upheld the contents of the complaint and directed issuance of "Censure" to the Editor of the news paper with a observation that on the basis of the inquiry report further action may be taken by other agencies of the Government which deal with the news paper. He invited the attention of this Court towards the contents of the complaint as also the report, which was printed on 12.04.2009 to point out that the applicant has been able to prove commission of offence punishable under 500 of IPC yet the Courts below have acted in contravention to the established legal position and have virtually burdened the present applicant to prove the proposed charge against the respondents by leading evidence which is beyond reasonable doubt. He submits that for the purposes of issuance of process the complainant is not required to prove the charge beyond reasonable doubt rather it is sufficient to establish *prima-facie* commission of offence by the accused persons, therefore, he submits that the orders passed by the Courts below be set-aside and the process be issued against the accused persons.

7. Per contra, the learned counsel for the respondents pointed out that it is an admitted position between the parties that in the year 2000, a case has been filed against the present applicant before the Court at District Bundi (Rajasthan) and thus, the record of proceedings have been spelled out in the said piece of news published on 12.04.2009, therefore, there is no scope of indulgence by this Court. The case is squarely covered by Exception 4 of Section 499 of IPC. Further he pressed into service the reasoning recorded by the Courts below to submit that there is no scope of indulgence by this Court under Section 482 of Cr.P.C.

8. This Court has examined the record and considered the same in the light of submissions recorded hereinabove. The perusal of the front page contents of the news published on 12.04.2009 by the respondent No.1 clearly shows that there are imputations against the present applicant, which have been scathing in nature and impeach upon the social image of the present applicant.

9. Having perused the same, I am unable to hold that the Courts below have rightly pronounced the impugned order. In order to substantiate this observation, I feel it appropriate to consider the case from the perspective that the complaint made before the Courts below as also statement of the applicant recorded before the Court of Judicial Magistrate First Class clearly spell out the ingredients contained under Section 499 of IPC as while reporting a Court proceeding, which is yet to be taken to its logical end, no offender can be permitted to publish a report which only refers to a version of the one side and completely omits that defence put up from the other side. The manner in which the reporting of the Court proceeding has been done, it is clear that the purpose is to report the version of the one party which will tarnish the reputation of the other side and such type of selective reporting is permitted to be carried out then the Courts will be undermining the rights of the other party which is to lead life with dignity.

10. The purpose of carving out an exception under Section 499 of IPC was for the benefit of the general public that they are aware about the Court proceedings which will rightly create an impression that the Courts are in control of the proceedings and if such impression is created to boast the confidence in the minds of general public about the majesty of law, then the same can outweigh the right of reputation of an individual. However, the case in hand is obviously not the one which can be held to be covered by Exception 4 of Section 499 of IPC at this stage. The applicant is specifically asserted about the factual scenario in the matter that the piece of news published on 12.04.2009 is not accurate reporting of the Court proceedings.

11. Be that as it may. I have arrived at the afore-stated finding for the reason that, if the impugned action is held to be covered under Exception 4 of Section 499 of IPC, then it give rise to the situation where a frivolous case is filed against a reputed citizen of the country and thereafter the other party selectively mentions about the

pleadings made in the Court against such person even though the other party has not been given any opportunity to clarify on the pleadings reported in the news but still the Courts will have to give such reporting the benefit of Exception 4 of Section 499 of IPC. I have no hesitation in concluding that such state of affairs will abridge the right of any individual to live with dignity and reputation in the society and Exception 4 will become a shield for those, who have dented the basic and sacrosanct right of an individual.

12. It may be borne in the mind that this Court is not suggesting that a fair reporting of a Court proceeding is not protected by virtue of Exception 4 of Section 499 of IPC. A report, which substantially deal with contentions of both the parties even though the author and news paper records its own opinion about the entire controversy can, in no manner, be held to be a punishable behaviour under Section 499 of IPC, but the Court cannot turn its blind eye towards inaccurate and selective reporting of Court proceedings.

13 What makes the report dated 12.04.2009 more outrageous is the fact that the photograph of the applicant was also published along with one sided narration of facts that the publication of photograph with a false caption would also amount to defamation.

14. The perusal above leaves no doubt in the mind of this Court that the conduct of the respondents can not be given the benefit of Exception 4 of Section 499 of IPC. Moreover, the Courts below have also not given due consideration to the fact that the Press Council of India had categorically observed the contents to be violative of established norms and an action was proposed against the news paper. It is pertinent to observe that the respondent No.1 had taken a defence before the Council that the publication dated 12.04.2009 was not the news item rather the same was only an advertisement. It is interesting to take note of the fact that the Courts below have afforded the protection of Exception 4 to an advertisement which cannot be termed a report on a Court proceedings rather the same is selective narration of one party's version to the Court proceedings, therefore, the Courts below have erred in holding that an advertisement with a photograph of the applicant is in fact publication of report of the court proceedings.

15. Now it will be appropriate to deal with the approach of the Courts below while considering with the complaint filed by the present applicant.

16. The Revisional Court in the impugned judgment has clearly observed in paragraph 14 that the perusal of news item goes to show that the contents are defamatory in nature, however, the proceedings are protected under Exception 4 of Section 499 of IPC. The Court has observed that the present applicant ought to have furnished more documents to demonstrate that the news item was not accurate account

of the Court proceedings. In this regard, the Court has relied upon the decision of Rajasthan High Court in *K. Narendra's case* (supra).

17. In the considered opinion of this Court that the decision of the Rajasthan High Court is in totally different footing as in that case the versions of both the parties were discussed rather than selective narration of one party. Further, the approach of the Court below in insisting for proof which is sufficient to convict an individual is improper because it is well established in the case of *S.W. Palanitkar & ors. vs. State of Bihar & another* (2002) 1 SCC 241 ; wherein it is held that:

> ***"15. In case of a complaint under Section 200 Cr.P.C. or IPC a Magistrate can take cognizance of the offence made out and then has to examine the complainant and his witnesses; if any, to ascertain whether a prima facie case is made out against the accused to issue process so that the issue of process is prevented on a complaint which is either false or vexatious or intended only to harass. Such examination is provided in order to find out whether there is or not sufficient ground for proceeding. The words 'sufficient ground', used under Section 203 have to be construed to mean the satisfaction that a prima facie case is made out against the accused and not sufficient ground for the purpose of conviction."***

18. The Court is not required to see that there is sufficient ground for conviction at a stage when the Court is considering issuance of process to the accused person.

19. On cumulative consideration of the facts and discussion made hereinabove this Court is of the considered view that the Court below have erred in rejecting the complaint filed by the present applicant and therefore, the instant application is **allowed** with direction to the Court of Judicial Magistrate First Class to reconsider the facts of the case in the light of the discussion hereinabove and pass a fresh order on the complaint filed by the present applicant.

20. Consequently, the impugned orders dated 12.06.2013 and 24.01.2012 are hereby set-aside with the direction recorded above.

Certified copy as per rules.

Application allowed.