VOL. 3

INDIAN LAW REPORT (M.P.) COMMITTEE

SEPTEMBER 2018

PATRON

Hon'ble Shri Justice HEMANT GUPTA

Chief Justice

CHAIRMAN

Hon'ble Shri Justice SUJOY PAUL

MEMBERS

Shri Purushaindra Kaurav, Advocate General, *(ex-officio)*
Shri Rajendra Tiwari, Senior Advocate
Smt. Shobha Menon, Senior Advocate
Shri Kishore Shrivastava, Senior Advocate
Shri Ritesh Kumar Ghosh, Advocate, Chief Editor, *(ex-officio)*
Shri Rajeev Kumar Shrivastava, Principal Registrar (ILR)
Shri Manoj Kumar Shrivastava, Principal Registrar (Judicial), *(ex-officio)*

SECRETARY

Shri Joginder Singh, Registrar (Exam)

PUBLISHED BY

Shri Rajeev Kumar Shrivastava, Principal Registrar (ILR)

TABLE OF CASES REPORTED

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

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

माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 34 – माध्यस्थम् अवार्ड में हस्तक्षेप – अभिनिर्धारित – ऐसे किसी अभिकथन की अनुपस्थिति में कि मध्यस्थ द्वारा पारित अवार्ड लोक नीति के विरूद्ध है, पक्षकारों के मध्य हुए करार की शर्तों के अनुसार अधिरोपित परिनिर्धारित नुकसानी पर माध्यस्थम् अधिकरण द्वारा हस्तक्षेप नहीं किया जा सकता यद्यपि दावा कानूनी माध्यस्थम् के माध्यम से चाहा गया हो – (2003) 5 एस सी सी 705 (आइल एवं नेचुरल गैस कॉर्पोरेशन लि. वि. सॉ पाइप्स लि.) के प्रकरण में उच्चतम न्यायालय के निर्णय पर विश्वास किया गया। (द जनरल मेनेजर वि. मे. रायसिंह एण्ड कं.) **(DB)…2018**

***Arbitration and Conciliation Act (26 of 1996), Section 34 – Setting aside of Arbitral Award* – The terms of the contract stand crystallized with the issuance of Advance Purchase Order and acceptance of the same – The Arbitral Tribunal has to take into account the terms of the contract while deciding and making an award – The terms of the contract are sacrosanct and an award cannot be rendered against the terms of the contract – If the terms of the contract have been interpreted then the decision of the Arbitrator would not be interfered with in proceedings u/S 34 of the Act. [Bharat Sanchar Nigam Ltd. Vs. M/s. Optel Telecommunication Ltd.]…2004**

माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 34 – माध्यस्थम् अवार्ड अपास्त किया जाना – अग्रिम क्रय आदेश जारी होने एवं उसे स्वीकार किये जाने के साथ ही संविदा के निबंधन स्पष्ट और सुनिश्चित हो जाते हैं – माध्यस्थम् अधिकरण को अवार्ड निर्णित करते एवं देते समय संविदा के निबंधनों को विचार में लेना होता है – संविदा के निबंधन अलंघनीय हैं और संविदा के निबंधनों के विरूद्ध अवार्ड नहीं दिया जा सकता – यदि संविदा के निबंधनों का निर्वचन किया गया है तब अधिनियम की धारा 34 के अंतर्गत कार्यवाहियों में मध्यस्थ के विनिश्चय में हस्तक्षेप नहीं होगा। (भारत संचार निगम लि. वि. मे. आप्टेल टेलीकम्यूनिकेशन लि.) **…2004**

***Arbitration Proceedings – Practice* – Judgment relied upon in the impugned order has since been overruled by larger bench of the High Court, impugned order is set aside – Appeal allowed – If any arbitration proceedings are pending will now be governed by the above judgment of High Court. [State of M.P. Vs. Ashoka Infraways Ltd.] (SC)…1600**

माध्यस्थम् कार्यवाहियां – पद्धति – चूंकि आक्षेपित आदेश में विश्वास किये गये निर्णय को उच्च न्यायालय की वृहद् न्यायपीठ द्वारा उलट दिया गया है, आक्षेपित आदेश अपास्त किया जाता है – अपील मंजूर – यदि कोई भी माध्यस्थम् कार्यवाहियां लंबित हैं, तो वे उच्च न्यायालय के उपर्युक्त निर्णय द्वारा शासित होंगी। (म.प्र. राज्य वि. अशोका इन्फ्रावेज लि.) **(SC)…1600**

***Bhumi Vikas Rules, M.P, 1984, Rule 57 – Leaving of open spaces in premises* – The open space, in terms of Rule 57 of the Madhya Pradesh Bhumi Vikas Rules, 1984 is required within the plot of an owner so as to provide ventilation and lighting and that in terms of Appendix-L, part of such open**

Civil Procedure Code (5 of 1908), Section 7(iv)(c) – Ad Valorem Court Fee – **Petitioner/plaintiff filed a suit seeking relief of declaration that sale deed is void and not binding on him on the ground of forgery – Trial Court directed to pay ad valorem court fee – Challenge to – Held – Sale deed dated 07.05.2016 executed by father of petitioner but he is said to have expired in 2010 – Prima Facie, it is established that sale deed is forged – In such peculiar facts, petitioner is not liable to pay ad valorem court fees at present – At the time of passing decree, if Court comes to conclude that plaintiff failed to establish his allegations, ad valorem court fees may be recovered from petitioner – Impugned order set aside – Petition allowed. [Manish Parashar Vs. Pratap]** **…*65**

सिविल प्रक्रिया संहिता (1908 का 5), धारा 7(iv)(सी) – मूल्यानुसार न्यायालय फीस – याची/वादी ने इस घोषणा का अनुतोष चाहते हुए वाद प्रस्तुत किया कि कूटरचना के आधार पर विक्रय विलेख शून्य है तथा उस पर बाध्यकारी नहीं है – विचारण न्यायालय ने मूल्यानुसार न्यायालय फीस भुगतान करने हेतु निदेशित किया – को चुनौती – अभिनिर्धारित – विक्रय विलेख दिनांक 07.05.2016, याची के पिता द्वारा निष्पादित किया गया परंतु 2010 में उनकी मृत्यु होना बताया गया – प्रथम दृष्ट्या, यह स्थापित है कि विक्रय विलेख कूटरचित है – ऐसे विशेष तथ्यों में, याची वर्तमान में मूल्यानुसार न्यायालय फीस का भुगतान करने हेतु दायी नहीं है – डिक्री पारित करते समय, यदि न्यायालय इस निष्कर्ष पर आया कि वादी अपने अभिकथनों को साबित करने में विफल रहा, याची से मूल्यानुसार न्यायालय फीस की वसूली की जा सकती है – आक्षेपित आदेश अपास्त – याचिका मंजूर। (मनीष पाराशर वि. प्रताप) **…*65**

Civil Procedure Code (5 of 1908), Section 11 and Order 9 Rule 8 & 9 – Subsequent Suit – Maintainability – **Respondent No. 1/plaintiff filed a suit which was dismissed for want of prosecution under Order 9 Rule 8 – His application under Order 9 Rule 9 CPC for setting aside ex-parte order was also dismissed in year 2011 which was not further challenged and the same attained finality – Subsequent suit filed by plaintiff in 2012 – Held – If suit is dismissed under Order 9 Rule 8 CPC, plaintiff is precluded from filing subsequent suit between same parties seeking same relief in respect of same cause of action – Impugned order set aside – Revision allowed. [Anandi Bai Vs. Jhanak Lal]** **…*71**

सिविल प्रक्रिया संहिता (1908 का 5), धारा 11 एवं आदेश 9 नियम 8 व 9 – पश्चात्वर्ती वाद – पोषणीयता – प्रत्यर्थी क्र. 1/वादी ने एक वाद प्रस्तुत किया जिसे आदेश 9 नियम 8 के अंतर्गत अभियोजन के अभाव में खारिज किया गया था – सिविल प्रक्रिया संहिता के आदेश 9 नियम 9 के अंतर्गत एक–पक्षीय आदेश अपास्त करने हेतु उसके आवेदन को भी वर्ष 2011 में खारिज किया गया था जिसे आगे चुनौती नहीं दी गई तथा उक्त ने अंतिमता प्राप्त कर ली – वादी द्वारा 2012 में पश्चात्वर्ती वाद प्रस्तुत किया गया – अभिनिर्धारित – यदि सिविल प्रक्रिया संहिता के आदेश 9 नियम 8 के अंतर्गत वाद खारिज किया जाता है, वादी, समान पक्षकारों के मध्य समान वाद हेतुक के संबंध में समान अनुतोष

विचारण न्यायालय द्वारा मंजूर नहीं किया जा सकता था क्योंकि वह आदेश 8 नियम 6–ए सि.प्र.सं. की परिधि के बाहर आता है – विचारण न्यायालय ने आदेश 8 नियम 6–ए सि.प्र. सं. में शब्द ''प्रतिरक्षा'' को ''साक्ष्य'' मानकर अपनिर्वचन किया और गलत पढ़ा – आक्षेपित आदेश अपास्त – विचारण न्यायालय को प्रतिदावा छोड़कर कार्यवाही करने के लिए निदेशित किया गया – याचिका मंजूर। (सैनिक माइनिंग एलाईड सर्विसेस लि. (मे.) वि. नार्दन कोलफील्डस् लि.) **...1925**

***Civil Procedure Code (5 of 1908), Order 8 Rule 6-A – Term "defence"* – The word "defence" in Rule-6-A connotes to written statement only and cannot be said to be extended to stage of leading evidence in support of such written statement. [Sainik Mining Allied Services Ltd. (M/s.) Vs. Northern Coal Fields Ltd.] ...1925**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 8 नियम 6–ए – शब्द ''प्रतिरक्षा'' – नियम 6–ए में शब्द ''प्रतिरक्षा'' केवल लिखित कथन के लक्ष्यार्थ है और ऐसे लिखित कथन के समर्थन में साक्ष्य पेश करने के प्रक्रम तक विस्तारित होना नहीं माना जा सकता। (सैनिक माइनिंग एलाईड सर्विसेस लि. (मे.) वि. नार्दन कोलफील्डस् लि.) **...1925**

***Civil Procedure Code (5 of 1908), Order 19 Rule 1 & 2 and Order 39 Rule 1 & 2 – Cross Examination of Deponent – Discretionary Powers of Court* – Suit for specific performance of contract – Plaintiff and witnesses filed affidavit alongwith injunction application – Petitioner/defendant filed application under Order 19 Rule 1 & 2 to cross examine the plaintiff – Application rejected by trial Court – Challenge to – Held – Where CPC permits the Court to decide certain matters on affidavit in general injunction matters, provisions of Order 19 Rule 1 & 2 do not apply and either party cannot lay any claim or urge the right of cross-examination of deponent – It is discretionary power of Court to call the deponent for cross examination, looking to the particular facts of the case – Trial Court finding the injunction application of plaintiff more creditworthy and bonafide, rightly exercised its discretion – Petition dismissed. [Shehzad Vs. Sohrab] ...2181**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 19 नियम 1 व 2 एवं आदेश 39 नियम 1 व 2 – अभिसाक्षी का प्रतिपरीक्षण – न्यायालय की वैवेकिक शक्तियां – संविदा के विनिर्दिष्ट पालन हेतु वाद – वादी एवं साक्षीगण ने व्यादेश आवेदन के साथ शपथपत्र प्रस्तुत किया – याची/प्रतिवादी ने वादी के प्रति परीक्षण हेतु, आदेश 19 नियम 1 व 2 के अंतर्गत आवेदन प्रस्तुत किया – विचारण न्यायालय द्वारा आवेदन अस्वीकार किया गया – को चुनौती – अभिनिर्धारित – जहां सि.प्र.सं., न्यायालय को सामान्य व्यादेश के मामलों में शपथपत्र पर कतिपय मामले विनिश्चित करने की अनुज्ञा देती है, आदेश 19 नियम 1 व 2 के उपबंध प्रयोज्य नहीं होते तथा कोई पक्षकार, अभिसाक्षी के प्रतिपरीक्षण के अधिकार का कोई दावा या आग्रह नहीं कर सकता – प्रकरण के विशिष्ट तथ्यों को देखते हुए प्रति परीक्षण हेतु अभिसाक्षी को बुलाया जाना, यह न्यायालय की वैवेकिक शक्ति है – विचारण न्यायालय ने वादी का व्यादेश आवेदन अधिक विश्वसनीय एवं सद्भाविक निष्कर्षित करने

INDEX

INDEX

स्वीकृत रूप से, सफल बोली लगाने वाला अधिक तकनीकी रूप से योग्य था तथा उसे अधिक अंक प्राप्त हुए – मात्र इस कारण से कि प्रत्यर्थी की वित्तीय बोली निम्नतम है, नियमों तथा शर्तों के अनुपालन की आवश्यकता को अनदेखा नहीं किया जा सकता – न्यायालय, अपीली न्यायालय के रूप में कार्य नहीं करता परंतु मात्र उस रीति का पुनर्विलोकन करता है जिसमें विनिश्चय लिया गया था – न्यायालय के पास प्रशासनिक विनिश्चयों को सुधारने की विशेषज्ञता नहीं है – वर्तमान प्रकरण में, निगम या तकनीकी विशेषज्ञों की ओर से कोई पक्षपात या असद्भावना नहीं है – उच्च न्यायालय द्वारा पारित आदेश अपास्त – अपील मंजूर। (म्यूनिसिपल कारपोरेशन, उज्जैन वि. बी.व्ही.जी. इंडिया लि.) **(SC)…1843**

***Constitution – Article 226/227 – Interim Order – Appeal – Maintainability* – Held – Writ Appeal is maintainable against an interim order. [Prashant Shrivastava Vs. State of M.P.] (DB)…2104**

संविधान – अनुच्छेद 226/227 – अंतरिम आदेश – अपील – पोषणीयता – अभिनिर्धारित – अंतरिम आदेश के विरूद्ध रिट अपील पोषणीय है। (प्रशांत श्रीवास्तव वि. म. प्र. राज्य) **(DB)…2104**

***Constitution – Article 226/227 – Transfer Matter – Practice – Scope* – Held – Transfer is an incident of service and same cannot be interfered unless transfer order is issued in violation of statutory rule or suffers from malafide exercise of power – Court cannot sit as an appellate authority in administrative matter like transfer of employee. [M.P. Power Transmission Co. Ltd. Vs. Yogendra Singh Chahar] (DB)…2099**

संविधान – अनुच्छेद 226/227 – स्थानांतरण मामला – पद्धति – विस्तार – अभिनिर्धारित – स्थानांतरण सेवा का एक भाग है एवं उक्त को तब तक बाधित नहीं किया जा सकता है जब तक कि स्थानांतरण आदेश कानूनी नियम के उल्लंघन में जारी नहीं किया गया हो या शक्ति के असद्भावपूर्वक प्रयोग से ग्रस्त हो – न्यायालय प्रशासनिक मामले जैसे कि कर्मचारी के स्थानांतरण में अपीली प्राधिकारी के रूप में सुनवाई नहीं कर सकता। (एम.पी. पॉवर ट्रांसमिशन कं. लि. वि. योगेन्द्र सिंह चहार) **(DB)…2099**

***Constitution – Article 227 – Scope of interference* – Is limited, if order passed by court having no jurisdiction and suffers from manifest procedural impropriety or perversity – Another view is possible is not a ground for interference – Interference can be made for the said purpose and not for correcting error of law and facts in a routine manner. [Gopaldas Khatri Vs. Dr. Tarun Dua] …1934**

संविधान – अनुच्छेद 227 – हस्तक्षेप की परिधि – सीमित है, यदि आदेश बिना अधिकारिता वाले न्यायालय द्वारा पारित किया गया है तथा प्रकट प्रक्रियात्मक अनुचितता या विपर्यस्तता से ग्रसित है – अन्य दृष्टिकोण संभव है, यह हस्तक्षेप के लिए आधार नहीं है – हस्तक्षेप, कथित प्रयोजन हेतु किया जा सकता है एवं न कि नैत्यिक ढंग से विधि एवं तथ्यों की त्रुटि को सुधारने के लिए। (गोपालदास खत्री वि. डॉ. तरूण दुआ) **…1934**

पूर्णता की अवधि को नहीं बढ़ाता है – यह केवल सहमति के अनुसार, ठेकेदार को परिनिर्धारित नुकसानी के भुगतान के अधीन कार्य पूर्ण करने की अनुमति प्रदान करता है – संविदा के भंग होने के कारण परिनिर्धारित नुकसानी का दावा किया जाता है एवं ऐसी राशि को अनुचित या शास्ति के माध्यम से नहीं कहा जा सकता। (द जनरल मेनेजर वि. मे. रायसिंह एण्ड कं.) **(DB)…2018**

***Contract – Terms and Conditions – Termination of Contract & Imposition of Penalty* – Appellant company invited tender for procurement of power from Grid Connected Solar Energy, whereby respondent No.1 was successful bidder – Letter of intent was issued and bank guarantee was submitted – Respondent No. 1 unable to purchase land and subsequently State Government allotted land for establishment of power plant – Respondent No. 1 requested for change of location which was duly accepted and accordingly on a changed location, land was purchased – Appellant invoking clause of agreement, terminated the contract and imposed penalty, invoking bank guarantee submitted by respondent No. 1 – Challenge to – High Court set aside the order of termination of contract and upheld invocation of bank guarantee for penalty – Held – Delay caused in commissioning of project seems to be due to unavoidable reasons like heavy resistance faced at allotted site due to encroachments – Considering the subsequent change of location and huge investment in project and when project is in final stage of commissioning, termination of contract is unfair – Imposition of penalty is justified – Respondent No. 1 directed to pay the penalty as directed – Appeal dismissed. [M.P. Power Management Co. Ltd. Vs. Renew Clean Energy Pvt. Ltd.] (SC)…1595**

संविदा – नियम एवं शर्तें – संविदा का पर्यवसान एवं शास्ति का अधिरोपण – अपीलार्थी कम्पनी ने ग्रिड से जुड़ी सौर ऊर्जा से शक्ति अधिप्राप्ति के लिए निविदा आमंत्रित की, जिसमें प्रत्यर्थी क्र. 1 सफल बोलीदाता था – आशय पत्र जारी किया गया था एवं बैंक गारंटी प्रस्तुत की गई थी – प्रत्यर्थी क्र. 1 भूमि क्रय करने में असमर्थ रहा एवं तत्पश्चात् राज्य सरकार ने पावर प्लांट की स्थापना के लिए भूमि आबंटित की – प्रत्यर्थी क्र. 1 ने स्थान परिवर्तित करने के लिए अनुरोध किया जो कि सम्यक् रूप से स्वीकार किया गया एवं तद्नुसार एक परिवर्तित स्थान पर, भूमि क्रय की गई थी – अपीलार्थी ने करार के खंड का अवलंब लेते हुये, संविदा पर्यवसित की तथा प्रत्यर्थी क्र. 1 द्वारा प्रस्तुत की गई बैंक गारंटी का अवलंब लेते हुए, शास्ति अधिरोपित की – को चुनौती – उच्च न्यायालय ने संविदा के पर्यवसान के आदेश को अपास्त किया तथा शास्ति के लिए बैंक गारंटी के अवलंबन को कायम रखा – अभिनिर्धारित – परियोजना को शुरू करने में कारित विलंब, आबंटित स्थल पर अतिक्रमण के कारण भारी प्रतिरोध का सामना करने जैसे अपरिहार्य कारणों की वजह से प्रतीत होता है – पश्चात्वर्ती स्थान का परिवर्तन एवं परियोजना में वृहत् निवेश पर विचार करते हुये तथा जब परियोजना शुरू होने के अंतिम प्रक्रम पर है, संविदा का पर्यवसान अनुचित है – शास्ति का अधिरोपण न्यायोचित है – प्रत्यर्थी क्र. 1 को निदेशानुसार शास्ति का भुगतान करने हेतु निदेशित किया गया – अपील खारिज। (एम.पी. पॉवर मेनेजमेन्ट कं. लि. वि. रिन्यू क्लीन एनर्जी प्रा. लि.) **(SC)…1595**

INDEX

दाण्डिक पद्धति – मृत्युकालिक कथन – अभियुक्त की विशिष्टियां – वर्तमान प्रकरण में, मृत्युकालिक कथन में अभियुक्तगण के उपनाम नाम प्रकट किये गये हैं – सर्वोच्च न्यायालय ने **AIR 1972 SC 1557** में अभिनिर्धारित किया कि मृत्युकालिक कथन जिसमें अपराध से आरोपित व्यक्तियों के संपूर्ण नाम तथा विशिष्टियां नहीं है, यद्यपि उनकी पहचान स्थापित करने में सहायता कर सकते हैं, ऐसी प्रकृति के नहीं है, जिन पर दोषसिद्धि आधारित की जा सकती है – संपुष्टि के बिना यह स्वीकार्य नहीं किया जा सकता – मृत्युकालिक कथन, साक्ष्य का एक विश्वसनीय भाग नहीं है। (शिशुपाल सिंह उर्फ छुट्टे राजा वि. म.प्र. राज्य) **(DB)…1740**

Criminal Practice – Particulars of Assault and Injuries **– Held – When four persons assault the deceased together, it is not possible for witness to exactly mark as to which accused was assaulting with which weapon and on which part of the body of deceased – If presence and participation of four appellants is established, particulars of assault or any inconsistency in those particulars are immaterial. [Shishupal Singh @ Chhutte Raja Vs. State of M.P.] (DB)…1740**

दाण्डिक पद्धति – हमला एवं क्षतियों की विशिष्टियां – अभिनिर्धारित – जब चार व्यक्तियों ने मृतक पर एक साथ हमला किया, साक्षी के लिए यह स्पष्ट रूप से चिन्हित कर पाना संभव नहीं है कि कौनसा आरोपी किस आयुध से तथा मृतक के शरीर के किस भाग पर हमला कर रहा था – यदि चार अपीलार्थीगण की उपस्थिति एवं सहभागिता स्थापित है, हमले की विशिष्टियां या उन विशिष्टियों में कोई असंगति तत्वहीन है। (शिशुपाल सिंह उर्फ छुट्टे राजा वि. म.प्र. राज्य) **(DB)…1740**

Criminal Practice – Previous Enmity – Statement of Eye Witness **– Held – Enmity is a double edged weapon where a person can be falsely implicated or he can be assaulted for that reason – Enmity by itself, is not sufficient to discredit the eye witness. [Shishupal Singh @ Chhutte Raja Vs. State of M.P.] (DB)…1740**

दाण्डिक पद्धति – पूर्व वैमनस्यता – चक्षुदर्शी साक्षी का कथन – अभिनिर्धारित – वैमनस्यता दुधारी शस्त्र है जहां एक व्यक्ति को मिथ्या आलिप्त किया जा सकता है या उस कारण से उस पर हमला किया जा सकता है – शत्रुता अपने आप में, चक्षुदर्शी साक्षी पर अविश्वास करने हेतु पर्याप्त नहीं है। (शिशुपाल सिंह उर्फ छुट्टे राजा वि. म.प्र. राज्य) **(DB)…1740**

Criminal Procedure Code, 1973 (2 of 1974), Section 125 – Children From Earlier Marriage – Entitlement of Maintenance **– Both parties had separate unsuccessful marriages in past – They both had children from their earlier marriages – They got married with each other – Subsequently, wife filed application u/S 125 Cr.P.C. seeking maintenance for herself and for her daughter (from earlier marriage) – Family Court granted Rs. 10,000 pm to wife and Rs. 7000 pm to daughter – Challenge to – Held – The word "his" appearing in the section would include only the person who procreates,**

begets or brings forth offspring – It will not include a child of another father or mother – In the present case, daughter is from 1st marriage of wife and not of the applicant – Child of another have no right to claim maintenance – Family Court erred in awarding maintenance to daughter – Order awarding maintenance to daughter set aside – Revision partly allowed. [Pradeep Jain Vs. Smt. Manjulata Jain Modi] …1799

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125 – पूर्वतर विवाह से संताने – भरणपोषण की हकदारी – दोनों पक्षकारों के पूर्व में पृथक विवाह असफल हुए थे – दोनों को उनके पूर्ववर्ती विवाहों से संताने थी – उन्होनें एक दूसरे से विवाह किया – तत्पश्चात्, पत्नी ने स्वयं के और अपनी पुत्री (पूर्वतर विवाह से) हेतु भरणपोषण चाहते हुए धारा 125 दं. प्र.सं. के अंतर्गत आवेदन प्रस्तुत किया – कुटुंब न्यायालय ने पत्नी को रू. 10,000 प्रतिमाह एवं पुत्री को रू. 7000 प्रतिमाह प्रदान किये – को चुनौती – अभिनिर्धारित – धारा में उल्लिखित शब्द ''उसका'' में केवल वह व्यक्ति समाविष्ट है जो संतति का जनन, प्रजनन या जन्म देता है – इसमें अन्य पिता या माता की संतान शामिल नहीं होगी – वर्तमान प्रकरण में, पुत्री, पत्नी के पहले विवाह से है और न कि आवेदक की – दूसरे की संतान को भरणपोषण के दावे का अधिकार नहीं – कुटुंब न्यायालय ने पुत्री को भरणपोषण प्रदान कर त्रुटि की – पुत्री को भरणपोषण प्रदान करने का आदेश अपास्त – पुनरीक्षण अंशतः मंजूर। (प्रदीप जैन वि. श्रीमती मंजूलता जैन मोदी) **…1799**

Criminal Procedure Code, 1973 (2 of 1974), Section 125 – Interim Maintenance **– Held – Interim maintenance amount is not the final amount, it can be re-determined (either enhanced or reduced) while deciding application u/S 125 Cr.P.C. [Anubhav Ajmani Vs. Smt. Garima Ajmani] …2043**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125 – अंतरिम भरणपोषण – अभिनिर्धारित – अंतरिम भरण पोषण की राशि अंतिम राशि नहीं है, यह दण्ड प्रक्रिया संहिता की धारा 125 के अंतर्गत आवेदन का विनिश्चिय करते समय पुनः अवधारित (या तो बढ़ायी या कम की) जा सकती है। (अनुभव अजमानी वि. श्रीमती गरिमा अजमानी) **…2043**

Criminal Procedure Code, 1973 (2 of 1974), Section 125 – Maintenance – Quantum – Income of Husband and Wife **– Held – There is no evidence produced by husband on record to substantiate his plea that wife is an educated lady and is earning sufficiently for maintaining herself – Further husband has not produced any evidence/certificate of his permanent disability which he claims – Applicant husband is an Engineer by profession – Order granting maintenance to wife upheld. [Pradeep Jain Vs. Smt. Manjulata Jain Modi] …1799**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125 – भरणपोषण – मात्रा – पति एवं पत्नी की आय – अभिनिर्धारित – पति द्वारा अपने इस अभिवाक् को सिद्ध करने के लिए अभिलेख पर कोई साक्ष्य प्रस्तुत नहीं किया कि पत्नी एक शिक्षित महिला है और स्वयं के भरणपोषण हेतु पर्याप्त रूप से उपार्जन कर रही है – आगे, पति ने अपनी स्थायी निशक्तता

जिसका दावा वह करता है, का कोई साक्ष्य/प्रमाणपत्र प्रस्तुत नहीं किया है – आवेदक पति पेशे से एक यंत्री है – पत्नी को भरणपोषण प्रदान करने का आदेश अभिपुष्ट किया गया। (प्रदीप जैन वि. श्रीमती मंजूलता जैन मोदी) **…1799**

***Criminal Procedure Code, 1973 (2 of 1974), Section 125 & 127 – Alteration in Maintenance Amount* – Changed Circumstances – Evidence – Person seeking alteration in allowance has to prove changed circumstances by leading evidence – Income Tax return is a matter between assessee and revenue department and is not a public document – Court cannot take judicial notice to the same while considering application u/S 125 Cr.P.C. – Income has to be proved by leading evidence – It is not feasible for trial Court/Magistrate to first record evidence for Section 127 and thereafter to record evidence afresh for Section 125 – Applicant directed to lead evidence for final adjudication of application u/S 125 Cr.P.C. – No error in impugned order – Petition dismissed. [Anubhav Ajmani Vs. Smt. Garima Ajmani] …2043**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125 व 127 – भरणपोषण की राशि में परिवर्तन – बदली हुई परिस्थितियां – साक्ष्य – भत्ते में परिवर्तन चाहने वाले व्यक्ति को साक्ष्य प्रस्तुत कर बदली हुई परिस्थितियां साबित करनी होगी – आयकर रिटर्न, निर्धारिती एवं राजस्व विभाग के मध्य का मामला है तथा एक लोक दस्तावेज नहीं है – दण्ड प्रक्रिया संहिता की धारा 125 के अंतर्गत आवेदन पर विचार करते समय न्यायालय उक्त का न्यायिक प्रज्ञान नहीं ले सकता – आय साक्ष्य प्रस्तुत करके साबित की जाना है – विचारण न्यायालय/मजिस्ट्रेट के लिए यह साध्य नहीं है कि पहले वह धारा 127 हेतु साक्ष्य अभिलिखित करे एवं तत्पश्चात् धारा 125 हेतु नए सिरे से साक्ष्य अभिलिखित करे – आवेदक को दण्ड प्रक्रिया संहिता की धारा 125 के अंतर्गत आवेदन के अंतिम न्यायनिर्णयन के लिए साक्ष्य प्रस्तुत करने हेतु निदेशित किया गया – आक्षेपित आदेश में कोई त्रुटि नहीं – याचिका खारिज। (अनुभव अजमानी वि. श्रीमती गरिमा अजमानी) **…2043**

***Criminal Procedure Code, 1973 (2 of 1974), Section 156(3) and Penal Code (45 of 1860), Sections 409, 420, 468 & 471 – Power of Magistrate to Order Investigation* – Held – Even for offences which are exclusively triable by Sessions Court, Magistrate can order for investigation u/S 156(3) Cr.P.C. at the pre-cognizance stage – Magistrate's direction u/S 156(3) Cr.P.C. does not amount to taking cognizance – In present case, no cognizance has been taken by Magistrate – No illegality in impugned order – Application dismissed. [Lakhpat Singh Vs. State of M.P.] …*64**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 156(3) एवं दण्ड संहिता (1860 का 45), धाराएँ 409, 420, 468 व 471 – अन्वेषण आदेशित करने की मजिस्ट्रेट की शक्ति – अभिनिर्धारित – यहां तक कि अनन्य रूप से सत्र न्यायालय द्वारा विचारणीय अपराधों के लिए भी, संज्ञान–पूर्व प्रक्रम पर, मजिस्ट्रेट, धारा 156(3) दं.प्र.सं. के अंतर्गत, अन्वेषण हेतु आदेश कर सकता है – मजिस्ट्रेट का धारा 156(3) दं.प्र.सं. के अंतर्गत निदेश, संज्ञान लेने

को चुनौती – अभिनिर्धारित – साक्षी को तब तक पुनः बुलाया नहीं जा सकता जब तक कि न्यायालय इस निष्कर्ष पर न पहुंच जाये कि प्रकरण के न्यायसंगत विनिश्चय हेतु उसका, अतिरिक्त प्रतिपरीक्षण किया जाना आवश्यक है – आवेदक ने यह इंगित करने हेतु कोई परिस्थितियां नहीं दर्शाई हैं कि उसे साक्षी के प्रतिपरीक्षण हेतु पूर्ण अवसर प्रदान नहीं किया गया था – एक वरिष्ठ अधिवक्ता ने साक्षी का प्रतिपरीक्षण किया – अभियोक्त्री के कथन से कुछ भी इंगित नहीं किया जा सका कि किस प्रकार उसने असत्य तथ्यों का वर्णन किया है – अभियुक्त के कहने मात्र पर साक्षी को पुनः बुलाया नहीं जा सकता – आवेदन खारिज। (राजेश कुशवाह वि. म.प्र. राज्य) …*57

***Criminal Procedure Code, 1973 (2 of 1974), Section 311 – Recalling of Witness* – Revision against dismissal of application u/S 311 Cr.P.C. for re-examination of prosecutrix – Held – From statement of prosecutrix and the doctor, it is evident that effective and detailed cross examination of prosecutrix has been carried out by counsel of applicant – Opportunity cannot be granted to fill up the lacuna in evidence and to compel the witness to change her version – No need to recall the witness u/S 311 Cr.P.C. – Revision dismissed. [Roshan Vs. State of M.P.] …*66**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 311 – साक्षी को पुनः बुलाया जाना – अभियोक्त्री के पुनः परीक्षण हेतु धारा 311 दं.प्र.सं. के अंतर्गत आवेदन की खारिजी के विरूद्ध पुनरीक्षण – अभिनिर्धारित – अभियोक्त्री एवं चिकित्सक के कथन से यह सुव्यक्त है कि आवेदक के अधिवक्ता द्वारा अभियोक्त्री का प्रभावी एवं विस्तृत प्रतिपरीक्षण किया गया है – साक्ष्य की कमियां पूरी करने के लिए तथा साक्षी को उसका कथन बदलने के लिए विवश करने हेतु अवसर प्रदान नहीं किया जा सकता – दं.प्र.सं. की धारा 311 के अंतर्गत साक्षी को पुनः बुलाने की आवश्यकता नहीं – पुनरीक्षण खारिज। (रोशन वि. म.प्र. राज्य) …*66

***Criminal Procedure Code, 1973 (2 of 1974), Section 311, Penal Code (45 of 1860), Section 363 & 376(2)(n) and Protection of Children from Sexual Offences Act, (32 of 2012), Section 4 – Recall of witness – Grounds* – Revision against dismissal of application of accused to recall the prosecutrix for re-examination – Held – Statement of prosecutrix shows that she was duly and effectively cross examined by counsel of applicant – It shows that applicant only wants to recall her to change her version in his favour *malafidely* – Exercise of power u/S 311 Cr.P.C. cannot be permitted to compel the witness to change her earlier statement – Further held – Since offence u/S 376 IPC is not compoundable u/S 320 Cr.P.C., trial Court rightly rejected the prayer – Revision dismissed. [Shyam @ Bagasram Vs. State of M.P.] …1805**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 311, दण्ड संहिता (1860 का 45), धारा 363 व 376(2)(एन) एवं लैंगिक अपराधों से बालकों का संरक्षण अधिनियम, (2012 का 32), धारा 4 – साक्षी को पुनः बुलाया जाना – आधार – अभियोक्त्री को पुनःपरीक्षण हेतु पुनः बुलाये जाने हेतु अभियुक्त के आवेदन की खारिजी के विरूद्ध पुनरीक्षण – अभिनिर्धारित – अभियोक्त्री का कथन दर्शाता है कि आवेदक के अधिवक्ता द्वारा सम्यक्

INDEX

under the provisions of Cr.P.C. – Applicants have alternative remedy under civil law – Application u/S 482 not maintainable and is hereby dismissed. [Savitri Bai (Smt.) (Correct Name Smt. Savita Chajju Ram) Vs. Tapan Kumar Choudhary] …*77

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 एवं सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 नियम 2ए – सिविल मामलों में धारा 482 के अंतर्गत अंतर्निहित शक्तियों का प्रयोग – एक सिविल वाद में आदेश 39 नियम 2 के अंतर्गत वादी/प्रत्यर्थी द्वारा प्रस्तुत आवेदन पर आवेदक/प्रतिवादी के विरूद्ध आरंभ की गई अवमानना कार्यवाहियों का अभिखंडन चाहते हुए आवेदन – अभिनिर्धारित – दण्ड प्रक्रिया संहिता की धारा 482 के उपबंध केवल दण्ड प्रक्रिया संहिता के उपबंधों के अंतर्गत लंबित दाण्डिक कार्यवाहियों में लागू होते हैं – आवेदकों के पास सिविल विधि के अंतर्गत वैकल्पिक उपचार है – धारा 482 के अंतर्गत आवेदन पोषणीय नहीं एवं एतद् द्वारा खारिज। (सावित्री बाई (श्रीमती) (सही नाम श्रीमती सविता छज्जू राम) वि. तपन कुमार चौधरी) …*77

***Criminal Procedure Code, 1973 (2 of 1974), Section 482 and Penal Code (45 of 1860), Sections 420, 465, 468, 470 r/w Section 120-B – Quashment of FIR – Gambling activities through Online Games* – Held – Applicant/company designed fun games by name of Casino and Teen Patti – Video parlours are being run as Casinos – It is all gambling in which skill is not involved – Gambling is absolutely prohibited in M.P. – Enough material is available in case diary that points earned by players are being converted into money by applicant – Through bank account details, prosecution trying to establish that money is transferred to company/accused persons in regular manner by franchisee/video parlours – It is a matter of evidence which can be proved by prosecution by way of evidence – No case for interference – Application dismissed. [Achal Ramesh Chaurasia Vs. State of M.P.] …2287**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 एवं दण्ड संहिता (1860 का 45), धाराएँ 420, 465, 468, 470 सहपठित धारा 120–बी – प्रथम सूचना प्रतिवेदन अभिखंडित किया जाना – ऑनलाईन खेल के जरिए द्यूत क्रियाकलाप – अभिनिर्धारित – आवेदक/कंपनी ने केसीनों और तीन पत्ती के नाम से मनोरंजक खेल विकसित किये – वीडियो पार्लरों को केसीनों के तौर पर चलाया जा रहा है – यह सब द्यूत है जिसमें कुशलता शामिल नहीं है – म.प्र. में द्यूत को पूर्णतया प्रतिषिद्ध किया गया है – केस डायरी में पर्याप्त सामग्री उपलब्ध है कि खिलाड़ियों द्वारा अर्जित अंको को आवेदक द्वारा रूपयों में संपरिवर्तित किया जा रहा है – बैंक खाता विवरणों के जरिए अभियोजन यह स्थापित करने का प्रयास कर रहा है कि फ्रेंचाइजी/वीडियो पार्लरों द्वारा नियमित ढंग से कंपनी/अभियुक्तगण को रूपये अंतरित किये गये है – यह एक साक्ष्य का मामला है जिसे अभियोजन द्वारा साक्ष्य के जरिए साबित किया जा सकता है – हस्तक्षेप हेतु प्रकरण नहीं – आवेदन खारिज। (अचल रमेश चौरसिया वि. म.प्र. राज्य) …2287

Criminal Procedure Code, 1973 (2 of 1974), Section 482, Penal Code (45 of 1860), Sections 417, 420, 467, 468, 471 & 120-B and Information

discarded solely on the ground of relationship with the victim of offence. [Siyadeen @ Bhakada Kol Vs. State of M.P.] (DB)…*67

साक्ष्य अधिनियम (1872 का 1), धारा 3 – संबंधी साक्षी – साक्ष्य की ग्राह्यता – यदि यह अन्यथा विश्वसनीय है तो इसे अस्वीकार नहीं किया जा सकता – इसे अपराध के पीड़ित के साथ संबंध होने के एकमात्र आधार पर अस्वीकार नहीं किया जा सकता। (सियादीन उर्फ भाकडा कोल वि. म.प्र. राज्य) **(DB)…*67**

***Evidence Act (1 of 1872), Sections 7, 8 & 45-A – Examination of C.D. - Expert Opinion* – Election petition by respondent against petitioner – Application u/S 45-A of the Act of 1972 filed by petitioner to examine a CD which contained telephonic conversation – Application dismissed – Challenge to – Held – Election petition is regarding the caste status of petitioner whereas the conversation in CD does not throw any light on the caste status of petitioner – As per Section 7 and 8 of the Evidence Act, subsequent conduct of parties are relevant only when it is connected with the "fact in issue" – Conversation which has no nexus with the question involved in election petition cannot be a ground for appointing an expert to examine the voice and form an opinion. [Saraswati Manjhi Vs. Smt. Manju Kol] …1684**

साक्ष्य अधिनियम (1872 का 1), धाराएँ 7, 8 व 45–ए – सी.डी. का परीक्षण – विशेषज्ञ अभिमत – याची के विरूद्ध प्रत्यर्थी द्वारा निर्वाचन अर्जी – एक सी.डी. जिसमें दूरभाष वार्तालाप अंतर्विष्ट थी, के परीक्षण हेतु याची द्वारा 1972 के अधिनियम की धारा 45–ए के अंतर्गत आवेदन प्रस्तुत किया गया – आवेदन खारिज किया गया – को चुनौती – अभिनिर्धारित – निर्वाचन अर्जी, याची की जाति की स्थिति से संबंधित है जबकि सी.डी. का वार्तालाप याची की जाति की स्थिति पर कोई प्रकाश नहीं डालता – साक्ष्य अधिनियम की धारा 7 व 8 के अनुसार, पक्षकारों का पश्चात्वर्ती आचरण केवल तब सुसंगत है जब वह ''विवाद्यक तथ्य'' के साथ जुड़ा हो – वार्तालाप, जिसका निर्वाचन अर्जी में अंतर्ग्रस्त प्रश्न के साथ कोई परस्पर संबंध नहीं है, आवाज का परीक्षण करने एवं अभिमत निर्मित करने के लिए विशेषज्ञ की नियुक्ति किये जाने हेतु आधार नहीं हो सकता। (सरस्वती मांझी वि. श्रीमती मंजू कोल) **…1684**

***Evidence Act (1 of 1872), Section 9 – See – Penal Code, 1860, Sections 395, 396, 397 & 458* [Suraj Nath Vs. State of M.P.] (DB)…1761**

साक्ष्य अधिनियम (1872 का 1), धारा 9 – देखें – दण्ड संहिता, 1860, धाराएँ 395, 396, 397 व 458 (सूरज नाथ वि. म.प्र. राज्य) **(DB)…1761**

***Evidence Act (1 of 1872), Section 27 – Applicability – Scope – Presumption* – Held – Section 27 makes that part of the statement which is distinctly related to discovery, admissible as a whole, whether it be in the nature of confession or not – For application of Section 27, statement must be split into its components and to separate the admissible portion – Only those components or portions which were the immediate cause of discovery would**

INDEX

INDEX

morally and psychologically – Release will defeat the ends of justice – Bail rightly rejected – Revision dismissed. [Vinay Tiwari Vs. State of M.P.]
…2047

किशोर न्याय (बालकों की देखरेख और संरक्षण) अधिनियम, 2015 (2016 का 2), धारा 12, दण्ड संहिता (1860 का 45), धाराएँ 363, 376(2)(n), 347, 368 व 354(2)/34 एवं लैंगिक अपराधों से बालकों का संरक्षण अधिनियम, (2012 का 32), धारा 3/4 व 7/8 – किशोर को जमानत – अपवाद – अभिनिर्धारित – यह कहा जा सकता है कि किशोर को जमानत पर छोड़ा जाना उसका अधिकार है किंतु वर्तमान प्रकरण में, परिवीक्षा अधिकारी का प्रतिवेदन दर्शाता है कि अभियुक्त अवज्ञाकारी है और ऐसे व्यक्तियों के संपर्क में है जो सुदृढ़/अच्छे चरित्र/प्रतिष्ठा के व्यक्ति नहीं है – धारा 12 में उल्लिखित निर्बंधन/अपवाद आकर्षित होते हैं – यदि आवेदक को जमानत पर छोड़ा गया, वह निश्चित रूप से विहित अपराधियों के संपर्क में आएगा और जो उसे नैतिक रूप से एवं मानसिक रूप से हानि पहुंचाएगा – मुक्त किये जाने से न्याय के उद्देश्य की हानि होगी – जमानत को उचित रूप से अस्वीकार किया गया – पुनरीक्षण खारिज। (विनय तिवारी वि. म. प्र. राज्य) **…2047**

Krishi Upaj Mandi Adhiniyam, M.P. 1972 (24 of 1973), Section 40-A and Fundamental Rules, Rule 110 – Transfer of Government Servant – Power of State Government **– Held – U/S 40-A of the Act of 1972, State Government has been conferred power in respect of Marketing Board and Mandi Samiti/Committee to issue directions and Board and Samiti/Committee is bound to comply with directions – Further held – Rule 110 of Fundamental Rules also confers power to transfer a Government servant to the service of a body, incorporated or not, which is wholly or substantially owned or controlled by the Government. [Prashant Shrivastava Vs. State of M.P.] (DB)…2104**

कृषि उपज मण्डी अधिनियम, म.प्र. 1972 (1973 का 24), धारा 40–ए एवं मूलभूत नियम, नियम 110 – शासकीय सेवक का स्थानांतरण – राज्य शासन की शक्ति – अभिनिर्धारित – 1972 के अधिनियम की धारा 40–ए के अंतर्गत, राज्य शासन को विपणन बोर्ड एवं मंडी समिति के संबंध में निदेश जारी करने की शक्ति प्रदत्त की गई है तथा बोर्ड एवं समिति निदेशों का अनुपालन करने हेतु बाध्य है – आगे अभिनिर्धारित – मूलभूत नियमों का नियम 110 एक शासकीय सेवक को एक निकाय, निगमित हो अथवा नहीं, जिस पर पूरी तरह से या सारभूत रूप से स्वामित्व एवं नियंत्रण शासन का है, की सेवा में स्थानांतरित करने की शक्ति भी प्रदत्त करता है। (प्रशांत श्रीवास्तव वि. म.प्र. राज्य) **(DB)…2104**

Land Revenue Code, M.P. (20 of 1959), Section 178 and Specific Relief Act (47 of 1963), Section 34 & 42 – Suit for Declaration without any further prayer for Partition – Maintainability **– Held – If a co-sharer who is denied of his title as a co-sharer, files a suit for declaration of title and permanent injunction with no intention to get the property separated, he may file suit**

***Municipal Corporation Act, M.P. (23 of 1956), Section 308-A – Compounding of violation* – The failure of the owner to provide open spaces within the plot is not a compoundable construction in terms of Section 308-A of the Municipal Corporation Act, 1956 – As per the Municipal Corporation, had the construction been compoundable, compounding fee would have been Rs. 3,84,57,697.50 but since it is a non-compoundable construction, twice the amount of compoundable fee is considered reasonable so as to enable the corporation to provide multilevel parking near the plot in question. [Satish Nayak Vs. State of M.P.] (DB)…1895**

नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धारा 308–ए – उल्लंघन का शमन – भूखंड के भीतर खुली जगह का प्रबंध करने में स्वामी की असफलता, नगरपालिक निगम अधिनियम, 1956 की धारा 308–ए के निबंधनों में शमनीय निर्माण नहीं है – नगरपालिक निगम के अनुसार यदि निर्माण शमनीय था, शमन शुल्क रू. 3,84,57,697.50 होता किंतु चूंकि वह एक अशमनीय निर्माण है, शमन शुल्क की राशि से दोगुना युक्तियुक्त माना जाता है जिससे कि प्रश्नगत भूखंड के निकट बहुस्तरीय पार्किंग की व्यवस्था के लिए निगम समर्थ हो सके। (सतीश नायक वि. म.प्र. राज्य) **(DB)…1895**

***Municipalities Act, M.P. (37 of 1961), Section 20(3) and Limitation Act (36 of 1963), Section 5 & 29 – Election Petition – Limitation – Condonation of Delay* – Held – Election petition shall not be admitted unless it is filed within 30 days from date of publication of election result in gazette notification – Petition filed beyond such limitation as prescribed u/S 20(3) of the Act of 1961 deserves to be dismissed – In instant case, election was notified in gazette on 15.09.15 and election petition was filed on 15.10.15 alongwith application u/S 5 of the Act of 1963 whereby the trial Court condoned the delay and admitted the petition – Held – Supreme Court has concluded that provisions of Limitation Act has no application to an election petition presented u/S 20 of the Act of 1961 or under the Representation of Peoples Act – Trial Court erred in condoning the delay u/S 5 of the Act of 1963 – Impugned order set aside and election petition is dismissed – Petition allowed. [Sushila (Smt.) Vs. Rajesh Rajak] …1961**

नगरपालिका अधिनियम, म.प्र. (1961 का 37), धारा 20(3) एवं परिसीमा अधिनियम (1963 का 36), धारा 5 व 29 – निर्वाचन अर्जी – परिसीमा – विलंब के लिए माफी – अभिनिर्धारित – निर्वाचन अर्जी को ग्रहण नहीं किया जाएगा जब तक कि वह गजट अधिसूचना में निर्वाचन परिणाम के प्रकाशन की तिथि से 30 दिनों के भीतर प्रस्तुत न की गई हो – 1961 के अधिनियम की धारा 20(3) के अंतर्गत विहित उक्त परिसीमा से परे प्रस्तुत की गई अर्जी खारिज किये जाने योग्य है – वर्तमान प्रकरण में, निर्वाचन 15.09.2015 को गजट में अधिसूचित किया गया था और निर्वाचन अर्जी, 1963 के अधिनियम की धारा 5 के अंतर्गत आवेदन के साथ 15.10.2015 को प्रस्तुत की गई थी जिस पर विचारण न्यायालय ने विलंब माफ किया और अर्जी ग्रहण की – अभिनिर्धारित – उच्चतम न्यायालय ने निष्कर्षित किया है कि 1961 के अधिनियम की धारा 20 के अंतर्गत अथवा लोक

INDEX

Unless the administration of intoxicant substance is proved without his knowledge. [Siyadeen @ Bhakada Kol Vs. State of M.P.] (DB)…*67

दण्ड संहिता (1860 का 45), धारा 85 – मत्तता बचाव के रूप में – जब मदिरापान का कृत्य पूरी तरह से उसका स्वयं का कृत्य है, ऐसे व्यक्ति को लाभ प्रदान नहीं किया जा सकता है – ऐसे व्यक्ति को स्वयं के दोष का लाभ लेने की अनुमति नहीं दी जा सकती जब तक कि उसके ज्ञान के बिना मादक पदार्थ का दिया जाना साबित न हो जाए। (सियादीन उर्फ भाकडा कोल वि. म.प्र. राज्य) **(DB)…*67**

***Penal Code (45 of 1860), Section 85 & 86 – Intoxication – Defence* – Burden lies upon the accused – To show that the incapability/incapacity of the accused was because of intoxication, and it is of such a degree where he can claim the benefit. [Siyadeen @ Bhakada Kol Vs. State of M.P.] (DB)…*67**

दण्ड संहिता (1860 का 45), धारा 85 व 86 – मत्तता – बचाव – यह दर्शाने का भार अभियुक्त पर है कि अभियुक्त की असमर्थता/अक्षमता मत्तता के कारण थी और यह इतनी मात्रा में है जहां वह लाभ का दावा कर सकता है। (सियादीन उर्फ भाकडा कोल वि. म.प्र. राज्य) **(DB)…*67**

***Penal Code (45 of 1860), Section 107 & 306 – Abetment of Suicide – Revision against Charge – Suicide by husband – Suicide Note* – Husband suspected extra-marital relations of wife – As a result of dispute, wife living in maternal home for long time and gave birth to twins – Wife's maternal relatives particularly brother-in-law did not allow deceased to take his wife and children back and use to misbehave with him because of which he was frustrated – Held – Husband could have moved application for restitution of conjugal rights or for judicial separation or divorce but he adopted an escapist course – Clearly an overreaction on part of deceased for which wife and brother-in-law cannot be legally held liable – Petitioners neither actively instigated the deceased to commit suicide nor did they created any such situation where he was left with no option but to commit suicide – No ground to proceed u/S 306 or 306/34 IPC – Petitioners discharged – Revision allowed. [Savita Athya (Smt.) Vs. State of M.P.] …*76**

दण्ड संहिता (1860 का 45), धारा 107 व 306 – आत्महत्या का दुष्प्रेरण – आरोप के विरूद्ध पुनरीक्षण – पति द्वारा आत्महत्या – आत्महत्या लेख – पति को पत्नी के विवाहेतर संबंधों के होने का शक था – विवाद के परिणामस्वरूप, पत्नी लंबे समय से मायके में रह रही थी तथा उसने जुड़वा बच्चों को जन्म दिया – पत्नी के मायके वालों ने विशेष रूप से पत्नी के भाई ने मृतक को उसकी पत्नी एवं बच्चों को वापस ले जाने नहीं दिया तथा उसके साथ दुर्व्यवहार करते थे जिसके कारण वह निराश था – अभिनिर्धारित – पति दाम्पत्य अधिकारों के प्रत्यास्थापन या न्यायिक पृथक्करण या विवाह विच्छेद के लिए आवेदन प्रस्तुत कर सकता था परंतु उसने पलायनवादी मार्ग अपनाया – स्पष्टतः मृतक की ओर से यह एक अति–प्रतिक्रिया है जिसके लिए पत्नी एवं पत्नी के भाई को विधिक रूप से दायी नहीं ठहराया जा सकता – याचीगण ने, न तो सक्रिय रूप से मृतक को आत्महत्या

related to deceased or the injured, cannot be said to be untrustworthy and it do not per se render them partisan, especially when version of eye witnesses inspires confidence despite minor contradictions, embellishments and omissions – Testimony of such witnesses cannot be discarded outrightly but has to be scrutinized with care and caution – Further held – Mere non-explanation of injuries of accused is alone not fatal to prosecution – Sufficient evidence to record conviction against respondents for forming unlawful assembly and causing murder with common intention and also causing grievous/simple injuries – Judgment of acquittal set aside. [State of M.P. Vs. Latoori] (DB)…*68

दण्ड संहिता (1860 का 45), धाराएँ 147, 148, 149, 302/34 व 326 – दोषमुक्ति के विरूद्ध अपील – संबंधी साक्षीगण – अभिनिर्धारित – मात्र इसलिए कि एक साक्षी मृतक या आहत का संबंधी है, को अविश्वसनीय नहीं कहा जा सकता और उन्हें अंधभक्त नहीं बनाता, विशेष रूप से तब जब प्रत्यक्षदर्शी साक्षीगण का कथन गौण विरोधाभासों, अलंकरणों एवं लोपों के बावजूद विश्वास उत्पन्न करता है – उक्त साक्षीगण के परिसाक्ष्य को सीधे तौर पर अस्वीकार नहीं किया जा सकता बल्कि सावधानी एवं सतर्कता के साथ उसकी संवीक्षा की जानी चाहिए – आगे अभिनिर्धारित – केवल अभियुक्त की चोटों को स्पष्ट न किया जाना मात्र अभियोजन के लिए घातक नहीं – विधि विरूद्ध जमाव निर्मित करने एवं सामान्य आशय के साथ हत्या कारित करने और गंभीर/साधारण चोटें कारित करने के लिए भी, प्रत्यर्थीगण के विरूद्ध दोषसिद्धि अभिलिखित करने हेतु पर्याप्त साक्ष्य है – दोषमुक्ति का निर्णय अपास्त किया गया। (म.प्र. राज्य वि. लटोरी) **(DB)…*68**

***Penal Code (45 of 1860), Sections 147, 148, 149, 427, 336, 353, 153, 153-A, 440, 120-B, 188, 333 & 440 – See – Criminal Procedure Code, 1973, Section 438 & 439* [Jaheeruddin Vs. State of M.P.] …2056**

दण्ड संहिता (1860 का 45), धाराएँ 147, 148, 149, 427, 336, 353, 153, 153–ए, 440, 120–बी, 188, 333 व 440 – देखें – दण्ड प्रक्रिया संहिता, 1973, धारा 438 व 439 (जहीरूद्दीन वि. म.प्र. राज्य) **…2056**

***Penal Code (45 of 1860), Section 148 & 302/149 – Delay in Hearing of Appeals – Speedy Justice – Remedies* – Conviction – Life Sentence – Appeal – Prayer for bail rejected by High Court – Appellant in custody for more than 10 years – Apex Court while declining grant of bail, held, for access to speedy justice, concerned authorities may examine whether there is a need of any changes in the judicial structure – There is need to fill vacancies in Courts other than Constitutional Courts and also to consider as to how to supplement inadequacies in present system of appointment of Judges – There is need for consideration whether there should be a body of full time experts without affecting independence of judiciary, to assist in identifying, scrutinizing and evaluating candidates at pre-appointment stage and to evaluate performance post appointment – Uncalled strikes by the Bar**

चिकित्सीय साक्ष्य द्वारा सम्यक् रूप से समर्थित है – कुछ गौण/महत्वहीन लोप, विरोधाभास एवं अलंकरण है जो अनदेखा करने योग्य है – रामसिया की दोषसिद्धि की पुष्टि की गई। (रामसिया वि. म.प्र. राज्य) **(DB)…1976**

***Penal Code (45 of 1860), Section 302/34 – Murder – Conviction – Eye Witness – Ocular and Medical Evidence – Conflict* – Three eye witnesses in instant case, deposed that appellant No. 1 & 2 assaulted deceased by Ballam and Farsa respectively as a result of which he died on spot – Ballam seized from appellant No. 1 and Farsa seized from appellant No. 2 – Held – As per evidence of doctor, there was no penetrating wound on person of deceased – Prosecution has not produced the seized Ballam before doctor neither any question was asked to doctor as to whether such injuries could be caused by Ballam – Apex Court held that when medical evidence completely rules out all possibility of ocular evidence being true, the same may be disbelieved – No sufficient evidence to convict appellant No. 1 – Appellant No. 1 acquitted of the charge – Allegation against appellant No. 2 is proved by ocular and medical evidence, hence conviction upheld – Appeal partly allowed. [Brijendra Singh Vs. State of M.P.] (DB)…1772**

दण्ड संहिता (1860 का 45), धारा 302/34 – हत्या – दोषसिद्धि – चक्षुदर्शी साक्ष्य – चाक्षुष एवं चिकित्सीय साक्ष्य – विरोध – वर्तमान प्रकरण में, तीन चक्षुदर्शी साक्षीगण ने, यह कथन किया है कि अपीलार्थी क्र. 1 एवं 2 ने क्रमशः बल्लम तथा फरसा द्वारा मृतक पर हमला किया जिसके परिणामस्वरूप घटनास्थल पर ही उसकी मृत्यु हो गई – अपीलार्थी क्र. 1 से बल्लम जब्त किया गया तथा अपीलार्थी क्र. 2 से फरसा जब्त किया गया – अभिनिर्धारित – चिकित्सक के साक्ष्य के अनुसार, मृतक के शरीर पर कोई भेदनेवाला घाव नहीं था – अभियोजन ने चिकित्सक के समक्ष जब्तशुदा बल्लम प्रस्तुत नहीं किया, न ही चिकित्सक से कोई प्रश्न पूछा गया था कि क्या ऐसी क्षतियां बल्लम द्वारा कारित हो सकती है – सर्वोच्च न्यायालय ने अभिनिर्धारित किया कि, जब चिकित्सीय साक्ष्य, चाक्षुष साक्ष्य के सत्य होने की संभावना को पूरी तरह नकार देता है, उक्त पर अविश्वास किया जा सकता है – अपीलार्थी क्र. 1 को दोषसिद्ध करने हेतु कोई पर्याप्त साक्ष्य नहीं – अपीलार्थी क्र. 1 को आरोप से दोषमुक्त किया गया – अपीलार्थी क्र. 2 के विरूद्ध अभिकथन चाक्षुष तथा चिकित्सीय साक्ष्य द्वारा साबित किया गया, इसलिए दोषसिद्धि कायम रखी गई – अपील अंशतः मंजूर। (ब्रजेन्द्र सिंह वि. म.प्र. राज्य) **(DB)…1772**

***Penal Code (45 of 1860), Section 302/34 – Murder – Conviction – Eye Witness – Ocular and Medical Evidence* – Conviction based on testimony of three eye witnesses which are supported by medical evidences – In case of conflict between ocular and medical evidence, ocular evidence has to be preferred unless medical evidence is of such a nature as makes the ocular evidence highly improbable – Doctor found 13 fractures and stated that injuries were sufficient in ordinary course of nature to cause death – Appellants brutally beaten the deceased with stick and stones with intention of causing death, case would fall under purview of 'thirdly' of Section 300**

Penal Code (45 of 1860), Section 302/34 & 457 – Murder – Conviction – Eye Witness – Appreciation of Evidence **– Held – All accused persons gone to hospital where deceased was admitted and all of them exhorted each other to kill him and in pursuance of such exhortation, fatal axe blow was given by co-accused and all of them fled together pushing the complainant – Injured eye-witness supported the prosecution version and categorically narrated role of appellants in commission of crime – It is established from evidence that appellants gathered at spot with premeditation and acted in unison and concert with common intention of killing the deceased – No illegality committed by trial Court in convicting appellants – Appeals dismissed. [Mukesh Sharma Vs. State of M.P.] (DB)…2230**

दण्ड संहिता (1860 का 45), धारा 302/34 व 457 – हत्या – दोषसिद्धि – चक्षुदर्शी साक्षी – साक्ष्य का मूल्यांकन – अभिनिर्धारित – सभी अभियुक्तगण चिकित्सालय गये जहां मृतक भर्ती था तथा उनमें से सभी ने उसकी हत्या करने हेतु एक दूसरे को उकसाया एवं उस उकसाहट के अनुसरण में, सह–अभियुक्त द्वारा कुल्हाड़ी से घातक वार किया गया एवं वे सभी परिवादी को धक्का देकर एकसाथ भाग गये – आहत चक्षुदर्शी साक्षी ने अभियोजन कहानी का समर्थन किया तथा अपराध कारित करने में अपीलार्थीगण की भूमिका स्पष्ट रूप से वर्णित की – साक्ष्य से यह स्थापित होता है कि अपीलार्थीगण पूर्वचिन्तन के साथ घटनास्थल पर एकत्रित हुए तथा मृतक की हत्या करने के सामान्य आशय के साथ सामंजस्य से एवं मिलकर कृत्य किया – विचारण न्यायालय द्वारा अपीलार्थीगण को दोषसिद्ध करने में कोई अवैधता कारित नहीं की गई – अपीलें खारिज। (मुकेश शर्मा वि. म.प्र. राज्य) **(DB)…2230**

Penal Code (45 of 1860), Sections 302 r/w 149 & 148 – Conviction – Life Imprisonment – Appreciation of Evidence – Eye Witnesses – Forensic Examination and Medical Report **– Held – Both eye witnesses contradict each other about use and mode of using weapon by appellants – Eye witnesses specifically mentions fact of use of axe and farsa by accused persons but no injuries of incised wound were found in medical report – Blood group of blood stains found over stick (lathi) was not referred for chemical/forensic examination nor the same was matched with blood group of deceased or accused persons and in this respect no explanation has been offered by prosecution – Blood stained clothes of deceased were also not seized and sent for chemical examination – No conclusive inference can be drawn to prove the guilt of appellants u/S 302 IPC. [Raghuveer Singh Vs. State of M.P.] (DB)…2219**

दण्ड संहिता (1860 का 45), धाराएँ 302 सहपठित धारा 149 व 148 – दोषसिद्धि – आजीवन कारावास – साक्ष्य का मूल्यांकन – चक्षुदर्शी साक्षीगण – न्यायालयिक विज्ञान परीक्षण एवं चिकित्सीय प्रतिवेदन – अभिनिर्धारित – दोनों चक्षुदर्शी साक्षीगण ने अपीलार्थीगण द्वारा आयुध का उपयोग तथा उपयोग करने के ढंग के बारे में एक दूसरे का खंडन किया – चक्षुदर्शी साक्षीगण ने विनिर्दिष्ट रूप से अभियुक्तगण द्वारा

कुल्हाड़ी और फरसे के उपयोग के तथ्य का उल्लेख किया है, परंतु चिकित्सीय प्रतिवेदन में छिन्न घाव की कोई चोट नहीं पायी गई – लाठी पर पाये गये खून के धब्बों के रक्त समूह को रासायनिक/न्यायालयिक विज्ञान परीक्षण के लिए निर्दिष्ट नहीं किया गया था और न ही उक्त का मिलान मृतक या अभियुक्तगण के रक्त समूह के साथ किया गया था तथा इस संबंध में अभियोजन द्वारा कोई स्पष्टीकरण प्रस्तुत नहीं किया गया – मृतक के रक्त रंजित कपड़े भी जब्त नहीं किये गये एवं रासायनिक परीक्षण के लिए नहीं भेजे गये – भारतीय दण्ड संहिता की धारा 302 के अंतर्गत अपीलार्थीगण की दोषिता को साबित करने हेतु कोई निश्चायक निष्कर्ष नहीं निकाला जा सकता। (रघुवीर सिंह वि. म.प्र. राज्य) **(DB)…2219**

***Penal Code (45 of 1860), Sections 302/149, 324/149 & 325/149 – Murder – Conviction – Appreciation of Evidence – Injured/Interested Witnesses – Injuries & Medical Evidence* – Held – Three simple injuries and one internal injury in abdomen – Evidence of injured prosecution witnesses duly corroborated by medical evidence – Victim/deceased was operated for abdominal injury whereby he died after 20 days of incident – As per medical evidence, cause of death in postmortem report was failure in surgical operation – Homicidal death not proved – Conviction of each accused u/S 302/149 is erroneous and defective and is hereby set aside – Accused persons deserves to be and are convicted u/S 325/149 IPC and looking to their period of detention, are sentenced to period already undergone – Appeal partly allowed. [Patru Vs. State of M.P.] (DB)…2239**

दण्ड संहिता (1860 का 45), धाराएँ 302/149, 324/149 व 325/149 – हत्या – दोषसिद्धि – साक्ष्य का मूल्यांकन – आहत/हितबद्ध साक्षीगण – चोटें व चिकित्सीय साक्ष्य – अभिनिर्धारित – पेट में तीन साधारण चोटें एवं एक आंतरिक चोट – आहत अभियोजन साक्षीगण का साक्ष्य चिकित्सीय साक्ष्य द्वारा सम्यक् रूप से संपुष्ट है – पीड़ित/मृतक की पेट में चोट की शल्यक्रिया की गई थी, जिससे घटना के 20 दिन के पश्चात् उसकी मृत्यु हो गई थी – चिकित्सीय साक्ष्य के अनुसार, शव परीक्षण प्रतिवेदन में मृत्यु का कारण शल्यक्रिया में विफलता थी – मानव वध स्वरूप की मृत्यु साबित नहीं – प्रत्येक अभियुक्त की धारा 302/149 के अंतर्गत दोषसिद्धि त्रुटिपूर्ण एवं दोषयुक्त है एवं एतद्द्वारा अपास्त – अभियुक्तगण, भारतीय दंड संहिता की धारा 325/149 के अंतर्गत दोषसिद्ध किये जाने योग्य हैं एवं दोषसिद्ध किये गये तथा उनकी निरोध अवधि को देखते हुए, पूर्व में भुगताई जा चुकी अवधि से दण्डादिष्ट किये गये – अपील अंशतः मंजूर। (पतरू वि. म.प्र. राज्य) **(DB)…2239**

***Penal Code (45 of 1860), Section 302 & 304 Part I – Murder – Conviction – Life Imprisonment – Intention* – Appellant inflicted single blow of axe to deceased – Held – Intention has to be gathered from circumstances and the force that has been used by accused to inflict injury – Deceased was a boy of tender age who had come to his friend's house to take books, there was no quarrel, no altercation for anything – Appellant inflicted severe axe blow using sharp side of axe on temporal region of deceased whereby his jaw was cut and he died on spot – Appellant rightly convicted u/S 302 IPC – Appeal dismissed. [Ram Karan Yadev Vs. State of M.P.] (DB)…1779**

दण्ड संहिता (1860 का 45), धारा 302 व 304 भाग I– हत्या – दोषसिद्धि – आजीवन कारावास – आशय – अपीलार्थी ने मृतक पर कुल्हाड़ी से एकल वार किया – अभिनिर्धारित – आशय, परिस्थितियों तथा बल जिसका अभियुक्त द्वारा चोट पहुंचाने में उपयोग किया गया है, से एकत्रित किया जाना है – मृतक एक कोमल आयु का बालक था जो कि अपने मित्र के घर किताबें लेने आया था, किसी बात पर कोई लड़ाई, कोई कहासुनी नहीं थी – अपीलार्थी ने कुल्हाड़ी के धारदार भाग का उपयोग करते हुए मृतक की कनपटी पर कुल्हाड़ी से तीव्र वार किया जिससे उसका जबड़ा कट गया था तथा घटनास्थल पर ही उसकी मृत्यु हो गई थी – अपीलार्थी को भारतीय दण्ड संहिता की धारा 302 के अंतर्गत उचित रूप से दोषसिद्ध किया गया – अपील खारिज। (राम करण यादेव वि. म.प्र. राज्य)
(DB)…1779

Penal Code (45 of 1860), Section 302 & 304 Part I – Sudden Provocation – Single Blow **– Held – Complainant and accused party ploughing their respective field, indulged into verbal altercation and sudden fight broke over the issue of common passage (Medh) – No pre-meditated assault – No repeated blows by accused – Case falls under Section 304 Part I and appellants are accordingly convicted – Further held – Since accused undergone more than 10 yrs. imprisonment, deserves to sentence for period already undergone – Appeal allowed. [Raghuveer Singh Vs. State of M.P.]**
(DB)…2219

दण्ड संहिता (1860 का 45), धारा 302 व 304 भाग I – अचानक प्रकोपन – एकल वार – अभिनिर्धारित – अपने–अपने खेत में जुताई कर रहे परिवादी एवं अभियुक्त पक्ष में आम रास्ता (मेढ़) की बात पर मौखिक कहा–सुनी हुई और अचानक झगड़ा हो गया – किसी पूर्व चिंतन से हमला नहीं – अभियुक्त द्वारा बारंबार वार नहीं किये गये – प्रकरण धारा 304 भाग *I* के अंतर्गत आता है एवं अपीलार्थीगण तद्नुसार दोषसिद्ध किये गये – आगे अभिनिर्धारित – चूंकि अभियुक्त 10 वर्षों से अधिक का कारावास भुगत चुका है, भुगताई जा चुकी अवधि के दण्डादेश हेतु हकदार है – अपील मंजूर। (रघुवीर सिंह वि. म. प्र. राज्य)
(DB)…2219

Penal Code (45 of 1860), Section 302/304 (Part-II) – Murder **– Deceased, 70 years old, quite weak and frail lady was assaulted by appellant with help of honey flower stick on her back due to suspicion of witchcraft – Death – Doctor evidence – Death due to haemorrhage from lungs and liver – Held – As the assault was not pre-meditated and initially there was no intention to kill and even honey flower stick was not a deadly weapon and the region of the body assaulted was back and lumber region, so the intention of appellant was to punish the deceased and not to kill her – Act of the appellant would fall u/S 304(Part-II) and not u/S 302 of IPC – Conviction u/S 302 converted into Section 304(Part-II) of IPC – Sentence of life imprisonment converted into sentence of 8 years – Appeal partially allowed. [Shivprasad Panika @ Lallu Vs. State of M.P.]**
(DB)…1732

INDEX

पश्चात् जब उनका प्रतिपरीक्षण किया गया, उन्हें अपीलार्थी की पहचान के मुद्दे पर पक्ष विरोधी घोषित किया गया – वर्तमान प्रकरण में, अभिलेख पर उपलब्ध अन्य सामग्री एवं परिस्थितियां, साक्षीगण के पूर्ववर्ती कथन की संपुष्टि करते है जो कि प्रथम सूचना प्रतिवेदन, चिकित्सीय साक्ष्य एवं न्यायालयिक विज्ञान प्रयोगशाला प्रतिवेदन द्वारा समर्थित है – उक्त कथन पर विश्वास किया जा सकता है – अपीलार्थी को उचित रूप से दोषसिद्ध किया गया – अपील खारिज। (रफीक खान वि. म.प्र. राज्य) **...1996**

***Penal Code (45 of 1860), Section 376(2) & 506, Protection of Children from Sexual Offences Act, (32 of 2012), Sections 3, 4 & 6 and Criminal Procedure Code, 1973 (2 of 1974), Section 482 – Quashment of FIR – Compromise – Effect* – Held – Even if the prosecutrix/victim compromised with accused, the offence being a heinous and serious one, cannot be quashed u/S 482 Cr.P.C. – It is a crime against society and it becomes responsibility of State to punish the offender – Compromise regarding offences under the special statute like POCSO Act, 2012 would not provide quashment of criminal proceedings – Even if there is a settlement between offender and victim, their will would not prevail as in such case, matter is in public domain – Application dismissed. [Sanjay Vs. State of M.P.] ...1828**

दण्ड संहिता (1860 का 45), धारा 376(2) व 506, लैंगिक अपराधों से बालकों का संरक्षण अधिनियम, (2012 का 32), धाराएँ 3, 4 व 6 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – प्रथम सूचना प्रतिवेदन को अभिखंडित किया जाना – समझौता – प्रभाव – अभिनिर्धारित – यदि अभियोक्त्री/पीड़िता ने अभियुक्त के साथ समझौता कर लिया है तब भी, अपराध एक जघन्य एवं गंभीर अपराध होने के कारण, दं.प्र.सं. की धारा 482 के अंतर्गत अभिखंडित नहीं किया जा सकता – यह समाज के विरूद्ध अपराध है और अपराधी को दण्डित करना राज्य का उत्तरदायित्व बनता है – विशेष कानून जैसे POCSO अधिनियम 2012 के अंतर्गत अपराधों के संबंध में समझौता, दाण्डिक कार्यवाहियों को अभिखंडित किया जाना उपबंधित नहीं करेगा – यदि अपराधी एवं पीड़ित के मध्य समझौता हुआ है, तब भी उनकी इच्छा अभिभावी नहीं होगी क्योंकि ऐसे प्रकरण में मामला लोक अधिकार क्षेत्र में है – आवेदन खारिज। (संजय वि. म.प्र. राज्य) **...1828**

***Penal Code (45 of 1860), Section 376(2)(g) – Gang Rape – Minor Girl – Testimony of Prosecutrix – Medical Evidence – Female Accused* – Relying the statement of prosecutrix when it is not corroborated by medical evidence – Held – In the present case, prosecutrix deposed that she was threatened by appellants that if she resist, she will be thrown into well – Statement of prosecutrix and reason for not putting resistance is trustworthy – Statement of rape victim must be treated on a higher pedestal – Further held – Appellant No. 2 being a woman cannot be charged for offence u/S 376 IPC even if she facilitates the act of rape – Appellant no. 1 alone cannot be convicted for gang rape but certainly guilty u/S 376 IPC for committing rape on minor girl – Trial Court rightly convicted appellant No.1 – Conviction of appellant No. 2 set aside. [Chhotelal Vs. State of M.P.] ...1698**

INDEX

provision in Cr.P.C. for granting permission to intervenor but u/S 482 Cr.P.C. the same can be granted for better adjudication of the matter – In instant case, proposed intervenor is the affected party, thus should be allowed to participate in the proceedings – Application allowed. [Uma Uikey Vs. State of M.P.] …*69

दण्ड संहिता (1860 का 45), धाराएँ 376(2)(i), 376(2)(d), 363, 343 व 506, लैंगिक अपराधों से बालकों का संरक्षण अधिनियम, (2012 का 32), धारा 4 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 301 व 302 – मध्यक्षेप हेतु उपबंध – सुने जाने का अधिकार – अभियोक्त्री की माता द्वारा आवेदन जहां अभियुक्त ने मध्यक्षेप हेतु एक आवेदन प्रस्तुत किया – अभिनिर्धारित – यद्यपि मध्यक्षेपकर्ता को अनुमति प्रदान करने हेतु दं.प्र.सं. में कोई उपबंध नहीं है परंतु मामले के बेहतर न्यायनिर्णयन हेतु उक्त को धारा 482 दं.प्रं.सं. के अंतर्गत प्रदान किया जा सकता है – वर्तमान प्रकरण में, प्रस्तावित मध्यक्षेपकर्ता प्रभावित पक्षकार है, अतः कार्यवाहियों में भाग लेने के लिए अनुमति दी जानी चाहिए – आवेदन मंजूर। (उमा उईके वि. म.प्र. राज्य) **…*69**

***Penal Code (45 of 1860), Sections 376(2)(N), 342, 506 & 190, Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), Section 3(1)(W)(ii) & 3(2)(V) and Criminal Procedure Code, 1973 (2 of 1974), Section 438 – Anticipatory Bail – Ground* – Allegation that appellant committed sexual intercourse in pretext of service and marriage and because of which she delivered a girl child – Held – As per the available records, prosecutrix is not a fair lady, she delivered a child in the year, when she was in relation with other persons other than appellant – In another case, she admitted that the said girl child is from another person – Further held – Any act related to caste is not alleged in entire evidence – Prosecutrix lodged FIR against other persons also, in which they were acquitted by the Court – Anticipatory bail granted – Appeal allowed. [Ramkumar Vs. State of M.P.] …2254**

दण्ड संहिता (1860 का 45), धाराएँ 376(2)(एन), 342, 506 व 190, अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 3(1)(डब्ल्यू)(ii) व 3(2)(V) एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 438 – अग्रिम जमानत – आधार – अभिकथन है कि अपीलार्थी ने नौकरी और विवाह के बहाने लैंगिक संभोग कारित किया एवं जिसकी वजह से उसने एक बच्ची को जन्म दिया – अभिनिर्धारित – उपलब्ध दस्तावेजों के अनुसार, अभियोक्त्री एक अच्छी महिला नहीं है, उसने एक बच्ची को उस वर्ष जन्म दिया, जब वह अपीलार्थी के अलावा अन्य व्यक्तियों के साथ संबंध में थी – अन्य प्रकरण में, उसने स्वीकार किया है कि कथित बच्ची दूसरे व्यक्ति की है – आगे अभिनिर्धारित – संपूर्ण साक्ष्य में जाति के संबंध में कोई कृत्य अभिकथित नहीं है – अभियोक्त्री ने अन्य व्यक्तियों के विरूद्ध भी प्रथम सूचना प्रतिवेदन दर्ज कराया, जिसमें वे न्यायालय द्वारा दोषमुक्त किये गये थे – अग्रिम जमानत प्रदान की गई – अपील मंजूर। (रामकुमार वि. म.प्र. राज्य) **…2254**

Challenge to – Held – Witness has not stated that after hearing the alleged words uttered by applicant, reputation of respondent No.1 was harmed in his estimation – Prima facie does not fulfill the requirement of Section 499, Explanation 4 I.P.C. – Further held – Brother of respondent No. 1 facing criminal prosecution for theft of electricity – Complaint filed maliciously with ulterior motive of wreaking vengeance on applicant and to deter him from discharging his official duties – Forcing officials to face criminal prosecution for performing their duties would demoralize them – It would be against the society at large and would not be in the interest of justice – Impugned order set aside – Complaint filed against applicant is dismissed – Application allowed. [A.K. Hade Vs. Shailendra Singh Yadav] …1807

दण्ड संहिता (1860 का 45), धारा 499 स्पष्टीकरण 4 व 500 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – मानहानि – आरोप का अभिखंडन – प्रत्यर्थी क्र. 1, जो कि पेशे से एक वकील है, ने आवेदक जो कि विद्युत विभाग में एक कार्यपालिक अभियंता है, के विरूद्ध आपराधिक परिवाद प्रस्तुत किया – आवेदक के विरूद्ध भारतीय दण्ड संहिता की धारा 500 के अंतर्गत आरोप विरचित किया गया था – को चुनौती – अभिनिर्धारित – साक्षी ने यह कथन नहीं किया है कि आवेदक द्वारा अभिकथित शब्दों को सुनने के पश्चात्, उसके अनुमान में प्रत्यर्थी क्र. 1 की प्रतिष्ठा को अपहानि पहुंचाई गई थी – प्रथम दृष्ट्या, भारतीय दण्ड संहिता की धारा 499 के स्पष्टीकरण 4 की अपेक्षा को पूर्ण नहीं करता – आगे अभिनिर्धारित – प्रत्यर्थी क्र. 1 का भाई विद्युत की चोरी हेतु आपराधिक अभियोजन का सामना कर रहा है – परिवाद, आवेदक से बदला लेने के अंतरस्थ हेतु के साथ तथा उसे उसके पदीय कर्तव्यों के निर्वहन से भयोपरत करने हेतु द्वेषपूर्ण रूप से प्रस्तुत किया गया – पदधारियों/अधिकारियों को अपने कर्तव्यों का निर्वहन करने के लिए दाण्डिक/आपराधिक अभियोजन का सामना करने के लिए मजबूर करना, उन्हें निरूत्साहित करेगा – यह बड़े पैमाने पर समाज के विरूद्ध होगा तथा न्यायहित में नहीं होगा – आक्षेपित आदेश अपास्त – आवेदक के विरूद्ध प्रस्तुत परिवाद खारिज – आवेदन मंजूर। (ए.के. हाडे वि. शैलेन्द्र सिंह यादव) **…1807**

Penal Code (45 of 1860), Section 499 & 500 and Criminal Procedure Code, 1973 (2 of 1974), Section 199(2) & 199(4) – Defamation – Sanction/Permission for prosecution – Nexus of Allegation **– Defamatory statements against Chief Minister in press conference by appellant – Held – Statements such as "appointment of persons from area/place to which the wife of Chief Minister belongs" and "making of phone calls by relatives of Chief Minister" have no reasonable nexus with discharge of public duties by or the office of Chief Minister – Statements may be defamatory but in absence of nexus between the same and discharge of public duties of office, remedy u/S 199(2) and 199(4) Cr.P.C. is not be available – Complaint proceedings untenable in law and is quashed – Appeal allowed. [K.K. Mishra Vs. State of M.P.] (SC)…2083**

समय में अस्तित्व में होना चाहिए जब राय बनायी जा रही हो या इतना आसन्न और स्पष्ट होना चाहिए कि यदि निवारक/उपचारात्मक कार्रवाई नहीं की जाती है, तो आसन्न खतरा वास्तविकता में बदल जाएगा – मात्र यह कारण कि किसी व्यक्ति का आपराधिक अतीत है, स्वतः इस निष्कर्ष की ओर नहीं ले जा सकता कि उक्त व्यक्ति को आने–जाने की स्वतंत्रता का उपभोग करने की अनुमति दी जाना, वर्तमान में लोक व्यवस्था के लिए खतरे की कीमत पर होगा – वर्तमान प्रकरण में, याची के विरूद्ध पंजीबद्ध हत्या का जघन्य अपराध 2010 का है, जिसका विचारण लंबित है, शेष अपराध जमानतीय एवं तुच्छ प्रकृति के हैं – किसी भी स्वतंत्र व्यक्ति का कोई कथन अभिलिखित नहीं किया गया है – वर्तमान में लोक व्यवस्था के लिए जीवंत खतरे की आशंका को सिद्ध करने हेतु कोई सामग्री नहीं – निर्वासन आदेश कायम रखने योग्य नहीं एवं अभिखंडित किया गया – याचिका मंजूर। (शोभाराम यादव वि. म.प्र. राज्य) **...*78**

Recovery of Debts Due to Banks and Financial Institutions Act (51 of 1993), Sections 19(4), (5), (24) & (25) – Written Statement – Limitation **– Held – As per the provisions of the Act of 1993, it is mandatory to file written statement within 30 days from service of summons, which could in exceptional cases or in special circumstances be extended by Tribunal by another 15 days – Petitioners being failed to file written statement within time frame prescribed, have lost their right to file written statement – Further held – Intention for expeditious disposal is implicit when Section 19(24) mandates the Tribunal to conclude proceedings within two hearings – Aims and objects of the Act of 1993 discussed – Petition dismissed. [Crest Steel & Power Pvt. Ltd. (M/s.) Vs. Punjab National Bank] (DB)...*72**

बैंकों और वित्तीय संस्थाओं को शोध्य ऋण वसूली अधिनियम (1993 का 51), धाराएँ 19(4), (5), (24) व (25) – लिखित कथन – परिसीमा – अभिनिर्धारित – 1993 के अधिनियम के उपबंधों के अनुसार, समन की तामील से 30 दिनों के भीतर लिखित कथन प्रस्तुत करना आज्ञापक है, जिसे आपवादिक प्रकरणों में या विशेष परिस्थितियों में अधिकरण द्वारा अन्य 15 दिनों तक बढ़ाया जा सकता है – याचीगण विहित समय सीमा के भीतर लिखित कथन प्रस्तुत करने में विफल रहने के कारण, लिखित कथन प्रस्तुत करने का अपना अधिकार गवां चुके हैं – आगे अभिनिर्धारित – शीघ्र निपटारे का आशय अंतर्निहित है जब धारा 19(24) अधिकरण के लिए दो सुनवाई के भीतर कार्यवाहियों को समाप्त करना आज्ञापक बनाती है – 1993 के अधिनियम के लक्ष्य एवं उद्देश्य विवेचित – याचिका खारिज। (क्रेस्ट स्टील एण्ड पॉवर प्रा. लि. (मे.) वि. पंजाब नेशनल बैंक) **(DB)...*72**

Regularization of Adhoc Appointment Rules, M.P., 1986, Rule 5 – See – Service Law **[Saiyad Ghazanafar Ishtiaque (Dr.) Vs. State of M.P.] ...2142**

तदर्थ नियुक्ति का नियमितीकरण नियम, म.प्र., 1986, नियम 5 – देखें – सेवा विधि (सैय्यद गजनाफर इश्तियाक (डॉ.) वि. म.प्र. राज्य) **...2142**

Representation of the People Act (43 of 1951), Section 123(2)(a)(i) & 7(d) – Corrupt Practice **– Allegations against respondent, a returned**

challenged candidates is contrary to Section 34 of the Act – Reservation can only be denied if any Government establishment is exempted from provisions of the Act by the Chief Commissioner or the State Commissioner – In absence of such exemption, High Court was bound to reserve post for such candidates – Further held – Vide Notification of Government of India, the post of Judicial Magistrate has been identified as one which can be filled by such candidates – Selection not yet finalized – Respondents directed to conduct special written examination for petitioner – Petition allowed. [Rashmi Thakur Vs. High Court of M.P.] (DB)…1616

दिव्यांगजन अधिकार अधिनियम (2016 का 49), धारा 34 – परीक्षा – मंद दृष्टि अभ्यर्थी के लिए आरक्षण – व्यवहार न्यायाधीश वर्ग–II के पद के लिए परीक्षा – मंद दृष्टि के अभ्यर्थियों के लिए कोई आरक्षण उपबंधित नहीं किया गया – को चुनौती – अभिनिर्धारित – 2016 के अधिनियम की धारा 34, प्रत्येक समुचित सरकार के लिए यह आज्ञापक बनाती है कि वह प्रत्येक सरकारी स्थापना में कुल रिक्तियों का कम से कम 4% दिव्यांगजनों की भर्ती हेतु नियत करे, जिसमें 1% अंध और निम्न दृष्टि श्रेणी के लिए अर्थान्वित है – मंद दृष्टि अभ्यर्थियों के लिए बिना आरक्षण उपबंधित किये विज्ञापन, अधिनियम की धारा 34 के प्रतिकूल है – आरक्षण से केवल तब इंकार किया जा सकता है यदि किसी सरकारी स्थापना को मुख्य आयुक्त या राज्य आयुक्त द्वारा अधिनियम के उपबंधों से छूट दी जाती है – ऐसी छूट की अनुपस्थिति में, उच्च न्यायालय ऐसे अभ्यर्थियों के लिए पद आरक्षित करने हेतु बाध्य था – आगे अभिनिर्धारित – भारत सरकार की अधिसूचना के माध्यम से, न्यायिक मजिस्ट्रेट के पद को ऐसे रूप में पहचाना जाता है जिसे कि ऐसे अभ्यर्थियों द्वारा भरा जा सकता है – चयन अभी तक पूर्ण नहीं हुआ है – प्रत्यर्थीगण को याची के लिए विशेष लिखित परीक्षा संचालित करने हेतु निदेशित किया गया – याचिका मंजूर। (रश्मि ठाकुर वि. हाई कोर्ट ऑफ एम.पी.) **(DB)…1616**

***Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), Section 3(1)(W)(ii) & 3(2)(V) – See – Penal Code, 1860, Sections 376(2)(N), 342, 506 & 190* [Ramkumar Vs. State of M.P.] …2254**

अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 3(1)(डब्ल्यू)(ii) व 3(2)(V) – देखें – दण्ड संहिता, 1860, धाराएँ 376(2)(एन), 342, 506 व 190 (रामकुमार वि. म.प्र. राज्य) **…2254**

***Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), Section 18 and Criminal Procedure Code, 1973 (2 of 1974), Section 438 – Anticipatory Bail – Bar u/S 18 of Act of 1989* – Held – If offence is registered under the Act of 1989, anticipatory bail can be granted when Court prima facie find that offence is not made out – Court cannot reject the bail outrightly, simply writing that police have registered offence under the Act of 1989 and thus bar u/S 18 of the Act is applicable – While rejecting bail application, it is mandatory for the Judge to give a definitive finding on the basis of evidence available on record – In present case, looking to evidence on**

record, bar u/S 18 not applicable – Bail granted. [Ramkumar Vs. State of M.P.] …2254

अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 18 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 438 – अग्रिम जमानत – 1989 के अधिनियम की धारा 18 के अंतर्गत वर्जन – अभिनिर्धारित – यदि 1989 के अधिनियम के अंतर्गत अपराध पंजीबद्ध है, अग्रिम जमानत प्रदान की जा सकती है जब न्यायालय प्रथम दृष्ट्या यह पाता है कि कोई प्रकरण नहीं बनता – न्यायालय, साधारणतः यह लिखकर कि पुलिस ने 1989 के अधिनियम के अंतर्गत अपराध पंजीबद्ध किया है एवं इसलिए अधिनियम की धारा 18 के अंतर्गत वर्जन लागू होता है, जमानत को सिरे से अस्वीकार नहीं कर सकता – जमानत आवेदन अस्वीकार करते समय, न्यायाधीश के लिए अभिलेख पर उपलब्ध साक्ष्य के आधार पर एक निश्चायक निष्कर्ष देना, आज्ञापक है – वर्तमान प्रकरण में, अभिलेख पर मौजूद साक्ष्य को देखते हुए, धारा 18 के अंतर्गत वर्जन प्रयोज्य नहीं – जमानत प्रदान की गई। (रामकुमार वि. म.प्र. राज्य) **…2254**

***Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, (54 of 2002), Section 13(2) & 17 and Reserve Bank of India Act (2 of 1934), Section 45(L) – Applicability of Circular* – Petitioner obtained credit facility from Consortium of Banks for construction of composite logistic hub – Construction could not be completed as per plan which resulted in loss and backlog of interest amount – Joint Lenders Forum (JLF) decided restructure of petitioner's finances – Subsequently, vide circular of RBI it was contemplated that all accounts where scheme have been invoked but yet not implemented shall be governed by the revised framework and amount will be recovered u/S 13(2) of the Act of 2002 – Challenge to – Held – Decision of Banks was a commercial decision keeping in view of their financial risks and possibility of recovery of amount from petitioner, thus such decision do not warrant any interference/judicial review – In the present case, decision of JLF has not been implemented which can be said to be saved by the RBI Circular – RBI in exercise of statutory jurisdiction issued circular which has a statutory force and there cannot be any estoppel against a Statute – Remedy of petitioner lies before the DRT u/S 17 of the Act but after possession is taken – Petition dismissed. [Kesar Multimodal Logistics Ltd. (M/s.) Vs. Union of India] (DB)…1652**

वित्तीय आस्तियों का प्रतिभूतिकरण और पुनर्गठन तथा प्रतिभूति हित का प्रवर्तन (SARFAESI) अधिनियम, (2002 का 54), धारा 13(2) व 17 एवं भारतीय रिजर्व बैंक अधिनियम (1934 का 2), धारा 45(एल) – परिपत्र की प्रयोज्यता – याची ने सम्मिश्र व्यवस्था केन्द्र का निर्माण करने हेतु बैंकों के सहायता संघ से ऋण सुविधा प्राप्त की – योजना के अनुसार निर्माण पूर्ण नहीं हो सका जिससे हानि एवं ब्याज राशि का पिछला शेष परिणामित हुआ – ज्वाइंट लेंडर्स फोरम (जे.एल.एफ.) ने याची के वित्तियों की पुनर्रचना का विनिश्चय किया – तत्पश्चात आर.बी.आई. के परिपत्र द्वारा यह अनुध्यात किया गया कि सभी खाते जहाँ स्कीम का अवलंब लिया गया है परन्तु अभी तक कार्यान्वित नहीं हुआ है, पुनरीक्षित

संरचना द्वारा शासित होगा तथा 2002 के अधिनियम की धारा 13(2) के अंतर्गत राशि की वसूली की जाएगी – को चुनौती – अभिनिर्धारित – बैंको का विनिश्चय, उनके वित्तीय जोखिम एवं याची से राशि की वसूली की संभावना को दृष्टिगत रखते हुये एक वाणिज्यिक निर्णय था, अतः उक्त विनिश्चय में किसी हस्तक्षेप/न्यायिक पुनर्विलोकन की आवश्यकता नहीं – वर्तमान प्रकरण में जे.एल.एफ. का विनिश्चय कार्यान्वित नहीं किया गया है जिसे आर.बी.आई. परिपत्र द्वारा सुरक्षित होना कहा जा सकता है – आर.बी.आई. ने कानूनी अधिकारिता के प्रयोग में परिपत्र जारी किया जिसे कानूनी बल प्राप्त है एवं कानून के विरूद्ध कोई विबंध नहीं हो सकता – याची को अधिनियम की धारा 17 के अंतर्गत डी.आर. टी. के समक्ष जाने का उपचार उपलब्ध है परन्तु कब्जा प्राप्त कर लेने के पश्चात् – याचिका खारिज। (केसर मल्टीमॉडल लॉजिस्टिक्स लि. (मे.) वि. यूनियन ऑफ इंडिया)

(DB)…1652

Service Law – Civil Services (Pension) Rules, M.P. 1976, Rule 26 - Computation of Pension – Forfeiture of Service on Resignation – Inordinate Delay **– Petitioner filed the petition in 2011 challenging the order dated 06.11.1982 – Petitioner is highly educated and resourceful person and not uneducated, uninformed and under privileged person, so ought to have filed the petition within reasonable time – Delay of 29 years in filing petition is inordinate delay – Petition dismissed. [Rewa Prasad Dwivedi (Dr.) Vs. State of M.P.] …1648**

सेवा विधि – सिविल सेवा (पेंशन) नियम, म.प्र. 1976, नियम 26 – पेंशन की संगणना – त्यागपत्र पर सेवा का समपहरण – असाधारण विलंब – याची ने आदेश दिनांक 06.11.1982 को चुनौती देते हुए 2011 में याचिका प्रस्तुत की – याची अत्यधिक शिक्षित और साधन–संपन्न व्यक्ति है तथा न कि अशिक्षित, अनभिज्ञ एवं सुविधा से वंचित व्यक्ति, इसलिए युक्तियुक्त समय के भीतर याचिका प्रस्तुत की जानी चाहिए थी – याचिका प्रस्तुत करने में 29 वर्षों का विलंब, असाधारण विलंब है – याचिका खारिज। (रेवा प्रसाद द्विवेदी (डॉ.) वि. म.प्र. राज्य) **…1648**

Service Law – Civil Services (Pension) Rules, M.P. 1976, Rule 26 - Computation of Pension – Forfeiture of Service on Resignation **– Petitioner worked from 1959 to 1970 in the State of M.P. and then shifted to Banaras Hindu University – As per Rule 26, it is incumbent upon petitioner to opt for any other service under the State Government only – He cannot claim for entitlement of his previous service in the State Government after obtaining the service under any other States other than State of M.P. – Petitioner not entitled for any benefit of his past services rendered in State of M.P. when his subsequent appointment is in the State of U.P. – Petition dismissed on merits also. [Rewa Prasad Dwivedi (Dr.) Vs. State of M.P.] …1648**

सेवा विधि – सिविल सेवा (पेंशन) नियम, म.प्र. 1976, नियम 26 – पेंशन की संगणना – त्यागपत्र पर सेवा का समपहरण – याची ने 1959 से 1970 तक म.प्र. राज्य में कार्य किया तथा फिर बनारस हिन्दू विश्वविद्यालय स्थानांतरित हो गया – नियम 26 के

अनुसार, याची पर केवल राज्य शासन के अंतर्गत किसी अन्य सेवा को चुनना अनिवार्य है – म.प्र. राज्य के सिवाय किन्हीं अन्य राज्यों के अंतर्गत सेवा प्राप्त करने के पश्चात् वह राज्य शासन में अपनी पूर्व सेवा की हकदारी के लिए दावा नहीं कर सकता – याची, म.प्र. राज्य में प्रदान की गई अपनी पूर्व सेवाओं के किसी भी लाभ के लिए हकदार नहीं जब कि उसकी पश्चात्वर्ती नियुक्ति उ.प्र. राज्य में है – याचिका गुणदोषों पर भी खारिज। (रेवा प्रसाद द्विवेदी (डॉ.) वि. म.प्र. राज्य) **...1648**

***Service Law – Education Service (Collegiate Branch) Recruitment Rules, M.P., 1990, Article 15, 16(1) & (2) – Examination – Age Criteria* – Post of Assistant Professor – Minimum/Maximum age criteria for candidates was 21/28 whereas for candidates who are domicile of M.P, was 21/40 – Challenge to – Held – All citizens of the Country have to be treated equally – Mandate of Constitution is violated when place of birth or residence has been made basis for discrimination for candidates belonging to outside the State of MP – Such discriminatory treatment is not tenable in law – Condition in advertisement for relaxation of age upto 40 years for the candidates who are domicile of MP is unconstitutional in view of Article 15 and 16 of the Constitution and hence is set aside – Petition allowed. [Mukesh Kumar Umar Vs. State of M.P.] (DB)...1601**

सेवा विधि – शिक्षा सेवा (महाविद्यालयीन शाखा) भर्ती नियम, म.प्र., 1990, अनुच्छेद 15, 16(1) व (2) – परीक्षा – आयु मापदंड – सहायक प्राध्यापक का पद – अभ्यर्थीगण के लिए न्यूनतम/अधिकतम आयु मापदंड 21/28 था जबकि म.प्र. के मूल निवासी अभ्यर्थीगण के लिए 21/40 थी – को चुनौती – अभिनिर्धारित – देश के सभी नागरिकों के साथ समान रूप से व्यवहार किया जाना चाहिए – संविधान के आदेश का उल्लंघन होता है, जब म.प्र. राज्य के बाहर के अभ्यर्थीगण के लिए जन्म या निवास स्थान को विभेद का आधार बनाया गया है – ऐसा विभेदकारी बर्ताव विधि में मान्य नहीं है – विज्ञापन में म.प्र. के मूलनिवासी अभ्यर्थीगण के लिए 40 वर्ष तक की आयु की छूट की शर्त, संविधान के अनुच्छेद 15 एवं 16 की दृष्टि से असंवैधानिक है, तथा इसलिए अपास्त की गई – याचिका मंजूर। (मुकेश कुमार उमर वि. म.प्र. राज्य) **(DB)...1601**

***Service Law – Gram Rojgar Sahayak – Madhya Pradesh Rajya Rojgar Guarantee Council (Madhya Pradesh State Employment Guarantee Council)* – Scheme framed by council for Appointment of Gram Rojgar Sahayak's (Petitioner) wherein desirable condition or qualification was computer efficiency test – Gram Panchayat – Amendment in advertisement – Amending – Desirable qualification of computer efficiency test to essential qualification – Challenge to – Held – There is no condition in the scheme that gram panchayat can add modify or delete any of the conditions of the scheme framed by the council, therefore the desirable qualification of computer efficiency test converted by the Gram Panchayat to essential qualification is not legally sustainable – Appointment had to be made strictly in terms of the**

termination – Petitioner was terminated and was subsequently reinstated vide Court orders – For the purpose of regularization, respondents have not counted the services of petitioner after reinstatement and there was no justification or reason assigned in impugned order for not counting the services from date of termination till reinstatement and upto 10.04.2006 (date mentioned in circular) – Further held – A finally determined issue cannot be subsequently negated relying upon interpretation of law given in subsequent judgment in some other case – Benefit of reinstatement cannot be denied to petitioner – Impugned order set aside – Petitioner shall be treated as eligible regarding consideration for regularization – Petition allowed. [Arvind Kumar Mehra Vs. State of M.P.] …1663

सेवा विधि – सेवा समाप्ति – बहाली – बहाली का अर्थ है कर्मचारी की उस स्थिति को पुनः स्थापित करना जिसका वह सेवा समाप्ति के समय उपभोग कर रहा था – याची की सेवा समाप्त की गई और बाद में न्यायालय के आदेशों के द्वारा बहाल किया गया – नियमितीकरण के प्रयोजन हेतु, प्रत्यर्थीगण ने याची की बहाली के पश्चात् की सेवा की गणना नहीं की और आक्षेपित आदेश में, सेवा समाप्ति से बहाली की तिथि तक एवं 10.04.2006 तक (परिपत्र में उल्लिखित तिथि) सेवा की गणना नहीं किये जाने का कोई न्यायोचित्य या कारण नहीं दिया गया था – आगे अभिनिर्धारित – किसी अन्य प्रकरण में, पश्चात्वर्ती निर्णय में दिये गये विधि के निर्वचन पर विश्वास करते हुए, एक अंतिम रूप से अवधारित विवाद्यक को पश्चात्वर्ती रूप से अस्वीकार नहीं किया जा सकता – याची को बहाली के लाभ से इंकार नहीं किया जा सकता – आक्षेपित आदेश अपास्त – नियमितीकरण हेतु विचार में लिये जाने के संबंध में याची को पात्र माना जाएगा – याचिका मंजूर। (अरविन्द कुमार मेहरा वि. म.प्र. राज्य) …1663

***Service Law – Transfer – Ground – Malafide Exercise of Power* – Respondent/Petitioner, an employee of appellant company challenged his transfer order whereby he was transferred from Bhopal to Gwalior – Writ Petition was allowed – Challenge to – Held – Respondent/petitioner could not substantiate his allegation of malafide by any material that authorities have transferred him on account of undue influence of father of his wife – Petitioner has not impleaded any officer of the company in personal capacity alleging malafide – Transfer order has been passed on administrative grounds and there is no flagrant violation of any statutory rules – Appeal allowed – Writ petition dismissed. [M.P. Power Transmission Co. Ltd. Vs. Yogendra Singh Chahar] (DB)…2099**

सेवा विधि – स्थानांतरण – आधार – असद्भावपूर्वक शक्ति का प्रयोग – प्रत्यर्थी/याची, जो कि अपीलार्थी कंपनी का एक कर्मचारी है, ने अपने स्थानांतरण आदेश जिससे उसका स्थानांतरण भोपाल से ग्वालियर किया गया था, को चुनौती दी – रिट याचिका मंजूर की गई थी – को चुनौती – अभिनिर्धारित – प्रत्यर्थी/याची असद्भावपूर्वक के अपने अभिकथन को किसी सामग्री द्वारा सिद्ध नहीं कर सका कि प्राधिकारियों ने उसका स्थानांतरण उसकी पत्नी के पिता के अनुचित प्रभाव के कारण किया – याची ने

***Tender – Power of State – Right of Contractor* – Held – Whether a contractor is suitable to carry out work on behalf of State, the decision is of the State or its agencies or instrumentalities – Contractor cannot claim any right that even though his security deposit has been forfeited, State is bound to consider him eligible, just because the matter of forfeited security deposit is disputed and challenged by them before Arbitral Tribunal – Past experience of contractor is a relevant consideration for State to decide tender finally – As per disqualification clause, contractor was rightly not permitted to participate – No allegation that such policy decision is actuated with malice – No right accrues to petitioners to invoke writ jurisdiction – Petitions dismissed. [MEIL Prasad (JV) Vs. State of M.P.] (DB)…2150**

निविदा – राज्य की शक्ति – ठेकेदार का अधिकार – अभिनिर्धारित – क्या एक ठेकेदार राज्य की ओर से कार्य संपादित करने के लिए उपयुक्त है, यह निर्णय राज्य या उसके अभिकरणों या परिकरणों का है – ठेकेदार किसी भी अधिकार का दावा नहीं कर सकता कि यद्यपि उसकी प्रतिभूति निक्षेप समपहृत कर ली गई है, राज्य उसे पात्र मानने हेतु बाध्य है, सिर्फ इसलिए कि समपहृत प्रतिभूति निक्षेप का मामला विवादित है तथा उनके द्वारा माध्यस्थम अधिकरण के समक्ष चुनौती दी गई है – ठेकेदार का पिछला अनुभव अंतिम रूप से निविदा का विनिश्चय करने हेतु राज्य के लिए एक सुसंगत विचार है – निरर्हता खंड के अनुसार, ठेकेदार को भाग लेने की अनुमति देने से उचित रूप से इंकार किया गया – कोई अभिकथन नहीं कि ऐसा नीति विनिश्चय दुर्भावना से प्रेरित है – याचीगण को रिट अधिकारिता का अवलंब लेने का कोई अधिकार प्रोद्भूत नहीं होता – याचिकाएँ खारिज। (एमईआईएल प्रसाद (जेव्ही) वि. म.प्र. राज्य) (DB)…2150

***Trade Marks Act (47 of 1999), Sections 103, 104, 105 & 115(4)(5) – Search and Seizure – Opinion of Registrar* – Held – Prior to search and seizure by police officer, in case offence is registered u/S 103, 104 & 105, opinion of Registrar is sin qua non/mandatory as provided u/S 115(4) of the Act of 1999 – Search, seizure and locking factory premise without opinion of Registrar in furtherance to the registration of offence is not valid and is illegal – Further held – u/S 115(5) remedy is for restoration of articles seized during search and seizure – Such provision cannot be said to be efficacious remedy to challenge the search and seizure – Respondents directed to open the lock of factory premises and allow appellant to work as per law – Appeal allowed. [Pitambra Industries Vs. State of M.P.] (DB)…2093**

व्यापार चिह्न अधिनियम (1999 का 47), धाराएँ 103, 104, 105 व 115(4)(5) – तलाशी एवं जब्ती – रजिस्ट्रार की राय – अभिनिर्धारित – पुलिस अधिकारी द्वारा तलाशी एवं जब्ती से पूर्व, यदि धारा 103, 104 एवं 105 के अंतर्गत अपराध पंजीबद्ध किया गया है, रजिस्ट्रार की राय अनिवार्य/आज्ञापक है जैसा कि 1999 के अधिनियम की धारा 115(4) के अंतर्गत उपबंधित है – अपराध के पंजीबद्ध होने के अग्रसरण में, रजिस्ट्रार की राय के बिना तलाशी, जब्ती एवं कारखाना परिसर में ताला लगाना विधिमान्य नहीं है एवं अवैध है – आगे अभिनिर्धारित – धारा 115(5) के अंतर्गत उपचार, तलाशी एवं जब्ती के दौरान जब्त की गई

वस्तुओं के प्रत्यावर्तन हेतु है – ऐसे उपबंध को तलाशी एवं जब्ती को चुनौती देने के लिए प्रभावकारी उपचार नहीं कहा जा सकता है – प्रत्यर्थीगण को कारखाना परिसर का ताला खोलने तथा अपीलार्थी को विधि अनुसार कार्य करने की अनुमति देने हेतु निदेशित किया गया – अपील मंजूर। (पीताम्बरा इंडस्ट्रीज वि. म.प्र. राज्य) **(DB)…2093**

Udyog Nivesh Samvardhan Yojna (MP) 2010, Clause 3.4 & 9 and Udyog Samvardhan Niti, (MP) 2014, Clause 10.7 & 10.11 – Exemptions and Concessions – Principle of Promissory Estoppel – Powers of State Government **– State Government launched scheme of 2010 whereby certain exemptions and concessions were granted to industries – Subsequently, State introduced a scheme of 2014 whereby some exemptions and concessions related to VAT and CST were withdrawn – Challenge to – Held – Grant or continuation of any exemption by State Government are sole prerogative of the State Government and are always open to review when higher exemptions were being availed than the actual payment of tax – Such concessions cannot be claimed as a right – Government has sole and exclusive power to either completely withdraw the concessions and exemptions or to alter them – There can be no promissory estoppel against legislature in exercise of its legislative functions – Amending the policy retrospectively was done in public interest to protect State exchequer and to prevent unjust enrichment, which cannot be said to be unjust and unreasonable – Petitions dismissed. [Venkatesh Industries (M/s.) Vs. Department of Commerce, Industry & Employment] (DB)…*58**

उद्योग निवेश संवर्धन योजना (म.प्र.) 2010, खंड 3.4 व 9 एवं उद्योग संवर्धन नीति (म.प्र.) 2014, खंड 10.7 व 10.11 – छूट एवं रियायतें – वचन विबंध का सिद्धांत – राज्य सरकार की शक्तियां – राज्य सरकार ने 2010 की स्कीम का शुभारंभ किया जिसमें उद्योगों को कुछ छूट एवं रियायतें प्रदान की गईं – तत्पश्चात्, राज्य ने 2014 की एक स्कीम शुरू की जिसमें वैट एवं सी.एस.टी. से संबंधित कुछ छूट एवं रियायतें वापस ले ली गई – को चुनौती – अभिनिर्धारित – राज्य सरकार द्वारा कोई छूट प्रदान करना या निरंतर रखना, राज्य सरकार का पूर्ण परमाधिकार है तथा पुनर्विलोकन के लिए मार्ग सदैव खुला है जबकि कर के वास्तविक भुगतान की अपेक्षा उच्चतर छूट का उपभोग किया जा रहा था – ऐसी रियायतों पर अधिकार के रूप में दावा नहीं किया जा सकता – सरकार को रियायतें एवं छूट पूरी तरह से वापस लेने या उन्हें परिवर्तित करने की पूर्ण एवं अनन्य शक्ति है – अपने विधायी कृत्यों का प्रयोग करती हुई विधायिका के विरूद्ध कोई वचन विबंध नहीं हो सकता है – नीति में भूतलक्षी रूप से संशोधन लोकहित में, राज्य के राजकोष की संरक्षा करने हेतु और अन्यायपूर्ण संवृद्धि को रोकने के लिए किया गया था, जिसे अन्यायपूर्ण और अयुक्तियुक्त नहीं कहा जा सकता – याचिकाएं खारिज। (वेंकटेश इंडस्ट्रीज (मे.) वि. डिपार्टमेन्ट ऑफ कामर्स, इंडस्ट्री एण्ड एम्पलॉयमेन्ट) **(DB)…*58**

Udyog Samvardhan Niti, (MP) 2014, Clause 10.7 & 10.11 – See – Udyog Nivesh Samvardhan Yojna (MP) 2010, Clause 3.4 & 9 **[Venkatesh Industries (M/s.) Vs. Department of Commerce, Industry & Employment] (DB)…*58**

INDEX

* * * * *

THE INDIAN LAW REPORTS M.P. SERIES, 2018

(Vol.-3)

JOURNAL SECTION

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

THE INSOLVENCY AND BANKRUPTCY CODE (AMENDMENT) ACT, 2017

NO. 8 OF 2018

[Received the assent of the President on the 18th January, 2018 and published in the Gazette of India (Extraordinary), Part II, Section 1 (No. 8), dated the 19th January, 2018, page Nos. 1 to 4]

An Act to amend the Insolvency and Bankruptcy Code, 2016.

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

1. Short title and commencement. (*1*) This Act may be called the Insolvency and Bankruptcy Code (Amendment) Act, 2018.

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

2. Amendment of section 2. In the Insolvency and Bankruptcy Code, 2016 (31 of 2016) (hereinafter referred to as the principal Act), in section 2,—

(*i*) in clause (d), the word "and" shall be omitted;

(*ii*) for clause (e), the following clauses shall be substituted, namely:-

"(*e*) personal guarantors to corporate debtors;

(*f*) partnership firms and proprietorship firms; and

(*g*) individuals, other than persons referred to in clause (*e*),".

3. Amendment of section 5. In section 5 of the principal Act,—

(a) for clause (25), the following clause shall be substituted, namely:—

'(25) “resolution applicant" means a person, who individually or jointly with any other person, submits a resolution plan to the resolution professional pursuant to the invitation made under clause *(h)* of sub-section *(2)* of section 25;';

(b) in clause *(26)*, for the words "any person", the words "resolution applicant" shall be substituted.

4. Amendment of section 25. In section 25 of the principal Act, in sub-section *(2)*, for clause *(h)*, the following clause shall be substituted, namely:—

"(*h*) invite prospective resolution applicants, who fulfil such criteria as may be laid down by him with the approval of committee of creditors, having regard to the complexity and scale of operations of the business of the corporate debtor and such other conditions as may be specified by the Board, to submit a resolution plan or plans.".

5. Insertion of new section 29A. After section 29 of the principal Act, the following section shall be inserted, namely:—

"29A. Persons not eligible to be resolution applicant. A person shall not be eligible to submit a resolution plan, if such person, or any other person acting jointly or in concert with such person —

(*a*) is an undischarged insolvent;

(*b*) is a wilful defaulter in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 (10 of 1949);

(*c*) has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 (10 of 1949) and at least a period of one year has lapsed from the date of such classification till the date of commencement of the corporate insolvency resolution process of the corporate debtor:

Provided that the person shall be eligible to submit a resolution plan if such person makes payment of all overdue amounts with interest thereon and charges relating to non-performing asset accounts before submission of resolution plan;

(*d*) has been convicted for any offence punishable with imprisonment for two years or more;

(*e*) is disqualified to act as a director under the Companies Act, 2013 (18 of 2013);

(*f*) is prohibited by the Securities and Exchange Board of India from trading in securities or accessing the securities markets;

(*g*) has been a promoter or in the management or control of a corporate debtor in which a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place and in respect of which an order has been made by the Adjudicating Authority under this Code;

(*h*) has executed an enforceable guarantee in favour of a creditor in respect of a corporate debtor against which an application for insolvency resolution made by such creditor has been admitted under this Code;

(*i*) has been subject to any disability, corresponding to clauses (*a*) to (*h*), under any law in a jurisdiction outside India; or

(*j*) has a connected person not eligible under clauses (*a*) to (*i*).

Explanation.—For the purposes of this clause, the expression "connected person" means—

(*i*) any person who is the promoter or in the management or control of the resolution applicant; or

(*ii*) any person who shall be the promoter or in management or control of the business of the corporate debtor during the implementation of the resolution plan; or

(*iii*) the holding company, subsidiary company, associate company or related party of a person referred to in clauses (*i*) and (*ii*):

Provided that nothing in clause (iii) of this *Explanation* shall apply to—

(*A*) a scheduled bank; or

(B) an asset reconstruction company registered with the Reserve Bank of India under section 3 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002); or

(C) an Alternate Investment Fund registered with the Securities and Exchange Board of India.".

6. Amendment of section 30. In section 30 of the principal Act, for sub-section *(4)*, the following sub-section shall be substituted, namely:—

"*(4)* The committee of creditors may approve a resolution plan by a vote of not less than seventy-five per cent. of voting share of the financial creditors, after considering its feasibility and viability, and such other requirements as may be specified by the Board:

Provided that the committee of creditors shall not approve a resolution plan, submitted before the commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017 (Ord. 7 of 2017.), where the resolution applicant is ineligible under section 29A and may require the resolution professional to invite a fresh resolution plan where no other resolution plan is available with it:

Provided further that where the resolution applicant referred to in the first proviso is ineligible under clause *(c)* of section 29A, the resolution applicant shall be allowed by the committee of creditors such period, not exceeding thirty days, to make payment of overdue amounts in accordance with the proviso to clause *(c)* of section 29A:

Provided also that nothing in the second proviso shall be construed as extension of period for the purposes of the proviso to sub-section *(3)* of section 12, and the corporate insolvency resolution process shall be completed within the period specified in that sub-section.".

7. Amendment of section 35. In section 35 of the principal Act, in sub-section *(1)*, in clause *(f)*, the following proviso shall be inserted, namely:-

"Provided that the liquidator shall not sell the immovable and movable property or actionable claims of the corporate debtor in liquidation to any person who is not eligible to be a resolution applicant.".

8. Insertion of new section 235A. After section 235 of the principal Act, the following section shall be inserted, namely:—

"235A. Punishment where no specific penalty or punishment is provided. If any person contravenes any of the provisions of this Code or the rules or regulations made thereunder for which no penalty or punishment is provided in this Code, such person shall be punishable with fine which shall not be less than one lakh rupees but which may extend to two crore rupees.".

9. Amendment of section 240. In section 240 of the principal Act, in sub-section *(2)*,—

(*i*) after clause *(s)*, the following clause shall be inserted, namely:—

"(*sa*) other conditions under clause *(h)* of sub-secton *(2)* of section 25;";

(*ii*) after clause (*w*), the following clause shall be inserted, namely:—

"(*wa*) other requirements under sub-section *(4)* of section 30;".

10. Repeal and savings. (*1*) The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017 (Ord. 7 of 2017) is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the Insolvency and Bankruptcy Code, 2016 (31 of 2016), as amended by the said Ordinance, shall be deemed to have been done or taken under the corresponding provisions of the said Code, as amended by this Act.

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

THE PAYMENT OF GRATUITY (AMENDMENT) ACT, 2018
NO. 12 OF 2018

[Received the assent of the President on the 28th March, 2018 and published in the Gazette of India (Extraordinary), Part II, Section 1 (No. 16), dated the 29th March, 2018, page Nos.1 to 2].

An Act further to amend the Payment of Gratuity Act, 1972.

BE it enacted by Parliament in the Sixty-ninth Year of the Republic of India as follows:—

1. Short title and commencement. (*1*) This Act may be called the Payment of Gratuity (Amendment) Act, 2018.

(*2*) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. Amendment of section 2. In the Payment of Gratuity Act, 1972 (39 of 1972.) (hereinafter referred to as the principal Act), in section 2, for clause (*k*), the following clause shall be substituted, namely:—

'(*k*) "notification" means a notification published in the Official Gazette and the expression "notified" shall be construed accordingly;'.

3. Amendment of section 2A. In section 2A of the principal Act, in sub-section (*2*), in the *Explanation*, in clause (*iv*), for the words "twelve weeks", the words "such period as may be notified by the Central Government from time to time" shall be substituted.

4. Amendment of section 4. In section 4 of the principal Act, in sub-section (*3*), for the words "ten lakh rupees", the words "such amount as may be notified by the Central Government from time to time" shall be substituted.

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

AMENDMENT IN THE MADHYA PRADESH FAMILY COURT RULES, 2002

[Published in Madhya Pradesh Gazette, Part IV (Ga), dated 27th April, 2018, page Nos. 121 to 123]

F.No. 1713/2018/21-B(One)/ In exercise of the powers conferred by section 23 of the Family Courts Act, 1984 (No. 66 of 1984), the State Government, in consultation with the High Court of Madhya Pradesh, hereby, makes the following amendment in the Madhya Pradesh Family Court Rules, 2002, namely:-

AMENDMENT

In the said rules, after rule 18, the following rule shall be added, namely:-

"18-A. Eligibility for empanelment of Amicus Curiae.-

(1) The following persons shall be eligible for empanelment of Amicus Curiae in the Family Court :-

(a) Any retired Judge of the Supreme Court of India;

(b) Any retired Judge of the High Court;

(c) Any retired member of the Higher Judicial Service;

(d) any Legal practitioner with minimum 10 years standing at the bar at the level of the Supreme Court, High Court or the District Court or equivalent status.

(2) **Disqualifications.-**

A person shall be disqualified for being empanelled as amicus curiae if he,

(a) has been adjudged as insolvent; or

(b) is facing criminal charges involving moral turpitude, framed by a criminal court and which are pending; or

(c) has been convicted and sentenced to imprisonment for an offence involving moral turpitude; or

(d) is facing disciplinary proceedings initiated by the appropriate disciplinary authority which are pending or have resulted in a penalty; or

(e) is interested or connected with the subject-matter of dispute(s) or is related to any one of the parties or to those who represent them, unless such objection is waived by all the parties in writing; or

(f) is a legal practitioner who is appearing for any of the parties in the suit or in other proceeding(s).

(3) **Addition to or deletion from panel.**

(a) The process of empanelment of amicus-curiae will be that the person fulfilling the criteria of eligibility may apply to the High Court or the District and Sessions Judge of concerning District on or before 31st January of each calendar year alongwith declaration/ proof of his eligibility.

(b) The High Court / the District and Sessions Judge may call from the concerning Bar Association, the name of the person interested and fulfilling the eligibility criteria for empanelment.

(c) The Principal Judge of the Family Court with prior approval of the High Court may in his discretion, from time to time, add or delete the name of any person in the panel of amicus curiae.

(4) The duties of the amicus curiae.-

The duties of the amicus curiae shall be as under:

(a) The amicus-curiae shall assist the court with regard to the case but not to the any particular petitioner/party. He shall be required to help the court by expanding the law impartially.

(b) When a person is approached in connection with his proposed appointment as amicus curiae, he shall disclose circumstances likely to give rise to a reasonable doubt as to his independence or impartiality;

(c) Every Amicus Curia shall from the time of his appointment and during continuance of the proceedings, without delay, disclose to the parties, about the existence of any circumstance referred to in clause (b).

(5) **Withdrawal of appointment.-**

Upon information furnished by the Amicus Curiae or upon any other information received from the parties or other persons, if the court, in which the suit or proceedings is pending, is satisfied that the said information has raised a reasonable doubt as to the amicus curiae independence or impartiality, he may withdraw the appointment and replace him by another amicus curiae.

(6) **Confidentiality, disclosure and inadmissibility of information.-**

(a) Receipt or perusal of any document by the amicus curiae or receipt of information orally by the amicus curiae while serving in that capacity, shall be confidential and the amicus curiae shall not be compelled to divulge information regarding the document or record or oral information not as to what transpired during the proceedings.

(b) Parties shall maintain confidentiality in respect of events that transpired during the amicus curiae and shall not rely on or introduce the said information in any proceedings.

(7) **Communication between amicus curiae and the Court.-**

(a) In order to preserve the confidence of parties in the Court and the neutrality of the amicus curiae, there should be no communication between the amicus curiae and the Court, except as stated in sub-rule (2) and (3) of this rule.

(b) If any communication between amicus curiae and the Court is necessary, it shall be in writing and copies of the same shall be given to the parties or their constituted attorneys or the counsel.

(c) All communication between the amicus curiae and the Court shall be made only by the amicus curiae and in respect of the following matters-

(i) The failure of a party or parties to attend;

(ii) The amicus curiae's assessment that the case is not suited for settlement;

(iii) Settlement of dispute or disputes arrived at between parties; or

(iv) Any opinion regarding any point of law, if referred to the amicus curiae for assistance by the Family Court.".

By the name and order of the Governor of Madhya Pradesh,
A.M. SAXENA, *Pr. Secy.*

NOTES OF CASES SECTION

Short Note
****(71)***
Before Ms. Justice Vandana Kasrekar
C.R. No. 427/2012 (Jabalpur) decided on 18 September, 2018

ANANDI BAI & ors. …Applicants

Vs.

JHANAK LAL & ors. …Non-applicants

***Civil Procedure Code (5 of 1908), Section 11 and Order 9 Rule 8 & 9 – Subsequent Suit – Maintainability* – Respondent No. 1/plaintiff filed a suit which was dismissed for want of prosecution under Order 9 Rule 8 – His application under Order 9 Rule 9 CPC for setting aside *ex-parte* order was also dismissed in year 2011 which was not further challenged and the same attained finality – Subsequent suit filed by plaintiff in 2012 – Held – If suit is dismissed under Order 9 Rule 8 CPC, plaintiff is precluded from filing subsequent suit between same parties seeking same relief in respect of same cause of action – Impugned order set aside – Revision allowed.**

सिविल प्रक्रिया संहिता (1908 का 5), धारा 11 एवं आदेश 9 नियम 8 व 9 – पश्चात्वर्ती वाद – पोषणीयता – प्रत्यर्थी क्र. 1/वादी ने एक वाद प्रस्तुत किया जिसे आदेश 9 नियम 8 के अंतर्गत अभियोजन के अभाव में खारिज किया गया था – सिविल प्रक्रिया संहिता के आदेश 9 नियम 9 के अंतर्गत एक–पक्षीय आदेश अपास्त करने हेतु उसके आवेदन को भी वर्ष 2011 में खारिज किया गया था जिसे आगे चुनौती नहीं दी गई तथा उक्त ने अंतिमता प्राप्त कर ली – वादी द्वारा 2012 में पश्चात्वर्ती वाद प्रस्तुत किया गया – अभिनिर्धारित – यदि सिविल प्रक्रिया संहिता के आदेश 9 नियम 8 के अंतर्गत वाद खारिज किया जाता है, वादी, समान पक्षकारों के मध्य समान वाद हेतुक के संबंध में समान अनुतोष चाहते हुए पश्चात्वर्ती वाद प्रस्तुत करने से प्रवारित है – आक्षेपित आदेश अपास्त – पुनरीक्षण मंजूर।

Case referred:

I.L.R. (2009) MP 2935.

Manish Gavane, for the applicants.
Pranay Choubey, P.L. for the non-applicant-State.

NOTES OF CASES SECTION

Short Note
****(72)(DB)***
Before Mr. Justice Hemant Gupta, Chief Justice & Mr. Justice Vijay Kumar Shukla

M.P. No. 2271/2018 (Jabalpur) decided on 10 May, 2018

CREST STEEL & POWER PRIVATE LTD. (M/S) & ors. …Petitioners

Vs.

PUNJAB NATIONAL BANK & ors. …Respondents

***Recovery of Debts Due to Banks and Financial Institutions Act (51 of 1993), Sections 19(4), (5), (24) & (25) – Written Statement – Limitation* – Held – As per the provisions of the Act of 1993, it is mandatory to file written statement within 30 days from service of summons, which could in exceptional cases or in special circumstances be extended by Tribunal by another 15 days – Petitioners being failed to file written statement within time frame prescribed, have lost their right to file written statement – Further held – Intention for expeditious disposal is implicit when Section 19(24) mandates the Tribunal to conclude proceedings within two hearings – Aims and objects of the Act of 1993 discussed – Petition dismissed.**

बैंकों और वित्तीय संस्थाओं को शोध्य ऋण वसूली अधिनियम (1993 का 51), धाराएँ 19(4), (5), (24) व (25) – लिखित कथन – परिसीमा – अभिनिर्धारित – 1993 के अधिनियम के उपबंधों के अनुसार, समन की तामील से 30 दिनों के भीतर लिखित कथन प्रस्तुत करना आज्ञापक है, जिसे आपवादिक प्रकरणों में या विशेष परिस्थितियों में अधिकरण द्वारा अन्य 15 दिनों तक बढ़ाया जा सकता है – याचीगण विहित समय सीमा के भीतर लिखित कथन प्रस्तुत करने में विफल रहने के कारण, लिखित कथन प्रस्तुत करने का अपना अधिकार गवाँ चुके हैं – आगे अभिनिर्धारित – शीघ्र निपटारे का आशय अंतर्निहित है जब धारा 19(24) अधिकरण के लिए दो सुनवाई के भीतर कार्यवाहियों को समाप्त करना आज्ञापक बनाती है – 1993 के अधिनियम के लक्ष्य एवं उद्देश्य विवेचित – याचिका खारिज।

The order of the Court was delivered by : **HEMANT GUPTA, C.J.**

Cases referred :

2005 (4) SCC 480, (2015) 16 SCC 22, 2002 (6) SCC 635, (2009) 4 SCC 94, (2016) 3 SCC 762, (2016) 4 SCC 47, C.A. No(s). 10941-10942/2013 decided on 18.01.2017 (Supreme Court).

Manoj Sharma, Rajmani Mishra & *Deepak Raghuvanshi,* for the petitioner.

Praveen Chaturvedi, for the respondents.

NOTES OF CASES SECTION

Short Note
****(73)***
Before Mr. Justice Sanjay Dwivedi
W.P. No. 8539/2016 (Jabalpur) decided on 22 June, 2018

MANAGING DIRECTOR, M.P.P.K.V.V. CO. LTD. & anr. …Petitioners

Vs.

PRESIDING OFFICER, APPELLATE AUTHORITY & anr. ...Respondents

Electricity Act (36 of 2003), Section 126 – Unauthorized Use of Electricity – Sanctioned Load – Violation **– Load was found more than sanctioned in the unit of Respondent No.2 – Recovery order passed by petitioner company for violation of provisions of Section 126 for illegally consumed electricity – Appellate authority quashed the recovery order and directed re-assessment – Challenge to – Held – In view of the provision of Section 126, it is not a case of unauthorized use of electricity, but is a case of connected load beyond the sanctioned load – Even in report submitted by petitioner, there is no such allegation of unauthorized consumption of electricity – No illegality by Appellate authority while quashing the recovery – Petition dismissed.**

विद्युत अधिनियम (2003 का 36), धारा 126 – विद्युत का अप्राधिकृत उपयोग – मंजूर भार – उल्लंघन – प्रत्यर्थी क्र. 2 की इकाई में मंजूर भार से अधिक भार पाया गया – अवैध रूप से विद्युत उपभोग हेतु, धारा 126 के उपबंधों के उल्लंघन के लिए याची कंपनी द्वारा वसूली आदेश पारित किया गया – अपीली प्राधिकारी ने वसूली आदेश अभिखंडित किया और पुनर्निर्धारण निदेशित किया – को चुनौती – अभिनिर्धारित – धारा 126 के उपबंध को दृष्टिगत रखते हुए यह विद्युत के अप्राधिकृत उपयोग का एक प्रकरण नहीं है बल्कि मंजूर भार से परे संबद्ध भार का एक प्रकरण है – यहां तक कि याची द्वारा प्रस्तुत प्रतिवेदन में भी विद्युत के अप्राधिकृत उपभोग का ऐसा कोई अभिकथन नहीं – अपीली प्राधिकारी द्वारा वसूली अभिखंडित करने में कोई अवैधता नहीं – याचिका खारिज।

Case referred:

2012 (2) MPLJ 628.

Brijesh Choubey, for the petitioners.
Manoj Sharma, for the respondent No. 2.

NOTES OF CASES SECTION

Short Note
****(74)***
Before Mr. Justice Subodh Abhyankar
M.Cr.C. No. 20753/2018 (Jabalpur) decided on 16 July, 2018

RAHUL YADAV …Applicant

Vs.

STATE OF M.P. …Non-applicant

(Alongwith M.Cr.C. No. 26277/2018)

***Criminal Procedure Code, 1973 (2 of 1974), Section 439 and Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 8/21 – Bail – Grounds – CCTV Footage* – Case of prosecution is that applicants were arrested from city area of Jabalpur on 17.05.2018 on account of possession of "Smack" - Held – Applicants submitted that factually they were arrested on 16.05.2018 from Jabalpur Railway Station when they were travelling from Allahabad to Mumbai – In this respect, they produced CCTV footage of Railway Station, relevant photographs, reservation tickets and leave letter from employer which are clinching in nature and ignoring the same would amount to closing eyes from reality – Bail granted – Application allowed.**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 439 एवं स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 8/21 – जमानत – आधार – सी.सी.टी. वी. फुटेज – अभियोजन का प्रकरण यह है कि आवेदकगण के कब्जे में ''स्मैक'' होने के कारण, उन्हें दिनांक 17.05.2018 को जबलपुर के शहरी क्षेत्र से गिरफ्तार किया गया था – अभिनिर्धारित – आवेदकगण ने निवेदित किया कि वास्तव में उनको दिनांक 16.05.2018 को जबलपुर रेल्वे स्टेशन से गिरफ्तार किया गया था जब वे इलाहाबाद से मुंबई की यात्रा कर रहे थे – इस संबंध में, उन्होंने रेल्वे स्टेशन की सी.सी.टी.वी. फुटेज, सुसंगत फोटोग्राफ, रिजर्वेशन टिकटें तथा नियोक्ता से अनुमति पत्र जो कि निश्चित प्रकृति के हैं तथा उक्त की उपेक्षा की जाना वास्तविकता से आँखें बंद करना होगा – जमानत प्रदान की गई – आवेदन मंजूर।

Cases referred:

Cr.A. No. 273/2007 decided on 27.04.2018 (Supreme Court), 2011 (1) SCC 609.

Vipin Yadav, for the applicant in M.Cr.C. No. 20753/2018.

Parag S. Chaturvedi, for the applicant in M.Cr.C. No. 26277/2018.

Samdarshi Tiwari, Dy. A.G. with *D.K. Paroha*, G.A. for the non-applicant-State.

NOTES OF CASES SECTION

Short Note
****(75)***
Before Mr. Justice Subodh Abhyankar
M.Cr.C. No. 15428/2018 (Jabalpur) decided on 24 July, 2018

RAVINDRA KUMAR MANI …Applicant

Vs.

RAMRATAN KUSHWAHA …Non-applicant

***Negotiable Instruments Act (26 of 1881), Section 138 – Appropriate Party to a Complaint* – Applicant, a Bank Manager was arrayed as an accused in a complaint u/S 138 of the Act of 1881 – Challenge to – Held – Provisions of Section 138 refers to a person as an accused who is the drawer of the dishonoured cheque – It does not contemplate any other mode of impleading of any other person as accused – An employee of bank cannot be prosecuted u/S 138 of the Act of 1881 – Further held – A penal legislation has to be strictly construed – Proceeding against applicant quashed – Application allowed.**

परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 – परिवाद हेतु समुचित पक्षकार – आवेदक, एक बैंक प्रबंधक को 1881 के अधिनियम की धारा 138 के अंतर्गत परिवाद में अभियुक्त के रूप में दोषारोपित किया गया – को चुनौती – अभिनिर्धारित – धारा 138 के उपबंध एक व्यक्ति जो कि अनादृत चैक का लेखीवाल है, को अभियुक्त के रूप में निर्दिष्ट करते हैं – यह किसी अन्य व्यक्ति को अभियुक्त के रूप में अभियोजित करने के किसी अन्य ढंग को अनुध्यात नहीं करता है – बैंक के एक कर्मचारी को 1881 के अधिनियम की धारा 138 के अंतर्गत अभियोजित नहीं किया जा सकता – आगे अभिनिर्धारित – एक दंड विधान का सख्ती से अर्थ लगाया जाना चाहिए – आवेदक के विरूद्ध कार्यवाही अभिखंडित – आवेदन मंजूर।

Case referred:

(2015) 9 SCC 622.

Abhishek Arjaria, for the applicant.
Manoj Kumar Sharma with *Quazi Fakhruddin*, for the non-applicant.

Short Note
****(76)***
Before Mr. Justice C.V. Sirpurkar
Cr.R. No. 1507/2017 (Jabalpur) decided on 9 August, 2018

SAVITA ATHYA (SMT.) & anr. …Applicants

Vs.

STATE OF M.P. …Non-applicant

***Penal Code (45 of 1860), Section 107 & 306 – Abetment of Suicide – Revision against Charge – Suicide by husband – Suicide Note* – Husband**

suspected extra-marital relations of wife – As a result of dispute, wife living in maternal home for long time and gave birth to twins – Wife's maternal relatives particularly brother-in-law did not allow deceased to take his wife and children back and use to misbehave with him because of which he was frustrated – Held – Husband could have moved application for restitution of conjugal rights or for judicial separation or divorce but he adopted an escapist course – Clearly an overreaction on part of deceased for which wife and brother-in-law cannot be legally held liable – Petitioners neither actively instigated the deceased to commit suicide nor did they created any such situation where he was left with no option but to commit suicide – No ground to proceed u/S 306 or 306/34 IPC – Petitioners discharged – Revision allowed.

दण्ड संहिता (1860 का 45), धारा 107 व 306 – आत्महत्या का दुष्प्रेरण – आरोप के विरूद्ध पुनरीक्षण – पति द्वारा आत्महत्या – आत्महत्या लेख – पति को पत्नी के विवाहेतर संबंधों के होने का शक था – विवाद के परिणामस्वरूप, पत्नी लंबे समय से मायके में रह रही थी तथा उसने जुड़वा बच्चों को जन्म दिया – पत्नी के मायके वालों ने विशेष रूप से पत्नी के भाई ने मृतक को उसकी पत्नी एवं बच्चों को वापस ले जाने नहीं दिया तथा उसके साथ दुर्व्यवहार करते थे जिसके कारण वह निराश था – अभिनिर्धारित – पति दाम्पत्य अधिकारों के प्रत्यास्थापन या न्यायिक पृथक्करण या विवाह विच्छेद के लिए आवेदन प्रस्तुत कर सकता था परंतु उसने पलायनवादी मार्ग अपनाया – स्पष्टतः मृतक की ओर से यह एक अति–प्रतिक्रिया है जिसके लिए पत्नी एवं पत्नी के भाई को विधिक रूप से दायी नहीं ठहराया जा सकता – याचीगण ने, न तो सक्रिय रूप से मृतक को आत्महत्या करने के लिए उकसाया था न ही उन्होंने ऐसी कोई परिस्थिति सृजित की जहाँ उसके पास आत्महत्या करने के सिवाय कोई अन्य विकल्प नहीं बचा था – भारतीय दंड संहिता की धारा 306 या 306/34 के अंतर्गत कार्यवाही का कोई आधार नहीं है – याचीगण को आरोपमुक्त किया गया – पुनरीक्षण मंजूर।

Cases referred:

(2001) 9 SCC 618, 2010 Cr.L.J. 2110, 2008 Cr.L.J. 2569.

Manish Datt with *S.P. Chadar*, for the applicants.
B.P. Pandey, G.A. for the non-applicant/State.

NOTES OF CASES SECTION

Short Note
****(77)***
Before Smt. Justice Anjuli Palo
M.Cr.C. No. 17427/2017 (Jabalpur) decided on 1 August, 2018

SAVITRI BAI (SMT.) (CORRECT NAME SMT. SAVITA CHAJJU RAM) & ors. …Applicants

Vs.

TAPAN KUMAR CHOUDHARY & anr. …Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Section 482 and Civil Procedure Code (5 of 1908), Order 39 Rule 2A – Exercise of Inherent Powers u/S 482 in Civil Matters **– Application seeking quashment of contempt proceedings initiated against applicant/defendant on an application filed by plaintiff/respondent under Order 39 Rule 2 in a civil suit – Held – Provisions of Section 482 Cr.P.C. is only applicable in criminal proceedings pending under the provisions of Cr.P.C. – Applicants have alternative remedy under civil law – Application u/S 482 not maintainable and is hereby dismissed.**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 एवं सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 नियम 2ए – सिविल मामलों में धारा 482 के अंतर्गत अंतर्निहित शक्तियों का प्रयोग – एक सिविल वाद में आदेश 39 नियम 2 के अंतर्गत वादी/प्रत्यर्थी द्वारा प्रस्तुत आवेदन पर आवेदक/प्रतिवादी के विरूद्ध आरंभ की गई अवमानना कार्यवाहियों का अभिखंडन चाहते हुए आवेदन – अभिनिर्धारित – दण्ड प्रक्रिया संहिता की धारा 482 के उपबंध केवल दण्ड प्रक्रिया संहिता के उपबंधों के अंतर्गत लंबित दाण्डिक कार्यवाहियों में लागू होते हैं – आवेदकों के पास सिविल विधि के अंतर्गत वैकल्पिक उपचार है – धारा 482 के अंतर्गत आवेदन पोषणीय नहीं एवं एतद् द्वारा खारिज।

Cases referred:

2003 (1) WLC 788, (2001) 7 SCC 530, (2009) 5 SCC 665, AIR 2008 SC 3077.

Anand Singh Thakur, for the applicant.
Hemlata Rai, for the non-applicant No. 1.
Puneet Shroti, G.A. for the non-applicant No. 2/State.

NOTES OF CASES SECTION

Short Note
****(78)***
Before Mr. Justice Sheel Nagu
W.P. No. 16408/2017 (Gwalior) decided on 21 June, 2018

SHOBHARAM YADAV …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

***Rajya Suraksha Adhiniyam, M.P. 1990 (4 of 1991), Section 3 & 5 – Externment Orders – Grounds* – Held – Movements or acts of any person, should either exist in present time when opinion is being formed or should be so imminent and palpable that if preventive/remedial action is not taken, imminent danger would turn into reality – Merely because a person has criminal past cannot per se lead to a conclusion that allowing of such person to enjoy liberty of movement would be at the cost of danger to public order in present – In present case, one of heinous crime of murder registered against petitioner is of 2010, of which trial is pending, rest of offences are bailable and trivial in nature – No statement of any independent person has been recorded – No material to sustain apprehension of live danger to public order in present – Externment order not sustainable and is quashed – Petition allowed.**

राज्य सुरक्षा अधिनियम, म.प्र., 1990 (1991 का 4), धारा 3 व 5 – निर्वासन आदेश – आधार – अभिनिर्धारित – किसी भी व्यक्ति का आना–जाना या कृत्य, या तो वर्तमान समय में अस्तित्व में होना चाहिए जब राय बनायी जा रही हो या इतना आसन्न और स्पष्ट होना चाहिए कि यदि निवारक/उपचारात्मक कार्रवाई नहीं की जाती है, तो आसन्न खतरा वास्तविकता में बदल जाएगा – मात्र यह कारण कि किसी व्यक्ति का आपराधिक अतीत है, स्वतः इस निष्कर्ष की ओर नहीं ले जा सकता कि उक्त व्यक्ति को आने–जाने की स्वतंत्रता का उपभोग करने की अनुमति दी जाना, वर्तमान में लोक व्यवस्था के लिए खतरे की कीमत पर होगा – वर्तमान प्रकरण में, याची के विरूद्ध पंजीबद्ध हत्या का जघन्य अपराध 2010 का है, जिसका विचारण लंबित है, शेष अपराध जमानतीय एवं तुच्छ प्रकृति के हैं – किसी भी स्वतंत्र व्यक्ति का कोई कथन अभिलिखित नहीं किया गया है – वर्तमान में लोक व्यवस्था के लिए जीवंत खतरे की आशंका को सिद्ध करने हेतु कोई सामग्री नहीं – निर्वासन आदेश कायम रखने योग्य नहीं एवं अभिखंडित किया गया – याचिका मंजूर।

Pratip Visoriya, for the petitioner.
Yogesh Chaturvedi, G.A. for the respondents-State.

I.L.R. [2018] M.P. 2083 (SC)
SUPREME COURT OF INDIA

Before Mr. Justice Ranjan Gogoi, Mrs. Justice R. Banumathi & Mr. Justice Mohan M. Shantanagoudar

Cr.A. No. 547/2018 decided on 13 April, 2018

K.K. MISHRA …Appellant

Vs.

STATE OF M.P. & anr. …Respondents

***A. Penal Code (45 of 1860), Section 499 & 500 and Criminal Procedure Code, 1973 (2 of 1974), Section 199(2) & 199(4) – Defamation – Sanction/Permission for prosecution – Nexus of Allegation* – Defamatory statements against Chief Minister in press conference by appellant – Held – Statements such as "appointment of persons from area/place to which the wife of Chief Minister belongs" and "making of phone calls by relatives of Chief Minister" have no reasonable nexus with discharge of public duties by or the office of Chief Minister – Statements may be defamatory but in absence of nexus between the same and discharge of public duties of office, remedy u/S 199(2) and 199(4) Cr.P.C. is not be available – Complaint proceedings untenable in law and is quashed – Appeal allowed.**

(Para 11 & 15)

क. दण्ड संहिता (1860 का 45), धारा 499 व 500 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 199(2) व 199(4) – मानहानि – अभियोजन हेतु मंजूरी/अनुमति – अभिकथन का संबंध – अपीलार्थी द्वारा पत्रकार सम्मेलन में मुख्यमंत्री के विरूद्ध मानहानिकारक कथन – अभिनिर्धारित – कथन जैसे कि ''उस क्षेत्र/स्थान से व्यक्तियों की नियुक्ति जहां से मुख्यमंत्री की पत्नी हैं'' एवं ''मुख्यमंत्री के रिश्तेदारों द्वारा फोन कॉल किये जाना'' का मुख्यमंत्री या मुख्यमंत्री के कार्यालय द्वारा लोक कर्तव्यों के निर्वहन से कोई युक्तियुक्त संबंध नहीं है – कथन मानहानिकारक हो सकते हैं परंतु उक्त के तथा कार्यालय के लोक कर्तव्यों के निर्वहन के मध्य संबंध की अनुपस्थिति में, दण्ड प्रक्रिया संहिता की धारा 199(2) एवं 199(4) के अंतर्गत उपचार उपलब्ध नहीं है – परिवाद कार्यवाहियां विधि में असमर्थनीय हैं एवं अभिखंडित की गई – अपील मंजूर।

***B. Criminal Procedure Code, 1973 (2 of 1974), Section 199(2) & 199(4) – Defamation – Sanction/Permission for prosecution – Procedure* – Held – Before filing complaint, Public Prosecutor should analyse/scan and apply his mind regarding material placed before him regarding disclosure of offence – In present case, press meet was convened by appellant on 21.06.2014, Government accorded sanction to public prosecutor to file complaint on 24.06.2014 and complaint was filed on the very same day which**

indicates that Public Prosecutor has not applied its mind to materials/allegation placed before him – Complaint not maintainable.

(Paras 12 to 14)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 199(2) व 199(4) – मानहानि – अभियोजन हेतु मंजूरी/अनुमति – प्रक्रिया – अभिनिर्धारित – परिवाद प्रस्तुत करने से पूर्व, लोक अभियोजक को अपराध के प्रकटन से संबंधित उसके समक्ष प्रस्तुत सामग्री का विश्लेषण/अवलोकन कर अपने मस्तिष्क का प्रयोग करना चाहिए – वर्तमान प्रकरण में, अपीलार्थी द्वारा 21.06.2014 को पत्रकारों की सभा बुलाई गई थी, सरकार ने दिनांक 24.06.2014 को लोक अभियोजक को परिवाद प्रस्तुत करने की मंजूरी प्रदान की तथा उसी दिन परिवाद प्रस्तुत किया गया था जो यह इंगित करता है कि लोक अभियोजक ने उसके समक्ष प्रस्तुत की गई सामग्री/अभिकथन पर अपने मस्तिष्क का प्रयोग नहीं किया है – परिवाद पोषणीय नहीं।

Cases referred:

AIR 1961 SC 387, (2013) 15 SCC 624, (2016) 7 SCC 221, (2014) 10 SCC 380.

J U D G M E N T

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

2. By the order impugned, the High Court of Madhya Pradesh has negatived the challenge made by the appellant to the maintainability of a criminal prosecution/proceeding instituted under Section 199(2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as "Cr.P.C.") alleging commission of offences under Sections 499 and 500 of the Indian Penal Code, 1860 (hereinafter referred to as "IPC") against the Hon'ble Chief Minister of the State of Madhya Pradesh. The complaint has been filed by the Public Prosecutor on 24th June, 2014 before the District & Sessions Judge, Bhopal (Madhya Pradesh) after receipt of sanction from the Competent Authority of the State Government on the very same day i.e. 24th June, 2014.

3. At the very outset, we deem it necessary to put on record that during the pendency of the present proceedings the prosecution against the accused appellant has been concluded by the learned Special Judge, Prevention of Corruption Act, Bhopal, Madhya Pradesh by judgment and order dated 17th November, 2017 in Sessions Trial No.573 of 2014. The accused appellant has been found guilty of the commission of the offence punishable under Section 500 IPC and, accordingly, he has been sentenced to undergo simple imprisonment for two years with fine of Rs.25,000/- (Rupees twenty thousand). We are told at the Bar that an appeal against the said order is presently pending before the High Court of Madhya Pradesh and the accused appellant is presently on bail.

4. At this stage, we would like to recapitulate our order dated 5th January, 2018 reiterating that, notwithstanding the conviction of the accused appellant, this Court would like to consider the question of the validity of the very initiation of the prosecution against the appellant.

5. While Section 499 IPC defines and deals with the offence of defamation, punishment for the said offence is provided by Section 500 IPC. In the present case, the alleged offence of defamation against the Hon'ble Chief Minister of the State of Madhya Pradesh, according to the prosecution, has been committed by the accused appellant on account of certain statements made with regard to the Hon'ble Chief Minister in the course of a Press Conference that the appellant had addressed as a Chief Spokesperson of the Indian National Congress, Madhya Pradesh organized on 21st June, 2014 at the MP Congress Committee, 1461 Indra Bhawan Shivaji Nagar, Bhopal.

6. Though a reading of the transcript of the Press Conference, which has been placed on record, may indicate a reference to the Hon'ble Chief Minister in respect of several acts and events, for the purposes of the present case we will, necessarily, have to confine ourselves to only three statements allegedly made in the Press Conference with reference to the Hon'ble Chief Minister. This is because in the order granting sanction/permission dated 24th June, 2014 for filing of a complaint under Section 199 (2) Cr.P.C. it is only the aforesaid three statements which have been taken note of as being defamatory and, therefore, taken cognizance for purpose of grant of sanction/permission under Section 199(2) of the Cr.P.C. The aforesaid three statements mentioned in the order dated 24th June, 2014 granting sanction/permission are as follows:

> "1. 19 amongst the Transport Inspection appointed in Madhya Pradesh are from the in-laws house Gondiya (Maharashtra) of Chief Minister Shivraj Singh Chouhan.
>
> 2. Conversation has been made with the accused persons of the Vyapam Scam from the mobile of Sanjay Chouhan son of Phoolsingh Chouhan-Mama of the Chief Minister Sh. Shivraj Singh Chouhan.
>
> 3. Conversation has been made from the Chief Minister's house by an influential woman through 139 phone calls with the accused of Vyapam Scam Nitin Mahendra, Pankaj Trivedi, Lakshmikant Sharma."

7. Section 199(2) Cr.P.C. provides for a special procedure with regard to initiation of a prosecution for offence of defamation committed against the constitutional functionaries and public servants mentioned therein. However, the

offence alleged to have been committed must be in respect of acts/conduct in the discharge of public functions of the concerned functionary or public servant, as may be. The prosecution under Section 199 (2) Cr.P.C. is required to be initiated by the Public Prosecutor on receipt of a previous sanction of the Competent Authority in the State/Central Government under Section 199 (4) of the Code. Such a complaint is required to be filed in a Court of Sessions that is alone vested with the jurisdiction to hear and try the alleged offence and even without the case being committed to the said court by a subordinate Court. Section 199(2) Cr.P.C. read with section 199(4) Cr.P.C., therefore, envisages a departure from the normal rule of initiation of a complaint before a Magistrate by the affected persons alleging the offence of defamation. The said right, however, is saved even in cases of the category of persons mentioned in sub-section (2) of Section 199 Cr.P.C. by sub-section (6) thereof.

8. The rationale for the departure from the normal rule has been elaborately dealt with by this Court in a judgment of considerable vintage in *P.C. Joshi and another vs. The State of Uttar Pradesh*[1] [paragraph 9]. The core reason which this Court held to be the rationale for the special procedure engrafted by Section 199(2) Cr.P.C. is that the offence of defamation committed against the functionaries mentioned therein is really an offence committed against the State as the same relate to the discharge of public functions by such functionaries. The State, therefore, would be rightly interested in pursuing the prosecution; hence the special provision and the special procedure.

P.C. Joshi (supra), however, specifically dealt with the provisions of Section 198B of the Code of Criminal Procedure, 1898 ("old Code") which are pari materia with the provisions of Section 199 of the Cr.P.C. ("new Code").

9. The above would require the Court to consider as to whether the statements made by the accused appellant in the Press Conference which have been taken note of in the order dated 24th June, 2014 granting sanction/ permission can legitimately be said to be attributable or connected with the discharge of public functions of the office of the Hon'ble Chief Minister. In other words, whether the said statements have any reasonable nexus with the discharge of Official duties by the Hon'ble Chief Minister.

10. The problem of identification and correlation of the acts referred to in an allegedly defamatory statement and those connected with the discharge of public functions/official duties by the holder of the public office is, by no means, an easy task. The sanction contemplated under Section 199(4) Cr.P.C. though in the opposite context i.e. to prosecute an offender for offences committed against a public servant may have to be understood by reference to the sanction

[1] AIR 1961 SC 387

contemplated by Section 197 Cr.P.C. which deals with sanction for prosecution of a public servant. There is a fair amount of similarity between the conditions precedent necessary for accord of sanction in both cases though the context may be different, indeed, the opposite. While dealing with the requirement of sanction under Section 197 Cr.P.C. this Court in *Urmila Devi* vs. *Yudhvir Singh*[2] had taken the following view which may have some relevance to the present case.

> "59. The expression *"official duty"* would in the absence of any statutory definition, therefore, denote a duty that arises by reason of an office or position of trust or authority held by a person. It follows that in every case where the question whether the accused was acting in discharge of his official duty or purporting to act in the discharge of such a duty arises for consideration, the court will first examine whether the accused was holding an office and, if so, what was the nature of duties cast upon him as holder of any such office. It is only when there is a direct and reasonable nexus between the nature of the duties cast upon the public servant and the act constituting an offence that the protection under Section 197 CrPC may be available and not otherwise. Just because the accused is a public servant is not enough. A reasonable connection between his duties as a public servant and the acts complained of is what will determine whether he was acting in discharge of his official duties or purporting to do so, even if the acts were in excess of what was enjoined upon him as a public servant within the meaning of that expression under Section 197 of the Code."

11. If the allegedly defamatory statements, already extracted, in respect of which sanction has been accorded to the Public Prosecutor to file the complaint against the appellant under Section 199 (2) Cr.P.C. by the order dated 24th June, 2014 are to be carefully looked into, according to us, none of the said statements, even if admitted to have been made by the appellant, can be said to have any reasonable connection with the discharge of public duties by or the office of the Hon'ble Chief Minister. The appointment of persons from the area/place to which the wife of the Hon'ble Chief Minister belongs and the making of phone calls by the relatives of the Hon'ble Chief Minister have no reasonable nexus with the discharge of public duties by or the office of the Hon'ble Chief Minister. Such statements may be defamatory but then in the absence of a nexus between the same and the discharge of public duties of the office, the remedy under Section

[2] (2013) 15 SCC 624

199(2) and 199(4) Cr.P.C. will not be available. It is the remedy saved by the provisions of sub-section (6) of Section 199 Cr.P.C. i.e. a complaint by the Hon'ble Chief Minister before the ordinary Court i.e. the Court of Magistrate which would be available and could have been resorted to.

12. There is yet another dimension to the case. In *Subramanian Swamy* vs. *Union of India*[3] one of the grounds on which the challenge to the constitutional validity of Section 499 and 500 IPC was sustained by this Court was the understanding that Section 199(2) and 199(4) Cr.P.C. provide an inbuilt safeguard which require the Public Prosecutor to scan and be satisfied with the materials on the basis of which a complaint for defamation is to be filed by him acting as the Public Prosecutor. In this regard, an earlier decision of this Court in *Bairam Muralidhar vs. State of Andhra Pradesh*[4] while dealing with Section 321 Cr.P.C. (i.e. Withdrawal from prosecution) was considered by this Court and it was held as follows:

> "…It is ordinarily expected that the Public Prosecutor has a duty to scan the materials on the basis of which a complaint for defamation is to be filed. He has a duty towards the court. This Court in *Bairam Muralidhar Vs. State of A.P [(2014) 10 SCC 380]* while deliberating on Section 321 CrPC has opined that the Public Prosecutor cannot act like a post office on behalf of the State Government. He is required to act in good faith, peruse the materials on record and form an independent opinion. It further observed that he cannot remain oblivious to his lawful obligations under the Code and is required to constantly remember his duty to the court as well as his duty to the collective. <u>While filing cases under Sections 499 and 500 IPC, he is expected to maintain that independence and not act as a machine</u>."
>
> (underlining is ours)

13. In the proceedings before the learned trial Court, the Public Prosecutor who had presented the complaint under Section 199(2) Cr.P.C. was cross-examined on behalf of the accused appellant. From the relevant extract of the cross-examination of the Public Prosecutor, which is quoted below, it is clear to us that the Public prosecutor had admitted the absence of any scrutiny by him of the materials on which the prosecution is sought to be launched. In fact, the Public Prosecutor had gone to the extent of admitting that he had filed the complaint against the accused appellant on the orders of the State Government. The relevant

[3] (2016) 7 SCC 221
[4] (2014) 10 SCC 380

extract of the cross-examination of the Public Prosecution is as under:

xxx 7.3.2015

"47. It is correct to say that I have not given any proposal in capacity of public prosecutor to the Government that I want to file a complaint against Shri K.K. Mishra in connection with giving defamatory statement. It is correct to say that I have filed the present case in the official capacity of Public Prosecutor. It is correct to say that I have not filed the present complaint on behalf of the Government (Volunteered to say) that I have filed the above case being a Public Prosecutor. It is correct to say that on the order of the Government, I have filed the complaint. If the Government had not directed me, then, I would not have filed a complaint as a Public Prosecutor.

48. xxxxxxxxxx

49. xxxxxxxxxx

50. Before receiving the permission, I have not seen any document and did not consider whether complaint has to be filed or not. It is correct to say that I have not submitted any document in connection with this fact that Jagdish Devda was a Minister in the Government of Madhya Pradesh and Shri Shivraj Singh Chouhan was positioned as Hon'ble Chief Minister of Government of Madhya Pradesh on the date of Press Conference (Voluntarily state that) the accused himself, while addressing Shri Shivraj Singh Chouhan as Chief Minister, has made all the allegations.

51. It is correct to say that before filing the complaint, I have not given any legal notice to the accused in connection with this fact that whether objections were raised against the Hon'ble Chief Minister in Press Conference or not."

14. The testimony of the Public Prosecutor in his cross-examination effectively demonstrates that the wholesome requirement spelt out by Section 199(2) and 199(4) Cr.P.C., as expounded by this Court in *Subramanian Swamy* (supra), has not been complied with in the present case. A Public Prosecutor filing a complaint under Section 199 (2) Cr.P.C. without due satisfaction that the materials/allegations in complaint discloses an offence against an Authority or against a public functionary which adversely affects the interests of the State

would be abhorrent to the principles on the basis of which the special provision under Section 199(2) and 199(4) Cr.P.C. has been structured as held by this Court in *P.C. Joshi* (supra) and *Subramanian Swamy* (supra). The public prosecutor in terms of the statutory scheme under the Criminal Procedure Code plays an important role. He is supposed to be an independent person and apply his mind to the materials placed before him. As held in *Bairam Muralidhar* case supra)

> "……He cannot remain oblivious to his lawful obligations under the Code. He is required to constantly remember his duty to the court as well as his duty to the collective."

In the present case, the press meet was convened by the appellant on 21.06.2014. The government accorded sanction to the public prosecutor to file complaint under Section 500 IPC against the appellant on 24.06.2014. As seen from the records, the complaint was filed by the public prosecutor against the appellant on the very same day i.e. 24.06.2014. The haste with which the complaint was filed *prima facie* indicates that the public prosecutor may not have applied his mind to the materials placed before him as held in *Bairam Muralidhar* case (supra). We, therefore, without hesitation, take the view that the complaint is not maintainable on the very face of it and would deserve our interference.

15. On the conclusions that have been reached by us, as indicated above, the conviction of the accused appellant and the sentence imposed would not have any legs to stand. The very initiation of the prosecution has been found by us to be untenable in law. Merely because the trial is over and has ended in the conviction of the appellant and the matter is presently pending before the High Court in appeal should not come in the way of our interdicting the same. The requirements of justice would demand that we carry our conclusions to its logical end by invoking our special and extraordinary jurisdiction under Article 142 of the Constitution of India. Consequently, we allow this appeal; quash the impugned prosecution/proceedings registered and numbered as Sessions Session Trial No.573 of 2014; and set aside the order dated 17th November, 2017 passed by the learned Special Judge, Prevention of Corruption Act, Bhopal, Madhya Pradesh in Sessions Trial No.573 of 2014 convicting the accused appellant under Section 500 IPC and sentencing him as aforesaid. The appeal pending before the High Court against the order dated 17th November, 2017 passed by the learned Special Judge, Prevention of Corruption Act, Bhopal, Madhya Pradesh in Sessions Trial No.573 of 2014 shall also stand closed in terms of the present order. Bail bond, if any shall stand discharged accordingly.

16. The appeal is allowed in the above terms.

Appeal allowed

I.L.R. [2018] M.P. 2091 (SC)
SUPREME COURT OF INDIA
Before Mr. Justice Adarsh Kumar Goel & Mr. Justice Rohinton Fali Nariman
C.A. No. 4017/2018 decided on 18 April, 2018

GANGOTRI ENTERPRISES LTD. (M/S) …Appellant

Vs.

M.P. ROAD DEVELOPMENT CORP. & anr. …Respondents

***A. Madhyastham Adhikaran Adhiniyam, M.P. (29 of 1983), Section 2(d) – Dispute – "Ascertained Money"* – Held – Expression "ascertained money" as used in Section 2(d) of the Act of 1983 will include not only the amount already ascertained but the amount which may be ascertained during the proceedings on the basis of Claims/Counter-claims of parties.**

(Para 3)

क. माध्यस्थम् अधिकरण अधिनियम, म.प्र. (1983 का 29), धारा 2(डी) – विवाद – ''अभिनिश्चित धन'' – अभिनिर्धारित – अभिव्यक्ति ''अभिनिश्चित धन'' जैसा कि 1983 के अधिनियम की धारा 2(डी) में उपयोग किया गया है, में न केवल पहले से अभिनिश्चित राशि शामिल होगी बल्कि पक्षकारों के दावों/प्रतिदावों के आधार पर कार्यवाहियों के दौरान अभिनिश्चित की जा सकने वाली राशि भी शामिल होगी।

***B. Madhyastham Adhikaran Adhiniyam, M.P. (29 of 1983), Section 4(3)(iii) – Member of Tribunal/Arbitrator* – Held – Apex Court has already concluded that an employee of a party to dispute cannot be an arbitrator – In present case, it is directed that State of M.P. will not appoint as member of Tribunal, its employees of the concerned department to which the dispute relates – Appeal disposed.**

(Para 4)

ख. माध्यस्थम् अधिकरण अधिनियम, म.प्र. (1983 का 29), धारा 4(3)(iii) – अधिकरण के सदस्य/मध्यस्थ – अभिनिर्धारित – सर्वोच्च न्यायालय ने पहले ही निष्कर्षित किया है कि विवाद के किसी पक्षकार का कर्मचारी, मध्यस्थ नहीं हो सकता – वर्तमान प्रकरण में, यह निदेशित किया गया कि म.प्र. राज्य उस संबंधित विभाग के उसके कर्मचारियों को अधिकरण के सदस्य के रूप में नियुक्त नहीं करेगा जिससे विवाद संबंधित है – अपील निराकृत।

Case referred:

(2009) 8 SCC 520.

O R D E R

Leave granted. Heard learned counsel for the parties.

2. Our attention has been drawn to the definition of "dispute" under Section 2(d) of the Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983 ("1983 Act") which is as follows:

> "dispute' means claim of ascertained money valued at Rupees 50,000 or more relating to any difference arising out of the execution or non-execution of a works contract or part thereof."

3. We consider it appropriate to clarify that the expression "ascertained money" as used in Section 2(d) of the 1983 Act will include not only the amount already ascertained but the amount which may be ascertained during the proceedings on the basis of claims/counter claims of the parties.

4. Our attention has also been drawn to Section 4(3)(iii) of the 1983 Act to submit that consistent with the policy of law and the judgment of this Court in *Indian Oil Corporation Ltd. and Ors. Vs. Raja Transport Private Ltd.,* (2009) 8 SCC 520, an empolyee of a party to the dispute cannot be an arbitrator. Section 4(3)(iii) of the 1983 Act is in the following terms :

> "4. Chairman and members of Tribunal and their qualifications. -
>
> (3) No person shall be qualified for appointment as a member of the Tribunal, unless-
>
> (iii) he is or has been :-
>
> (a) Chief Engineer in the service of the State Government in Public Works, Irrigation or Public Health Engineering Department; or
>
> (b) a Chief Engineer in the service of the Madhya Pradesh Electricity Board; or
>
> (c) a Senior Deputy Accountant General of the Office of the Accountant General, Madhya Pradesh,
>
> for a period of not less than five years:
>
> Provided that in the case of clause (iii), in exceptional circumstances, the State Government may relax the prescribed minimum period of five years to three years."

5. We clarify that the State of Madhya Pradesh will not appoint as member of the Tribunal, its employee of the concerned department to which the dispute relates.

6. The appeal stands disposed of as above.

S.L.P. (C)....D. No. 101817/2018 and S.L.P.(C).....D. No. 12928/2018:

Delay condoned.

The special leave petitions shall also stand disposed of in terms of the order passed today in S.L.P. (C) No. 6513 of 2018.

Pending applications, if any, also stand disposed of.

Order accordingly

I.L.R. [2018] M.P. 2093(DB)
WRIT APPEAL

Before Mr. Justice J.K. Maheshwari & Mr. Justice S.A. Dharmadhikari

W.A. No. 459/2018 (Gwalior) decided on 19 April, 2018

PITAMBRA INDUSTRIES …Appellant

Vs.

STATE OF M.P. & ors. …Respondents

A. Trade Marks Act (47 of 1999), Sections 103, 104, 105 & 115(4)(5) – Search and Seizure – Opinion of Registrar **– Held – Prior to search and seizure by police officer, in case offence is registered u/S 103, 104 & 105, opinion of Registrar is *sin qua non*/mandatory as provided u/S 115(4) of the Act of 1999 – Search, seizure and locking factory premise without opinion of Registrar in furtherance to the registration of offence is not valid and is illegal – Further held – u/S 115(5) remedy is for restoration of articles seized during search and seizure – Such provision cannot be said to be efficacious remedy to challenge the search and seizure – Respondents directed to open the lock of factory premises and allow appellant to work as per law – Appeal allowed.**

(Paras 7, 10, 12 & 14)

क. व्यापार चिह्न अधिनियम (1999 का 47), धाराएँ 103, 104, 105 व 115(4)(5) – तलाशी एवं जब्ती – रजिस्ट्रार की राय – अभिनिर्धारित – पुलिस अधिकारी द्वारा तलाशी एवं जब्ती से पूर्व, यदि धारा 103, 104 एवं 105 के अंतर्गत अपराध पंजीबद्ध किया गया है, रजिस्ट्रार की राय अनिवार्य/आज्ञापक है जैसा कि 1999 के अधिनियम की धारा 115(4) के अंतर्गत उपबंधित है – अपराध के पंजीबद्ध होने के अग्रसरण में, रजिस्ट्रार

की राय के बिना तलाशी, जब्ती एवं कारखाना परिसर में ताला लगाना विधिमान्य नहीं है एवं अवैध है – आगे अभिनिर्धारित – धारा 115(5) के अंतर्गत उपचार, तलाशी एवं जब्ती के दौरान जब्त की गई वस्तुओं के प्रत्यावर्तन हेतु है – ऐसे उपबंध को तलाशी एवं जब्ती को चुनौती देने के लिए प्रभावकारी उपचार नहीं कहा जा सकता है – प्रत्यर्थीगण को कारखाना परिसर का ताला खोलने तथा अपीलार्थी को विधि अनुसार कार्य करने की अनुमति देने हेतु निदेशित किया गया – अपील मंजूर।

***B. Constitution – Article 226 – Jurisdiction* – Held – Search and seizure by police officer is illegal and without jurisdiction – In such circumstances, invoking jurisdiction under Article 226 is not barred.**
(Para 11 & 12)

ख. संविधान – अनुच्छेद 226 – अधिकारिता – अभिनिर्धारित – पुलिस अधिकारी द्वारा तलाशी एवं जब्ती अवैध एवं अधिकारिता के बिना है – ऐसी परिस्थितियों में, अनुच्छेद 226 के अंतर्गत अधिकारिता का अवलंब लेना वर्जित नहीं है।

Case referred :

1998 (8) SCC 1.

Sunil Jain, for the appellant.
Raghvendra Dixit, G.A. for the State.

J U D G M E N T

The Judgment of the Court was delivered by :
J.K. MAHESHWARI, J :- Assailing the order dated 03.04.2018 passed by learned single bench in W.P. No. 6644/2018, dismissing the writ petition on account of having an efficacious alternative remedy to the appellant, this appeal has been preferred.

2. The facts unfolded to file the present appeal are that appellant is the sole proprietorship concern manufacturing Putty, Dyes, Paint and Varnish etc. under the brand name "Maha Utsav". As alleged the said brand name is neither registered under the Trade Marks Act, 1999 nor under the Copyrights Act, 1957. A complaint was lodged by one Mahesh Arjun Adaan of Torque Detective, that appellant is manufacturing the Putty similar to Birla White Wall Care Putty and selling the bags resembling the same. On the said complaint offence was registered at Crime No. 69/2018 under Section 103 and 104 of Trade Marks Act, 1999 (hereinafter it be referred to Trade Mark Act) and also a separate FIR has been registered under Section 51, 63 of Copyright Act, 1957 (hereinafter it be referred to Copy Right Act) at Crime No. 70/2018 at Police Station Girwai, District Gwalior. In this writ petition, the appellant sought direction against the respondents to open the lock and seal affixed on 16.03.2018 while search in the

Pitambra Industry situated at Village Girwai, District Gwalior and permit the appellant to run the industry as per law.

3. Learned single bench referring the sub-section (5) of Section 115 of the Trade Marks Act observed that since the appellant is having efficacious alternative remedy for restoration of the seized articles, approaching before the Metropolitan Magistrate, therefore, interference was denied dismissing the writ petition.

4. Learned counsel appearing on behalf of appellant submits that as per Section 115 of the Trade Marks Act, after taking cognizance of the offence by the Deputy Superintendent of Police search and seizure of any industry can be made by the officer not below the rank of Deputy Superintendent of Police as per the opinion of the Registrar to the facts involved in the offence relating to Trade Marks Act and he shall abide the opinion so obtained. In the present case the respondents have not obtained any opinion from the Registrar defined under Section 2(v) and Section 3 of the Act. In absence of it, search, seizure, attachment and lock put to the industry by the respondents is not permissible under the law. It is further submitted that taking cognizance by the Deputy Superintendent of Police may be based upon the opinion of the Registrar, otherwise, the action taken by the respondent is illegal and without jurisdiction. It is urged, when the search and seizure itself is under challenge, the remedy provided for restoration of the article is not an efficacious alternative remedy, however, dismissal of the writ petition is not justified. In support of the said contention, reliance has been placed on the judgment of the Supreme Court in the case of *Whirlpool Corporation vs Registrar of Trade Marks, Mumbai* reported in 1998 (8) SCC 1.

5. On the last date i.e. 18.04.2018, on being asked by the Court, learned Govt. Advocate, sought time to seek instruction, whether any opinion was sought from the Registrar. Today, he has received the case diary and after going through the same and under the instructions, it is fairly stated that either in the case diary or in the return filed in the writ petition, opinion of the Registrar has not been attached or received, therefore, the question arises for consideration, whether without obtaining the prior opinion from the Registrar for an offence registered under Section 103 and 104 of the Trade Marks Act, search, seizure and attachment of the industry is permissible?

6. After hearing learned counsel on behalf of both the parties and to advert the arguments as advanced, first of all provisions of Section 115 of the Trade Marks Act is relevant to deal with the issue, which is reproduced as under:-

> ***"115****.Cognizance of certain offences and the powers of police officer for search and seizure.—*

1. No court shall take cognizance of an offence under section 107 or section 108 or section 109 except on complaint in writing made by the Registrar or any officer authorised by him in writing: Provided that in relation to clause (c) of sub-section (1) of section 107, a court shall take cognizance of an offence on the basis of a certificate issued by the Registrar to the effect that a registered trade mark has been represented as registered in respect of any goods or services in respect of which it is not in fact registered.

2. No court inferior to that of a Metropolitan Magistrate or Judicial Magistrate of the first class shall try an offence under this Act.

3.The offences under section 103 or section 104 or section 105 shall be cognizable.

4.Any police officer not below the rank of deputy superintendent of police or equivalent, may, if he is satisfied that any of the offences referred to in sub-section (3) has been, is being, or is likely to be, committed, search and seize without warrant the goods, die, block, machine, plate, other instruments or things involved in committing the offence, wherever found, and all the articles so seized shall, as soon as practicable, be produced before a Judicial Magistrate of the first class or Metropolitan Magistrate, as the case may be:

Provided that the police officer, before making any search and seizure, shall obtain the opinion of the Registrar on facts involved in the offence relating to trade mark and shall abide by the opinion so obtained.

5.Any person having an interest in any article seized under sub-section (4), may, within fifteen days of such seizure, make an application to the Judicial Magistrate of the first class or Metropolitan Magistrate, as the case may be, for such article being restored to him and the Magistrate, after hearing the applicant and the prosecution, shall make such order on the application as he may deem fit."

7. On perusal, it is apparent that for an offence under Sections 107, 108 and 109 of the Act, the cognizance can be taken on filing a complaint in writing by the

Registrar, and the Courts of Metropolitan Magistrate and Judicial Magistrate First Class are empowered to try the offences under this Act. But the offences under Sections 103, 104 and 105 of the Act, shall be cognizable and if these offences are required to be registered, then it ought to be by an officer not below the rank of Deputy Superintendent of Police on being satisfied that the offence has been committed. Sub-section 4 of Section 115 of the Act makes it clear that the police officer who is taking cognizance in the said offence shall obtain opinion of the Registrar on the facts involved in the offence relating to Trade Mark and shall abide the opinion so obtained before making any search and seizure. However, to obtain an opinion is a *sin-qua-non* and it must be abide by the Police Officer at the time of search and seizure, therefore, such compliance is mandatory to the police officer prior to search and seizure in case an offence is registered under Section 103, 104 and 105 of the Trade Marks Act.

8. It is not disputed that the Registrar has been defined under Section 2(v) of the Act which is known as Registrar of Trade Marks as referred in Section 3 of the Act. As per Section 3 of the Act, the appointment of the Registrar may be made by the Central Government by way of notification in the Official Gazette but simultaneously the Central Government may also appoint such other officer to discharge functions of the Registrar under the superintendence and direction of the Registrar and such person shall carry out those functions.

9. As per the return filed by the respondents, it is merely said that the procedure prescribed under Section 115(4) of the Act has been followed, however, appellant is having an efficacious alternative remedy available to him as provided under sub-section 5 of Section 115 of the Trade Mark Act. Accepting the objection of the respondents, learned Single Bench relying upon the said objection dismissed the writ petition by the impugned order.

10. During the course of hearing when this Court asked to produce the opinion of the Registrar, learned Govt. Advocate informed that the opinion of the Registrar has not yet obtained in the present case and also not available in the case diary. Looking to the facts of the case and in view of the discussion made hereinabove, it is apparent that an offence under Sections 103, 104 and 105 of the Trade Marks Act was registered against the appellant by the Deputy Superintendent of Police, however, for the purpose of search and seizure, he is required to take an opinion from the Registrar and to abide the same as per Section 115(4) of the Trade Marks Act. In the present case, no such opinion has been obtained, however, the search and seizure without the opinion in furtherance to the registration of an offence is illegal and not valid, therefore, the prayer as made in the writ petition deserves to be allowed holding that lock put on the factory premises is without jurisdiction and not in accordance with the provisions of the Trade Marks Act.

11. It is trite law that in case the action taken by the authority is in violation of the provisions of the Act and Rules, without jurisdiction or in non-observance of the principle of natural justice, the interference in exercise of the power under Article 226 of the Constitution of India is not barred. In this regard guidance can be taken from the judgment of *Whirlpool Corporation* (supra). In addition, it is to observe, that the finding of learned Single Bench, that the appellant may apply for restoration of the articles before the Metropolitan Magistrate but it has not been considered that the search and seizure made under Section 115(4) of the Trade Marks Act can be made by the Police Officer.

12. As discussed above, it is clear that upon taking the cognizance by the Deputy Superintendent of Police for an offence under Sections 103, 104, 105 of the Trade Marks Act for the purpose of search and seizure, the opinion from the Registrar to the facts involved relating to the trade mark is necessary, which ought to be abided by such officer. In absence of the opinion of the Registrar and without abiding it, the search and seizure made by the Police Officer is illegal and without jurisdiction. Once the action of the authority is found as illegal and without jurisdiction, invoking the jurisdiction under Article 226 of the Constitution of India is not barred. In addition when the challenge made to the search and seizure is itself found illegal and against such action alternative remedy is not provided in the Act. The remedy under Section 115(5) of the Trade Marks Act is of restoration to the articles seized during search and seizure, which cannot be said to be efficacious remedy to challenge the search or seizure and it is only for restoration of the articles so seized, therefore, the finding as recorded by the learned Single Judge dismissing the writ petition stands set aside.

13. Insofar as registration of an offence under the Copyrights Act as alleged in the F.I.R and looking to the violation as specified in Section 3 of the Copyrights Act is concerned, it includes the classes of work, which are original literary, dramatic, musical, artistic and cinematography films. The said contingency to take the cognizance has been contained in Sections 51 & 63 of the infringement of the Copyrights Act to which the procedure has been prescribed in Sections 64 & 65 of the said Act. But for taking the cognizance until the copyright as specified in Section 3 subsists, the registration of the offence and taking of the cognizance is said to have not permissible. It is urged that allegation alleged in the F.I.R *prima facie* does not establish the infringement of the copyrights. However, the search and seizure under the said provision is not germane and it has been initiated by the respondents without prior opinion of the Registrar, therefore, such action is illegal and without jurisdiction.

14. In consequence to the aforesaid discussion, this writ appeal succeeds and is hereby allowed. The order dated 03.04.2018 passed by learned Single Bench in W.P. No. 6644/2018 stands set aside. The search and seizure made by the Police

Officer without the opinion of the Registrar and to abide it, is held to be illegal and without jurisdiction, therefore, the relief as prayed for in this writ appeal also stands allowed. The respondents are directed to open the lock of the industrial premises forthwith and shall permit the appellant to run the industry as per law.

15. While disposing of this writ appeal, it is made clear here that this Court has dealt with the issue of search, seizure and closure of the factory under the provisions of the Trade Marks Act and the Copyrights Act. The findings recorded hereinabove are only relating to deal with the said issue and closure of the factory premises, however, it is having nothing to do with the merits of the registration of the F.I.R. The Court below while trying with the offence is at liberty to form its own opinion in accordance with provisions of Trade Marks Act, 1999 and the Copyrights Act, 1957 without being influenced by the above observations.

Appeal allowed

I.L.R. [2018] M.P. 2099(DB)
WRIT APPEAL

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

W.A. No. 644/2018 (Jabalpur) decided on 17 July, 2018

M.P. POWER TRANSMISSION CO. LTD. & ors. …Appellants

Vs.

YOGENDRA SINGH CHAHAR …Respondent

A. Service Law – Transfer – Ground – Malafide Exercise of Power **– Respondent/Petitioner, an employee of appellant company challenged his transfer order whereby he was transferred from Bhopal to Gwalior – Writ Petition was allowed – Challenge to – Held – Respondent/petitioner could not substantiate his allegation of *malafide* by any material that authorities have transferred him on account of undue influence of father of his wife – Petitioner has not impleaded any officer of the company in personal capacity alleging *malafide* – Transfer order has been passed on administrative grounds and there is no flagrant violation of any statutory rules – Appeal allowed – Writ petition dismissed.**

(Paras 3, 6 & 8)

क. सेवा विधि – स्थानांतरण – आधार – असद्भावपूर्वक शक्ति का प्रयोग – प्रत्यर्थी/याची, जो कि अपीलार्थी कंपनी का एक कर्मचारी है, ने अपने स्थानांतरण आदेश जिससे उसका स्थानांतरण भोपाल से ग्वालियर किया गया था, को चुनौती दी – रिट याचिका मंजूर की गई थी – को चुनौती – अभिनिर्धारित – प्रत्यर्थी/याची असद्भावपूर्वक के अपने अभिकथन को किसी सामग्री द्वारा सिद्ध नहीं कर सका कि प्राधिकारियों ने उसका

स्थानांतरण उसकी पत्नी के पिता के अनुचित प्रभाव के कारण किया – याची ने असद्भावना का अभिकथन करते हुए व्यक्तिगत रूप से कंपनी के किसी भी अधिकारी को अभियोजित नहीं किया है – स्थानांतरण आदेश प्रशासनिक आधार पर पारित किया गया है तथा कानूनी नियमों का कोई स्पष्ट उल्लंघन नहीं है – अपील मंजूर – रिट याचिका खारिज।

B. ***Constitution – Article 226/227 – Transfer Matter – Practice – Scope*** **– Held – Transfer is an incident of service and same cannot be interfered unless transfer order is issued in violation of statutory rule or suffers from *malafide* exercise of power – Court cannot sit as an appellate authority in administrative matter like transfer of employee.**

(Para 6)

ख. संविधान – अनुच्छेद 226/227 – स्थानांतरण मामला – पद्धति – विस्तार – अभिनिर्धारित – स्थानांतरण सेवा का एक भाग है एवं उक्त को तब तक बाधित नहीं किया जा सकता है जब तक कि स्थानांतरण आदेश कानूनी नियम के उल्लंघन में जारी नहीं किया गया हो या शक्ति के असद्भावपूर्वक प्रयोग से ग्रस्त हो – न्यायालय प्रशासनिक मामले जैसे कि कर्मचारी के स्थानांतरण में अपीली प्राधिकारी के रूप में सुनवाई नहीं कर सकता।

C. ***Words and Phrases*** **– "Malice" – "Legal Malice" or "Malice in Law" and "Malice in Fact" & "Malice in Law" – Meaning – Discussed.**

(Para 5)

ग. शब्द और वाक्यांश – ''दुर्भाव'' – ''विधिक दुर्भाव'' या ''विधि में दुर्भाव'' तथा ''तथ्य में दुर्भाव'' व ''विधि में दुर्भाव'' – अर्थ – विवेचित।

Cases referred :

(2009) 2 SCC 592, (2010) 9 SCC 437, (2003) 4 SCC 739, (2004) 7 SCC 450, (1995) 2 SCC 570.

Amit Seth on behalf of *Ashish Anand Barnad,* for the appellants.
K.C. Ghildiyal, for the respondent.

J U D G M E N T

The Judgment of the Court was delivered by:
V.K.SHUKLA, J. :- In the present Intra Court appeal, challenge has been made to the order 26-04-2018, passed by the learned Single Judge, whereby the writ petition filed by the respondent/petitioner has been allowed.

2. The respondent/petitioner, who is an employee of the appellant company working as Systems Expert in the work of erection, testing and commissioning of transmission systems filed a writ petition challenging the transfer order dated 13-03-2018, whereby he has been transferred from Bhopal to Gwalior and also the order dated 19-04-2018, whereby the petitioner's representation against the

transfer order has been rejected. In the earlier round of litigation, the petitioner had preferred W.P.No.6403/2018 against the transfer order dated 13-03-2018 which was disposed of by the order dated 20-03-2018 with a direction to the appellants to decide the petitioner's representation in accordance with law within a period of four weeks from the date of receipt of certified copy of the order. The Court had also directed that till the representation of the petitioner is decided, the operation of impugned order dated 13-03-2018 was directed to be stayed and the petitioner was allowed to work at Bhopal.

3. The petitioner submitted representation and the same was rejected. The said order has been challenged mainly on the ground that the order has been issued in malafide exercise of power. Being confronted with the fact that the petitioner has not impleaded any officer of the appellant company in personal capacity alleging malafide. Learned counsel for the respondent/petitioner submitted that he has not alleged allegation of malafide against any individual but the order suffers from legal malice. To bolster his submission, he relied on the judgment passed by the Apex Court in the case of *Somesh Tiwari* Vs. *Union of India* and *others* (2009)2 SCC 592 and also the judgment passed in the case of *Kalabharati Advertising* Vs. *Hemant Vimalnath Narichania and others* (2010) 9 SCC 437.

4. The learned counsel for the appellants submitted that the learned Single Judge has quashed the order of rejection of the representation against the transfer order and made observation that the impugned order was passed in a cavalier manner without any application of mind. The learned counsel for the appellants also submitted that this court in exercise of powers under Article 226 of the Constitution of India does not sit over as an Appellate Authority. It is further submitted that there was no material to draw an inference that the appellant company had any malafide intention . The writ petitioner is working as a systems expert in the work of erection, testing and commissioning of transmission systems and there are several works of erection, testing and commissioning of transmission systems which are being undertaken and being planned in the Gwalior region and therefore, on administrative ground, the petitioner has been posted in Gwalior region. They have further stated that on earlier occasion on compassionate ground and looking to the difficulties of the petitioner that his wife is suffering from mental disease physical disorder and was undergoing treatment, he was transferred from Ratlam to Bhopal. But, since he has filed divorce case against his wife and now his wife and child are no longer residing with him, therefore, the writ petitioner has been transferred from Bhopal to Gwalior.

5. In the case of *Kalabharati Advertising* (supra), the Apex Court was dealing with an issue of "legal malice" and "malice in law" and held that the State is under obligation to act fairly without ill will or malice. "Legal malice" or ″malice in law" means something done without lawful excuse. It is an act done

wrongfully and willfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite. It is a deliberate act in disregard to the rights of others. It is further held that it means conscious violation of the law to the prejudice of another. In the case of *Somesh Tiwari* (supra) the court had taken into consideration the malafides of two kinds- "malice in fact" and "malice in law" and explained that an employee's transfer on the basis of non-existent facts is a "malice in law". In the case of *State of A.P. and others Vs. Goverdhanlal Pitti* (2003)4 SCC 739, the legal meaning of "malice" was considered. The relevant paras of the judgment are re-produced as under :

> "12. The legal meaning of malice is 'ill-will or spite towards a party and any indirect or improper motive in taking an action'. This is sometimes described as 'malice in fact'. 'Legal malice' or 'malice in law' means 'something done without lawful excuse'. In other words,'it is an act done wrongfully and willfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite'. It is a deliberate act in disregard of the rights of others'. [See Words and Phrases legally defined in Third Edition, London Butterworths 1989].
>
> 13. Where malice is attributed to the State, it can never be a case of personal ill-will or spite on the part of the State. If at all, it is malice in legal sense, it can be described as an act which is taken with a oblique or indirect object. Prof. Wade in its authoritative work on Administrative Law [Eighth Edition at pg. 414] based on English decisions and in the context of alleged illegal acquisition proceedings, explains that an action by the State can be described mala fide if it seek to 'acquire land' 'for a purpose not authorized by the Act'. The State, if it wishes to acquire land, should exercise its power bona fide for the statutory purpose and for none other'.
>
> 14. The legal malice, therefore, on the part of the State as attributed to it should be understood to mean that the action of the State is not taken bona fide for the purpose of the Land Acquisition Act and it has been taken only to frustrate the favourable decisions obtained by the owner of the property against the State in the eviction and writ proceedings."

6. In the present case the challenge is to an order of transfer of an employee. In the first round of the petition, the petition was disposed of with a direction to decide the representation of the petitioner in accordance with law and the interim protection was granted. In compliance to the order passed by this court, the representation of the petitioner was considered by the competent authority and the same was rejected by a detailed order. The petitioner has been transferred on administrative ground and considering the same representation has been rejected. The aforesaid judgments would not render any aid to the petitioner because he could not substantiate his allegation of malafie (sic:malafide) by any material that the authorities have transferred him from Bhopal to Gwalior on account of undue influence of the father of the wife. Further, the transfer is an incident of service and

the same cannot be interfered unless the transfer order is issued in violation of any statutory rule or suffers from malafide exercise of power. The courts can not sit as an appellate authority in administrative matters like transfer of an employee. In the case of *State of U.P. and another Vs. Siya Ram and another* (2004)7 SCC 450, the Apex Court has held as under :

> "The High Court while exercising jurisdiction under Articles 226 and 227 of the Constitution of India, 1950 (in short the 'Constitution') had gone into the question as to whether the transfer was in the interest of public service. That would essentially require factual adjudication and invariably depend upon peculiar facts and circumstances of the case concerned. No government servant or employee of a public undertaking has any legal right to be posted forever at any one particular place or place of his choice since transfer of a particular employee appointed to the class or category of transferable posts from one place to other is not only an incident, but a condition of service, necessary too in public interest and efficiency in the public administration. Unless an order of transfer is shown to be an outcome of mala fide exercise or stated to be in violation of statutory provisions prohibiting any such transfer, the courts or the tribunals normally cannot interfere with such orders as a matter of routine, as though they were the appellate authorities substituting their own decision for that of the employer/management, as against such orders passed in the interest of administrative exigencies of the service concerned."

7. In the case of *State of Punjab and others* Vs. *Chaman Lal Goyal* (1995) 2 SCC 570, the Apex Court held that in the absence of any clear allegation of malafides against any particular official and in absence of impleading such person *eo nomine* so as to enable him to answer the charge against him, the charge of malafides cannot be sustained.

8. The learned Single Judge has held that the respondents have passed the order in a cavalier manner and without any application of mind cannot be sustained because the transfer is not an order of punishment but it is an administrative order and is an incident of service. Further the petitioner could not substantiate the allegation of malafide as the transfer order has been passed by the appellants on administrative ground and there is no flagrant violation of any statutory rules.

9. Accordingly, in view of the aforesaid conspectus, the writ appeal is allowed. The order passed by the learned Single Judge is set aside and the writ petition stands dismissed.

Appeal allowed

I.L.R. [2018] M.P. 2104(DB)
WRIT APPEAL

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

W.A. No. 912/2018 (Jabalpur) decided on 19 July, 2018

PRASHANT SHRIVASTAVA …Appellant

Vs.

STATE OF M.P. …Respondent

A. Krishi Upaj Mandi Adhiniyam, M.P. 1972 (24 of 1973), Section 40-A and Fundamental Rules, Rule 110 – Transfer of Government Servant – Power of State Government **– Held – U/S 40-A of the Act of 1972, State Government has been conferred power in respect of Marketing Board and Mandi Samiti/Committee to issue directions and Board and Samiti/Committee is bound to comply with directions – Further held – Rule 110 of Fundamental Rules also confers power to transfer a Government servant to the service of a body, incorporated or not, which is wholly or substantially owned or controlled by the Government.**

(Para 6 & 7)

क. कृषि उपज मण्डी अधिनियम, म.प्र. 1972 (1973 का 24), धारा 40–ए एवं मूलभूत नियम, नियम 110 – शासकीय सेवक का स्थानांतरण – राज्य शासन की शक्ति – अभिनिर्धारित – 1972 के अधिनियम की धारा 40–ए के अंतर्गत, राज्य शासन को विपणन बोर्ड एवं मंडी समिति के संबंध में निदेश जारी करने की शक्ति प्रदत्त की गई है तथा बोर्ड एवं समिति निदेशों का अनुपालन करने हेतु बाध्य है – आगे अभिनिर्धारित – मूलभूत नियमों का नियम 110 एक शासकीय सेवक को एक निकाय, निगमित हो अथवा नहीं, जिस पर पूरी तरह से या सारभूत रूप से स्वामित्व एवं नियंत्रण शासन का है, की सेवा में स्थानांतरित करने की शक्ति भी प्रदत्त करता है।

B. Service Law – Transfer – Ground **– Respondent No. 5/writ petitioner, an employee of Agricultural Marketing Board challenged his transfer from Jabalpur to Bhopal in a petition whereby as an interim order, execution of transfer order was stayed – Appellant, a Deputy Collector who was transferred to Jabalpur challenged the interim order – Held – Looking to provisions of Section 40-A of the Act of 1972 and Rule 110 of Fundamental Rules, appellant could have been transferred to services of Marketing Board – No illegality in transfer order – Further held – In the facts and circumstances, effect of interim order would be of final nature – Appeal allowed and writ petition dismissed.**

(Paras 6, 7 & 9)

ख. सेवा विधि – स्थानांतरण – आधार – प्रत्यर्थी क्र. 5/रिट याची जो कि कृषि विपणन बोर्ड का एक कर्मचारी है, ने एक याचिका में अपना स्थानांतरण जबलपुर से

भोपाल किये जाने को चुनौती दी जिसमें अंतरिम आदेश के रूप में, स्थानांतरण आदेश के निष्पादन को रोका गया था – अपीलार्थी, एक डिप्टी कलेक्टर जिसका स्थानांतरण जबलपुर किया गया था, ने अंतरिम आदेश को चुनौती दी – अभिनिर्धारित – 1972 के अधिनियम की धारा 40–ए के उपबंधों एवं मूलभूत नियमों के नियम 110 को देखते हुए, अपीलार्थी को विपणन बोर्ड की सेवाओं में स्थानांतरित किया जा सकता था – स्थानांतरण आदेश में कोई अवैधता नहीं – आगे अभिनिर्धारित – इन तथ्यों एवं परिस्थितियों में अंतरिम आदेश का प्रभाव अंतिम प्रकृति का होगा – अपील मंजूर एवं रिट याचिका खारिज।

***C. Constitution – Article 226/227 – Interim Order – Appeal – Maintainability* – Held – Writ Appeal is maintainable against an interim order.**

(Para 9)

ग. संविधान – अनुच्छेद 226/227 – अंतरिम आदेश – अपील – पोषणीयता – अभिनिर्धारित – अंतरिम आदेश के विरूद्ध रिट अपील पोषणीय है।

Cases referred :

ILR [2007] MP 1329, 2007 (3) MPLJ 565.

Swapnil Ganguly, for the appellant.
Amit Seth, G.A. for the respondents No. 1 to 3.
Aditya Khandekar, for the respondent No. 4.
Rajendra Tiwari with *T.K. Khadka,* for the respondent No. 5.

(Supplied: Paragraph numbers)

O R D E R

The order of the Court was passed by :
VIJAY KUMAR SHUKLA, J :- In the instant *intra court* appeal takes an exception to the interim order dated 11.7.2018 passed by the learned Single Judge in W.P. No.15153/2018 whereby, the operation of the order dated 5.7.2018 transferring the writ petitioner from Agriculture Marketing Board, Regional Office, Jabalpur to the Head Office of the Marketing Board at Bhopal has been stayed.

2. The brief facts of the case are that the respondent No.5 (herein- after referred as 'writ petitioner'), was transferred from Ujjain to Jabalpur by order dated 21.6.2018. In pursuance to the order dated 21.6.2018, he has submitted his joining on 22.6.2018 on the post of Joint Director, Jabalpur. The case of the petitioner is that within a period of 14 days because of the transfer of the appellant, the writ petitioner has been shifted from Jabalpur to Bhopal.

3. Counsel for the appellant submits that the transfer of the appellant and the writ petitioner is purely on administrative exigency. It is submitted that while posting of the writ petitioner as Secretary, Mandi Board, certain departmental enquiry was initiated against him. By virtue of his posting as Joint Director, M.P.

State Agriculture Marketing Board, Jabalpur, the Enquiry Officer/ Presenting Officer will now become subordinate to respondent No.5. It is also submitted by him that as per provisions of Section 40-A of M.P. Krishi Upaj Mandi Adhiniyam, 1972 (for short 'Adhiniyam, 1972'), the State Government is competent to issue any direction against the Marketing Board and the Marketing Committee and they are bound to follow the same.

4. Counsel for the writ petitioner submits that since the appellant is holding the post of Deputy Collector, whereas, the writ petitioner is an employee of the marketing Board, therefore, the State Government could not have transferred the appellant in the Marketing Board.

5. Heard learned counsel for the parties.

6. In view of the provisions of Section 40-A of the Adhiniyam, 1972 where the State Government has been conferred power in respect of Marketing Board and Mandi Samiti, contention advanced by the counsel for the writ petitioner is not appreciable. The provisions of Section 40-A of the Adhiniyam, 1972 reads as under :-

> **"40-A. Power of State Government to give direction.-** (1) The State Government may give directions to the Board and Mandi Committees.
>
> (2) The Board and the Mandi Committees shall be bound to comply with directions issued by the State Government under sub-section (1) "

7. Fundamental Rule 110 also confers power to transfer a Government Servant to the service of a body, incorporated or not, which is wholly or substantially owned or controlled by the Government. The same is reproduced as under :-

> **"F.R.110. Authorities competent to transfer a Government servant to foreign service :-** (a) No Government servant may be transferred to foreign service against his will :
>
> Provided that this sub-rule shall not apply to the transfer of a Government servant to the service of a body, incorporated or not, which is wholly or substantially owned or controlled by the Government."
>
> In view of the aforesaid provision also, the appellant could have been transferred to the service of Marketing Board.

8. Since the transfer is an incident of service and the interference in the administrative matters, especially in respect of transfers, the law has been settled that the Courts cannot interfere unless the transfer order suffers from malafide exercise of powers. A Coordinate Bench of this Court in the case of *R. S. Chaudhary Vs. State of M.P. & Ors.* reported in ILR[2007] MP 1329 after consideration of the judgments passed by the Apex Court has held that transfer policy formulated by the State Government is not enforceable by a Court of law as employee does not have a right of posting at a particular place and the Courts have limited jurisdiction to interfere in the order of transfer. The Court can interfere only in the case of breach of mandatory statutory rules or where the action of the State is capricious, malicious, cavalier and fanciful. The writ petitioner could not show any malice or bias against the authority who has passed the transfer orders.

9. In view of the aforesaid, we do not find any merit in the writ petition itself. The effect of the interim order would be of final nature as the writ petitioner would be required to be allowed to continue on the post where appellant has been posted, therefore, against an interim order, the writ appeal is entertained in view of the law laid down by the Full Bench in the case of *Arvind Kumar Jain & Others Vs. State of M.P. & Others* – 2007(3) MPLJ 565.

10. Consequently, the writ appeal is **allowed** and as a logical corollary, the writ petition stands dismissed.

Appeal allowed

I.L.R. [2018] M.P. 2107(DB)
WRIT PETITION

Before Mr. Justice P.K. Jaiswal & Mr. Justice Virender Singh

W.P. No. 1313/2018 (Indore) decided on 8 March, 2018

VIJAY LUNIYA …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

(Alongwith W.P. Nos. 1321/2018, 1324/2018 & 3041/2018)

***A. Land Revenue Code, M.P. (20 of 1959), Section 247(7) and Minor Mineral Rules, M.P. 1996, Rule 53(5) – Penalty – Jurisdiction – Amendment* – Retrospective and Prospective Application – Held – Penalty imposed on petitioner by SDO for illegally extracting mineral outside the granted lease area – Challenge to – Held – Vide amendment dated 18.05.17, power delegated to SDO to initiate proceedings under Rule 53 and impose fine/penalty – In present case SDO imposed penalty on basis of panchnama dated 27.08.16 & 09.12.16 whereas, Rule 53 was amended w.e.f. 18.05.17 – As**

per amended Rule, SDO is competent to pass the impugned order (being procedural part) but he has acted illegally imposing penalty as per amended Rule 53 treating it to have retrospective effect/operation – Penalty part of impugned order is quashed – Petitions partly allowed.

(Paras 18 to 22)

क. भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 247(7) एवं गौण खनिज नियम, म.प्र. 1996, नियम 53(5) – शास्ति – अधिकारिता – संशोधन – भूतलक्षी एवं भविष्यलक्षी प्रयोज्यता – अभिनिर्धारित – प्रदान किये गये पट्टा क्षेत्र से बाहर खनिज का अवैध रूप से उत्खनन करने हेतु उपखंड अधिकारी द्वारा याची पर शास्ति अधिरोपित की गई – को चुनौती – अभिनिर्धारित – दिनांक 18.05.2017 के संशोधन द्वारा उपखंड अधिकारी को नियम 53 के अंतर्गत कार्यवाहियां आरंभ करने तथा जुर्माना/शास्ति अधिरोपित करने हेतु शक्ति प्रत्यायोजित की गई – वर्तमान प्रकरण में उपखंड अधिकारी ने पंचनामा दिनांक 27.08.2016 व 09.12.2016 के आधार पर शास्ति अधिरोपित की जबकि, नियम 53 का संशोधन दिनांक 18.05.2017 से प्रभावशील किया गया था – संशोधित नियम के अनुसार, उपखंड अधिकारी आक्षेपित आदेश (प्रक्रियात्मक भाग होने के कारण) पारित करने में सक्षम है, परंतु उसने संशोधित नियम 53 का भूतलक्षी रूप से प्रभाव/प्रवर्तन मानते हुए, उसके अनुसार शास्ति अधिरोपित कर अवैध रूप से कार्रवाई की – आक्षेपित आदेश का शास्ति भाग अभिखंडित – याचिकाएँ अंशतः मंजूर।

B. Interpretation of Statute – Amendments – Effect & Presumption **– Held – Every statute is *prima facie* prospective unless it is expressly or by necessary implication made to have retrospective operation – There is a presumption of prospectivity unless shown to the contrary by express provision in statute or is otherwise discernible by necessary implication.**

(Para 14)

ख. कानून का निर्वचन – संशोधन – प्रभाव व उपधारणा – अभिनिर्धारित – प्रत्येक कानून प्रथम दृष्ट्या भविष्यलक्षी होता है जब तक कि उसका अभिव्यक्त रूप से अथवा आवश्यक विवक्षा द्वारा भूतलक्षी प्रवर्तन होना नहीं बताया जाता – जब तक कि कानून में अभिव्यक्त उपबंध द्वारा इसके प्रतिकूल दर्शाया नहीं गया हो या आवश्यक विवक्षा द्वारा अन्यथा स्पष्ट न हो, भविष्यलक्षी होने की उपधारणा की जाती है।

C. Legal Maxim – "nova constitution futuris forman imponere debet non praeteritis" **– It means "a new law ought to regulate what is to follow, not the past".**

(Para 14)

ग. विधिक सूत्र – ''नवीन विधि का प्रभाव भविष्यलक्षी होना चाहिए न कि भूतलक्षी'' – इसका अर्थ है ''एक नवीन विधि को वह विनियमित करना चाहिए जो कि आगे होगा, न कि जो अतीत में हुआ है''।

Cases referred :

AIR 1987 SC 1364, AIR 1990 SC 209, AIR 1981 SC 711, AIR 2008 SC 2276.

Vivek Dalal, for the petitioner.
H.Y. Mehta, G.A. for the respondents/State.

O R D E R

The order of the Court was passed by:

P.K. JAISWAL, J :- Since a common question of law is involved in these writ petitions therefore, they are being heard together and are being disposed of by this common order. For the sake of convenience the facts are borrowed from W.P.No.1313/2018.

2. By this writ petition under Article 226 of the Constitution of India, the petitioner is challenging the order dated 13.10.2017, passed by the respondent No.3 – Sub Divisional Officer (Revenue), Ratlam, in a proceeding under the provisions of Rule 53 of M.P. Minor Minerals Rules, 1996 (hereinafter referred as 'the Rules of 1996') whereby, the learned authority has imposed the penalty under sub-rule (5) of Rule 53 of Rules of 1996 read with Section 247(7) of MPLR Code, 1959 to the writ petitioner.

3. This order has been assailed by the petitioner, on the ground that, Sub-Divisional Officer (R), Ratlam, was having no jurisdiction to impose the penalty under Rule 53(5) of the Rules of 1996. The aforesaid provision provides for composition of the matter and not for imposition of the penalty. The penalty could have been imposed under sub-rule (1) of Rule 53 of 1996 and that too by the Magistrate and not by the Sub-Divisional Office concerned.

4. Per contra, Shri H.Y. Mehta, learned Govt. Advocate for the respondents – State though supported the impugned order on the ground that by the said order, the petitioner could have invoked the jurisdiction of appellate authority by challenging the impugned order in appeal under Rule 57 of the Rules of 1996. It is also submitted that the Government of M.P. in exercise of the powers conferred under sub-section (1) of Section 15 of the Mines and Minerals (Development and Regulations) Act, 1957, makes further amendments in the M.P. Minor Mineral Rules, 1996, which came into force w.e.f. 18.5.2017 and as per sub-Rule (1) of Rule 53 of the Rules of 1996, the Collector or any officer authorized by him not below the rank of Deputy Collector shall determines that such person has exported / transported the minerals in contravention of the provisions of these Rules and as per the amended Rules, the Sub-Divisional Officer is empowered to impose the penalty and pass the impugned order.

5. On merit, he submits that before the imposition of penalty, the area in

question was inspected by team of Mining and Revenue Department in presence of the petitioner, who at the time of inspection was present, but refused to sign the panchnama prepared at the spot. On the basis of the aforesaid panchnama, a detailed notice was issued to the petitioner and after receipt of reply and affording a reasonable and proper opportunity of hearing, a detailed order was passed, in accordance with law. The new amended Rules, which came into force w.e.f. 18.5.2017, specifically empowers the SDO to impose the penalty after issuance of show cause notice, which has been done in the present case and prayed for dismissal of the writ petition.

6. To appreciate the controversy involved in this writ petition, we narrate the few facts, which are relevant in this writ petition.

7. A quarry lease was granted to petitioner – Vijay Lunia, over an area of four hectares in village – Bibdodh, patwari halka No.63 at Survey No.126, for a period of ten years for extraction of minor mineral, commencing from 18.12.2007 to 17.12.2017. After grant of quarry lease, area was demarcated and possession of the said demarcated area was handed over to the petitioner for extraction of minor mineral. As per Rules of 1996 and terms and conditions of lease deed, he was permitted to carry out mining over the leased area. The permission was given to him by the department. One year prior to completion of lease period, he applied for renewal of quarry lease on 16.12.2016. The Superintendent, land record of District Ratlam, District Mining Officer and Mining Inspector, on the basis of applications of all the petitioners, constituted a team on 12.8.2016 and inspected the grant area of the petitioner and in presence of the lessee, the area of the petitioner was demarcated by them. During demarcation, they found that though area of four hectares of Survey No.126 of village – Bibdodh was granted to the petitioner, but he was carrying out mining operation outside of the grant and demarcated area. It is also observed that he was in possession of 1.130 hectares, which is outside of the grant area. They also found that the petitioner illegally extracted the mineral outside of the grant area. On the basis of the aforesaid inspection, a show cause notice dated 13.10.2017 was issued under Rule 53(5) of Rules of 1996 by the Sub-Divisional Officer for imposition of penalty of the alleged offence of illegal mining activities carried out by the petitioner. A show cause notice was issued to the petitioner to show cause as to why the petitioner be not punished with penalty of ten times of the market value under Rule 53(5) of Rules of 1996 read with Section 247 (7) of MPLR Code and why the petitioner be not prosecuted and seized mineral be not forfeited.

8. A detailed reply was filed and on opportunity of hearing he submitted that he has not illegally extracted the aforesaid minerals and he being lessee, no action can be taken against him. The SDO (R), after going through the reply found that there was violation of sub-rule (I) of Rule 53 and directed imposition of penalty to

the tune of ten times of the market price of the mineral. The SDO found that he illegally extracted 16504 cubic meters of stone and the value of the said mineral is Rs.16,50,400/-. After imposing the fine and considering the fact that market value was Rs.24,75,600/- and ten times of the market value comes to Rs.24,75,600/-, proposed to impose fine of Rs.3,30,08,000/- and after following the due procedure, passed the order dated 8.12.2017.

9. To appreciate the aforesaid contention the provisions as contained in sub-rule (1) and (5) of Rule 53 of 1996, may be referred which reads as under :-

> **53. Penalty for Un-authorised Extraction and Transportation.** – (1) Whenever any person is found extracting or transporting minerals or on whose behalf such extraction or transportation is being made otherwise than in accordance with these rules, shall be presumed to be a party to the illegal extraction of minerals and every such person shall be punishable with simple imprisonment for a minimum term of three months which may extend to two years or with fine which may extend to fifty thousand rupees or with both.
> (5).....The Collector/Additional Collector/Joint Director/Deputy Director/ Mining Officer or Officer authorised by Zila/Janpad/Gram Sabha may either before or after the institution of the prosecution, compound the offence so committed under sub-rule (1) on payment of such fine which may extend to ten times the market value of mineral so extracted but in no case it will be less than rupees one thousand or twenty times of royalty of minerals so extracted whichever is higher.
>
> Provided that in case of continuing contravention Collector / Additional Collector / Deputy Director/Mining Officer in addition to the fine imposed may also recover an amount of Rs.500/- for each day till such contravention continues.

10. Amended Rule 53 of M.P. Minor Mineral Rules, which came into force *w.e.f.* 18.5.2017 read thus :-

> "53. **(1) Penalty for un-authorized extraction and transportation** - Whenever any person is found extracting or transporting minerals or on whose behalf such extraction or transportation is being made otherwise than in accordance with these rules, shall be presumed to be a

party to the illegal mining / transportation, then the Collector or any officer authorized by him not below the rank of Deputy Collector shall after giving an opportunity of being heard determines that such person has extracted / transported the minerals in contravention of the provisions of these rules, then he shall impose the penalty in the following manner, namely :-

(a) on first time contravention, a penalty of minimum 30 times of the royalty of illegally extracted / transported minerals, shall be imposed but it shall not be less than ten thousand rupees.

(b) on second time contravention a penalty of minimum 40 times of the royalty of illegally extracted/ transported minerals shall be imposed but it shall not be less than twenty thousand rupees.

(c) on third time contravention, a penalty of minimum 50 times of the royalty of illegally extracted/ transported minerals shall be imposed but it shall not be less than thirty thousand rupees.

(d) on third time or subsequent contravention, a penalty of minimum 70 times of the royalty of illegally extracted/ transported minerals, shall be imposed but it shall not be less than fifty thousand rupees.

(2) Forfeiture of minerals in cases of illegal excretion and transportation.-

In respect of the Forfeiture/discharge of the mineral extracted/ transported illegally the Collector or any other officer authorized by him not below the rank of the Deputy Collector shall take an appropriate decision. Provided that seized minerals shall not be discharged till the penalty imposed as above is not paid. In case of forfeiture, the seized mineral shall be disposed of through a transparent auction/tender procedure as prescribed by the State Government.

(3) Forfeiture/Discharge of the seized tools, machines and vehicles etc. and disposal of forfeited material through Auction/ Tender.-

(a) In case of illegal extraction, the Collector or any other officer not below the rank of a Deputy Collector, authorized by him shall

take an appropriate decision in respect of forfeiture/discharge of tools, machines and vehicles used. Provided that the tools, machines, vehicles and other material so seized shall not be discharged till the penalty imposed as above is not paid. In case of forfeiture, the seized materials shall be disposed of through a transparent auction/tender procedure as prescribed by the State government.

(b) In respect of Forfeiture/Discharge of vehicle carrying mineral extracted/transported without any transit pass the Collector or any other officer not below the rank of Deputy Collector authorized by him shall take an appropriate decision. Provided that tools, machines, vehicles and other materials shall not be discharged till the penalty imposed as above is not paid.
In case of forfeiture the seized material shall be disposed off through a transparent auction/tender procedure as prescribed by the State Government:
Provided that the vehicle carrying minerals in excess as mentioned in transit pass, shall not be forfeited on doing so for first three times but the vehicle shall only be discharged on payment of penalty as imposed above. On repetition for the fourth time vehicle shall be liable to be forfeited.

(4) Action and compounding cases of un-authorized extraction/transportation:

Whenever any person is found involved extracting/transporting of the minerals in contravention of provisions of these rules, the Collector/Additional Collector/Deputy Collector/Chief Executive Officer of Zilla Panchayat/Chief Executive Officer of Janpad Panchayat/Deputy Director (Mineral Administration)/ Officer in charge (Mining Section)/Assistant Mining officer/ Mining Inspector/officer in charge (Flying Squad)/Sub Divisional officer (Revenue)/Tehsildar/Naib Tehsildar and any other officer not below the rank of class-III executive authorized by the Collector from time to time shall proceed to act in the following manner:-

(a) to initiate case of unauthorized extraction/transportation by preparing Panchnama on spot;

(b) to collect necessary evidences (including video-graphy) relevant to un-authorized extraction/transportation;

(c) to seize all tools, devices, vehicles and other materials used in excavation of miner mineral in such contravention and to handover all material so seized to the persons or lessee or any other person from whose possession such material was seized on executing an undertaking up to the satisfaction of the officer seizing such material, to this effect that he shall forthwith produce such material as and when may be required to do so:

Provided that where the report is submitted under sub-rule (3) above to the Collector or any other officer not below the rank of a Deputy Collector authorized by him, the seized property shall only be discharged by the order of the Collector or the officer authorized by him.

(d) officer as mentioned above shall inform the Collector or any other officer not below the rank of Deputy Collector, authorized by him about the incident within 48 hours of coming in to notice of the same.

(e) officers as mentioned above shall make a request in writing to the concerning police station/seeking police assistance, if necessary and police officer shall provide such assistance as may be necessary to prevent unlawful excavation/transportation of the mineral.

(5) Rights and powers of the investigating officer.-

During the investigation of the cases of illegal extraction/ transportation of the minerals, in contravention of these rules, the investigation officer shall have the following rights and powers, namely:-

(a) to call for person concern to record statement;

(b) to seize record and other material related to the case;

(c) to enter into place concern and to inspect the same;

(d) all powers as are vested in an in-charge of a police station while investigation any cognizable offence under Code of Criminal Procedure; and

(e) all other powers as are vested under Code of Civil Procedure to compel any person to appear or to be examined on oath or to produce any document.

(6) Submitting application by illegal extractor/ transporter to compound and its disposal.-

Before initiating or during the operation of the case, if the extractor/transporter is agree to compound the case, he shall have to submit an application of his intention to do so before the Collector/Additional Collector/Deputy Collector/Sub Divisional Officer (Revenue)/ Deputy Director (Mineral Administration)/ Mining officer/Officer-in-charge (Mining Section)/Assistant Mining Officer/ Officer in charge (Flying Squad) and he shall proceed to compound in the case. Provided that to avail the benefit of compounding the violator shall have to deposit the amount as determined here under as fine, namely:-

(a) For the first time violation 25 time of royalty of unlawfully excavated/transported minerals or rupees 10,000/- (Ten Thousand) whichever is more,

(b) For the Second time violation 35 time of royalty of unlawfully excavated/ transported minerals or rupees 20,000/- (Twenty thousand) whichever is more.

(c) For the third time violation 45 time of royalty of unlawfully excavated/ transported minerals or rupees 30,000/- (Thirty Thousand) whichever is more, and

(d) For the fourth time or subsequent violation minimum 65 time of royalty of unlawfully extracted/transported. Provided that it should not be less than rupees 50,000/- (Fifty thousand).

On being compounded, the seized mineral, tools machinery/and other materials shall be discharged.

(7) Action against contravention of conditions of extract trade quarry/quarry lease/permit or the provisions of this rules:

If during the enquiry of any illegal extraction/transportation a fact comes into the knowledge that any lease holder/contractor/permit holder, in order to evade the royalty from any sanctioned quarry lease/trade quarry/permit area is involved in dispatching/selling of minerals in excess quantity by showing less quantity of minerals in transit pass/defective transit permit/blank transit permit, then the Collector of the concerned district may suspend the quarrying operation in such quarry lease/trade quarry permit by issuing show cause notice for violating the conditions of the agreement and after providing an opportunity of being heard may

cancel the such lease/trade quarry/ permit. The additional royalty may be recovered after making the assessment of the quantity dispatched or sold in order to evade the royalty:

Provided that during the inspection if it is found that illegal minerals transporter by securing the transit pass from the lease holder in order to evade the royalty has made overwriting or tempered the pass then the officer of the minerals department/Mineral Inspector may registered a case against the person concerned.

2. In rule 68, sub-rule (5) shall be omitted."

11. Amended Sub-rule (1) of Rule 53, specifically provides that whenever any person is found extracting or transporting minerals or the transportation is being made otherwise than in accordance with the Rules shall be presumed to be a party to the illegal extraction of minerals and every such person shall be liable to pay penalty, which may extend to 30 to 70 times of royalty of illegal extracted minerals but in no case it will be less than rupees ten thousand to fifty thousand rupees so extracted whichever is higher.

12. The aforesaid amended provision provides that the Collector or any officer authorised by him not below the rank of Deputy Collector is empowered to impose penalty upto seventy times of the royalty of the mineral but it nowhere provides for imposition of the fine as was imposed by the impugned order.

13. From the un-amended Rule 53(1) and sub-rule (5) of the Rules, 1996, the authority to impose fine is Collector and not SDO. As per show cause notice, the details of the place from where the mineral was extracted, the quantity extracted, the market price of the mineral extracted were given and joint panchnama was also prepared to show that it was extracted without lawful authority. Under sub-section (7) of Section 247, the maximum penalty is four times, the market value of the mineral so extracted. Under the unamended provision of sub-rule (1) and sub-rule (5) of the Rule 53 of Rules of 1996, the Collector is empowered to compound the offence by imposing the penalty upon ten times of the value of the mineral, but it nowhere provide for imposition of the fine as was imposed by the Sub-Divisional Officer (R) by the impugned order. Only on filing the application or approaching to the Collector to compound the matter, the Collector could have exercised such power. Admittedly, in this case, the petitioner herein had not moved to the Collector for compounding the matter, so the SDO was not empowered to invoke the power under sub-Rule (5) of Rule 53. So far as, the stand of the State Government that after amendment in Rule 53 of the Rules of 1996, the SDO is empowered to impose the fine against the petitioner.

14. It is a cardinal principle of construction that every statute is *prima facie* prospective unless it is expressly or by necessary implication made to have retrospective operation. There is a presumption of prospectivity articulated in the legal maxim *'nova constitutio futuris forman imponere debet non praeteritis', i.e. ' a new law ought to regulate what is to follow, not the past'*, and this presumption operates unless shown to the contrary by express provision in the statute or is otherwise discernible by necessary implication.

15. In *M/s. Rai Bahadur Seth Shreeram Durgaprasad* V/s. *Director of Enforcement*, AIR 1987 SC 1364, the Apex Court considered the effect of amendment introduced to Foreign Exchange Regulations Act, 1947 on certain previous actions. It was held that proceedings could be initiated for adjudication under the amended law even in regard to a violation which took place prior to the amendments since the provision has retrospective operation. In *Gurbachan Singh* V/s. *Satpal Singh*, AIR 1990 SC 209, it was held that section 113-A of the Evidence Act which lays down a presumption, being only a matter of procedure of evidence would be retrospective in operation. The Court referred to the following passages in Halsbury's Laws of England (Fourth Edition), Vol.44 pages 570 and 574 respectively :

> *"The general rule is that all statutes, other than those which are merely declaratory or which relate only to matters of procedure or of evidence, are prima facie prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature....."*
> *"The presumption against retrospection does not apply to legislation concerned merely with matters of procedure or of evidence; on the contrary, provisions of that nature are to be construed as retrospective unless there is a clear indication that such was not the intention of Parliament.*

16. The decision in *State of T.N.* V/s. *M/s. Hind Stone*, AIR 1981 SC 711, is almost on point.

17. The rules under consideration in the case *State of T.N.* V/s. *M/s. Hind Stone*, AIR 1981 SC 711, were Tamilnadu Minor Mineral Concession Rules, 1959. Rule 8C was introduced by notification issued on 2.12.1977. It prescribed the procedure and the forum. Application of the respondent in the case was pending even before incorporation of Rule 8C. It was contended that the disposal was delayed and the application should be disposed of under the preexisting rule. The Court held as follows :-

> "While it is true that such applications should be dealt with within a reasonable time, it cannot on that account be said that the right to have an application disposed of in a reasonable time clothes an application for a lease with a right to have the application disposed of on the basis of the rules in foce at the time of making of the application. No one has

> a vested right to the grant or renewal of a lease and none can claim a vested right to have an application for the grant of renewal of a lease dealt with in a particular way, by applying particular provisions. In the absence of any vested rights in any one an application for a lease has necessarily to be dealt with according to the rules in force on the date of disposal of the application despite the fact that there is a long delay since the making of the application." (Emphasis supplied)

18. In the case in hand, by the impugned order the Sub - Divisional Officer imposed the penalty on the basis of panchnama dated 27.8.2016 and notice (Annexure P/3) dated 9.12.2016, on the basis of joint demarcation done by the mining authorities in presence of the petitioner. As per para 1 of the impugned order, a joint inspection team was constituted on 12.8.2016 and thereafter, they in presence of the petitioner and mining department inspected the area on 27.8.2016 and 28.8.2016, respectively whereas, the Rule 53 of the Rules of 1996 was amended *w.e.f.* 18.5.2017. The Apex Court in the case of *State of Punjab & Others* V/s. *Bhajan Kaur & Others*, AIR 2008 SC 2276 has held that amendment increasing compensation for no fault liability in Section 140 of the Motor Vehicles Act, 1988 is not retrospective.

19. It is also well settled that if the new Act affect the matters of procedure only then, prima facie, it applies to all the actions pending as well as future. The Rules of 1996 prescribed particular procedure to compound the offence by imposition of penalty. The procedure has been altered by subsequent amendment during the pendency of proceedings. The petitioners certainly have a right to dispose of their cases of un-authorized extraction and transportation of minerals by levy of penalty on the basis of rules inforce at the time of inspection made by the mining authorities, but they have no vested right to follow the procedure prescribed on that date on which inspection was made. Since, there is no such vested right, all pending cases of illegal extraction is to be disposed of as per procedure prescribed under the amended provisions of the law. The amendments, no doubt introduced certain additional conditions and power has been given to the Collector or any officer authorized by him not below the rank of Deputy Collector, which one intended for public good and due regulation of the mining activity in the light of vital concerns with regard to protection of illegal extraction and transportation of minerals.

20. In the present case, by amendment dated 18.5.2017, the power has also been delegated to the Sub Divisional Office to initiate proceeding under Rule 53 and impose fine / penalty under the aforesaid provision, but also enhance a penalty of minimum thirty to maximum seventy times of the royalty of illegal extracted / transported minerals whereas as per unamended provision the penalty was ten times of the market value of the mineral and thus, we are of the view that the amending provisions of Rule 53 would apply in the case in hand in the matter

of procedural only because no person has a vested right in any course or procedure. He has only the right of defence in the manner prescribed for time being by or for the authority, which the case is pending and, if, by amendment the mode of procedural is altered, he has no other right then to proceeding according to the altered mode. A change of forum (from the court of Collector to Sub-Divisional Officer) is a matter of procedure and, therefore, if an amended Rules requires or give authority to Sub-Divisional Officer instead of Collector, the said authority is competent to consider the question and decide it in accordance with law.

21. For the above mentioned reasons, we are of the view that the Sub-Divisional Officer is competent to pass the impugned order, but he has acted illegally and the penalty has been imposed on the basis of amended Rule 53 of Rules of 1996, treated it to have retrospective operation and, therefore, we quash that part of the order and remit the matter back to the learned Sub-Divisional Officer to reconsider the same and decide the question of imposition of penalty as per the Rules, which was prevailing on the date of joint inspection made by the joint inspect team and the same has to be dealt with under amended provisions (only procedural part) and decide it a fresh, after giving opportunity of hearing to the petitioner in accordance with law, preferably, within a period of sixty days from the date of filing of the certified copy of the order.

22. In the result, the writ petitions are allowed in part, to the extend as indicated hereinabove, but with no costs.

Petition partly allowed

I.L.R. [2018] M.P. 2119 (DB)

WRIT PETITION

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

W.P. No. 7801/2018 (Jabalpur) decided on 6 April, 2018

BHAGYASHREE SYED (SMT.) …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

***A. Higher Judicial Service (Recruitment and Conditions of Service) Rules, M.P., 1994, Rule 5(1)(c) and Civil Services (General Conditions of Service) Rules, M.P., 1961, Rule 6(6) – Appointment under the Rules of 1994 – Disqualification – Applicability of Rules of 1961* – Held – High Court clearly mentioned in advertisement that candidate has to satisfy eligibility criteria as per Rules of 1994 as well as Rules of 1961, thus independence of judiciary is not impinged when High Court itself makes the 1961 Rules applicable for**

appointment of posts of Higher Judicial Services – Applicability of 1961 Rules does not relate to core of judicial service but relates to procedural aspect – Further held – Mere participation in written examination and interview do not accrue any right in favour of petitioner and will not make a candidate eligible, if in terms of advertisement he is found not eligible for appointment under the Rules of 1961 – Petition dismissed.

(Paras 13, 14 16 & 17)

क. उच्चतर न्यायिक सेवा (भर्ती तथा सेवा शर्तें) नियम, म.प्र., 1994, नियम 5(1)(सी) एवं सिविल सेवा (सेवा की सामान्य शर्तें) नियम, म.प्र., 1961, नियम 6(6) – 1994 के नियमों के अंतर्गत नियुक्ति – निरर्हता – 1961 के नियमों की प्रयोज्यता – अभिनिर्धारित – उच्च न्यायालय ने विज्ञापन में स्पष्ट रूप से उल्लिखित किया है कि अभ्यर्थी को 1994 के नियमों के साथ साथ 1961 के नियमों के अनुसार पात्रता मानदंडों को पूरा करना होगा, इसलिए न्यायपालिका की स्वतंत्रता प्रभावित नहीं होती है जब उच्च न्यायालय स्वयं 1961 के नियमों को उच्चतर न्यायिक सेवाओं के पदों की नियुक्ति हेतु लागू करता है – 1961 के नियमों की प्रयोज्यता न्यायिक सेवा के मूल भाग से संबंधित नहीं है बल्कि प्रक्रियात्मक पहलू से संबंधित है – आगे अभिनिर्धारित – लिखित परीक्षा तथा साक्षात्कार में मात्र सम्मिलित होना, याची के पक्ष में कोई अधिकार प्रोद्भूत नहीं करता तथा एक अभ्यर्थी को पात्र नहीं बनाता है, यदि विज्ञापन की शर्तों के अनुसार वह 1961 के नियमों के अंतर्गत नियुक्ति के लिए अपात्र पाया गया है – याचिका खारिज।

***B. Principle of Estoppel* – Held – Petitioner cannot raise a plea of estoppel as petitioner's candidature has been cancelled before the stage of appointment in terms of the conditions of advertisement itself.**

(Para 17)

ख. विबंध का सिद्धांत – अभिनिर्धारित – याची विबंध का अभिवाक् नहीं उठा सकता क्योंकि स्वयं विज्ञापन की शर्तों के निबंधनों के अनुसार नियुक्ति के प्रक्रम के पूर्व ही याची की अभ्यर्थिता रद्द कर दी गई।

Cases referred :

(2000) 4 SCC 640, W.P. No. 15680/2017 decided on 23.02.2018, 1979 M.P.L.J. 498.

Anil Khare with *H.S. Chhabra,* for the petitioner.
Pushpendra Yadav, Dy. A.G. for the respondents/State.

O R D E R

The order of the Court was passed by :
HEMANT GUPTA, C. J. :- The challenge in the present petition is to the proviso to Rule 3 and Rule 6 (6) of the Madhya Pradesh Civil Services (General Conditions of Service) Rules, 1961 (hereinafter referred to as the 1961 Rules) in relation to its application to Madhya Pradesh Judicial Service. The relevant Rules read as under :-

"3. Scope of application. - The rule shall apply to every person who holds a post or is a member of a service in the State, except –

(a) person whose appointment and conditions of employment are regulated by the special provisions of any law for the time being in force;

(b) persons in respect of whose appointment and conditions of service special provisions have been made, or may be made hereafter by agreement;

(c) persons appointed to the Madhya Pradesh Judicial Service:

Provided that in respect of any matter not covered by the special provisions relating to them, their services or their posts, these rules shall apply to the persons mentioned in clauses (a), (b) and (c) above.

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) xxxxx

(6). No candidate shall be eligible for appointment to a service or post who has more than two living children one of whom is born on or after the 26th day of January, 2001,

Provided that no candidate shall be disqualified for appointment to a service or post, who has already one living child and next delivery takes place on or after the 26th day of January 2001, in which two or more than two children are born."

(emphasis supplied)

02. The challenge arises out of the fact that an advertisement was issued on 9.3.2017 to fill up 42 post of District Judge (Entry Level) in the pay-scale of Rs.51550-1230-58930-1380-63070/- in the cadre of Higher Judicial Service by direct recruitment from amongst the eligible Advocates under Rule 5 (1) (c) of the M.P. Higher Judicial Service (Recruitment and Conditions of Service) Rules, 1994 (for short "the Rules").

03. The petitioner appeared in the preliminary examination as a candidate for appointment to the service and was successful. It is thereafter, the petitioner submitted her application for main examination. In the application, there was a column seeking information about the number of children as also the number of children born after 26.1.2001. She disclosed that she had 3 children and one of

them was born after 26.1.2001. She qualified the main examination as well. Thereafter she was asked to submit Personal Information in the form which was available on the website before appearing for interview. Again, she submitted information that she had 3 children out of which one was born after 26.1.2001. After the Personal Information was uploaded she was issued with an admit card and then she appeared for interview on 16.9.2017. The grievance of the petitioner is that her name was not in the provisional select list of the successful candidates. On enquiry, the petitioner was informed that her candidature has been cancelled. On the basis of information obtained under Right to Information Act, the petitioner was informed that her candidature has been cancelled in view of Clause 3 of the advertisement and in view of Rule 6 (6) of 1961 Rules.

04. The argument of learned counsel for the petitioner is that 1961 Rules have been framed without consultation with the High Court as mandated by the Article 233 of the Constitution of India. Since the Rules have not been framed in consultation with the High Court, therefore, such Rules impinge upon independence of judiciary. It is contended that proviso to Rule 3 and Rule 6 (6) of 1961 Rules are beyond the legislative competence of the State being contrary to the Articles 233 and 234 of the Constitution of India having been framed without consultation with the High Court. Petitioner relies upon the Constitution Bench judgment reported as (2000) 4 SCC 640 *(State of Bihar and another* Vs. *Bal Mukund Sah* and *others)*.

05. The advertisement dated 9.3.2017 published by Madhya Pradesh High Court has a clause pertaining to disqualification of the candidates. The relevant condition read as under :-

> **"3. <u>Disqualification</u>** :-
>
> In any of the following cases, Applicants/Candidates may be liable for prosecution and/or cancellation of their candidature for selection may be canceled and he/she may be prohibited, temporarily or for any specific time period, to appear in any Examination conducted by M.P. High Court :-
>
> *(a) If he or she does not fulfill the provisions of M.P. Higher Judicial Service Rules 1994 and M.P. Civil Services (General Conditions of Service) Rules, 1961, or....."*

06. Learned counsel for the petitioner argued that to ensure independence of judiciary, Articles 233 and 234 of the Constitution of India contemplate that service conditions of the Judicial Officers shall be governed by the Rules published after consultation with the High Court. Since the 1961 Rules have not been published in consultation of the High Court, therefore, disqualification mentioned therein cannot be extended to the members of the Judicial Services. It is pointed out that in the Rules, there is no reference of applicability of the 1961 Rules to the members of Judicial Service, therefore, even if condition is

incorporated in the advertisement, such condition is not in terms of the constitutional scheme, therefore, not legal. It is contended that Madhya Pradesh Higher Judicial Service (Recruitment and Conditions of Service) Rules, 2017 has been published on 13.3.2018 repealing the Rules, which specifically contemplates that the conditions of the service of member of the cadre shall be regulated by the Rules as mentioned in Rule 13 including the 1961 Rules. Therefore, the absence of applicability of similar clause in the Rules is indicative of the fact that the 1961 Rules have not been adopted by the High Court and/or framed in consultation with the High Court.

07. It is also contended that in W.P. No.15680/2017 *(Manoj Kumar* Vs. *State of Madhya Pradesh* and *another)* decided on 23.2.2018, the appointments made to the Higher Judicial Service in terms of Rules in pursuance of advertisement dated 23.11.2015 was allowed wherein the challenge was to the termination of services of two Judicial Officers who had more than two children and one of them was born on or after 26.1.2001. This Court in the aforesaid judgment has not examined the legality of proviso to Rule 3 and the Rule 6 (6) of the 1961 Rules, therefore, the said judgment is not applicable to the facts of the present case.

08. Article 233 contemplates that the appointment of persons to be, and the posting and promotion of District Judges shall be made by the Governor of the State in consultation of the High Court exercising jurisdiction in relation to such State. Whereas Article 234 contemplates that the appointments of a person other than the District Judges to the judicial service of the State shall be made by the Governor of the State in accordance with the Rules made by him in that behalf after consultation with the State Public Service Commission and with the High Court exercising jurisdiction in relation to such State.

09. The 1961 Rules provide that such Rules will not be applicable to the persons appointed to M.P. Judicial Service but, if any matter is not covered by the special provisions relating to them, these Rules shall apply to the persons to the members of Madhya Pradesh Judicial Service as well. The applicability of 1961 Rules has come up for consideration before Division Bench this Court in a judgment reported as 1979 M.P.L.J. 498 *(Ramanand Ramnarayan Raidas* Vs. *State of M.P.* and *others)*. The Court upheld the applicability of the 1961 Rules in respect of any matter not covered by the special provisions relating to their service or their post. The relevant extract read as under:-

> "16. The contention of the learned counsel for the petitioner has to be repelled for the reasons to follow. The Service Rules cannot be pressed into service for the decision of the point at hand. Rule 3 (C) read with proviso of the Service Rules clearly provides that the Service Rules do not apply to persons appointed to the Madhya Pradesh Judicial Service except in respect of any matter not covered by the special provisions relating to them, their services or their posts. It may be mentioned that

> this Court has in *Jayant Kumar v. Public Service Commission, M.P. (1978 MPLJ 784)*, reiterating the view of this Court in an earlier decision in *Anant Kumar v. State of M.P., (1975 MPLJ 624)* held that State Government in exercise of its executive powers issue executive instructions relating to the matters of appointment and services of persons to the Madhya Pradesh Judicial Service. The validity of the terms and conditions contained in Annexure 'C' has rightly not been disputed before us. In this view of the matter there being a specific provision in Annexure C, regarding probation and confirmation, resort cannot be made to rule 8 (2) of the service rules."

10. That apart, it is not the argument of learned counsel for the petitioner that Rules are comprehensive to include all situations which a member of the Judicial Service would face as member of the cadre. The proviso to Rule 3 of 1961 Rules, contemplates that if there is any special provision made in respect of judicial service in the Rules, then that provision will prevail otherwise the 1961 Rules would be applicable. The High Court clearly mentioned in the advertisement that the candidate has to satisfy the eligibility criteria as per the Rules as well as 1961 Rules. Therefore, the High Court has not objected to the applicability of the 1961 Rules to the members of Judicial Service. Therefore, the independence of judiciary is not impinged when the High Court itself makes the 1961 Rules as applicable to a candidate seeking appointment to the cadre posts of Higher Judicial Service.

11. The judgment in *Bal Mukund Sah's* case (supra) arises out of a situation where Bihar Reservation of Vacancy in Posts and Services (for Scheduled Castes/Scheduled Tribes and other Backward Classes) Act, 1991 provided reservation for direct recruitment to the posts in Judiciary of the State without any consultation with the High Court. The Division Bench of the High Court struck down the reservation in the cadre of the District Judges to be filled by the direct recruitment provided without consultation and in the face of objection by the High Court. Therefore, that was a case where the State Government and the High Court were at variance on the question of reservation in the Judicial Services. Therefore, the judgment in *Bal Mukund Sah's* case (supra) has to be read in view of the facts of the said case. The Court has held as under :-

> **"29.** xxxxxxx. So far as direct recruitment to the posts of District Judges is concerned, Article 233 sub-article (2) leaves no room for doubt that unless the candidate is recommended by the High Court, the Governor cannot appoint him as a District Judge. Thus Articles 233 and 234, amongst them, represent a well-knit and complete scheme regulating the appointments at the apex level of District Judiciary, namely, District Judges on the one hand and Subordinate Judges at the grass-root level of Judiciary subordinate to the district court. Thus Subordinate Judiciary represents a pyramidical structure. At base level i.e. grass- root level are the Munsiffs and Magistrates whose recruitment is governed by Article 234. That is the first level of the

Judiciary. The second level represents already recruited judicial officers at grass-root level, whose working is controlled by the High Court under Article 235 first part. At the top of this pyramid are the posts of District Judges. Their recruitment to these posts is governed by Article 233. It is the third and the apex level of Subordinate Judiciary.

30. It has also to be kept in view that neither Article 233 nor Article 234 contains any provision of being subject to any enactment by appropriate Legislature as we find in Articles 98, 146, 148, 187, 229(2) and 324(5). These latter Articles contain provisions regarding the rule making power of the concerned authorities subject to the provisions of the law made by the Parliament or Legislature. Such a provision is conspicuously absent in Articles 233 and 234 of the Constitution of India. Therefore, it is not possible to agree with the contention of learned counsel for the appellant-State that these Articles only deal with the rule making power of the Governor, but do not touch the legislative power of the competent Legislature. It has to be kept in view that once the Constitution provides a complete Code for regulating recruitment and appointment to District Judiciary and to Subordinate Judiciary, it gets insulated from the interference of any other outside agency. We have to keep in view the scheme of the Constitution and its basic framework that the Executive has to be separated from the Judiciary. Hence, the general sweep of Article 309 has to be read subject to this complete Code regarding appointment of District Judges and Judges in the Subordinate Judiciary.

35. In order to fructify this Constitutional intention of preserving the independence of Judiciary and for fructifying this basic requirement, the process of recruitment and appointment to the District Judiciary with which we are concerned in the present case, is insulated from outside legislative interference by the Constitutional makers by enacting a complete Code for that purpose, as laid down by Articles 233 and 234. Consultation with the High Court is, therefore, an inevitable essential feature of the exercise contemplated under these two Articles. If any outside independent interference was envisaged by them, nothing prevented the founding fathers from making Articles 233 and 234 subject to the law enacted by the Legislature of States or Parliament as was done in the case of other Articles, as seen earlier. …...

36. It becomes, therefore, obvious that no recruitment to the post of a District Judge can be made by the Governor without recommendation from the High Court. Similarly, appointments to Subordinate Judiciary at grass-root level also cannot be made by the Governor save and except according to the rules framed by him in consultation with the High Court and the Public Service Commission. Any statutory provision bypassing consultation with the High Court and laying down a statutory fiat as is tried to be done by enactment of Section 4 by the Bihar Legislature has got to be held to be in direct conflict with the complete Code regarding recruitment and

> appointment to the posts of District Judiciary and Subordinate Judiciary as permitted and envisaged by Articles 233 and 234 of the Constitution. The impugned Section 4, therefore, cannot operate in the clearly earmarked and forbidden field for the State Legislature so far as the topic of recruitment to District Judiciary and the Subordinate Judiciary is concerned. That field is carved out and taken out from the operation of the general sweep of Article 309."

12. The aforesaid extract from the judgment would show that no recruitment on the post of District Judge can be made by the Governor without recommendation from the High Court. Any statutory provision bypassing consultation with the High Court and providing reservation by the enactment in question is in direct conflict with the constitutional scheme regarding recruitment and appointment to the posts of the District Judiciary and the Subordinate Judiciary as permitted and envisaged by Articles 233 and 234 of the Constitution of India.

13. Coming to the facts of the present case, it is not even remotely suggested by the petitioner that appointment and recruitment to the post of District Judiciary is being made without consultation of the High Court. In fact, the advertisement for recruitment was published by the High Court stipulating disqualification if the candidate is not qualified under the 1994 Rules and 1961 Rules. Therefore, the High Court has considered it appropriate to apply 1961 Rules for the purpose of conditions of eligibility to the post of District Judge (Entry Level). By such process, the constitutional mandate as interpreted by the Supreme Court in *Bal Mukund Sah's* case (supra) is not infringed in any manner.

14. The recruitment and promotion conditions are peculiar to the Higher Judicial Service and the Rules govern such aspects. However, general procedural conditions such as the period of probation or the conditions for confirmation are dealt with by the 1961 Rules. The applicability of 1961 Rules to the members of the Higher Judicial Service does not relate to core of judicial service but relates to procedural aspect which does not cast any shadow on the independence of judiciary.

15. Still further, in *Manoj Kumar's* case, (supra) the Court has set aside the order of termination for the reason that information in respect of children was not sought from the candidates at the time of filing of application form. In the said case, an argument was raised that 1961 Rules cannot be made applicable to the members of Judicial Service. It was held that the advertisement itself has a stipulation that the candidature of the candidate may be liable for cancellation if he or she does not fulfill the provisions of 1961 Rules. Therefore, the argument that in the absence of statutory Rules framed by the Governor in consultation with the High Court, the 1961 Rules cannot be extended for the purposes of Judicial services was not accepted. The Court held as under :-

"14. The argument of the learned counsel for the petitioners relying upon **Bal Mukund Sah's** case (supra) is not tenable. **Bal Mukund Sah** (supra) was a judgment in which the State and the High Court were at variance with respect of applicability of the Rules of reservation for appointment to the members of Judicial service. However, in the present case, the High Court in the advertisement itself made a stipulation for the candidates that the candidate may be liable for cancellation of candidature if he or she does not fulfill the provisions of 1961 Rules. In the teeth of such categorical condition in the advertisement, we do not find any merit in the argument that in the absence of statutory Rules framed by the Governor in consultation with the High Court, the 1961 Rules cannot be extended for the purposes of Judicial services.

15. The argument that where a power is given to do certain thing in a certain way, things must be done in that way or not at all, is again not applicable to the facts of the present case as it was always open to the High Court to adopt the statutory Rules framed by the State Government for the purposes of recruitment to the Judicial services. By adoption of such Rules, the High Court is not acting contrary to the Constitutional scheme to ensure independence of the Judiciary. Such clause of disqualification for having more than two living children has a larger public purpose with the aim to control population in the country, therefore, such clause cannot be deemed to be illegal violating any of the provisions of the Constitution or the judgments referred to by the petitioners. Therefore, neither the judgment in **Bal Mukund Sah (supra)** nor **Nazir Ahmad's** case (supra) nor the other judgments that things must be done in a certain way prescribed or not at all, are applicable to the facts of the present case.

16. It is contended that the advertisement issued is not clear and categorical in respect of eligibility of candidates, who have more than two living children as on 26th January, 2001. There was no clause in the application form seeking information about the number of children, therefore, disqualification in terms of Clause 3(a) is inferential disqualification and such clause, which is not clear and categorical, cannot be extended to the petitioners. The condition of the advertisement is that the candidate needs to satisfy the condition of eligibility as contemplated in the Rules. The 1961 Rules are not applicable to M.P. Judicial Services. M.P. Judicial Services are not defined under the aforesaid Rules, therefore, Clause (c) of Rule 3 of the 1961 Rules would include the Higher Judicial Services as well as Lower Judicial Services but the proviso contemplates that if any matter is not covered by any special provision relating to Judicial Services, these Rules shall apply.

17. It is not the case of any of the parties that the Rules have any condition similar to disqualification for having more than two living children, therefore, in terms of proviso, the condition of having more than two living children as contained in Rule 6(6) of the 1961 Rules

> would be applicable to the candidates for the purposes of determining the eligibility of the candidates. Though, the language of the advertisement is not clear but keeping in view the rule of interpretation that various clauses in the advertisement have to be read together, once the advertisement specifies that disqualification as contemplated in the 1961 Rules would be applicable, it necessarily implies that the conditions of eligibility as contained in 1961 Rules are also applicable for the purposes of recruitment to the post of District Judge (Entry Level)."

16. In view of the above, we find that the issue in respect of applicability of 1961 Rules has been dealt with in *Manoj Kumar's* case (supra). This Court interfered with the order of termination on the ground that the application form had no column to seek information about the children. The order of termination was set aside only for the reason that disqualification cannot be based upon inferential condition of qualification. But in the present case, the petitioner has submitted the details of her children in the application form for appearing in the main examination and also before appearing in the interview. The advertisement itself contemplates that 1961 Rules would be applicable. Therefore, the condition of disqualification was quite clear and categorical.

17. The argument that the petitioner was called to appear for the written examination and also for the interview, therefore, the respondents cannot raise a plea that the petitioner is disqualified, is again does not merit consideration. The advertisement was clear and categorical that the disqualification shall be as per the 1994 Rules and 1961 Rules. Mere participation in the written examination and the interview will not make a candidate eligible if in terms of the advertisement itself the candidate was not eligible for appointment. No right accrues in favour of the petitioner prior to appointment, when the candidature was cancelled on the ground of disqualification under the 1961 Rules. In the present case, the candidature of the petitioner has been cancelled before the stage of appointment in terms of the condition of the advertisement itself. Therefore, the petitioner cannot raise a plea of estoppel against the respondents.

18. Consequently, we do not find any merit in the present petition. The same is, accordingly, dismissed.

Petition dismissed

I.L.R. [2018] M.P. 2129 (DB)
WRIT PETITION

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

W.P. No. 8078/2018 (Jabalpur) order passed on 10 April, 2018

PRAVEEN PANDEY ....Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

Advocates Act, (25 of 1961) – Role of State Bar Council – Call from Council to Lawyers to Abstain from Judicial Work – Legality **– Held – State Bar Council is a creation of the Act of 1961 and it derives its authority from the Act and has to discharge functions which are conferred on it by the said Act – No provision of the Act confers power to such statutory body to call the members to abstain from judicial work which is the responsibility of every member of Bar in terms of provisions of Act itself – Such decision and call of the State Bar Council is illegal, unconstitutional and against statutory provisions as well as contrary to judgments of Supreme Court – Advocates in State directed to resume work forthwith.**

(Paras 18 to 21)

अधिवक्ता अधिनियम (1961 का 25) – राज्य अधिवक्ता परिषद् की भूमिका – परिषद् द्वारा अधिवक्तागण को न्यायिक कार्य से प्रविरत रहने के लिए आवाह्न – वैधता – अभिनिर्धारित – राज्य अधिवक्ता परिषद् का सृजन 1961 के अधिनियम द्वारा हुआ है एवं वह इस अधिनियम से अपने प्राधिकार व्युत्पन्न करता है तथा उक्त अधिनियम द्वारा उसे प्रदत्त किये गये कृत्यों का निर्वहन करना होता है – इस अधिनियम का कोई उपबंध ऐसे कानूनी निकाय को न्यायिक कार्य, जो कि स्वयं अधिनियम के उपबंधों के निबंधनों के अनुसार अधिवक्ता संघ के प्रत्येक सदस्य का उत्तरदायित्व है, से प्रविरत रहने के लिए सदस्यों का आवाह्न करने की शक्ति प्रदत्त नहीं करता – राज्य अधिवक्ता परिषद् का ऐसा विनिश्चय एवं आवाह्न अवैध, असंवैधानिक तथा कानूनी उपबंधों के विरूद्ध होने के साथ–साथ उच्चतम न्यायालय के निर्णयों के प्रतिकूल है – राज्य में अधिवक्तागण को तत्काल कार्य पुनः आरंभ करने हेतु निदेशित किया गया।

Cases referred :

(2003) 2 SCC 45, AIR 1996 Calcutta 331, 2017 (5) SCC 702, Cr.A. No. 470/2018 decided on 28.03.2018 (Supreme Court).

Petitioner in person.

None for the respondents.

Mohd. Fahim Anwar, Registrar General and *A.K. Shukla*, Principal Registrar (Judicial), M.P. High Court.

O R D E R

The Order of the Court was passed by : **HEMANT GUPTA, CHIEF JUSTICE**:- The present petition in public interest has been filed by the petitioner, a practicing Advocate of this Court, challenging the call to all the Advocates in the State by the State Bar Council to abstain from Court work from 9th April, 2018 to 14th April, 2018. The demand is of appointment of High Court Judges, enactment of Advocates' Protection Act and seating arrangement of Advocates in the High Court premises.

2. The Chairman, State Bar Council of Madhya Pradesh is said to have addressed a Press Conference on 28th March, 2018 giving an ultimatum to the State for fulfillment of their demands by 8th of April, 2018 otherwise the State Bar Council will call the strike in whole of State of Madhya Pradesh and that no Advocate will appear before any Court. The Chairman has also threatened the Advocates that, whosoever will appear in the Courts, shall be subjected to a disciplinary action. News with regard to holding of Press Conference was published in the newspapers such as Patrika: Jabalpur (Annexure P-1) and Dainik Bhaskar: Jabalpur dated 29.03.2018 (Annexure P-2).

3. It is contended that the State Bar Council is a statutory body and it has no jurisdiction to call for the strike. The call of strike affects the urgent hearing matters which are pending in the Courts. The petitioner refers to a Constitution Bench judgment of the Supreme Court reported as (2003) 2 SCC 45 *(Ex-Capt. Harish Uppal vs. Union of India and Another).*

4. As per the listing mechanism in this Court, a Short Messaging Service (SMS) of hearing of the petition on 05.04.2018 was sent to Shri Kuldeep Singh, Panel Lawyer of State Bar Council of M.P on 05.04.2018 at 12:46:34. The case was called for hearing at 2.30 p.m. when Shri Naman Nagrath, Senior Advocate appeared for the State Bar Council and the case was adjourned to 06.04.2018. On 06.04.2018, at about 12 p.m., the case was called. Shri Nagrath, stated that meeting of the office bearers of the State Bar Council with the office bearers of all the Bar Associations at the Principal Seat of High Court was convened at about 4.30 p.m. on 5th April, 2018 and it has been decided to call for voluntary abstaining from work by the members of the Bar. The case was ordered to be taken up at 01.00 p.m. with the direction that Shri Naman Nagrath to disclose the issues on which the members have decided to abstain from work and the names of the office bearers of the State Bar Council; office bearers of the different Bar Associations of the High Court of Principal Seat at Jabalpur, Gwalior and Indore so that further action, as may be permissible in law, can be considered. At 01.00 p.m. on 6th April, 2018, when the case was taken up, Shri Nagrath sought time to comply with the order passed earlier in the day. On his request, the case was

ordered to be taken up on 09.04.2018 at 02.30 p.m. . However, when the case was called for hearing yesterday, Shri Nagrath did not appear.

5. The Registrar General of this Court produced on record a Press release and an appeal to the members of the different Bar Associations to attend the Court work issued earlier in the day on 9.4.2018. It was circulated that by abstaining from work from 9th April, 2018 to 15th April, 2018, approximately 960 court working hours of the High Court will be jeopardized and about 40,000 working hours (of approximately 1315 Judicial Officers) in the Subordinate Courts will be affected. Shri A.K. Shukla, Principal Registrar (Judicial) has produced the record of the cases decided, as also the status of appointments in the Subordinate judiciary and the present vacancy position. Such details have been kept on record.

6. In the first representation dated 21st March, 2018, the State Bar Council has sought the resolution of three issues; (1) immediate steps for appointment of Judges to the High Court, (2) enactment of Advocates' Protection Act and (3) appropriate arrangement for working space/ chambers.

7. The Registrar General of this Court sent an information to the Chairman, State Bar Council on 22.03.2018 itself that the Chief Justice is conscious of the prevailing situation regarding the vacancies and necessary steps are being taken whereas the Issue Nos.2 and 3 pertain to the State Government for which they need to directly approach the State Government. Therefore, there is no cause to propose to go for a week-long protest or for abstaining from judicial work. It is, thereafter, the Press Conference was held on 28th March, 2018. A supplementary representation was submitted on 5th April, 2018 raising grievance of non-sanctioning of 16 additional posts of High Court Judges; the vacant posts of District Judges and Additional District Judges; non-appointment of Presiding Officers of the District Consumer Redressal Forums and other Quasi-Judicial Tribunals; the system of payment of e-court fee and new criminal listing mechanism. Therefore, the Bar Council has decided to continue with the protest from 9th April, 2018 to 14th April, 2018.

8. It cannot be disputed that the enactment of Advocates' Protection Act or arrangement for working space/chambers, as sought, is to be considered by the State Government. As per information given by the Principal Registrar (Judicial), a public interest litigation bearing W.P. No.4436/2018 *(Dr. P.G. Najpande* vs. *The State of M.P.* and *another)* is pending in the High Court for non-appointment of the Presidents of the District Consumer Redressal Forums, which is now fixed for 30th April, 2018 in view of the statement of the State counsel that Chairpersons of 13 District Consumer Redressal Forum shall be appointed before the said date.

9. In respect of the vacancies in the subordinate Courts, it is pointed out that as many as 560 posts i.e. 235 in the Higher Judicial Service and 325 in Madhya

Pradesh Judicial Services have been created by the State Government on 5th October, 2016 and such posts have been decided to be filled up in staggered manner i.e. 111 posts in 2016, 150 posts in 2017, 150 posts in 2018 and 149 posts in 2019 in order to ensure that necessary infrastructure is available for working of the officers. After sanction of 560 additional posts, the total posts as on 31st March, 2018 are 2021 out of which 706 posts are vacant including the newly created 560 posts. The appointment/selection of 424 Judicial Officers is in progress out of which 253 posts are to be filled in the year 2018 and the process of appointment of 171 officers is near completion. The selection process of 149 Judicial Officers i.e. 59 of Higher Judicial Service and 90 of State Judicial Service will be taken up in the year 2019. Therefore, it cannot be said that there is an acute shortage of the Judicial Officers.

10. The Principal Registrar (Judicial) furnished information regarding appeals preferred and decided in last two years. It shows that from 1st April, 2017 to 31st March, 2018 as many as 1717 Division Bench criminal appeals and 4476 Single Bench criminal appeals, total 6193 criminal appeals were decided. Out of such appeals 1656 criminal appeals i.e. 1239 Division Bench appeals and 417 Single Bench appeals, the accused persons were in custody. Still further, in 140 cases, *Amicus Curiae* were appointed. It may also be noticed that in the year 2016, 1658 Division Bench appeals were preferred out of which 519 appeals were decided whereas in the year 2017, total 1617 Division Bench appeals were preferred out of which 1390 appeals were decided. On the other hand, in the years 2016 and 2017, total number of 5631 and 7904 Single Bench criminal appeals were preferred and out of which 1464 and 4290 appeals were decided in the years 2016 and 2017 respectively. Thus, we find that disposal of the cases at the High Court level has not deteriorated but has substantially improved in the year 2017.

11. Though the statement of Shri Nagrath was that abstaining from work is voluntary but even Shri Nagrath has failed to appear on 9th April, 2018 when the present writ petition was called for hearing. None of the members of the Bar appeared for hearing though in few cases, on mention memo by the Members of the Bar, the writ petitions were listed for hearing on the same day. Therefore, it is not a voluntary act but a call given by a statutory body which is competent to take disciplinary action against the Advocates enrolled with it and is compelling the members of the Bar to abstain from work. The so-called object to abstain from work is that there are huge arrears. There is no doubt about it. But, the abstaining of work is not addressing the issue of reducing the arrears but is increasing the same. One can understand if the State Bar Council has to request the Courts to work extra to address the problem of arrears or the members of the Bar decide not to seek adjournments and to avoid repetitive arguments so that the disposal could be much better.

12. This Bench has been hearing criminal appeals in which the accused persons are in custody for more than 10 years at 03.30 p.m every day for almost a year but the Bench is deprived of assistance of the Advocates, who are engaged by the convicts and this Bench has to take assistance from the Legal Aid counsels to argue the appeals on behalf of the accused persons who are in custody for more than 10 years. Therefore, the State Bar Council was expected to address the problem of the members of the Bar of not appearing in Court but instead, a decision taken to abstain from work is, in fact, aggravation of problem of mounting arrears.

13. A Single Bench of Calcutta High Court in a judgment reported as AIR 1996 Calcutta 331 *(Arunava Ghosh and others* vs. *Bar Council of West Bengal* and *other)* was examining the resolution of the Bar Council of West Bengal to call the Advocates to abstain from attending the Courts in view of lack of court infrastructure. The Court held that the Bar Council is to ensure safe place of work for all lawyers, as the lawyers were adjunct to the administration of justice and that the Bar Council had to ensure that the cause of administration of Justice did not suffer. The Court held as under:-

> "**8**. Quoting from observations of the Supreme Court and the English Courts in different cases relating to the nature and character of the legal profession and the standard of ethics to be followed by the Advocates and also referring to the rules framed by the Bar Council under Section 49(1)(c) of the Advocates Act relating to standard of the professional conduct and etiquette, it has been further contended by the petitioners that the Advocates practise the profession of law to serve the people to secure justice for them and to do everything as agent of his client to espouse honourably and fearlessly the cause of his client although not as his client's mouthpiece, having allegiance to a higher cause, namely the cause of truth and justice which he secures as an officer of the Court. It is contended that such standard of professional conduct and etiquette imposes a compulsive duty on an Advocate to accept brief of a litigant unless exempted by the rules and to plead his cause in Court and not to withdraw from such duty without notice to his client and without reasonable cause.
>
> *** *** ***
>
> **10**. It has been prayed by the writ petitioners, inter alia, for a declaration that the respondents have no jurisdiction or power to call upon Courts/Tribunal/ Authorities or the Advocates to cease work or to boycot (sic) any Court or to resort to strike so that normal works of the Courts are disrupted and the Advocates are prevented from practising profession of law; for a further direction upon the respondents to forebear from interfering with or suspending or prohibiting the Advocates form (sic) performing their professional work by calling upon them to cease work and for issue of a writ in the nature of prohibition prohibiting the respondents from giving any effect or further effect to the resolution dated 3rd May, 6th May, 11th

May and 13th May 1994 and for writ in the nature of mandamus directing the respondents to withdraw and/or rescind such resolutions. A writ in the nature of quo warranto has also been asked for commanding the respondent No. 2 and respondent Nos. 5 to 27 to vacate the office of the members of the West Bengal Bar Council to withdraw and resile such resolution.

*** *** ***

28. The Bar Council of West Bengal and some other respondents supporting the stand of the Bar Council in their submission have not disputed the facts that the Bar Council being a statutory body its powers are circumscribed by the statute. But all of them have submitted, inter alia, that the Bar Council does possess the power even to call upon the Advocates to cease work for the purpose of protecting the interest of the entire legal fraternity in exercise of its function under Section 6(1)(d) and (i) of the Advocates Act and all of them have justified such action of Bar Council by contending, inter alia, that such a measure was resorted to by the Bar Council as a last resort, for protecting the interest of the legal fraternity and as all other methods failed to rouse the State Government into action.

*** *** ***

41. Admittedly the Bar Council of West Bengal is State within the meaning of Article 12 of the Constitution of India. Every Act of State must be presumed to be informed with reason and in public interest. Whosoever seeks to displace this presumption has a heavy onus to discharge.

42. Section 6 of the Advocates Act lists within the functions of the Bar Council the doing of all other things necessary for discharging the functions from sub-sections l(a) to l(h). It was not possible for the legislature to visualise and accordingly to enumerate the specific actions that the Bar Council could take in the eventualities that might arise in course of time. The situation was singular. The Advocates were denied a safe place of work. The Bar Council which is State within the meaning of Article 12, found that exhortations were fruitless and in exasperation decided upon the cease work for a limited period with advance notice that if in the meantime anything meaningful was done, the cease work would not take effect. It was in the interest of all Advocates to ensure what the Bar Council was striving for and unless the action proposed was binding and unless the Bar Council had the authority to punish a violation, it would be a meaningless step and would hardly be a method of persuading the Government to take action.

43. The Bar Council had, therefore, to ensure safe place of work for all lawyers, not only the Lawyers affected in particular Courts, and also, since lawyers were adjunct of the administration of justice, the Bar Council had to ensure that the cause of administration of Justice did not suffer.

*** *** ***

51. Under Section 35 of the Advocates Act when the State Bar Council on receipt of a complaint or otherwise has a reason to believe that any Advocate on its roll has been guilty of professional or other misconduct, it shall refer the case for disposal to its Disciplinary Committee. In the instant case although by the impugned resolution dated 13th May 1994 the Bar Council did not resolve that it had already reason to believe that the Advocates, who defied the call of the Bar Council for ceasing work have committed other misconduct, it resolved that show cause notices be issued against such Advocates and in the event the State Bar Council has reason to believe that such Advocates are guilty of other misconduct the case may be referred to the Disciplinary Committee.

*** *** ***

54. As to the merits of the controversy between the parties, it is pertinent to note, that in the instant case the Court is concerned only the existence or lack of jurisdiction of Bar Council to give call for cease work and to compel the Advocates on its roll to follow such resolution and the Court is not concerned with the question whether an association of Advocates can call for such a cease work or whether an Advocate individually or collectively has the right to strike work.

55. While examining, the issues which have been raised before this Court, it is necessary to keep in mind that the Bar Council of West Bengal or for the matter of that any State Bar Council or Bar Council of India is neither an Association nor a Guild of the Advocates nor the same is a Trade Union. The Bar Council of West Bengal and for the matter that all State Bar Council and All India Bar Council admittedly are statutory bodies created and/or reconstituted under the Advocates Act 1961. The fact that the Bar Council being a Statutory body its powers and functions are circumscribed by the provisions of the Statute as asserted by the petitioners, is not really disputed by the respondents. The fact that the Bar Council has also not been invested specifically with the power of giving a call to the members on its roll to cease work either under the Advocates Act 1961 or under any other statute is not also disputed by the respondent. But the respondents have contended inter alia, that one of the functions of the Bar Council under Section 6(1)(d) of the Advocates Act is to safeguard the rights, privileges and interest of Advocates on its roll and under Section 6(1)(i) of the said Act, it has the power to do all other things necessary for discharging the functions enumerated in the other clause including clause (d) of sub-section (1) of Section 6 of the said Act. It has been contended that to protect the rights, privileges and interest of the Advocates on its roll the Bar Council has the power under aforesaid clause (i) of subsection (1) of Section 6 to do all other things necessary to discharge such functions, and therefore it had the power to give call for cease work as the same bona fide was thought necessary by the Bar Council to protect the interest of the Advocates, all other methods to protect the interest of the Advocates, because of the failure of the State Government to shift the Courts from the dilapidated building to a safer building, having failed to obtain result.

56. Assuming there is scope of such interpretation of Section 6(1), (d) and (i) of the said Act as it is sought to be made by the respondents, namely the impugned action resorted to by the Bar Council having been thought to be necessary for protecting the interest of the Advocate the same was permissible and the Bar Council had the jurisdiction to take such action, then the question obviously comes in how far the Bar Council can go in the matter of taking any action or doing anything which is considered necessary for protection and safeguard the interest the rights and privileges of the Advocates. In doing such things what is thought by the Bar Council to be necessary, can it do such a thing which although may be thought to be necessary by the Bar Council for protecting the interest of the Advocates and their rights and privileges, which also takes away the statutory or constitutional right of an Advocate even though may be temporarily? The answer in my view will be in the negative. Such power to the Bar Council, which apart from being statutory body is also an authority within the meaning of Art. 12 of the Constitution, cannot be unbriddled and uncontrolled, but like all state actions must be free from arbitrariness, must be reasonable. The Bar Council being a statutory body while exercising its functions under Section 6(1), (d) and (i) of the Advocates Act while doing all things which are necessary for discharging its various other functions enumerated in different clauses of sub-section 1 of Section 6 including safeguarding the rights, privileges and interest of the Advocates on its roll cannot do such things which are illegal, or which are against the public policy or against the law of the land, which are unreasonable, arbitrary or which adversely affects the livelihood, right and interest of other persons including Advocates. In my view in the name of safeguarding the rights, privileges and interests of the Advocates on its roll the Bar Council cannot certainly do something which will take away, even though temporarily, the statutory and the constitutional right of an Advocate to practise, except under the provisions of Section 35 of the Advocates Act.

*** *** ***

60. An examination of the Bar Council Act 1926 and the Advocates Act 1961 will clearly indicate that the State Bar Council has no power or jurisdiction to take away the right of an Advocate to practice as of right either temporarily or permanently or to compel him not to practice even for a day or affect his right to practise in any manner whatsoever except by way of exercising, disciplinary jurisdiction under Section 35 of the Advocates Act 1961.

61. Such being the position of law and admittedly, the State Bar Council also not having been specifically invested with any power to call upon the Advocates on its roll to cease work or to compel an Advocate to cease work, to read the existence of such power impliedly under clause (i) of sub-section (1) section (6) of the Advocates Act will be against all canons of interpretation particularly when the effect of the same would be negation and affectation of statutory right of

Advocates to practice as of right.

62. Such call for cease work by the Bar Council and compelling an Advocate to cease work not only amounts to negation of such statutory right of Advocate under Section 14 of the Bar Council Act to practise as of right, the same is also an invasion of the fundamental right of an Advocate as guaranteed under Art. 19(1)(g) of the Constitution of India under which the freedom to practise any profession is guaranteed subject to reasonable restrictions that may be imposed. In exercise of such fundamental right every Advocate has the freedom to practise as a lawyer. Subject to reasonable restrictions that might be imposed. The only reasonable restriction upon such freedom and right of an Advocate is provided in the aforesaid provision of Section 14 of the Bar Council Act 1926 and in the various regulatory measures including disciplinary power which could be exercised by the Bar Council under the Advocates Act 1961. There is no other provision either in the Advocates Act or in the Bar Council Act or in any other legislation or enactment empowering the Bar Council to affect such right of an Advocate to practise as of right either by compelling him to cease work or in any other manner whatsoever."

14. We respectfully approve the reasoning and findings given in the said Judgment dealing with the right of the Bar Council to give call for abstaining work from the Courts.

15. A Constitution Bench of the Supreme Court in *Ex. Capt. Harish Uppal's* case (supra) observed as under:-

"**20**. Thus the law is already well settled. It is the duty of every Advocate who has accepted a brief to attend trial, even though it may go on day to day and for a prolonged period. It is also settled law that a lawyer who has accepted a brief cannot refuse to attend Court because a boycott call is given by the Bar Association. It is settled law that it is unprofessional as well as unbecoming for a lawyer who has accepted a brief to refuse to attend Court even in pursuance of a call for strike or boycott by the Bar Association or the Bar Council. It is settled law that Courts are under an obligation to hear and decide cases brought before them and cannot adjourn matters merely because lawyers are on strike. The law is that it is the duty and obligation of Courts to go on with matters or otherwise it would tantamount to becoming a privy to the strike. It is also settled law that if a resolution is passed by Bar Associations expressing want of confidence in judicial officers it would amount to scandalising the Courts to undermine its authority and thereby the Advocates will have committed contempt of Court. Lawyers have known, at least since *Mahabir Prasad Singh v. Jacks Aviation (P) Ltd., (1999) 1 SCC 37* that if they participate in a boycott or a strike, their action is ex-facie bad in view of the declaration of law by this Court. A lawyer's duty is to boldly ignore a call for strike or boycott of Court/s. Lawyers have also known, at least since Roman Services' case, that the Advocates would be answerable for the consequences suffered by their clients if the non-appearance was solely on grounds of a strike call.

21. It must also be remembered that an Advocate is an officer of the Court and enjoys special status in society. Advocates have obligations and duties to ensure smooth functioning of the Court. They owe a duty to their client. Strikes interfere with administration of justice. They cannot thus disrupt Court proceedings and put interest of their clients in jeopardy. In the words of Mr. H. M. Seervai, a distinguished jurist:-

> "Lawyers ought to know that at least as long as lawful redress is available to aggrieved lawyers, there is no justification for lawyers to join in an illegal conspiracy to commit a gross, criminal contempt of court, thereby striking at the heart of the liberty conferred on every person by our Constitution. Strike is an attempt to interfere with the administration of justice. The principle is that those who have duties to discharge in a court of justice are protected by the law and are shielded by the law to discharge those duties, the advocates in return have duty to protect the courts. For, once conceded that lawyers are above the law and the law courts, there can be no limit to lawyers taking the law into their hands to paralyse the working of the courts. "In my submission", he said that "it is high time that the Supreme Court and the High Courts make it clear beyond doubt that they will not tolerate any interference from anybody or authority in the daily administration of justice. For in no other way can the Supreme Court and the High Courts maintain the high position and exercise the great powers conferred by the Constitution and the law to do justice without fear or favour, affection or ill-will."

*** *** ***

35. In conclusion it is held that lawyers have no right to go on strike or give a call for boycott, not even on a token strike. The protest, if any is required, can only be by giving press statements, TV interviews, carrying out of Court premises banners and/or placards, wearing black or white or any colour arm bands, peaceful protect marches outside and away from Court premises, going on dharnas or relay fasts etc. It is held that lawyers holding Vakalats on behalf of their clients cannot refuse to attend Courts in pursuance of a call for strike or boycott. All lawyers must boldly refuse to abide by any call for strike or boycott. No lawyer can be visited with any adverse consequences by the Association or the Council and no threat or coercion of any nature including that of expulsion can be held out. It is held that no Bar Council or Bar Association can permit calling of a meeting for purposes of considering a call for strike or boycott and requisition, if any, for such meeting must be ignored. It is held that only in the rarest of rare cases where the dignity, integrity and independence of the Bar and/or the Bench are at stake, Courts may ignore (turn a blind eye) to a protest abstention from work for not more than one day. It is being clarified that it will be for the Court to decide whether or not the issue involves dignity or integrity or independence of the Bar and/or the Bench. Therefore in such cases the President of the Bar must first consult the Chief Justice or the District Judge before Advocate decide to absent themselves from Court. The decision of the Chief Justice or

> the District Judge would be final and have to be abided by the Bar. It is held that Courts are under no obligation to adjourn matters because lawyers are on strike. On the contrary, it is the duty of all Courts to go on with matters on their boards even in the absence of lawyers. In other words, Courts must not be privy to strikes or calls for boycotts. It is held that if a lawyer, holding a Vakalat of a client, abstains from attending Court due to a strike call, he shall be personally liable to pay costs which shall be in addition to damages which he might have to pay his client for loss suffered by him."

16. In another judgment reported as 2017 (5) SCC 702 *(Hussain* and *Another* vs. *Union of India)*, the Court held that the speedy trial is a part of reasonable, fair and just procedure guaranteed under Article 21 of the Constitution of India. After saying so, the Court held as under:-

> "27. One other aspect pointed out is the obstruction of Court proceedings by uncalled for strikes/abstaining of work by lawyers or frequent suspension of court work after condolence references. In view of judgment of this Court in *Harish Uppal v Union of India [(2003) 2 SCC 45]*, such suspension of work or strikes is clearly illegal and it is high time that the legal fraternity realizes its duty to the society which is the foremost. Condolence references can be once in while periodically say once in two/three months and not frequently. Hardship faced by witnesses if their evidence is not recorded on the day they are summoned or impact of delay on undertrials in custody on account of such avoidable interruptions of court proceedings is a matter of concern for any responsible body of professionals and they must take appropriate steps. In any case, this needs attention of all authorities concerned – the Central Government/State Governments/ Bar Councils/Bar Associations as well as the High Courts and ways and means ought to be found out to tackle this menace. Consistent with the above judgment, the High Courts must monitor this aspect strictly and take stringent measures as may be required in the interests of administration of justice.
>
> **28**. Judicial service as well as legal service are not like any other services. They are missions for serving the society. The mission is not achieved if the litigant who is waiting in the queue does not get his turn for a long time. Chief Justices and Chief Ministers have resolved that all cases must be disposed of within five years which by any standard is quite a long time for a case to be decided in the first court. Decision of cases of undertrials in custody is one of the priority areas. There are obstructions at every level in enforcement of right of speedy trial – vested interests or unscrupulous elements try to delay the proceedings. Lack of infrastructure is another handicap. In spite of all odds, determined efforts are required at every level for success of the mission. Ways and means have to be found out by constant thinking and monitoring. The Presiding Officer of a court cannot rest in the state of helplessness. This is the constitutional responsibility of the State to provide necessary infrastructure and of the High Courts to monitor the functioning of subordinate courts to ensure timely

disposal of cases. The first step in this direction is preparation of an appropriate action plan at the level of the High Court and thereafter at the level of each and every individual judicial officer. Implementation of the action plan will require serious efforts and constant monitoring."

17. The Supreme Court in another judgment in Criminal Appeal No.470/2018 *(Krishnakant Tamrakar* vs. *State of M.P.)* decided on 28th March, 2018 considered various issues including the issue of uncalled for strikes by the members of the Bar. The Court held as under:-

"**46**. *In Ex-Capt. Harish Uppal v. Union of India [(2003) 2 SCC 45]*, this Court held that lawyers have no right to go on strike or to give a call for boycott of courts nor can they abstain from the Courts. Calls given by Bar Association or Bar Council for such purpose cannot require the court to adjourn the matters. Strike or abstaining from court is unprofessional. Even though more than 15 years have passed after the said judgment was rendered, the judgment of this Court is repeatedly flouted and no remedial measures have been adopted. Regulation of right of appearance in courts is within the jurisdiction of the courts. This Court also asked the Law Commission to suggest appropriate changes in the regulatory framework for the legal profession. The Law Commission has submitted 266th Report. The problem continues seriously affecting the rule of law.

47. In *Mahipal Singh Rana vs. State of U.P. [(2016) 8 SCC 335)*, this court noted that the High Courts can frame rules to lay down conditions on which Advocates can be permitted to practise in Courts. An Advocate can be debarred from appearing in Court even if the disciplinary jurisdiction for misconduct is vested with the Bar Councils. This Court requested the Law Commission to look into all relevant aspects relating to regulation of legal profession.

*** *** ***

51. Since the strikes are in violation of law laid down by this Court, the same amount to contempt and at least the office bearers of the associations who give call for the strikes cannot disown their liability for contempt. Every resolution to go on strike and abstain from work is per se contempt. Even if proceedings are not initiated individually against such contemnors by the court concerned or by the Bar Council concerned for the misconduct, it is necessary to provide for some mechanism to enforce the law laid down by this Court, pending a legislation to remedy the situation.

52. Accordingly, we consider it necessary, with a view to enforce fundamental right of speedy access to justice under Articles 14 and 21 and law laid by this court, to direct the Ministry of Law and Justice to present at least a quarterly report on strikes/abstaining from work, loss caused and action proposed. The matter can thereafter be considered in its contempt or inherent jurisdiction of this court. The Court may, having regard to the fact situation, hold that the office bearers of the Bar Association/Bar Council who passed the resolution for strike or

> abstaining from work, are liable to be restrained from appearing before any court for a specified period or until such time as they purge themselves of contempt to the satisfaction of the Chief Justice of the concerned High Court based on an appropriate undertaking/ conditions. They may also be liable to be removed from the position of office bearers of the Bar Association forthwith until the Chief Justice of the concerned High Court so permits on an appropriate undertaking being filed by them. This may be in addition to any other action that may be taken for the said illegal acts of obstructing access to justice. The matter may also be considered by this Court on receipt of a report from the High Courts in this regard. This does not debar report/petition from any other source even before the end of a quarter, if situation so warrants."

18. The Bar Council is a creation of the Advocates Act, 1961 (in short "the Act") and is a body corporate. The function of the State Bar Council is to admit persons as Advocates on its roll and to entertain and determine cases of misconduct against Advocates and to safeguard the rights, privileges and interests of Advocates on its roll but giving of a call by a statutory body established under the Act to entertain and to decide the cases of misconduct against Advocates, cannot itself indulge in an act which is not permissible under the Act nor is permissible in view of the Constitution Bench judgment of the Supreme Court in *Ex-Capt. Harish Uppal* (supra) and subsequent pronouncements of the Supreme Court in *Hussain's* case (supra); *Krishnakant Tamrakar's* case (supra) as well as the decision of the Calcutta High Court in *Arunava Ghosh's* case (supra), as referred to above.

19. If an Advocate does not appear at the time of hearing of the cases, he can be proceeded against for misconduct for negligence in defending the interest of his client. The call of the Bar Council to Advocates of the State to abstain from work, does not fall within the four corners of the Act and the role assigned to the Bar Council. The State Bar Council derives its authority from the Act and has to discharge functions which are conferred on it. None of the provisions of the Act confers power on the statutory body to call the members to abstain from judicial work which is a responsibility of every member of the Bar in terms of the provisions of the Act itself. It has been rightly held by the Calcutta High Court in *Arunava Ghosh* (supra) that the Act does not confer any power or jurisdiction on the State Bar Council to take away the right of an Advocate to practice as of right either temporarily or permanently or to compel him not to practice even for a day or affect his right to practice in any manner whatsoever except by way of exercising disciplinary jurisdiction under Section 35 of the Act. Therefore, the call given to the Advocates to abstain from Judicial work negates the statutory right of Advocates to practice and also is an violation of fundamental right of an Advocate where freedom to practice any profession is guaranteed under Section 19(1)(g) of the Constitution of India.

20. In view of the foregoing, we find that the decision of the State Bar Council calling upon the Advocates in the State to observe a week-long protest and to abstain from all judicial works and Court proceedings is illegal, unconstitutional and against the statutory provisions as well as contrary to the judgments of the Supreme Court. Therefore, we hold the call to abstain from court work vide letters dated 21st March, 2018 and 5th April, 2018 as illegal and against the provisions of the Advocates Act and the Judgments on the subject.

21. Consequently, we direct the Advocates in the State to resume the work forthwith so that the poor, needy, under-trials, convicts and numerous other persons desiring to seek justice from the Courts do not suffer on account of lack of legal assistance for the reason that the members of the Bar are not available to work in the Courts.

22. A copy of this Order be served on the Bar Council of India, State Bar Council; Bar Associations on the Principal Seat and Benches of this Court; Chief Secretary and Principal Secretary (Law) of the State of Madhya Pradesh forthwith for information and necessary action. The order be displayed prominently on the website of this Court for information of the Advocates and General Public as well.

23. List on **11.04.2018** for further proceedings.

Order accordingly

I.L.R. [2018] M.P. 2142
WRIT PETITION
Before Mr. Justice Anand Pathak
W.P. No. 8197/2016 (S) (Gwalior) decided on 2 June, 2018

SAIYAD GHAZANAFAR ISHTIAQUE (DR.) …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

***Service Law – Health Services Recruitment Rules, M.P., 1967, Rule 6 – Regularization of Adhoc Appointment Rules, M.P., 1986, Rule 5 – Unani Chikitsa Adhikari – Adhoc Appointment – Benefit of Higher Time Pay Scale – Seniority/Count of Service – Criteria* – Held – Adhoc appointment in 1984 under rules of 1967 and regularization in 1987 under Rules of 1986 – Held – Benefits of 1st and 2nd higher time pay scale granted considering tenure of service from date of initial appointment (adhoc appointment) but at the time of grant of 3rd higher time pay scale, regarding seniority, tenure was counted from date of regularization – Respondents cannot do so when petitioner appointed on a vacant post and as per rules – Petitioner's appointment**

cannot be termed as "de hors" the recruitment rules – Seniority of petitioner has to be reckoned from date of initial appointment – Petition allowed.

(Paras 16, 17, 22 & 23)

सेवा विधि – स्वास्थ्य सेवायें भर्ती नियम, म.प्र., 1967, नियम 6 – तदर्थ नियुक्ति का नियमितीकरण नियम, म.प्र., 1986, नियम 5 – यूनानी चिकित्सा अधिकारी – तदर्थ नियुक्ति – उच्चतर समयमान वेतनमान का लाभ – वरिष्ठता/सेवा की गणना – मानदंड – अभिनिर्धारित – 1967 के नियमों के अंतर्गत 1984 में तदर्थ नियुक्ति एवं 1986 के नियमों के अंतर्गत 1987 में नियमितीकरण – अभिनिर्धारित – प्रारंभिक नियुक्ति (तदर्थ नियुक्ति) की तिथि से सेवा अवधि विचार में लेते हुए, प्रथम एवं द्वितीय उच्चतर समयमान वेतनमान के लाभ प्रदान किये गये परंतु तृतीय उच्चतर समयमान वेतनमान प्रदान करते समय, वरिष्ठता के संबंध में अवधि की गणना, नियमितीकरण की तिथि से की गई थी – प्रत्यर्थीगण ऐसा नहीं कर सकते जब याची की नियुक्ति एक रिक्त पद पर एवं नियमानुसार की गई थी – याची की नियुक्ति को भर्ती नियमों के ''असंबद्ध'' होना नहीं कहा जा सकता – याची की वरिष्ठता प्रारंभिक नियुक्ति की तिथि से मानी जानी चाहिए – याचिका मंजूर।

Cases referred :

2013 (IV) MPJR 123, 2002 (10) SCC 674, 2003 (11) SCC 732, AIR 2014 SC 2925, AIR 1990 SC 1607, JT 2009 (13) SC 9, 2000 (8) SCC 4.

Anil Sharma, for the petitioner.
Abhishek Mishra, G.A. for the respondents/State.

O R D E R

ANAND PATHAK, J :- The present petition has been preferred by the petitioner, being crestfallen by the action and inaction of the respondents, whereby the benefits of Higher Time Pay Scale has not been extended to the petitioner on completion of 30 years of his service on the ground that the petitioner was initially appointed on adhoc basis and therefore, the period spent as adhoc employee cannot be treated as regular employment for consideration of 3rd Higher Time Pay Scale to the petitioner.

2. Precisely stated facts of the case for adjudication are that in the year 1977-78, Public Health and Family Welfare Department got bifurcated and Directorate of Indian System of Medicine and Homeopathy came into existence which is now renamed as Department of AYUSH. Service conditions of the petitioner were governed by the recruitment rules namely **Madhya Pradesh Health Services Recruitment Rules, 1967** (Hereinafter referred as "Recruitment Rules, 1967"). Public Health and Family Welfare Department issued an advertisement for the post of Unani Chikitsa Adhikari in regular pay scale of Rs. 1000-1800 on adhoc basis in the year 1984. At that point of time, the posts were fallen vacant and **Madhya Pradesh Public Service Commission** (Hereinafter referred as

"MPPSC") did not conduct the selection process and under the provisions of **Madhya Pradesh Public Service Commission (Limitation of Functions) Regulations, 1957,** (herein referred as "Regulations, 1957"), which was issued in exercise of power under Article 320 of the Constitution of India, the State Government issued the notification and declared that the adhoc appointments filled up before 31st March, 1986 are exempted from the jurisdiction of MPPSC, therein, the post of Unani Chikitsa Adhikari was also included.

3. It is further submitted that after due process of law Public Health and Family Welfare Department issued the appointment order dated 03.05.1984, whereby the petitioner was given appointment for a period of six months or till the appointment made by the MPPSC.

4. It appears that the State Government by invoking the power under proviso to Article 309 of the Constitution of India framed the rules namely **Madhya Pradesh Regularization of Adhoc Appointment Rules, 1986** (Hereinafter referred as "Adhoc Appointment Rules, 1986") and as per its Rule 5, the persons who have been appointed on adhoc basis before 31st March, 1986 and working on the post on said date were considered for regularization. Resultantly, the petitioner was regularized vide order dated 27.03.1987.

5. As per the submission, the petitioner received the benefits of first Higher Time Pay Scale on completion of 8 years of service and second Higher Time Pay Scale on completion of 16 years of service treating the petitioner's length of service w.e.f. 03.05.1984. On 30.09.2014 vide Annexure P-6 Finance Department, respondent No.2 herein, issued a circular whereby it has been provided to grant third Higher Time Pay Scale to the civil servants on completion of 30 years of service. Since, the petitioner was entitled for the benefit of third Higher Time Pay Scale, he made proposal to the respondent No.1 for the said benefit vide Annexure P-7 but to no avail. Annual Confidential Reports of the petitioner are above bench mark for consideration of the said benefit, but it appears that the respondents have not responded in affirmation because of the promulgation of circular dated 13.11.2009 vide Annexure P-8, wherein it is mentioned that the services rendered as adhoc employee would not been taken into consideration for Higher Time Pay Scale and earlier benefits of first and second Higher Time Pay Scale are attached with the petition to contend that respondents have caused arbitrariness and illegality in not extending the benefit of third Higher Time Pay Scale to the petitioner, whereas he has completed 30 years of service.

6. According to the learned counsel for the petitioner, Rule 12(4)(b) of the Madhya Pradesh Civil Services (General Conditions of Service) Rules, 1961 provides for seniority of adhoc employees and it specifically stipulates the consideration of period of officiating service for the period of seniority. Once the

rule provides for counting of service for seniority w.e.f. officiating service, then respondents erred in considering the case of the petitioner while treating the seniority of the petitioner from the date of regularization and not from the date of initial appointment. Respondents have given the benefits of first and second Higher Time Pay Scale to the petitioner counting his service w.e.f. 03.05.1984 which is date of initial appointment then respondents cannot take a different stand for rejection of claim of the petitioner for third Higher Time Pay Scale. He relied upon the judgment of Division Bench of this Court in the case of *State of Madhya Pradesh* and *another* Vs. *Dr. Ramesh Chandra Dixit*, [2013 (IV) MPJR 123]

7. *Per contra*, learned counsel for the respondents opposed the prayer made by the petitioner and referred the reply in which the stand taken by the respondents is that reckoning of service is to be made from the date of regularization and not from the date of initial appointment. Respondents relied upon the judgment rendered by Hon'ble Apex Court in the case of *State of Punjab* and *others* Vs. *Ishar Singh* and *others*, [2002 (10) SCC 674] as well as in the case of *State of Punjab* Vs. *Gurdeep Kumar Uppal*, [2003 (11) SCC 732] and in the case of *State of Rajasthan* and *another* Vs. *Surendra Mohnot* and *others*, [AIR 2014 SC 2925] and prayed for dismissal of writ petition because according to them, in view of the mandate of Apex Court, no case for interference is made out.

8. Heard the learned counsel for the parties and perused the documents appended thereof.

9. The case in hand is in respect of benefits arising out of third Higher Time Pay Scale. As per the submissions, the petitioner got superannuated in the year 2016. His service conditions were governed by the Madhya Pradesh Health (Gazetted Service Recruitment Rules), 1967. Method of recruitment has been provided in the said rules by way of Rule 6.

The Rule 6 is reproduced herein for ready reference:-

> **6. Method of Recruitment**.- Recruitment to the Service, after commencement of these rules, shall be by the following methods and as far as may be, according to the proportion specified in the Schedule II.-
>
> (a) by direct recruitment;
>
> (b) by promotion of the members of the service as specified in the Schedule;
>
> (c) by transfer of persons who hold post in different branches of this service or in such services as may be specified in this behalf.

[2] The number of persons recruited under clause (b) or clause (c) of sub-rule (1) shall not at any time exceed the percentage shown in the Schedule, for promotion quota of the number of duty posts (as specified in the Schedule).

[3] Subject to the provisions of these rules, the method or methods of recruitment to be adopted for the purposes of filling any particular vacancy or vacancies in the services as may be required to be filled during any particular period of recruitment, and the number of persons to be recruited by each method, shall be determined on each occasion by Government in consultation with the Commission.

[4] Notwithstanding anything contained in sub-rule (1) if in the opinion of Government, the exigencies of service so require, the government may, after consulting the commission, adopt such methods of recruitment to the service other then those specified in the said sub-rule, as it may, by order issued in this behalf prescribed.

10. The said rule provides for certain exigencies besides direct recruitment or by promotion. (Sub-rules 3 and 4) of Rule 6 provides sufficient leverage to the State Government being appointing authority for recruitment to the post of government under the rules. That power includes the appointment without consultation to the Madhya Pradesh Public Service Commission as per the Regulations of 1957, because Regulation of 1957, provides the mechanism wherein Rule 3 mandates the State Government not to consult the commission for appointment to any of the services to the extent specified in the appendix of the State Regulations.

11. Rule 3 of the Madhya Pradesh Public Service Commission (Limitation of Functions) Regulations, 1957 is reproduced as under for ready reference:-

"3. Commission to be consulted- It shall not be necessary for the Commission to be consulted in regard to—

(a) the appointment by direct recruitment or by promotion or by transfer, to any of the posts or classes of posts or to any of the services to the extent specified in the Appendix of these Regulations;

(b) the re-employment within three years of a retired or retrenched Government Servant in a post which he was holding at the time of his retirement or retrenchement, or for duties which he had performed previously in the course of his service of his retirement or retrenchement;

> (c) the appointment by promotion to any of the post or classes of posts or of any of the services other than that specified in the Appendix to these Regulations or the confirmation on such post to be made on the recommendations of a Departmental promotion Committee or a Departmental Committee set up for consideration of confirmation of officers on the aforesaid post as the case may be where such committee is presided over by the Chairman or member of the Commission."

12. Perusal of Rule 3(a) mandates and gives an impression that the MPPSC is not required to be consulted if the State Government being appointing authority considers so for appointment on any post specified in the appendix of the regulation.

13. Appendix provides list of certain services which may not require consultation with the Public Service Commission. Entry 17(ix) includes Unani Chikitsa Adhikari and the said post could have been filled up by adhoc appointment before 31st March, 1986. Since the petitioner was appointed prior to 31.03.1986 (He was appointed on 31.05.1984), therefore, State Government could have appointed the petitioner without consultation with MPPSC through the power deriving from the Regulations, 1957 as well as from Recruitment Rules, 1967.

14. Once the Recruitment Rules, 1967 provides the method of recruitment other than direct recruitment and promotion and same is confirmed by the Regulations, 1957 as referred above, then it becomes clear that State Government had power and authority to appoint certain classes of officers of some departments without consultation with the Madhya Pradesh Public Service Commission. Therefore, appointment of the petitioner was legal and against the vacant post and the appointing authority was State Government (under the name of his Excellency, the Governor). The said information was sent to the Secretary, Madhya Pradesh Public Service Commission as it is clear from the perusal of appointment order dated 03.05.1984 vide Annexure P-1.

15. The petitioner was regularized by the promulgation of Adhoc Appointment Rules, 1986 wherein eligibility was prescribed for regularization. The petitioner successfully passed the para-meters fixed by the authority and vide order dated 27.03.1987 he was regularized.

16. The petitioner was earlier given the benefit of first Higher Time Pay Scale and vide order dated 31.01.2009 (Annexure P-5) was conferred the benefit of Second Higher Time Pay Scale. The said order indicates that the date of completion of 16 years of service of petitioner was treated as 16.05.2000 meaning

thereby, the petitioner was appointed in 1984 in the department and he completed 16 years of service in the year 2000. It further appears that respondents while granting benefits of First and Second Higher Time Pay Scale considered the tenure w.e.f. 03.05.1984, but for grant of benefit of Third Higher Time Pay Scale respondents changed the criteria and tried to count the service of petitioner from the date of regularization. Respondents cannot do so when the petitioner's appointment was against the vacant post and his appointment was as per rules prevalent at that point of time.

17. The petitioner was regularized by the Rules of 1986 in which schedule provides the reference of Unani Chikitsa Adhikari and therefore, by the effect of said rules, the petitioner was regularized. Therefore, no illegality committed in appointment of petitioner since inception. One more aspect worth consideration in this regard is the Rule 12(4) (b) of Rules, 1961 which categorically stipulates the seniority of adhoc employees from the period of officiating service.

18. It appears that the respondents are persuaded by the circular dated 13.11.2009 vide Annexure P-8 which, in clause 4 stipulates that the service rendered as adhoc would not be reckoned for grant of Higher Time Pay Scale, but from the documents submitted by the parties, it appears that grant of Third Higher Time Pay Scale is being provided by the circular dated 30.09.2014 vide Annexure P-6 in which no such discretion carved out *viz-a-viz* earlier circular Annexure P-8. It categorically stipulates that the length of service shall be computed from the date of first appointment or (initial appointment). The said circular dated 30.09.2014 is subsequent in nature and therefore, it can be safely assumed that State Government must have taken into consideration the earlier circular dated 13.11.2009 and its implications. The circular dated 13.11.2009 as well as circulate dated 30.09.2014 both referred the circular dated 24.01.2008. Still respondents have used the expression that third benefit would be available from the date of first appointment, therefore, Executive Wisdom cannot be taken into zone of doubt to contend that the petitioner is not entitled because the benefit of Third Higher Time Pay Scale can only be granted once the employee is regularized. Subsequent circular dated 30.09.2014 supports the cause of petitioner. No rebuttal has been made by the respondents in respect of said circular of 2014, therefore, the legislative/executive intent appears to be grant of benefit of Third Higher Time Pay Scale to be reckoned from the date of initial appointment, not from the date of regularization.

19. Division Bench of this Court in the case of *Dr. Ramesh Chandra Dixit* (Supra) dealing in respect of adhoc Assistant Professors who were appointed under the Educational Service (Collegiate Branch) Recruitment Rules, 1967 and Rule 13 (5) of Education Services (Collegiate Branch) Recruitment Rules, 1990. Those teachers were also standing on the same side where the petitioner is

standing. They were initially appointed as Assistant Professors on adhoc basis, but later on they were regularized. In the said fact situation, Division Bench of this Court came to the conclusion that they are entitled to the same benefits which have been extended to other emergency appointees at par with regularized employees. The case of the petitioner appears to be standing virtually on the same footing.

20. Here, the petitioner was appointed to the post according to the Rules of 1967 and Regulations of Rules, 1957. Although appointment was adhoc, but it was sanctioned by law, therefore, the appointment would be treated in accordance with the rules. Judgment by the Hon'ble Apex Court in the case of *Direct Recruit Class II Engineering Officer's Association and other Vs. State of Maharashtra* and *others* [AIR 1990 SC 1607] has held that once the incumbent is appointed to the posts according to the rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation. The judgment of Apex Court coupled with the judgment delivered by Division Bench of this Court in the case of *State of Madhya Pradesh* and *another* Vs. *Dr. Ramesh Chandra Dixit*, [2013 (IV) MPJR 123], the petitioner is entitled to get the benefit from the date of initial appointment.

21. Hon'ble Apex Court in the case of *State of Rajasthan and others Vs. Jagdish Narain Chaturvedi*, [JT 2009 (13) SC 9] has held that in order to become "a member of service" candidate must satisfy four conditions namely (i) the appointment must be in a substantive capacity (ii) to a post in the service i.e. in substantive vacancy (iii) made according to Rules (iv) within the quota prescribed for the source. Here, the petitioner has been appointed in substantive capacity in regular pay scale on a vacant post and by the competent authority (State Government), therefore, appointment of the petitioner cannot be held to be stop gap arrangement. It was sanctioned under the rules.

22. Judgment relied upon by the respondents did not support the case of the petitioner because the judgment rendered by the Apex Court in the case of *State of Haryana* Vs. *Haryana Veterinary* and *AHTS Association* and *another*, [2000 (8) SCC 4] decides the controversy by defining the regular service. Mandate of the judgment is that if service on the basis of adhoc appointment made "dehors" the recruitment rules, although without interruption followed by regular appointment on selection by Public Service Commission, held not includible in regular service. Here, the petitioner was appointed in accordance with rules and therefore, his appointment cannot be termed as "dehors" the recruitment rules. Therefore, ratio of said judgment is not applicable in the present facts situation of the case. In the case of *State of Punjab and other Vs. Ishar Singh* and *others*, [2002 (10) SCC 674], wherein appointment of then petitioner was made on adhoc basis without following the procedure laid down in the recruitment rules. In respect of case of *State of Punjab and others Vs. Gurdeep Kumar Uppal* and *others*, [2003 (11) SCC

732], the fact suggest that said case was in respect of Civil Medical Service Class-II [Recruitment and Conditions of Service] Rules, 1943. Therefore, the said judgment is also of no help as precedent in the case in hand.

23. From the cumulative analysis, it appears that the petitioner was appointed in accordance with rules and later on, regularized also by effect of the rules, therefore, as per mandate of *Direct Recruit Class II Engineering Officer's Association* (Supra), seniority of the petitioner has to be reckoned from the date of initial appointment. The circular dated 30.09.2014 vide Annexure P-6 also clarifies that the benefit to the incumbents shall be given from the date of first appointment and no way segregates between two exigencies i.e. date of first appointment and date of regularization, therefore, circular also furthers the cause of petitioner.

24. In almost similar facts situation *viz-a-viz* the present case, Division Bench of this Court also expressed the opinion in favour of the incumbent when it declared that incumbent would be entitled for the benefits from the date of initial appointment. Therefore, the case of the petitioner deserves to be allowed and is hereby allowed.

25. Writ or mandamus is issued whereby the respondents are directed to consider the case of the petitioner for grant of third Higher Time Pay Scale as he has completed 30 years of service in 2014. Necessary benefits be accorded to the petitioner in this regard within three months from the date of receipt of certified copy of this order. Petitioner would also be entitled for all consequential benefits if any accrue by effect of this order.

26. Petition stands allowed and disposed of. No cost.

Petition allowed

I.L.R. [2018] M.P. 2150(DB)
WRIT PETITION
Before Mr. Justice Hemant Gupta, Chief Justice & Mr. Justice Vijay Kumar Shukla
W.P. No. 21126/2017 (Jabalpur) decided on 10 July, 2018

MEIL PRASAD (JV) …Petitioner

Vs.

STATE OF M.P. & anr. …Respondents

(Alongwith W.P. No. 1473/2018)

***A. Tender – Disqualification Clause – Judicial Review* – Default by petitioners in performance of earlier contracts – Security Deposits forfeited**

by respondents which was further challenged before Arbitral Tribunal – Held – Mere pendency of dispute before Arbitral Tribunal would not mean that petitioners have not incurred disqualification as per tender condition particularly when tender conditions are applied in a transparent and in a non-discriminatory manner – Court in Judicial Review cannot hold that such condition is beyond jurisdiction of respondents.

(Para 22)

क. निविदा – निरर्हता खंड – न्यायिक पुनर्विलोकन – पूर्व संविदाओं के पालन में याचीगण द्वारा व्यतिक्रम – प्रत्यर्थीगण द्वारा प्रतिभूति निक्षेपों को समपहृत किया गया जिसे आगे माध्यस्थम अधिकरण के समक्ष चुनौती दी गई थी – अभिनिर्धारित – माध्यस्थम् अधिकरण के समक्ष विवाद के मात्र लंबित रहने का यह अर्थ नहीं होगा कि याचीगण निविदा शर्तों के अनुसार निरर्हता उपगत नहीं करते विशिष्ट रूप से तब जब निविदा शर्तों को पारदर्शिता से तथा बिना किसी भेदभाव के लागू किया जाता है – न्यायालय, न्यायिक पुनर्विलोकन में यह अभिनिर्धारित नहीं कर सकती कि उक्त शर्त प्रत्यर्थीगण की अधिकारिता से परे है।

***B. Tender – Power of State – Right of Contractor* – Held – Whether a contractor is suitable to carry out work on behalf of State, the decision is of the State or its agencies or instrumentalities – Contractor cannot claim any right that even though his security deposit has been forfeited, State is bound to consider him eligible, just because the matter of forfeited security deposit is disputed and challenged by them before Arbitral Tribunal – Past experience of contractor is a relevant consideration for State to decide tender finally – As per disqualification clause, contractor was rightly not permitted to participate – No allegation that such policy decision is actuated with malice – No right accrues to petitioners to invoke writ jurisdiction – Petitions dismissed.**

(Para 23 & 24)

ख. निविदा – राज्य की शक्ति – ठेकेदार का अधिकार – अभिनिर्धारित – क्या एक ठेकेदार राज्य की ओर से कार्य संपादित करने के लिए उपयुक्त है, यह निर्णय राज्य या उसके अभिकरणों या परिकरणों का है – ठेकेदार किसी भी अधिकार का दावा नहीं कर सकता कि यद्यपि उसकी प्रतिभूति निक्षेप समपहृत कर ली गई है, राज्य उसे पात्र मानने हेतु बाध्य है, सिर्फ इसलिए कि समपहृत प्रतिभूति निक्षेप का मामला विवादित है तथा उनके द्वारा माध्यस्थम अधिकरण के समक्ष चुनौती दी गई है – ठेकेदार का पिछला अनुभव अंतिम रूप से निविदा का विनिश्चय करने हेतु राज्य के लिए एक सुसंगत विचार है – निरर्हता खंड के अनुसार, ठेकेदार को भाग लेने की अनुमति देने से उचित रूप से इंकार किया गया – कोई अभिकथन नहीं कि ऐसा नीति विनिश्चय दुर्भावना से प्रेरित है – याचीगण को रिट अधिकारिता का अवलंब लेने का कोई अधिकार प्रोद्भूत नहीं होता – याचिकाएँ खारिज।

Cases referred :

2006 SCC OnLine Jhar 825, 2017 SCC OnLine P&H 166, (1996) 10 SCC 760, (2004) 4 SCC 19, (2005) 1 SCC 679, (2005) 4 SCC 435, (2010) 6 SCC 303, (2012) 8 SCC 216, (2016) 8 SCC 622, (2016) 16 SCC 818.

Sourav Agrawal, Ishaan Chhaya and *Rashi Goswami,* for the petitioners.

Amit Seth, G.A. for the respondents/State.

Arpan J. Pawar, for the respondent No. 2-Narmada Valley Development Authority.

O R D E R

The Order of the Court was passed by :

HEMANT GUPTA, CHIEF JUSTICE :- This order shall dispose of two writ petitions raising identical questions of law and facts. One petitioner is MEIL Prasad (Joint Venture) whereas the other writ petitioner is MEIL-KBL (Joint Venture). The petitioner in W.P. No.21126/2017 [MEIL Prasad (JV) vs. State of M.P. & Another] was granted contract for Upper Narmada Irrigation Project in the year 2013 whereas the petitioner in W.P. No.1473/2018 [MEIL-KBL (JV) vs. State of M.P. and others] was granted contract for construction of Khargone Lift Canal in the year 2011.

2. Though the two contracts are for different projects but the arguments raised is identical that on account of disqualification clause in the subsequent Notice Inviting Tender (NIT), the petitioners stand disqualified from participating in the tender process. As per the petitioners, 11 tenders have been issued in the year 2018-19 so far. However, the condition in the Notice Inviting Tender that a contractor whose contract has been terminated and security deposit forfeited, stands disqualified from participating in the tender, seriously affects the rights of the petitioners to carry out their business, therefore, it violates the provisions of Articles 14 and 19(1)(g) of the Constitution of India.

3. The petitioners have disputed the action of the respondents in forfeiture of the security deposit and enforcement of the Bank Guarantee and that such question is pending before Madhya Pradesh Arbitral Tribunal (for short "the Arbitral Tribunal") constituted under Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983 and/or in proceedings under Section 9 of the Arbitration and Conciliation Act, 1996 (for short "the Act").

4. The condition of disqualification is identical in all the tenders which have been issued but for facility of reference, the relevant disqualification clause is quoted from Prequalification Document (Volume I) Tender No.7734 of NIT No.502/2016-17/ENC/etendering dated 06.02.2017 (Annexure P/25 to W.P. No.1473/2018) issued by the Government of Madhya Pradesh, Water Resources

Department, Chief Engineer, Projects, Bhopal (M.P.) for the supply of water from left bank rising main system and delivering at farmers' field indicated in the index map for Left bank Micro Irrigation system under Mohanpura Major Project. The relevant clause reads as under:-

> **"2. Disqualification**
>
> Even though the bidder satisfies the above requirements they are subject to be disqualified -
>
> (a) If the design submitted by the bidder does not fulfill the criteria in general, his offer is liable for disqualification.
>
> (b) If they have made untrue or false representations or hidden the material information in the forms, statements and attachments required in the prequalification documents.
>
> (c) If any Department of GoMP including Municipal Corporation, Development Authority, Corporation of Society has, in consequence of some penal action, during last five years:-
>
> (i) Cancelled or suspended the registration of the firm.
>
> (ii) Registration was cancelled or suspended before five years and not revoked up to the date of bid submission.
>
> (iii) Black listed the Contractor
>
> (iv) Debarred the Contractor for participating in future tendering.
>
> (v) Termination of contract due to default of contractor.
>
> (vi) *Forfeiting of full or partial SD for poor performance. (including cases where the forfeiting has been done in last 5 years) though the contract period/case may be older than 5 years provided the above said penal action was in force on the last date of submission of the bid.*
>
> *(Emphasis Supplied)*
>
> In case of JV all the partners shall be required to submit an affidavit giving full information of above facts."

5. The argument of the learned counsel for the petitioners is that forfeiture of the security deposit or encashment of performance Bank Guarantee is a matter, which is pending before the statutory Arbitral Tribunal or in proceedings under Section 9 of the Act. Therefore, till such time there is legal adjudication of the issues between the parties, the petitioners cannot be said to be disqualified from

participating in future tender processes. It is argued that the forfeiture of security deposit and to disqualify a tenderer from participating in the tender process is nothing but a deemed blacklisting of the contractor, which cannot be resorted to so as to oust the petitioners from consideration of future contracts. Learned counsel for the petitioners relies upon a Single Bench decision of Jharkhand High Court reported as 2006 SCC OnLine Jhar 825 *(Ripley and Company Limited, Ranchi vs. Central Coalfields Limited, Ranchi and others)* and a Division Bench decision of Punjab & Haryana High Court reported as 2017 SCC OnLine P&H 166 *(M/s R.S. Labour and Transport Contractor vs. Food Corporation of India and others*.. etc.) rendered in Civil Writ Petition No.21863 of 2016 and connected writ petition, to contend that such clause is wholly arbitrary, unreasonable which ousts the petitioner from being considered for tender though the petitioner satisfies all eligibility conditions.

6. On the other hand, learned counsel for the respondents submitted that the condition of disqualification is not introduced in recent tenders published, but, in fact, a similar condition was in existence in which the petitioners were successful tenderers. Reference is made to a communication dated 29.07.2015 (Annexure R/2A) issued by the Narmada Valley Development Authority where the disqualification condition was sought to be incorporated as mentioned in the said communication. The said condition is now a standard condition in all the Notice Inviting Tenders. The relevant extract from the said document (Annexure R/2A) reads as under:-

> "**2**. The vague conditions of disqualification clause such as poor performance and delay, are hereby clearly defined and amended as under:-

Existing Provision regarding Poor performance and delay	**Amended Provision**
Volume-1 Clause Disqualification (c) Record of poor performance in works department of Govt. of M.P. such as abandoning the works, not properly completing the contract, inordinate delays in completion, litigation history or financial failure.	Volume-1 Clause Disqualification The bidder shall be disqualified if he has not shown satisfactory performance in contract with any department of Govt. of Madhya Pradesh or its undertaking, including Municipal Corporations/ Development Authorities and any other Corporation/society under the Govt. of Madhya Pradesh.

	Satisfactory performance shall mean:- The bidder should not have a history of poor performance in last 5 financial years. Poor performance mean:- (i) Termination of contract due to default of contractor. (ii) Forfeiting of full or partial SD for poor performance (including cases where forfeiting has been done in last 5 years though the contract period/case may be older than 5 years) The bidder should have to submit an affidavit giving full information of above facts. If any false information relating to poor performance found, then the bidder will be disqualified.

7. It is also argued that the conditions of tender as to in what circumstances a tenderer has to be disqualified is a decision of the employer and such decision, unless it is actuated by malice or misuse of statutory powers, cannot be interfered with in exercise of power of judicial review by this Court. Reference was made to certain decisions of the Supreme Court reported as (1996) 10 SCC 760 *(Shapers Construction (P) Ltd. & Another vs. Airport Authority of India & Another)*; (2004) 4 SCC 19 *(Directorate of Education and others vs. Educomp Datamatics Limited and others)*; (2005) 1 SCC 679 *(Association of Registration Plates vs. Union of India and others)*; (2005) 4 SCC 435 *(Global Energy Ltd. And Another vs. Adani Exports Ltd. And others)*; (2010) 6 SCC 303 *(Shimnit UTSCH India Pvt. Ltd. & Another vs. West Bengal Transport Infrastructure Development Corporation Ltd. & others)* and (2012) 8 SCC 216 *(Michigan Rubber (India) Ltd. vs. State of Karnataka and others)*.

8. Before we consider the respective arguments raised by the learned counsel for the parties, it is pertinent to mention that in W.P. No.1473/2018 the petitioner could not complete the project within the originally stipulated period of 36 months i.e. on or before 27.03.2014 and applied for extension of time on 22.04.2014. The reason for seeking extension, *inter alia*, was that total land acquisition was not complete and broad concept layout plan was not approved by the respondents. The request of the petitioner was accepted when extension of time up to 27.06.2015 was granted. The petitioner again applied for second extension on 26.06.2015, *inter alia* for the reason that the villagers of certain

villages are not allowing access to the petitioner to the site. The petitioner was granted second extension up to 30.06.2016. The petitioner applied for third extension *inter alia* on the ground that the petitioner has completed more than 80% of the total value of the work, therefore, the petitioner is entitled to third extension as well. The petitioner relies upon a work completion certificate dated 02.07.2016 (Annexure P-6) issued by the Narmada Valley Development Authority but still the petitioner's security deposit was forfeited. A sum of Rs.20303.00 Lacs was imposed as penalty limited to 10% of contract value i.e. Rs.55,08,89,900.00. Out of the said amount, Rs.2,08,24,088.00 was retained from the running bills whereas the remaining amount of Rs.53,00,65,812.00 was said to be recoverable. By a subsequent letter dated 12.09.2016 (Annexure P/18), a sum of Rs.10.00 Crore deducted from the running bills was forfeited. The petitioner was served with another notice on 12.09.2016 (Annexure P/19) to complete the work within seven days otherwise action as per relevant clause of the agreement including blacklisting of the petitioner will be taken.

9. In W.P. No.21126/2017, the stand of the petitioner is that the work on site was stalled due to law and order problem because of large scale protest by the villagers but instead of mitigating the problem, a notice was issued on 09.05.2014 (Annexure P-8) alleging that the petitioner has breached the tender condition and the petitioner should take corrective action within 15 days. As per the petitioner, a penalty of Rs.40.28 Crore, as maximum of 10% of the tender value, was imposed on 09.09.2015 (Annexure P-12) and that the petitioner has invoked the jurisdiction of the Arbitral Tribunal disputing the action taken against the petitioner. The request of the petitioner for waiver of the penalty and interest on the mobilization advance was rejected and a Bank Guarantee of Rs.20.14 Crore was invoked on 04.03.2016 (Annexure P-15). The petitioner remitted the balance sum of Rs.20,01,91,236.00 from the amount of mobilization advance given to the petitioner. The three Bank Guarantees were released and only one performance Bank Guarantee was enforced. Vide letter dated 20.06.2016 (Annexure P-20), the petitioner was informed that the respondent has decided not to continue the Upper Narmada Project further. In view of the said fact, the petitioner claims that it is deemed to be discharged from all contractual obligations, therefore, sought release of the performance Bank Guarantee.

10. The issue of encashment of Bank Guarantee is pending in the proceedings under Section 9 of the Act whereas the petitioner has invoked the jurisdiction of the Arbitral Tribunal under the Act challenging the action of the respondents including forfeiture of performance security deposit as also filed its claim for unpaid bills and damages caused to the petitioner. Since the disputes arising out of two contracts are pending, we proceed to decide the question raised that petitioner cannot be disqualified only for the reason that security amount stands forfeited without commenting upon merits of respective contentions of the parties.

11. The stand of the respondent No.2 in the return filed, is as under:-

> 5(i) It is submitted that the impugned "disqualification clause" is not new and has existed in the Standard Bidding Document of the answering respondent since the year 2007. In fact, the clause, originally was quite subjective and is reproduced as under:
>
> > "Record of **poor performance** such as abandoning the works, not properly completing the contract, inordinate delays in completion, litigation history or financial failure."
>
> Since the aforesaid clause for **poor performance** was quite subjective and its scope was very wide with ample discretion, the answering respondent amended it on 29.07.2015 as follows to make it more objective and only for extreme cases-
>
> > **"Forfeiting the full or partial SD for poor performance (including cases where the forfeiting has been done in last 5 years though the contract period may be older than 5 years)"**

As can be seen that the **"poor performance"** in the earlier clause has now been absolutely objective and only for extreme cases; and without discretion with the mandate that it will now come into force only in such cases where the poor performance has come to such level that the bank guarantee has come to such level that the bank guarantee or security deposit of the contractor has to be encashed. It means that in such cases the contractor has not done any work and hence there is either no pending payment or the pending payment is less than the amount of penalty sough to be recovered and penalty has mounted to such an extent that the department has no choice but to encash the Bank guarantee to recover the said amount. The impugned disqualification clause is much objective and considerate than the earlier one and adds disqualification only in **extreme cases of poor performance.** Upper Narmada is a fit case under this principle where the petitioner in the allotted three years time for a project of Rs.402.80 Crores could carry out only the survey work of Rs.1.72 crores. The inordinate delay and poor performance attracted a penalty of 10% of the contract amount under clause 113.6 & 115 of the contract agreement upon the petitioner. Obviously, as the petitioner had done absolutely nothing, it was impossible to recover the penalty from his bills and the only way to recover the penalty amount was to encash the bank guarantees. Hence in the present case the petitioner invited the disqualification by his own deeds and cannot blame the "disqualification clause" in the subsequent NIT's….."

12. With this factual background, the argument of the learned counsel for the parties needs to be examined.

13. The judgment of learned Single Bench of Jharkhand High Court in *Ripley and Company Limited* (supra) is in the context of rejection of bid of the petitioner on account of poor performance in an earlier contract. The condition in the Notice Inviting Tender is as under:-

> **"5.4.3** Even though the bidders meet the above qualifying criteria, they are subject to be disqualified if they have:
>
> (a) made misleading or false representation in the forms, statements and attachments submitted in proof of the qualification requirements, and/or

(b) record of poor performance such as abandoning the works, not properly completing the contract, inordinate delays in completion, litigation history, or financial failure etc.

Considering the said clause, it was held that the Government must have a free hand in setting the terms of the tender. It was held that refusal to consider the petitioner for award of contract on account of its alleged earlier non-completion and abandonment of contract is a stigma on its credibility. The relevant extract from the said decision reads as under:-

> **"18.** That the Government must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere: The Courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias. It is entitled to pragmatic adjustments which may be called for by the particular circumstances. The Courts cannot strike down the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. The Courts can interfere only if the policy decision is arbitrary, discriminatory or mala fide.
>
> *** *** ***
>
> **23.** No doubt, performance and non-performance of a contract relates to the mutual contractual obligations, arising out of any contract. But when non observance of a contractual obligation or even a breach of a contractual stipulation becomes an impediment for a contracting party for award of future contract, it is not simplicitor a case of performance or non-performance of certain contractual obligations but has its impact on a long way. *To deny the right of participation to a tenderer in future contracts on account of one or the other breach in an earlier contract, definitely not only casts stigma and black mark on it but clearly amounts to blacklisting, notwithstanding whether it is said so in so many words or not. The validity of the action is to be examined on the basis of its overall impact on a person. If any action indicates a penal consequence for its past acts in future, it cannot be but a penalty*.
>
> *** *** ***
>
> **25.** Now coming to the question whether the invocation of Clause 5.4.3(b) debarring the Petitioner from future participation even though it is fully qualified and eligible in all respect, amounts to blacklisting. Even though the word "blacklisting" has not been used either in Clause 5.4.3 or in the note of Respondent or the minutes of the Tender Committee, *but in sum and substance, the action amounts to blacklisting and casts stigma. That being the situation, such an action without observing the principles of natural justice has to be set aside and annulled. (Emphasis supplied)*

14. On the other hand, a Division Bench of Punjab & Haryana High Court in *M/s R.S. Labour and Transport Contractor* (supra) was examining the two writ petitions. The bid of the petitioner in the first writ was rejected on the ground of

cartelisation. It was found that the petitioner was blacklisted on account of forfeiture of earnest money. It was found that forfeiture of earnest money is not on the ground of breach of the contract whereas it was a case where the party was prevented from being considered for the contract itself. Therefore, the rejection of bid of the petitioner on alleged ground of cartelisation was found to be untenable. The relevant extracts from the said decision are reproduced as under:-

> **"16.** CWP No.21863 of 2016 admits of no difficulty. The petitioners must succeed. The first respondent did not merely forfeit the EMD but refused to consider the petitioners' bid altogether solely on the ground that they had formed a cartel with M/s Sushil & Co. The petitioners were, therefore, in effect, debarred from participating in the tender process altogether, although they were otherwise qualified to do so.
>
> *** *** ***
>
> **20.** The first respondent was bound to follow the principles of natural justice relating to blacklisting a party including affording him an opportunity of dealing with the grounds of the proposed blacklisting. The action of respondent No.1 impugned in CWP No.21863 of 2016 is, therefore, unsustainable."

However, in respect of other petition, the Court found that there is no reason for rejection of the bid of the petitioner for Safidon etc. The bid of the petitioner was rejected for the reason that earnest money of the petitioner was forfeited on the ground of forming of cartelisation that is the first case. It was held that disqualification of tenderer on account of forfeiture of the earnest money would have disastrous consequences of blacklisting. The relevant extracts from the judgment read as under:-

> **"24.** There are cases where government organisations and the State include a term in the notice inviting tenders that a party, though otherwise qualified, will not be entitled to submit a bid if it is blacklisted and/or its EMD has been forfeited by any other party such as another government or government agency or instrumentality of the State. Those cases are different and require different considerations. We do not intend expressing any view about the validity of such clauses and the manner in which the issue of blacklisting in such cases ought to be dealt with. The case before us is one where such a clause is included by the same organisation that forfeits the EMD in one contract and makes that the basis for disqualifying the party from participating in its other activities. There is less complication in such cases.
>
> **25.** If the respondents are permitted to disqualify a party from submitting a tender in respect of a contract merely on account of the EMD of such a party having been forfeited in another contract, it would have the disastrous consequences of blacklisting the party without affording it an opportunity of being heard or dealing with the order of blacklisting in any manner whatsoever. This cannot be permitted. A term in a notice inviting tenders which disqualifies absolutely a party from submitting its bids

> merely on account of its EMD having been forfeited in another contract, is illegal being unreasonable, arbitrary and violative of the principles of natural justice. If the term merely confers a right upon the party inviting tenders or gives it the discretion to disqualify a party whose EMD had been forfeited in another contract, it would be valid. However, in such a case, the party inviting tenders would have to grant the party sought to be disqualified an opportunity of showing cause against the proposed disqualification. Call it by any name, such a term, in effect, debars a party from participating in the tender process and must, therefore, have read into it the principles of natural justice as applicable to cases of blacklisting."

15. The forfeiture of earnest money without performing any part of the contract, at the stage of consideration of grant of contract, would stand on a materially different footing when security amount is forfeited on account of failure of the contractor to complete the project, as awarded.

16. However, in the present case, it is not forfeiture of earnest money which is the basis of disqualification but invocation of performance Bank Guarantee and/or security deposit on account of failure of the petitioners to complete the awarded work. Whether such decision of the respondents is fair and reasonable or what consequences will follow from such decision is yet to be adjudicated upon by a statutory Arbitral Tribunal but it cannot be said that though the performance of the petitioner was found to be wanting in two contracts, the respondents have to treat the petitioners as qualified/eligible bidder and that clause of the tender that forfeiture of the security deposit should not be taken into consideration, will be in fact introducing a clause in the tender document, which is not in existence. Both the judgments of the High Courts referred to by the learned counsel for the petitioners are in different context altogether, therefore, have no application in the present cases.

17. On the other hand, the Supreme Court in *Educomp Datamatics* (supra) has held that the terms and conditions in the tender are prescribed by the Government bearing in mind the nature of contract and in such matters the authority calling for the tender is the best judge to prescribe the terms and conditions of the tender. It is not for the courts to say whether the conditions prescribed in the tender under consideration were better than the ones prescribed in the earlier tender invitation. The Government must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The Courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias. The Courts cannot strike down the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. The Courts can interfere only if the policy decision is arbitrary, discriminatory or mala fide.

18. In *Global Energy Ltd.* (supra) the Supreme Court held that the Courts cannot whittle down the terms of the tender as they are in the realm of contract unless they are wholly arbitrary, discriminatory or actuated by malice. The relevant extract from the judgment is reproduced as under:-

> **"9.** In Tata Cellular v. Union of India (1994) 6 SCC 651, a Three Judge Bench has explained what is a tender and what are the requisites of a valid tender. It has been held that the tender must be unconditional and must conform to the terms of the obligation and further the person by whom the tender is made must be able and willing to perform his obligations. It has been further held that the terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. In Air India Ltd. v. Cochin International Airport Ltd. (2000) 2 SCC 617 the same view was reiterated that the State can fix its own terms of invitation of tender and that it is not open to judicial scrutiny. Whether and in what conditions the terms of a notice inviting tenders can be a subject matter of judicial scrutiny, has been examined in considerable detail in Directorate of Education v. Educomp Datamatics Ltd. (2004) 4 SCC 19. The Directorate of Education, Government of National Capital Territory of Delhi had taken a decision to establish computer laboratories in all Government schools in NCT area and tenders were invited to provide hardware for this purpose. For the final phase of 2002-03, tenders were called for 748 schools and the cost of project was approx. Rs.100 crores. In view of the difficulty faced in the earlier years where the lowest tenderers were not able to implement the entire project, a decision was taken to invite tenders from firms having a turnover of Rs.20 crores or more for the last three financial years ending with 31.3.2002, as it was felt that it would be easier for the department to deal with one company which is well managed and not with several companies. Some of the firms filed writ petitions in Delhi High Court challenging the clause of the NIT whereby a condition was put that only such firms which had a turnover of Rs.20 crores or more for the last three financial years would be eligible. It was contended before the High Court that the aforesaid condition had been incorporated solely with an intent to deprive a large number of companies imparting computer education from bidding and monopolize the same for big companies. The writ petition was allowed and the clause was struck down as being arbitrary and irrational. In appeal, this Court reversed the judgment of the High Court basically on the ground that the terms of the invitation to tender are not open to judicial scrutiny, the same being in the realm of contract and the Government must have a free hand in settling the terms of the tender. The courts would not interfere with the terms of the tender notice unless it was shown to be either arbitrary or discriminatory or actuated by malice. It was further held that while exercising the power of judicial review of the terms of the tender notice, the Court cannot order change in them.
>
> **10.** The principle is, therefore, well settled that the terms of the invitation to tender are not open to judicial scrutiny and the Courts cannot whittle down the terms of the tender as they are in the realm of contract unless they are wholly arbitrary, discriminatory or actuated by malice. This being the position of law, settled by a catena of decisions of this Court, it is rather

surprising that the learned Single Judge passed an interim direction on the very first day of admission hearing of the writ petition and allowed the appellants to deposit the earnest money by furnishing a bank guarantee or a bankers' cheque till three days after the actual date of opening of the tender. The order of the learned Single Judge being wholly illegal, was, therefore, rightly set aside by the Division Bench."

19. In *Shimnit UTSCH India Pvt. Ltd.* (supra), the Supreme Court held that the Government has discretion to adopt a different policy or alter or change its policy calculated to serve public interest and make it more effective in the context of tender conditions. The relevant extracts of the said decision read, thus:-

"52. We have no justifiable reason to take a view different from the High Court insofar as correctness of these reasons is concerned. The courts have repeatedly held that government policy can be changed with changing circumstances and only on the ground of change, such policy will not be vitiated. The government has a discretion to adopt a different policy or alter or change its policy calculated to serve public interest and make it more effective. Choice in the balancing of the pros and cons relevant to the change in policy lies with the authority. But like any discretion exercisable by the government or public authority, change in policy must be in conformity with Wednesbury reasonableness and free from arbitrariness, irrationality, bias and malice.

53. In Assn. of Registration Plates vs. Union of India, (2005) 1 SCC 679, this Court while dealing with the challenge to the conditions with regard to experience in foreign countries and prescribed minimum turnover from that business observed that these conditions have been framed in the NIT to ensure that the manufacturer selected would be technically and financially competent to fulfill the contractual obligations and to eliminate fly-by-night operators and that the insistence of the State to search for an experienced manufacturer with sound financial and technical capacity cannot be misunderstood. While maintaining the State Government's right to get the right and most competent person, it was held that in the matter of formulating conditions of a tender document and awarding a contract of the nature of ensuring the supply of HSRP, greater latitude is required to be conceded to the State authorities and unless the action of tendering authority is found to be malicious and a misuse of statutory powers, tender conditions are unassailable.

54. On the contentions advanced, this Court examined the impugned conditions and did not find any fault and overruled all objections raised by the petitioners therein in challenge to these conditions. This Court has neither laid down as an absolute proposition that manufacturer of HSRP must have the foreign experience and a particular financial capacity to fulfill the contractual obligations nor it has been held that these conditions must necessarily be insisted upon in the NIT.

55. The judgment of this Court in Association of Registration Plates(supra) cannot be read as prescribing the conditions in NIT for manufacture and supply of HSRP. Rather this Court examined legality and justification of the impugned conditions within the permissible parameters of judicial

review and recognized the right of the States in formulating tender conditions. In our opinion, there is no justification in denying the State authorities latitude for departure from the conditions of the NIT that came up for consideration before this Court in larger public interest to broaden the base of competitive bidding due to lapse of time and substantial increase in the number of persons having TAC from the approved institutes without compromising on the quality and specifications of HSRP, as set out, (The specifications of HSRP may be ascertained by a combined reading of Rule 50 of the 1989 Rules and Clause 4 of the 2001 Order) in Rule 50 (sic), Order 2001 and Amendment Order, 2001.

56. Mr. F.S. Nariman, learned senior counsel heavily relied upon a decision of this Court in S. Nagaraj & Ors. v. State of Karnataka & Anr., 1993 Supp (4) SCC 595 and submitted that the decision of this Court in Association of Registration Plates (supra) was binding on all States and the said judgment has to be enforced and obeyed strictly and any deviation from those conditions by the States on their own is impermissible."

20. In a judgment reported as (2016) 8 SCC 622 *[Central Coalfields Ltd. and another vs. SLL-SML (Joint Venture Consortium) and others]*, the bidder wanted the employer to deviate from the terms of Notice Inviting Tender. It was held that the employer has the right to punctiliously and rigidly enforce the terms of the tender. If a party approaches a court for an order restraining the employer from strict enforcement of the terms of the tender, the court would decline to do so. The Supreme Court held as under:-

"38. In *G.J. Fernandez v. State of Karnataka, (1990) 2 SCC 488* both the principles laid down in *Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489* were reaffirmed. It was reaffirmed that the party issuing the tender (the employer) "has the right to punctiliously and rigidly" enforce the terms of the tender. If a party approaches a court for an order restraining the employer from strict enforcement of the terms of the tender, the court would decline to do so. It was also reaffirmed that the employer could deviate from the terms and conditions of the tender if the "changes affected all intending applicants alike and were not objectionable".

Therefore, deviation from the terms and conditions is permissible so long as the level playing field is maintained and it does not result in any arbitrariness or discrimination in *Ramana Dayaram Shetty* (supra) sense.

*** *** ***

46. It is true that in *Poddar Steel* Corporation v. Ganesh Engineering Works and others, (1991) 3 SCC 273 and in *Rashmi Metaliks Ltd. v. Kolkata Metropolitan Development Authority, (2013) 10 SCC 95* a distinction has been drawn by this Court between essential and ancillary and subsidiary conditions in the bid documents. A similar distinction was adverted to more recently in *Bakshi Security and Personnel Services (P) Ltd. v. Devkishan Computed (P) Ltd., (2016) 8 SCC 446* through a reference made to *Poddar Steel (supra)*. In that case, this Court held a particular term of NIT as

essential (confirming the view of the employer) and also referred to the "admonition" given in *Jagdish Mandal vs. State of Orissa, (2007) 14 SCC 517 followed in Michigan Rubber (India) Ltd. v. State of Karnataka, (2012) 8 SCC 216*. Thereafter, this Court rejected the challenge to the employer's decision holding Bakshi Security and Personnel Services ineligible to participate in the tender.

47. The result of this discussion is that the issue of the acceptance or rejection of a bid or a bidder should be looked at not only from the point of view of the unsuccessful party but also from the point of view of the employer. As held in *Ramana Dayaram Shetty (supra)* the terms of NIT cannot be ignored as being redundant or superfluous. They must be given a meaning and the necessary significance. As pointed out in *Tata Cellular v. Union of India, (1994) 6 SCC 651* there must be judicial restraint in interfering with administrative action. Ordinarily, the soundness of the decision taken by the employer ought not to be questioned but the decision-making process can certainly be subject to judicial review. The soundness of the decision may be questioned if it is irrational or mala fide or intended to favour someone or a decision "that no responsible authority acting reasonably and in accordance with relevant law could have reached" as held in *Jagdish Mandal (supra)* followed in *Michigan Rubber (supra)."*

21. In a recent judgment reported as (2016) 16 SCC 818 *(Afcons Infrastructure Limited vs. Nagpur Metro Rail Corporation Limited and Another)*, the Supreme Court held as under:-

"11. Recently, in Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium), (2016) 8 SCC 622 it was held by this Court, relying on a host of decisions that the decision making process of the employer or owner of the project in accepting or rejecting the bid of a tenderer should not be interfered with. Interference is permissible only if the decision making process is mala fide or is intended to favour someone. Similarly, the decision should not be interfered with unless the decision is so arbitrary or irrational that the Court could say that the decision is one which no responsible authority acting reasonably and in accordance with law could have reached. In other words, the decision making process or the decision should be perverse and not merely faulty or incorrect or erroneous. No such extreme case was made out by GYT-TPL JV in the High Court or before us.

12. In Dwarkadas Marfatia and Sons v. Board of Trustees of the Port of Bombay, (1989) 3 SCC 293 it was held that the constitutional Courts are concerned with the decision making process. Tata Cellular v. Union of India, (1994) 6 SCC 651 went a step further and held that a decision if challenged (the decision having been arrived at through a valid process), the constitutional Courts can interfere if the decision is perverse. However, the constitutional Courts are expected to exercise restraint in interfering with the administrative decision and ought not to substitute its view for that of the administrative authority. This was confirmed in Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517 as mentioned in Central Coalfields.

13. In other words, a mere disagreement with the decision making process

> or the decision of the administrative authority is no reason for a constitutional Court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional Court interferes with the decision making process or the decision.
>
> *** *** ***
>
> **15.** We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional Courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional Courts but that by itself is not a reason for interfering with the interpretation given."

22. As per the information given by the petitioners, one contract i.e. Narmada Kshipra Samastha (Link) has been completed by the petitioners whereas 10 other contracts in other parts of the country have been completed. May be the petitioner has completed the projects for which tenders were invited by the other States but the question remains that in respect of Upper Narmada Irrigation Project and Khargone Lift Canal, the security deposited, stands forfeited for the reason that petitioners have defaulted in performance of the contract. The decision to arrive at that the petitioners have defaulted in performance of contract is subject matter of adjudication before the competent Arbitral Tribunal but that does not mean that even though the security deposit has been forfeited, which fact is not disputed, the petitioners cannot be said to have not incurred disqualification as per the tender conditions. Such tender condition is being applied in a transparent and in a non-discriminatory manner, therefore, it cannot be said that such condition is not proper. In any case, this Court in judicial review cannot hold that such condition is beyond the jurisdiction of the respondents.

23. The poor performance, as considered by the Jharkhand High Court in *Ripley and Company Limited* (supra) is subjective over the conditions in the Notice Inviting Tender issued by the State and/or Narmada Valley Development Authority prior to 2015. The earlier clause based on subjective satisfaction has been substituted and now disqualification clause is dependent upon a fact as to whether security deposit has been forfeited or not. By such disqualification clause, no stigma is cast to the tenderer as the only consequence is that such tenderer is not permitted to participate in a tender process issued by the respondents. Whether a contractor is suitable to carry out the works on behalf of the State, the decision is of the State or its agencies or instrumentalities. A contractor cannot claim any right that even though his security deposit has been

forfeited, the State is bound to consider him eligible and in the event, he is the lowest tenderer, to award contract.

24. The past experience of a contractor is a relevant consideration for the State to take into consideration whether the State should enter into contract with such contractor whose performance is not considered satisfactory by the respondents. There is no allegation that such policy decision is actuated by malice. Thus, no right accrues to the petitioners to invoke the writ jurisdiction by this Court so as to declare the petitioners to be not disqualified.

25. In view of the above, we do not find any merit in the present writ petitions. The same are **dismissed**.

Petition dismissed

I.L.R. [2018] M.P. 2166
WRIT PETITION
Before Mr. Justice J.K. Maheshwari
W.P. No. 2986/2016 (Indore) decided on 16 July, 2018

BHAGWANDAS & ors. …Petitioners

Vs.

NAGAR PALIKA NIGAM, RATLAM …Respondent

A. Municipal Corporation Act, M.P. (23 of 1956), Sections 173, 174, 302 & 307 – Demand Notice – Procedure and Grounds **– Held – Prior to taking action u/S 174 of the Act of 1956, the procedure as prescribed in Chapter XII, Section 173(2) and 174 has to be followed which was not done in present case – In absence thereto, issuance of notice u/S 174 is not permissible – Further, notice do not specify on which land of MOS, construction has been carried out specifying the area of illegal construction by making sketch or map of it – Without such specifications, notice is vague and if any action on basis of such notice is taken, same is invalid under law – Notice of demand quashed – Petition allowed.**

(Paras 5 to 7)

क. नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धाराएँ 173, 174, 302 व 307 – मांग नोटिस – प्रक्रिया एवं आधार – अभिनिर्धारित – 1956 के अधिनियम की धारा 174 के अंतर्गत कार्रवाई करने से पूर्व, अध्याय XII धारा 173(2) एवं 174 में विहित की गई प्रक्रिया का पालन किया जाना चाहिए, जो कि वर्तमान प्रकरण में नहीं किया गया था – इसकी अनुपस्थिति में, धारा 174 के अंतर्गत नोटिस जारी किया जाना अनुज्ञेय नहीं है – इसके अतिरिक्त, नोटिस यह विनिर्दिष्ट नहीं करता कि एम.ओ.एस. की किस भूमि पर, स्केच या नक्शा बनाकर अवैध निर्माण का क्षेत्र विनिर्दिष्ट करते हुए निर्माण किया गया है – ऐसे

विनिर्देशों के बिना, नोटिस अस्पष्ट है एवं यदि ऐसे नोटिस के आधार पर कोई कार्रवाई की जाती है, विधि के अंतर्गत वह अविधिमान्य है – मांग का नोटिस अभिखंडित – याचिका मंजूर।

***B. Municipal Corporation Act, M.P. (23 of 1956), Sections 173, 174, 302 & 307 – Demolition Expenses – Demand Notice* – Held – Notice for recovery of expenses incurred in demolition of alleged illegal construction does not come under the provisions of "Notice of Demand" specified in Sections 173 and 174 of the Act of 1956.**

(Paras 5 to 7)

ख. नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धाराएँ 173, 174, 302 व 307 – विध्वंस व्यय – मांग नोटिस – अभिनिर्धारित – अभिकथित अवैध निर्माण के विध्वंस में किये गये व्ययों की वसूली के लिए नोटिस, 1956 के अधिनियम की धारा 173 एवं 174 में विनिर्दिष्ट ''मांग का नोटिस'' के उपबंधों के अंतर्गत नहीं आता है।

Case referred :

1999 (2) MPLJ 56.

Rajeev Bhatjiwale, for the petitioners.
R.R. Bhatnagar with *Tarun Kushwaha*, for the respondents.

O R D E R

J.K. MAHESHWARI, J :- Being aggrieved by the notice of demand dated 8.4.2016 issued under section 174 of the M.P. Municipal Corporation Act, 1956 (referred hereinafter as 'the Act'), this petition has been preferred.

2. The background of the action taken against the petitioners is relevant whereunder the Writ Petition No.1778/2015 was filed and was decided as per order dated 13.5.2015. This court found that the construction which is being carried out by the petitioners is as per the sanctioned map of the Corporation on a land purchased by them. Resultantly, the Court quashed the order dated 25.9.2013 (Annx.P/12) and the order dated 16.1.2015 (Annx.P/15) in the said writ petition. The court further directed that the construction activity be carried out by the petitioners in consonance with the building permission granted in their favour. Thereafter a notice(Annx.P/4) dated 18.3.2016 was issued contending that as per the notice dated 3.8.2015 some construction of the building on the MOS land has been raised. The description of illegal construction has not been mentioned in the said notice. It was replied denying all facts stating that no construction on MOS land is raised . Thereafter the notice of demand under section 174 has been issued which is assailed in this petition inter alia contending that prior to issuing the demand, procedure as described in section 173 of the Act has not been followed, therefore the notice is bad in law, however it may be ordered to be quashed.

3. Respondent-Corporation has filed their reply inter alia contending that notice has rightly been issued to the petitioner on account of raising the illegal construction on the MOS land which was demolished by use of JCB and other equipments, therefore the recovery to expenses incurred by Corporation as per the provisions of the Act has rightly been ordered. In alternative, it is urged that the said recovery does not come within the purview of section 173 and 174 of the Act, therefore the argument advanced by the petitioners is of no avail to them, therefore the petition may be dismissed.

4. After hearing learned counsel appearing on behalf of both the parties, the reflection of the dispute can be taken from the findings recorded by this court in the previous petition vide order dated 13.5.2015 in W.P.No.1778/2015. The relevant part of the order is reproduced hereinbelow :-

> "Heard learned counsel for the parties as also the intervenors at length and perused the record. The matter is being disposed of at the admission stage itself with the consent of the parties.
>
> It is an admitted fact, that house No. 180 has been bought by the petitioners through registered sale deed in the year 2006. It is not in dispute that they are title holder of the property in question. It is also not in dispute that a map was sanctioned by the Municipal Corporation, Ratlam in respect of grant of building permission and the petitioners started constructing a building after the permission was granted in the year 2012. It has been categorically stated by the learned counsel for the respondent - Municipal Corporation, Ratlam that the petitioners have not constructed even an inch in contravention to the sanctioned layout. Not only this, the letter of the Commissioner, Municipal Corporation, Ratlam makes it very clear that the petitioners were carrying out construction in consonance with the sanctioned layout.
>
> It is really unfortunate that on account of some dispute with the intervenors, the building permission has been suspended even though there is no violation of the building permission. The building permission has been granted under the provisions of the M. P. Municipal Corporation Act, 1956 read with Bhumi Vikas Rules and once the permission has been granted by the Municipal Corporation, Ratlam until and unless, the construction is

raised contrary to the building permission the same could not have been revoked in the manner and method it has been done.

Resultantly, this Court is of the considered opinion that the order dt. 25/9/13 (Annexure P/12) and order dt. 16/1/2015 (Annexure P/15) are hereby set aside. However, it is made clear that the petitioner shall not damage the property of the intervenor while carrying out the construction activity and shall construct the building strictly in consonance with the building permission granted to him by the Municipal Corporation, Ratlam in the year 2012.

With the aforesaid, the Writ Petition stands disposed of."

5. On perusal of the aforesaid, it is luculent that the construction which was being carried out by the petitioners was found strictly in accordance with the permission granted by the Corporation and the said fact was not disputed during course of hearing. Thus the objection of intervenor was rejected. Thereafter along with Annx.P/4 notice impugned under sections 302 and 307 attached with the petition, was issued. The said notice do not specify, on which land of the MOS the construction has been carried out specifying the area of illegal construction making sketch by way of map of it. It is to observe here that without giving specifications thereof, such notice is vague and if any action is taken on the basis of said notice, it cannot be recognised valid under the law. Simultaneously if some construction has been raised on the land of the MOS, it is required to be examined by the Corporation specifying the limit of the said construction and it is exceeding from the compoundable limit but without taking such step, their action cannot be recognised valid under the law. In addition to the aforesaid, the notice under challenge (Annx.P/1) issued on 8.4.2016 is under section 174 of the Act. The said notice may be issued in furtherance to payment of bill raised by the Corporation not paid by the person by whom it is payable. In this regard the provisions of section 173 and 174 are relevant which are reproduced hereinder (sic:hereinunder) :-

S.173 : Presentation of bill for taxes and other demands

(1) when any amount declared by or under the provisions of this Act to be recoverable in the manner provided in this chapter, or payable on account of any tax imposed within the limits of the city shall have become due, the Commissioner shall with the least practicable delay cause to be presented to any person liable for the payment thereof a bill for the sum

claimed as due.

(2) Contents of bill – Every such bill shall specify -
(a) the period for which, and
(b) the property, occupation or thing in respect of
which the sum is claimed,
and shall also give notice of -
(i) the liability incurred in default of payment, and
(ii) the time within which an objection may be
preferred as against such claim.

174. If bill not paid within 15 days, notice of demand to issue -

(1) If the sum, for which a bill is presented as aforesaid is not paid and no objection has been preferred within 15 days from the presentation of the bill, the Commissioner may serve upon the person to whom such bill has been presented a notice of demand in the (form prescribed by byelaws).

(2) For every notice of demand, a fee shall be charged at the rate specified in the byelaws and shall be payable by the said person, and the fee shall be included in the costs of recovery.

6. On perusal thereto, it is clear that if any amount declared under the provisions of this Act to be recoverable, it may be recovered in the manner as provided in chapter XII of the Act. The manner is provided in sub-section 2 of Section 173, to issue the concerned bill specifying the details thereof and shall issue a notice with respect to the liability incurred in default of payment. Thereafter if the sum for which the bill is presented has not been paid, then the notice under section 174 may be issued to recover the said amount. In the present case either in the reply filed by the Corporation or before this Court during hearing, nothing has been brought to the notice that prior to taking action u/s 174 of the Act, the procedure as prescribed in chapter XII section 173(2) and 174 have been followed. In absence thereto, issuance of notice under section 174 is not permissible. In this regard the judgment of this Court in the matter of *Dhanya Kumar Dharamdas Agrawal Vs. State of M.P.*, 1999(2) MPLJ 56 is relevant.

7. So far as the arguments advanced with respect of recovery as per section 307(3) of the Act is concerned, it would cover within the purview of the amount due as specified in section 173 of the Act. However the recovery of the said amount may be made on demand by the Corporation observing the procedure prescribed. In view of foregoing, in my considered opinion, notice issued by the Corporation deserves to be and is hereby quashed.

8. Accordingly this petition succeeds and is hereby allowed. The notice dated 8.4.2016(Annx.P/1) is quashed.

In the facts, parties to bear their own cost.

Petition allowed

I.L.R. [2018] M.P. 2171
WRIT PETITION
Before Mr. Justice Sujoy Paul
W.P. No. 8320/2017 (Jabalpur) decided on 13 August, 2018

ZILA SATNA CEMENT STEEL FOUNDRY KHADAN KAAMGAR UNION THROUGH ITS GENERAL SECRETARY, RAMSAROJ KUSHWAHA …Petitioner

Vs.

UNION OF INDIA & ors. …Respondents

***A. Industrial Disputes Act (14 of 1947), Sections 2(k), 7, 7A, 10 & 10(1)(d) and Schedule II & III – Contract Labour – Reference – Appropriate Government – Jurisdiction & Powers* – Claim for regularization of contract labour on permanent post, whereby appropriate government denied reference to Tribunal – Challenge to – Held – Appropriate government can refer an industrial dispute for adjudication even if it is not covered under Schedule II and III – Appropriate government exceeded its authority and entered into merits of the case – Impugned order set aside – Appropriate government directed to refer the dispute for adjudication before Tribunal – Petition allowed.**

(Para 14 & 18)

क. औद्योगिक विवाद अधिनियम (1947 का 14), धाराएँ 2(के), 7, 7ए, 10 व 10(1)(डी) एवं अनुसूची II व III – संविदा श्रमिक – निर्देश – समुचित सरकार – अधिकारिता व शक्तियां – स्थाई पद पर संविदा श्रमिक के नियमितीकरण हेतु दावा, जिसे समुचित सरकार ने अधिकरण को निर्दिष्ट करने से इंकार किया – को चुनौती – अभिनिर्धारित – समुचित सरकार एक औद्योगिक विवाद को न्यायनिर्णयन हेतु निर्दिष्ट कर सकती है यद्यपि वह अनुसूची II व III के अंतर्गत आच्छादित न हो – समुचित सरकार अपने प्राधिकार से बाहर गई तथा प्रकरण के गुणदोषों पर विचार किया – आक्षेपित आदेश अपास्त – समुचित सरकार को अधिकरण के समक्ष न्यायनिर्णयन हेतु विवाद निर्दिष्ट करने हेतु निदेशित किया गया – याचिका मंजूर।

***B. Contractual Employees – Adjudication of Dispute – Powers of Labour Court/Tribunal* – Held – In industrial jurisprudence, it is now settled that even in cases of contractual employees, labour Courts are equipped with**

the power to examine the real nature of employment – Whether members of Union are "Workmen" or not can be examined by appropriate Tribunal/labour Court after recording evidence. (Para 11 & 12)

ख. संविदात्मक कर्मचारीगण – विवाद का न्यायनिर्णयन – श्रम न्यायालय/अधिकरण की शक्तियां – अभिनिर्धारित – औद्योगिक विधि शास्त्र में, यह अब सुस्थापित है कि संविदात्मक कर्मचारीगण के प्रकरणों में भी, श्रम न्यायालय नियोजन की वास्तविक प्रकृति का परीक्षण करने की शक्ति से सुसज्जित हैं – क्या संघ के सदस्य ''कर्मकार'' हैं अथवा नहीं, का परीक्षण समुचित अधिकरण/श्रम न्यायालय द्वारा साक्ष्य अभिलिखित करने के पश्चात् किया जा सकता है।

***C. Industrial Disputes Act (14 of 1947), Section 2(k) – "Industrial Dispute" – Definition – Scope* – Held – Definition of "industrial dispute" is very wide and includes any dispute or difference between employer and employer or between employers and workmen or even between workmen and workmen, connected with employment or even with non-employment or terms of employment.**

(Para 14)

ग. औद्योगिक विवाद अधिनियम (1947 का 14), धारा 2(के) – ''औद्योगिक विवाद'' – परिभाषा – विस्तार – अभिनिर्धारित – ''औद्योगिक विवाद'' की परिभाषा अति व्यापक है तथा नियोजकों और नियोजकों के मध्य का, या नियोजकों और कर्मकारों के मध्य का या कर्मकारों और कर्मकारों के मध्य का भी कोई विवाद या मतभेद सम्मिलित है, जो नियोजन या अनियोजन से या नियोजन के निबंधनों से संबद्ध है।

Cases referred :

AIR 1989 SC 1565, 1991 Supp (2) SCC 10, 1985 (2) SCC 136, 2015 (15) SCC 1, 2016 (12) SCC 420, 2018 Lab I.C. 725, 2008 LAB.I.C. 1775, 1978 (4) SCC 257, 2003 (6) SCC 528, 2004 (1) SCC 126, 1992 (4) SCC 711, 2004 (7) SCC 166, (1978) 1 SCC 405.

Uttam Maheshwari, for the petitioner.
Devesh Bhojane, for the respondents No. 1 & 2.
Kuldeep Bhargava, for the respondent No. 3/Employer.

O R D E R

SUJOY PAUL, J. :- This petition filed under Article 226 of the Constitution of India takes exception to the order dated 17.05.2017 (Annexure-P/9), whereby the appropriate government has refused to refer the dispute for adjudication to the appropriate Industrial Tribunal.

2. The admitted facts between the parties are that the petitioner filed an application under Section 10 of Industrial Disputes Act, 1947 before the Conciliation Officer and after failure of conciliation, a failure report (Annexure P-

8) was sent to the appropriate government. In turn, the appropriate government by order dated 17.05.2017 (Annexure P-9) declined to refer the dispute for the reasons stated in the said order.

3. Shri Uttam Maheshwari, learned counsel for the petitioner criticized this order by contending that an industrial dispute exists between the petitioner and the employer. The appropriate government has exceeded its jurisdiction and decided the status of the concerned workmen and touched the merits of the matter. The government cannot undertake the aforesaid exercise and this aspect needs to be decided on merits by appropriate Tribunal upon receiving the reference from the appropriate government. He submits that the appropriate government has reached to a conclusion on merits which was beyond its competence. Reliance is placed on AIR 1989 SC 1565, *[Telco Convoy Drivers Mazdoor Sangh and Ors. vs. State of Bihar and Ors.]*; 1991 Supp(2) SCC 10, *[Dhanbad Colliery Karamchari Sangh vs. Union of India* (UOI) and Ors.] and a judgment of this Court passed in W.P. No.3340/2011, *[Harprasad Khajuria Vs. Union of India and others]*.

4. *Per contra*, Shri Devesh Bhojane, learned counsel for the respondent Nos.1 and 2 contended that a conjoint reading of Section 7, 7(A) and Section 10 makes it clear that the impugned order is in consonance with the scheme of Industrial Disputes Act, 1947. Reliance is placed on Section 10(1)(d) to contend that unless a dispute falls within the ambit of IInd or IIIrd Schedule, it can not be referred for adjudication. He relied on various entries of the said schedules appended to the Industrial Disputes Act and urged that the claim of classification/regularization does not fall within the ambit of said Schedules.

5. Shri Kuldeep Bhargava, learned counsel for the respondent No.3 submits that the conciliation application and subject of failure report as well as impugned order shows that alleged dispute was pertaining to contract labours which does not fall within the ambit of Industrial Disputes Act, 1947. There was no employee-employer relationship between the members of the petitioner-Union and the respondent No.3. Thus, the reference was rightly declined by the authority. He placed reliance on 1985 (2) SCC 136, *[Workmen of the Food Corporation of India Vs. Food Corporation of India]* to contend that a contract worker is not covered within the definition of "dispute" and, therefore, no fault can be found in the impugned order as per definition of "Workman" under Section 2(s) of the Industrial Disputes Act, 1947. Reliance is placed on 2015 (15) SCC 1 , *[Prabhakar Vs. Joint Director, Sericulture Department and Another]* in support of this contention that the satisfaction of "appropriate government" regarding existence of an industrial dispute is a condition precedent. The said government must be satisfied that a person whose dispute is being referred for adjudication is a "Workman". In the instant case, since the members of Union were not "workmen" the reference was rightly declined. 2016 (12) SCC 420, *[Rahman Industires Pvt.*

Ltd. vs. State of Uttar Pradesh and others] is relied upon to contend that the earlier judgments of Supreme Court including the one on which reliance is placed by Shri Uttam Maheshwari, namely, *Telco Convoy Drivers Mazdoor Sangh* (Supra) was also considered by Supreme Court and the Supreme Court came to hold that only when their (sic : there) exists a dispute for adjudication, it can be referred for adjudication. Reference is made to a Karnataka High Court judgment reported in 2018 Lab I.C. 725, *[Management of M/s. Le Meridien Bangalore vs. State of Karnataka and others]* wherein the same principle was laid down and power of the government under Section 12 was considered in *extenso*. Lastly Shri Bhargava relied on 2008 LAB.I.C. 1775, *[G.M. Haryana Roadways vs. Jai Bhagwan & anr.]* to bolster his submissions that petitioner has not approached this Court with clean hands. They did not disclose in the body of petition that members were contract workers and for this suppression of fact alone the writ petition deserves to be dismissed.

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

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

8. Before dealing with the rival contentions of the parties, it is apposite to quote relevant portion of Section 2(k), Section 7, Section 7A and Section 10 of the ID Act, on which reliance is placed by the learned counsel for the parties.

> **"2(k)**. " industrial dispute" **means any dispute or difference** between employers and employers or between employers and workmen, or between workmen and workmen, which is connected with the employment or non- employment or the terms of employment or with the conditions of labour, of any person;
>
> **** **** ****
>
> **7. Labour Courts**.-
>
> (1) The appropriate Government may, by notification in the Official Gazette, constitute one or more Labour Courts for the adjudication of industrial disputes relating to any matter specified in the Second Schedule and for performing such other functions as may be assigned to them under this Act.
>
> **** **** ****
>
> **7A. Tribunals.-**
>
> (1) The appropriate Government may, by notification in the Official Gazette, constitute one or more Industrial Tribunals for the adjudication of industrial disputes relating to any matter, whether specified in the Second

Schedule or the Third Schedule [and for performing such other functions as may be assigned to them under this Act].

**** **** ****

10. Reference of disputes to Boards, Courts or Tribunals.-
(1) Where the appropriate Government is of opinion that **any industrial dispute exists** or is apprehended, it may at any time], by order in writing,--

(a) refer the dispute to a Board for promoting a settlement thereof; or

(b) refer any matter appearing to be connected with or relevant to the dispute to a Court for inquiry; or

(c) refer the dispute or any matter appearing to be connected with, or relevant to, the dispute, if it relates to any matter specified in the Second Schedule, to a Labour Court for adjudication; or

(d) **refer the dispute** or any matter appearing to be connected with, or relevant to, the dispute, whether it relates to any matter specified, in the Second Schedule or the Third Schedule, to a Tribunal for adjudication:"

[Emphasis Supplied]

9. In the light of aforesaid statutory provisions and the judgment cited by both the sides, it needs to be examined whether the impugned order can sustain judicial scrutiny.

10. Admittedly, the claim of the Union is regarding regularization/ classification on the permanent post. The reason for rejection by the appropriate Government is as under:

> "The subject matter of the demand for regularization of contract labour does not fall under either second or third schedule of the ID Act."

11. The singular reason for rejection is that the demand of regularization of contract labour does not fall under either IInd or IIIrd Schedule of the ID Act. The question whether the members of the petitioner-Union were "workmen" or not needs to be examined by the appropriate Tribunal. Interestingly, a similar objection was raised by the employer in the case of *Telco Convoy Mazdoor Sangh* (supra). Para 12 & 13 of said judgment reads as under:

> **"12.** It is, however, submitted on behalf of TELCO that unless there is relationship of employer and employees or, in other words, unless those who are raising the disputes are work- men, there cannot be any existence of industrial dispute within the meaning of the term as defined in section 2(k) of the Act. It is urged that in order to form an opinion as to whether an industrial dispute exists or is apprehended, one of the factors that has to be considered by

the Government is whether the persons who are raising the disputes are workmen or not within the meaning of the definition as contained in section 2(k) of the Act.

13. Attractive though the contention is, we regret, we are unable to accept the same. It is now well settled that, while exercising power under section 10(1) of the Act, the function of the appropriate Government is an administrative function and not a judicial or quasi judicial function, and that in performing this administrative function the Government cannot delve into the merits of the dispute and take upon itself the determination of the lis, which would certainly be in excess of the power conferred on it by section 10 of the Act. **See** Ram Avtar Sharma v. State of Haryana, [1985] 3 SCR 686; M.P. Irrigation Kararnchari Sangh v. The State of M.P., [1985] 2 SCR 1019 and Shambhu Nath Goyal v. Bank of Baroda, Jullundur, [1978] 2 SCR 793."

[Emphasis Supplied]

12. This is now settled in industrial jurisprudence that even in cases of contractual employees, the labour Courts are equipped with the power to lift the veil and see the real nature of employment. In other words, where the contract itself is a sham contract or it is merely a smoke screen or camouflage, the labour Court is not powerless to examine the real nature of employment. This aspect can be decided by the labour Court after recording evidence of the parties. Way back, in 1978 (4) SCC 257 *(Hussainbhai, Calicut vs. The Alath Factory Thezhilali Union Kozhikode and others)*, the Apex Court poignantly held as under:

"5. The true test may, with brevity, be indicated once again. Where a worker or group of workers labours to produce goods or services and these goods or services are for the business of another, that other is, in fact, the employer. He has economic control over the workers' subsistence, skill, and continued employment. If he, for any reason, chokes off, the worker is, virtually, laid off. The presence of intermediate contractors with whom alone the workers have immediate or direct relationship ex contractu is of no consequence when, on lifting the veil or looking at the conspectus of factors governing employment, we discern the naked truth, though draped in different perfect paper arrangement, that the real employer is the management, not the immediate contractor. Myriad devices, half-hidden in fold after fold of legal form depending on the degree of concealment needed, the type of industry, the local conditions and the like may be resorted to when labour legislation casts welfare obligations on

the real employer, based on Articles 38, 39, 42, 43 and 43-A of the Constitution. The court must be astute to avoid the mischief and achieve the purpose of the law and not be misled by the maya of legal appearance.

6. If the livelihood of the workmen substantially depends on labour rendered to produce goods and services for the benefit and satisfaction of an enterprise, the absence of direct relationship or the presence of dubious intermediaries or the make-believe trappings of detachment from the management cannot snap the real-life bond. The story may vary but the inference defies ingenuity. The liability cannot be shaken off."

This principle was reiterated by Constitution Bench in *Steel Authority of India Limited vs. National Union Water Front Workers*, 2001 (7) SCC. The reference may be made to para 107 which reads as under:

"107. ... (ii) where the contract was found to be a sham and nominal, rather a camouflage, in which case the contract labour working in the establishment of the principal employer were held, in fact and in reality, the employees of the principal employer himself. Indeed, such cases do not relate to abolition of contract labour but present instances wherein the Court pierced the veil and declared the correct position as a fact at the stage after employment of contract labour stood prohibited;"

In 2003 (6) SCC 528 *(Bharat Heavy Electricals Ltd. vs. State of U.P. and others)*, the Apex Court considered aforesaid judgments and opined that the case of *Hussainbhai* (Supra) is neither dissented from nor diluted by Constitution Bench in the case of *Steel Authority of India Ltd. (Supra).* In 2004 (1) SCC 126 *(Ram Singh and others vs. Union Territory, Chandigarh and others)*, Dharmadhikari J. speaking for the Bench opined that normally, the relationship of employer and employee does not exists between an employer and a contractor and the servant of an independent contractor. Where, however, an employer retains or assumes control over the means and method by which the work of a contractor is to be done, it may be said that the relationship between employer and employee exists between him and the servants of such a contractor. In such a situation the mere fact of formal employment by an independent contractor will not relieve the master of liability where the servant is, in fact, in his employment. In that event, it may be held that an independent contractor is created or is operating as a subterfuge and the employee will be regarded as the servant of the principal employer. *Whether a particular relationship between employer and employee is genuine or a camouflage through the mode of a contractor, is essentially a question of fact to be determined on the basis of the features of the relationship,*

the written terms of employment, if any, and the actual nature of the employment. The actual nature of relationship concerning a particular employment being essentially a question of fact, it has to be raised and proved before an industrial adjudicator.

13. The pivotal question is whether appropriate government can undertake this exercise? In catena of judgments, including *Telco Convoy Drivers Mazdoor Sangh* (supra), it was held that the "appropriate government" is not equipped with any judicial power while deciding to refer or not to refer an industrial dispute. Pertinently, in *Rahman Industries Pvt. Ltd* (supra) on which reliance is placed by Shri Bhargava, the same principle is reiterated. It is profitable to quote para 3 of this judgment, which reads as under:

> **"3**. We find force in the submission made by the learned counsel. In the scheme of the Industrial Disputes Act, 1947 (hereinafter referred to as "the Act"), it is not as if the Government has to act as a post office by referring each and every petition received by them. The Government is well within its jurisdiction to see whether there exits a dispute worth referring for adjudication. No doubt, the Government is not entitled to enter a finding on the merits of the case and decline reference. The Government has to satisfy itself, after applying it mind to the relevant factors and satisfy itself to the existence of dispute before taking a decision to refer the same for adjudication. Only in case, on judicial scrutiny, the Court finds that the refusal of the Government to make a reference of the dispute is unjustified on irrelevant factors, the court may issue a direction to the Government to make a reference."
>
> ***[Emphasis Supplied]***

14. The definition of "industrial dispute" is very wide and includes any dispute or difference between employer and employer or between employers and workmen or even between workmen and workmen which is connected with the employment or even with non-employment or terms of employment. Shri Bhojne contended that in view of Section 10(1)(d) of ID Act, only such disputes can be referred for adjudication which are covered under II or III Schedule under the ID Act. I do not see any merit in the said contention. A careful reading of clause (d) shows that it talks about reference of dispute to *Tribunal or any matter appearing to be connected with or relevant to the dispute*. The clause (d) is into two parts. First part talks about reference of dispute whereas the remaining part talks about any matter which may be connected with the dispute and for said kind of matters, it is mentioned that it may be specified in IInd or IIIrd Schedule. This is trite law that the word "or" is normally disjunctive and "and" is normally conjunctive. See Principles of Interpretation of Statute by Justice G.P. Singh (page 477 12th

Edition). Thus, a conjoint reading of Section 2(k) and 10(1) (d) shows that the appropriate government can refer an industrial dispute for adjudication even if it is not covered under IInd or IIIrd Schedule. Any other interpretation will make the use of word "or" meaningless. This is trite law that when a provision is clear and unambiguous it must be given effect to irrespective of consequences. See 1992 (4) SCC 711 *(Nelson Motis vs. Union of India and another)*. Thus, as per the text and in the context "or" is used, I am constrained to hold that power of appropriate government is not confined to refer the dispute only when it is covered by IInd or IIIrd Schedule.

15. This writ petition is filed against the order of "appropriate government". The main dispute was filed before the Conciliation Officer, wherein the Union has categorically mentioned about the nature of employment of the concerned workmen. Against rejection order, the matter traveled to this Court. Since in the basic dispute/application for conciliation the status of concerned workmen was disclosed, I am unable to hold that in the light of judgment of *G.M. Haryana Roadways* (supra) this petition can be thrown overboard for suppression of fact. Needless to mention that this Court is not deciding the status of the members of petitioner-Union and appropriate industrial tribunal is best suited to decide this issue. In 2004 (7) SCC 166 *(S.J.S. Business Enterprises(P) Ltd. vs. State of Bihar and others)*, the Apex Court held that general rule of denial of relief in cases of suppression of material facts would be of no effect when suppression of fact is not a material one.

16. In the case of *Prabhakar* (supra) the Apex Court opined that the satisfaction of "appropriate government" whether the dispute referred is relating to workmen or not is a condition precedent. There cannot be any dispute about this legal preposition. But the question is when the petitioner and the employer have taken a diametrically opposite stand on this aspect and this aspect cannot be decided on administrative exercise of power, whether appropriate government can decline to refer the dispute ? In my considered opinion, the appropriate government cannot reject the reference when the parties are at loggerheads on the question where employees fall within the definition of "workman" and for this purpose the evidence is required to be adduced. The same principle is enunciated by the Supreme Court in the case of *Dhanbad Colliery Karamchari Sangh* (supra) and by this Court in *Harprasad Khajuriya* (supra).

17. Apart from this, the matter may be viewed from another angle. The impugned rejection order assigns singular reason which is reproduced hereinabove. The reason for not referring the dispute is not that the members of Union do not fall within the ambit of "workman". Indeed, it is held that regularization of contract labour does not fall within the ambit of Schedules of ID Act. At the cost of repetition, in my view, the definition of "industrial dispute" is

wide enough and as per Section 10(1)(c) such dispute can be referred for adjudication even if it does not fall within IInd or IIIrd Schedule of the ID Act. The appropriate government did not form any opinion that no industrial dispute exists nor it formed any specific opinion in the impugned order that members of petitioner-Union are not workman. This is trite law that validity of an order of statutory authority is to be judged on the grounds/reasons mentioned therein and it cannot be substituted by filing return/counter affidavit. A Constitution Bench of Supreme Court in the case of *[Mohinder Singh Gill vs. Chief Election Commissioner]* reported in (1978) 1 SCC 405, opined that order of statutory authority is not like an old wine which may give strength by afflux of time. The relevant portion of said judgment reads as under:

> **"8.** The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose J. in Gordhandas Bhanji
>
> "Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in Ms mind, or what he intended to, do. Public orders made by public authorities are meant to have public effect and are intended to effect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."
>
> Orders are not like old wine becoming better as they grow older:"
>
> ***[Emphasis Supplied]***

18. In entirety, in my considered opinion the appropriate government has exceeded its authority and entered into the merits of the case by holding that the demand of regularization of contract labour is not covered under the ID Act. Resultantly, the order dated 17.05.2017 is set aside. The appropriate government is directed to refer the dispute for adjudication to the appropriate Tribunal within 45 days from the date of production of copy of this order.

19. **Petition is allowed**. No cost.

Petition allowed

I.L.R. [2018] M.P. 2181
MISCELLANEOUS PETITION
Before Mr. Justice Vivek Rusia
M.P. No. 3468/2018 (Indore) decided on 24 July, 2018

SHEHZAD …Petitioner

Vs.

SOHRAB & ors. …Respondents

***A. Civil Procedure Code (5 of 1908), Order 19 Rule 1 & 2 and Order 39 Rule 1 & 2 – Cross Examination of Deponent – Discretionary Powers of Court* – Suit for specific performance of contract – Plaintiff and witnesses filed affidavit alongwith injunction application – Petitioner/defendant filed application under Order 19 Rule 1 & 2 to cross examine the plaintiff – Application rejected by trial Court – Challenge to – Held – Where CPC permits the Court to decide certain matters on affidavit in general injunction matters, provisions of Order 19 Rule 1 & 2 do not apply and either party cannot lay any claim or urge the right of cross-examination of deponent – It is discretionary power of Court to call the deponent for cross examination, looking to the particular facts of the case – Trial Court finding the injunction application of plaintiff more creditworthy and *bonafide*, rightly exercised its discretion – Petition dismissed.**

(Paras 5, 6, 8 & 9)

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 19 नियम 1 व 2 एवं आदेश 39 नियम 1 व 2 – अभिसाक्षी का प्रतिपरीक्षण – न्यायालय की वैवेकिक शक्तियां – संविदा के विनिर्दिष्ट पालन हेतु वाद – वादी एवं साक्षीगण ने व्यादेश आवेदन के साथ शपथपत्र प्रस्तुत किया – याची/प्रतिवादी ने वादी के प्रति परीक्षण हेतु, आदेश 19 नियम 1 व 2 के अंतर्गत आवेदन प्रस्तुत किया – विचारण न्यायालय द्वारा आवेदन अस्वीकार किया गया – को चुनौती – अभिनिर्धारित – जहां सि.प्र.सं., न्यायालय को सामान्य व्यादेश के मामलों में शपथपत्र पर कतिपय मामले विनिश्चित करने की अनुज्ञा देती है, आदेश 19 नियम 1 व 2 के उपबंध प्रयोज्य नहीं होते तथा कोई पक्षकार, अभिसाक्षी के प्रतिपरीक्षण के अधिकार का कोई दावा या आग्रह नहीं कर सकता – प्रकरण के विशिष्ट तथ्यों को देखते हुए प्रति परीक्षण हेतु अभिसाक्षी को बुलाया जाना, यह न्यायालय की वैवेकिक शक्ति है – विचारण न्यायालय ने वादी का व्यादेश आवेदन अधिक विश्वसनीय एवं सद्भाविक निष्कर्षित करने में अपने विवेकाधिकार का उचित रूप से प्रयोग किया – याचिका खारिज।

***B. Constitution – Article 227 – Writ Jurisdiction – Scope* – Held – Where question of discretion of trial Court is there, then High Court should not interfere in writ petition filed under Article 227 of Constitution – Scope of Article 227 is very limited in respect of interfering with orders of subordinate Court.**

(Para 9)

ख. संविधान – अनुच्छेद 227 – रिट अधिकारिता – व्याप्ति – अभिनिर्धारित – जहां विचारण न्यायालय के विवेकाधिकार का प्रश्न होता है, तब उच्च न्यायालय को संविधान के अनुच्छेद 227 के अंतर्गत प्रस्तुत की गई रिट याचिका में हस्तक्षेप नहीं करना चाहिए – अधीनस्थ न्यायालय के आदेशों के साथ हस्तक्षेप के संबंध में अनुच्छेद 227 की व्याप्ति बहुत सीमित है।

Cases referred :

AIR 1978 AP 103, (1988) 3 SCC 366, 2015 (3) MPLJ 564, (2010) 8 SCC 329.

B.S. Gandhi, for the petitioner.

O R D E R

VIVEK RUSIA, J.:- **THE** petitioner/defendant has filed the present petition being aggrieved by the order dated 12.07.2018 passed by Additional District Judge, Badnagar, District Ujjain by which application under Order XIX Rule 1 and 2 of the CPC filed by the petitioner seeking presence of Respondent No.1/plaintiff for cross-examination over the affidavit filed by him in support of the plaint and application for temporary injunction has been rejected.

2. The Respondent No.1/plaintiff filed the suit for specific performance of contract and permanent injunction against the petitioner and other defendants. As per the pleading in the plaint, the present petitioner had agreed to sell agricultural land ad-measuring 1 hectare out of land bearing Survey No.16 situated at Village Bhomalvas, Tehsil Badnagar, District Ujjain on 08.06.2016 @ Rs.16,40,000-00 per bigha. At the time of agreement, plaintiff paid Rs.5,51,000-00 towards earnest money and the remaining amount was agreed to be paid on or before 07.11.2016 to him. According to the plaintiff he was always ready and willing to perform his part of contract. Thereafter he send legal notice and filed the suit along with an application under Order XXXIX Rule 1 and 2 of the CPC for temporary injunction seeking injunction against the petitioner/ defendant in respect of creating any third party right over the land in question.

3. The petitioner filed the reply to the aforesaid application and opposed the prayer of temporary injunction. The Respondent No.1 filed his own affidavit stating therein on oath about his possession over the land in question. According to the present petitioner he averred false fact and contradict to the statement of his claim, therefore, cross-examination is necessary, hence he filed an application under Order XIX Rule 1 and 2 of the CPC seeking permission from the Court to cross-examine the Respondent No.1. The Trial Court vide order dated 12.07.2018 had dismissed the application on the ground that he is adopting delaying tactis (sic:tactics). Hence, the present petition before this Court.

4. Shri B.S.Gandhi, learned counsel for the petitioner submits that Order XIX Rule 1 of the CPC specifically provides that any person can be called upon before the Court who submitted an affidavit. The Respondent No.1/plaintiff has stated some incorrect fact in his application, therefore, the cross-examination is necessary before deciding the application under Order XXXIX Rule 1 and 2 of the CPC.

5. According to Order XIX Rule 1 of the CPC, any Court may at any time for sufficient reason order that any particular facts be proved by affidavit. According to this provision, the Court allowing adducing the evidence by affidavit must apply its mind before such permission granted to the party to the suit. That under sub-rule (2) the Court may at the instance of either party, order the attendance of deponent for cross-examination. The provisions of Order XIX Rule (1) of the CPC is applicable where the Court suo motu after recording sufficient reasons order the party to a suit to file an affidavit in order to prove particular fact or facts and if an affidavit is filed as per the proviso the party may give either party desires the production of a witness for cross-examination, produce the witness for cross-examination. Under sub-rule (2) upon any application evidence may be given by affidavit, but the Court may at the instance of either party, order the attendance for cross-examination. The discretion is given to the Court to exercise such power looking to the particular facts of the case.

6. Rule 1 enables a Court to order that any particular fact may be proved by affidavit or that the affidavit of any witness may be read at the hearing on such conditions as the Court thinks reasonable. Where the Code permits the Court to decide certain matters on affidavit in general injunction matters under Order XXXIX Rule 1 and 2, the provisions of Order XIX Rule 1 and 2 do not apply and the either party cannot lay any claim or urge that it has got right to cross-examine the deponent. The Andhra Pradesh High Court in the case of *Sakalabhaktula Vykunta Rao v/s Made Appalaswamy*, reported in AIR 1978 AP 103, has held as under :-

> **"6. As stated above, the respondent plaintiff filed the above cited interlocutory application requesting the court to grant temporary injunction against the petitioners and also filed some affidavits in support of his contentions. Order 39, R. 1 C.P.C. provides expressly that the Court is permitted to dispose of the interlocutory application of affidavits. In view of the urgency involved in the matter, the regular procedure of examining the petitioner and his witnesses and respondent and his witnesses is dispensed with and the Court is given a special power to decide the matter by affidavits. Further, the scope of enquiry is quite limited and the rights of parties are not decided finally. That being the purpose of giving special power to the Court**

under O. 39, R. 1, the question of summoning the deponent for the purpose of cross-examination at the instance of a party under O. 19, Rules 1 and 2 does not arise at all. The power given to the Court under O. 39, R. 1 to decide the matters by affidavits is unfettered and is not subjected to the provisions of O. 19, Rules 1 and 2. In short, the provisions of O. 19, Rules 1 and 2 have no application at all to interlocutory matters governed by O. 39, R. 1. I am supported in this view by the decision of Gujarat High Court in Mavji Khimji v. Manjibhai, AIR1968Guj198 . Before the learned single Judge, it was contended that deponent who gave affidavit in support of the interlocutory application filed for the grant of temporary injunction, should be summoned for the purpose of cross-examination. Repelling this contention, J. M. Seth, J., held that when the court was given special power to decide certain interlocutory matters by affidavit, that power is not subject to limitations and conditions prescribed by the provisions of Rules 1 and 2 of O. 19. If really the legislature intended to place any conditions, and limitations in exercise of that special power also, the Legislature could have used those words in O, 39, R. 1 of the Code. The object underlying it may be that right of the parties in such interlocutory applications are not decided finally. The parties are not going to suffer as only for certain limited purposes, these I. As. were being decided and the rights of the parties were not being finally decided and that appears to be the reason why no such conditions and limitations have been prescribed in exercise of that special power.

7. But Sri Ranganatham relies upon the decision of a single Judge of the Allahabad High Court in Abdul Hameed v. Mujee-Ul-Hasan, AIR1975All398 and the decision of Madhava Rao, J. of this Court in C. R. P. No. 990/1975 dated 2-11-1976 (Andh Pra) in which, he followed the above cited decision of Allahabad High Court.

8. The decision of the Allahabad High Court in Abdul Hameed v. Majeed-Ul-Hasan, AIR1975All398 and the decision of Madhava Rao, J., in C. R. P. No. 990/75 dealt with the question that if the Court itself finds it essential for arriving at the truth of the matter and require the deponent to be examined, then the opposite party should be given an opportunity to cross-examine the deponent even in an interlocutory matter like the one under O. 39 R. 1 C.P.C Hence these rulings cannot be said to have dealt with the same point which is the subject-matter of the case on hand. They are of no assistance to the petitioners. 'It is, therefore, clear that the petitioners are, as of rights, not entitled to any

claim to call for the deponent for cross-examination with reference to the averments made in his affidavit. Hence, the contention of Sri Ranganatham that the Court below has committed an error in not exercising the right vested with it, is unsustainable. Though the reasons given by the learned District Munsif are unsustainable, yet the relief prayed for by the petitioners cannot be granted in view of the clear legal position discussed above. Thus I find no merits in the revision petition. It is therefore dismissed, but without costs."

7. The Supreme Court in the case of *Smt. Sudha Devi v/s M. P. Narayanan* [(1988) 3 SCC 366] has held that affidavit are not included in the definition of "evidence" in Section 3 of the Evidence Act and cannot be used as evidence only if for sufficient reasons court passes an order under Order XIX Rule 1 and 2 of the CPC.

8. This Court in the case of *Kalusingh v/s Nirmala* [2015 (3) MPLJ 564] has held that under Order XIX Rule 1 of the CPC the Court has power to order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, therefore, unless the Court passes an order under Order XIX Rule 1 of the CPC, the affidavit cannot be taken as evidence. Even under Order XIX Rule 2 the cross-examination is permitted but confined to the specified facts. Under Order XXXIX Rule 1 and 2 of the CPC the Court has been given special power to decide the application on affidavit. The affidavit filed in support of the application under Order XXXIX Rule 1 and 2 of the CPC cannot be an affidavit filed under Order XIX Rule 1 and 2 of the CPC because under these provisions the Courts direct the parties to disclose certain facts on affidavit. Therefore, the Trial Court in the present case has rightly rejected the application seeking cross-examination of the plaintiff who filed the affidavit and the witness who filed their affidavits in support of the application under Order XXXIX Rule 1 and 2 of the CPC.

9. In the present case the plaintiff filed an affidavit and in rebuttal the defendant No.1 i.e. the present petitioner has also filed the affidavit. Now the Court is required to decide the affidavit of which party is more reliable and creditworthy but the Court has found that the application filed by the defendant/petitioner is not *bona-fide* and the Court can decide the application under Order XXXIX Rule 1 and 2 of the CPC on the basis of material on record because the plaintiff is required to prove his case for temporary injunction. When the question of discretion of a Trial Court is there, then the High Court should not interfere in the writ petition filed under Article 227 of the Constitution of India.

10. Even, the scope of Article 227 of the Constitution of India in exercising jurisdiction is very limited in respect of interfering with the order of subordinate

Court. Hon'ble Supreme Court in the case of *Shalini Shyam Shetty* and *another* v/s *Rajendra Shankar Patil*, reported in (2010) 8 SCC 329, wherein it has been held that :-

> **"The scope of interference under Article 227 of the Constitution is limited. If order is shown to be passed by a Court having no jurisdiction, it suffers from manifest procedural impropriety or perversity, interference can be made. Interference is made to ensure that Courts below act within the bounds of their authority. Another view is possible, is not a ground for interference. Interference can be made sparingly for the said purpose and not for correcting error of facts and law in a routine manner."**

11. In view of the aforesaid observations, I do not find any infirmity or illegality in the order. The Trial Court has rightly exercised his discretion. Hence, the petition is fails and is hereby **dismissed**.

Petition dismissed

I.L.R. [2018] M.P. 2186
APPELLATE CIVIL
Before Mr. Justice Ashok Kumar Joshi

F.A. No. 46/2001 (Gwalior) decided on 15 February, 2018

KAMLABAI …Appellant

Vs.

STATE OF M.P. & anr. …Respondents

***A. Civil Suit – Practice – Pleadings and Evidence* – Suit of declaration of title and perpetual injunction – Held – It is well established that evidence filed by any party beyond limits of its pleadings is not considerable in civil cases – Evidence has to be tailored strictly according to pleadings and cannot be a probing adventure in dark, putting the opposite party into surprise – In present case, in respect of the land relating to suit house, plaintiff pleaded that an encroachment proceedings were initiated by government and she and her husband was fined whereas she deposed in evidence that land was allotted to her by Panchayat, which is totally contrary to her own pleadings – No documentary evidence produced in respect of such pleading and evidence – Ownership and title of the suit house not proved – Appeal dismissed.**

(Para 9 & 10)

क. सिविल वाद – पद्धति – अभिवचन एवं साक्ष्य – हक की घोषणा एवं शाश्वत व्यादेश का वाद – अभिनिर्धारित – यह भली–भांति स्थापित है कि सिविल प्रकरणों में किसी पक्षकार द्वारा उसके अभिवचनों की सीमाओं से परे प्रस्तुत किया गया साक्ष्य विचारणीय नहीं है – साक्ष्य को कठोर रूप से अभिवचनों के अनुरूप होना चाहिए और अंधेरे

में एक साहसिक खोज–बीन नहीं हो सकता जिससे विरूद्ध पक्षकार आश्चर्यचकित हो जाए – वर्तमान प्रकरण में, वाद मकान से संबंधित भूमि के संबंध में वादी ने अभिवाक् किया कि सरकार द्वारा अतिक्रमण कार्यवाहियां आरंभ की गई थी और उस पर एवं उसके पति पर जुर्माना लगाया गया था जबकि उसने साक्ष्य में अभिसाक्ष्य दिया कि उसे पंचायत द्वारा भूमि आबंटित की गई थी जो कि उसके स्वयं के अभिवचनों के पूर्णतः विपरीत है – उक्त अभिवचन एवं साक्ष्य के संबंध में कोई दस्तावेजी साक्ष्य प्रस्तुत नहीं किया गया – वाद मकान का स्वाामित्व व हक साबित नहीं किया गया – अपील खारिज।

B. ***Civil Suit – Practice – Proof of Title – Tax Receipts*** **– Held – Receipts regarding payment of taxes like water tax or property tax of housing property or land revenue receipts regarding agricultural lands are not evidence of title as the same are only kept for fiscal purposes.**

(Para 12)

ख. *सिविल वाद – पद्धति – हक का सबूत – कर रसीदें* – अभिनिर्धारित – संपत्ति के करों के भुगतान के संबंध में रसीदें, जैसे कि जल कर या आवासीय संपत्ति का संपत्ति कर अथवा कृषि भूमियों के संबंध में भूमि राजस्व रसीदें, हक का साक्ष्य नहीं क्योंकि उन्हें केवल वित्तीय प्रयोजनों हेतु रखा गया है।

C. ***Civil Suit – Practice – Old Documents – Credibility*** **– Held – Original documents which are 30 years old could not be disbelieved and could be presumed to be true and correct under the provisions of Evidence Act.**

(Para 15)

ग. *सिविल वाद – पद्धति – पुराने दस्तावेज – विश्वसनीयता* – अभिनिर्धारित – मूल दस्तावेजों पर अविश्वास नहीं किया जा सकता जो 30 वर्ष पुराने है तथा साक्ष्य अधिनियम के उपबंधों के अंतर्गत सत्य एवं सही होने की उपधारणा की जा सकती है।

Cases referred:

AIR 1957 MP 138, 1983 MPWN 259.

Vilas Tikhe, for the appellant.
Sangam Jain, G.A. for the respondent/State.

J U D G M E N T

ASHOK KUMAR JOSHI, J. :- The appellant/original plaintiff has filed this first appeal against the judgment and decree dated 12th February, 2001, passed by II Additional District Judge, Guna in Civil Suit No. 33A/1994, whereby the suit filed by the plaintiff for declaration that she is owner and possession holder of the suit house and it has no nexus with the recovery of arrears of tax against M/s Manmohan Badriprasad and for perpetual injunction against the respondents from restraining them to auction the suit house in the above mentioned recovery proceedings.

2. Appellant-Kamlabai filed a suit before the trial Court on 11.7.1994 with the pleadings that the suit house situated in village Fatehgarh is of sole ownership and possession of the plaintiff, wherein she is residing with her husband and her husband is a teacher in government service. The plaintiff and her husband Radhamohan are not having any connection with the business of concern M/s Manmohan Badriprasad Fatehgarh . Being a government teacher, her husband did not do any business but defendant No.2 has illegally attached the suit house in recovery proceedings regarding the arrears of sales tax against the above mentioned concern, against which the plaintiff filed her objection with the documents of her title in the relating Sales Tax Office but her objection was dismissed on 29th June, 2014. It is further pleaded that the plaintiff has constructed the suit house over the land bearing Survey No. 212, area 0.031 hectare of village Fatehgarh and in this relation against her a case of encroachment was registered by the government and she was fined, but the legal proceeding ultimately terminated in her favour. In encroachment proceedings, her husband Radha Mohan was also a party along with her. The defendants are proceeding for auction of her attached house, hence reliefs of above mentioned declaration and perpetual injunction were claimed.

3. In written statement filed by the defendants, it was pleaded that the disputed house is owned by the plaintiff and her husband Radha Mohan jointly and in the business of the above mentioned concern, the plaintiff's husband was conducting the business and was also representing the concern before the departmental proceedings of sales tax. The plaintiff's husband was regularly depositing the taxes under different heads till 1978 and in Sales Tax Office in relating proceedings, Radha Mohan had signed on the Vakalatnama filed on behalf of the above mentioned concern. Relating statements were regularly submitted in the Sales Tax Department signed by Radha Mohan himself and he was personally appearing in the relating recovery proceedings, hence the plaintiff and her husband are well acquainted with the arrears of sales tax and the suit is filed in the name of wife by the husband to evade his tax liability, whereas both are jointly living and plaintiff was not having any separate earnings. The suit house is constructed from the income of the above mentioned concern and, hence, the suit house is totally liable for auctioning it under recovery proceedings and the plaintiff is not entitled for any relief.

4. The Trial Court on pleadings framed issues and before the trial Court, Jagir Singh (PW-1), Jamunalal (PW-2) and plaintiff Kamla Bai (PW-3) were examined on behalf of the plaintiff and for the defendants, Rambabu Bhargava (DW-1) and Anil Kumar Sharma (DW-2) were examined which were employees of the Sales Tax Department. After hearing, the trial Court recorded its finding in the impugned judgment that it was not proved that the plaintiff is the sole owner and title holder of the suit house, and similarly it was also not proved that the suit

house is not liable for auction in recovery proceedings of arrears of sales tax against M/s Manmohan Badriprasad Fatehgarh and ultimately the plaintiff's suit is dismissed.

5. The point for consideration is that whether the trial Court erred in recording the above mentioned findings ?

6. Admittedly, the appellant's husband Radha Mohan expired during the pendency of the suit before the trial Court.

7. Learned counsel for the appellant contended that even the defence witnesses clearly admitted that the plaintiff's husband was a teacher in government service and he remained posted at different places in District Guna for different periods, hence he was unable to do business in the concern titled M/s Manmohan Badriprasad and it was proved by the oral and documentary evidence of the plaintiff's witnesses that the house is of sole ownership and possession of the plaintiff but the trial Court erred in recording adverse findings. Hence, it is prayed that appeal be allowed and appellant's suit be decreed.

8. *Per Contra*, learned Government Advocate on behalf of the respondents submits that the findings of the trial Court are based on legal and proper appreciation and analysis of oral and documentary evidence produced by both of the parties before the trial Court and from the original documents proved by the defendants' witnesses, it was proved that the plaintiff's husband Radha Mohan was doing business and representing the above mentioned concern before the Sales Tax Department, hence dismissal of the appeal is prayed.

9. It is well established that the evidence filed by any party beyond the limits of its pleadings is not considerable in civil cases. It was clearly pleaded by the plaintiff in her plaint that in relation to construction of suit house, encroachment proceedings were initiated by the government against her and her husband and she was fined, but surprisingly no any documentary evidence of encroachment proceedings was filed and proved by the plaintiff before the trial Court. Contrary to her pleading, plaintiff Kamla Bai (PW-3) deposed in her examination-in-chief (para 5) that the land on which she constructed the house, was allotted to her by the relating Panchayat under the direction of the Collector, as she had given Rs.1000/- as her contribution in construction of a school, but no any documentary evidence regarding allotment of relating land to the plaintiff by Panchayat was filed. Hence, there is material deviation or variance in plaintiff's evidence and her pleadings.

10. The law is well settled that no extraneous evidence can be looked into in the absence of specific pleadings in that regard. Evidence has to be tailored, strictly according to pleadings, and cannot be a probing adventure in the dark, filing surprise to the opposite party. It has been observed by a Division Bench of

this Court in the case of *Sukhram v. Baldeodas Manilal* (AIR 1957 MP 138) in para 9 of its judgment as follows:-

> *"(9) ..... It is settled law that decision of a case cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that has to be found by the Court: Messrs. Trojan & Co. v. R.M. N.N. Nagappa Chettiar, AIR 1953 SC 235."*

In the present case, the evidence of plaintiff that the land relating to suit house was allotted to her by Panchayat is obviously contrary to her own pleadings. [Dulichand vs. Prahladsingh, 1983 MPWN 259].

11. The plaintiff's evidence is not supported even by her witnesses Jagir Singh (PW-1) and Jamunalal (PW-2), who had previously held the post of Sarpanch and Deputy Sarpanch of the relating Gram Panchayat respectively. Jagir Singh (PW-1) deposed that when he was Sarpanch, then relating land was allotted by the Collector to the plaintiff for construction of her house. Jamunalal (PW-2) deposed that after getting government land, plaintiff constructed suit house and prior to construction plaintiff made her possession over the land and thereafter land was allotted to her, but it is clear that on the point of source of title, the evidence of appellant's witness is not mutually consistent, rather contradictory and in absence of any documentary evidence, it could not be believed that government or Panchayat's land was allotted to the plaintiff for constructing the house.

12. Much emphasis has been given by the learned counsel for the appellant on the receipt of water tax (Ex. P/1) and electricity bills (Ex.P/2 to Ex.P/7) of suit house which are bearing plaintiff's name only. It is well established that the receipts regarding payment of taxes like water tax or property tax in relation to housing property or receipts of payment of land revenue regarding agricultural lands are not evidence of title as relating records are kept only for fiscal purposes of recovery of taxes or service. Two certificates issued by different Sarpanch, Ex.P/8, appearing to be signed by Sarpanch Jagir Singh (PW-1) and another certificate Ex.P/9 signed by another Sarpanch Ramadevi, are certifying that the suit house is of sole ownership and possession of Kamlabai but Ex.P/8 was not formally proved by Jagir Singh (PW-1) and it is not bearing any date of its issuance. In Ex.P/8, it is also mentioned that the monthly income of the plaintiff Kamla Bai is not more than Rs.300/- and source of her income is tailoring work and rent of the shop. On one side the plaintiff pleaded that she encroached over the government land and constructed the house from her own income which is even contradicted by Ex.P/8. Ex.P/8 impliedly indicates that there is a shop in the plaintiff's house. These certificates issued by any Sarpanch could hardly be said to be documentary evidence of the title of anyone. It is clear from the total evidence of the plaintiff's witnesses and her pleadings that at the time of presentation of the

plaint, the plaintiff's husband Radha Mohan was residing with her (sic:his) wife-plaintiff and there was no any conflict of interest between them. Hence, it is clear that the finding of the trial Court that the plaintiff remained unsuccessful in proving her sole ownership on suit house appears to be totally and legally justified.

13. Much emphasis has been laid by the learned counsel for the appellant that her late husband Radha Mohan was a government teacher, hence he could not do any business and it is contended that it was not proved by the defendants' evidence that Radha Mohan was connected with the business of M/s Manmohan Badriprasad. It is also deposed by the defendants' witness Rambabu Bhargava (DW-1), Assistant Grade-2, Sales Tax, who had brought original record from the Sales Tax Department regarding above mentioned concern that the plaintiff's husband Radha Mohan was a government teacher. Anil Kumar Sharma (DW-2) relating Sales Tax Inspector, deposed that in recovery proceedings, he had gone to village Fatehgarh and had submitted his written report, Ex.D/11, and on the same day, i.e., 8.2.1988 prepared Panchanama (Ex.D/2). He had given enquiry report (Ex.D-11) and submitted an 'Outline Diagram' of the suit house (Ex.D/13) to the department, wherein the four-boundaries of the suit house are mentioned.

14. Much emphasis by the appellant's learned counsel has been laid on the fact which finds mention in para 14 of the statement of Rambabu Bhargava (DW-1) that Sales Tax Department had not received and even tried to get documentary evidence relating to ownership of the suit house. It is well established that the plaintiff has to prove his pleadings by his evidence and it is clear that no documentary evidence regarding alleged title of the plaintiff over the land, on which the suit house stood, was produced by the plaintiff. Undisputedly, relating house is standing on that land, wherein the plaintiff is presently residing and prior to death of her husband, he was also jointly residing with her.

15. Some original documents from the record of the Sales Tax Department are proved and available with the record of the trial Court, among which many documents are bearing the signature of Radha Mohan Gupta. In her cross-examination, the plaintiff deposed that she is not much educated lady, hence she could not identify her husband's signature but the original documents which are more than 30 years old could not be disbelieved and could be presumed under the provisions of the Evidence Act to be correct. The plaintiff deposed in her cross-examination (para 6) that her husband was not having any brother named Manmohan and there is no any person in her family named Manmohan.

16. The defendants' witnesses have proved the original written statements given by and signed by Radha Mohan before the Sales Tax Inspector (Ex.D/2 and Ex.D/3). In the written statement dated 10.9.1965, signed by Radha Mohan, the pedigree of Radha Mohan's family is mentioned, according to which Radha

Mohan's real brothers were Nandkishore, Omprakash, Manmohan and Jugalkishore and it is also clear that in the year 1965, younger brother of the plaintiff's husband, named Manmohan, was only 14 years old and was a student. Hence, it is clear that plaintiff Kamla Bai's falsehood is unlimited.

17. From Exts. D/2 and D/3, both signed statements of Radha Mohan, it is clear that previously business was conducted under the title of concern M/s Manmohan Jugalkishore, Binaganj. The plaintiff has deposed in her cross-examination that before coming to Fatehgarh in the year 1970, her husband was residing at Binaganj, where her father-in-law Mangiram was residing. An original inland letter bearing postal stamps indicating dates and names of the post offices (Ex.D/4) dated 21.9.1965 indicates that this letter was signed and sent by Radha Mohan Gupta, teacher posted in Middle School Binaganj at that time on behalf of ' M/s Manmohan Jugalkishore' intimating his inability to appear before the Sales Tax Officer, Circle Guna on fixed date of hearing 20.10.1965, as during relevant period he was busy in treatment of his mother at Mental Hospital, Gwalior. On behalf of M/s Manmohan Jugalkishore Binaganj, this inland letter was written by the plaintiff's husband.

18. The order sheet of concerning Sales Tax Officer containing different proceedings happened on dates 21.7.1982 and 18.9.1982 are having signatures of Radha Mohan Gupta and on Ex.D/7 (original order sheet) recorded proceedings dated 21.7.1982 and 18.9.1982, presence of trader Radha Mohan is specifically recorded and in the proceeding dated 18.9.1982, presence of trader Radha Mohan with his authorised counsel Shri K.C.Jain is marked. Relating original power of attorney (Ex. D-25) filed on behalf of M/s Manmohan Badriprasad Fatehgarh before the Additional Sales Tax Officer, Guna, is bearing signature of Late Radha Mohan Gupta (husband of plaintiff). The original statement Ex.D/10, sent on behalf of relating concern, is also bearing signature of Radha Mohan Gupta and in written enquiry report (Ex.D/11) submitted by Sales Tax Inspector Anil Kumar Sharma (DW-2) on 10.2.1988, it is mentioned that on 8.2.1988 he reached at the work place of the relating concern and tried to meet the trader Badriprasad, who was shown as proprietor of the concern in the registration, but at relating place Badriprasad was not present and his father teacher met him, who intimated him that Badriprasad had gone outside and Ex.D/11 was submitted with original Panchnama Ex.D/12, prepared on 8.2.1988 in presence of indicated Panch witnesses, wherein it is also mentioned that on relating date the father of the businessman, who was available at the house, denied from paying arrears of sales tax and it is also mentioned in Ex.D/12 that Badriprasad is generally residing outside from Fatehgarh and his father teacher is doing the work of purchasing and selling.

19. Plaintiff Kamlabai (PW-3) clearly deposed that no business was being conducted from the suit house by any concern, but in the original order sheet dated 21.1.1971 (Ex.D/1) of Sales Tax Officer, Guna, working place of M/s Manmohan Badriprasad Fatehgarh is shown at Fatehgarh and the starting date by relating concern is shown as 1.6.1970 and in the hand-written proceeding signed by the concerning officer, it is clearly mentioned that the relating concern is having a godown with a shop in the house of Smt. Kamla Bai at Fatehgarh. Similarly, in registration certificate (Ex. D-27) issued by the Sales Tax Officer, Guna on 1.11.1971 to the concern M/s Manmohan Badriprasad, its proprietor is shown as Manmohan and in other printed column relating to godown, in hand-written portion it is recorded that 'godown with a shop in house of Kamla Bai at Fatehgarh'. From such old original documents it is clear that the relating concern was doing its business from the suit house itself. In registration certificate (Ex. D-27) or in other papers of the department, the relevant entries are made on the basis of information given by the relating businessman. From copy of the notice (Ex. D-5C) sent by Additional Tahsildar and Sales Tax Officer, Circle Guna dated 29.6.1994 to Radha Mohan teacher, it is clear that it was recorded in this notice that Radha Mohan obtained registration certificate from the department in the name of M/s Manmohan Badriprasad Fatehgarh and he received the registration certificate from the office after giving written receipt and his mother stated in the department that the business of concern was done only by Radha Mohan and not by Manmohan. It is also mentioned in the notice that on behalf of relating concern, only Radha Mohan was replying different notices sent by the department and was submitting relating statements in the tax assessment cases for different years. In the same notice, it is also mentioned that he is a government servant, hence he obtained registration in the name of his brother Manmohan and was doing the business of grains and cotton.

20. It is clear pleading and evidence of the plaintiff Kamla Bai (PW-3) that her husband Radha Mohan was living with her in his life time. From Ex.D/6 it is clear that Radha Mohan gave written reply that he has not obtained registration certificate and was not doing any business and he is not liable for any recovery of arrears of relating tax against the concern, but in this original reply Radha Mohan mentioned that the proprietor of the concern is liable for the payment of tax, however in Ex.D/6 it is not mentioned that who are Manmohan and Badriprasad and what is their relation with Radha Mohan.

21. It was clearly proved from the old document that actually Radha Mohan was doing the business under the title of M/s Manmohan Badriprasad Fatehgarh. Cleverly the plaintiff has not pleaded that whether M/s Manmohan Badriprasad is a partnership concern or a proprietory concern, but from the original documentary evidence and evidence of the defendants' witnesses it is clearly proved that the plaintiff's husband Radha Mohan was doing and conducting the business under

the title of M/s Manmohan Badriprasad, though he was a government teacher. There was no reason to disbelieve the old documentary departmental evidence proved by Rambabu Bhargava (DW-1) and Anil Kumar Sharma (DW-2).

22. From the above discussion, I am of the considered view that the trial Court has properly and legally analyzed the oral and documentary evidence produced before it by both of the parties and it has not committed any error in law or in appreciating the evidence on facts.

23. In view of the aforesaid, the appellant's appeal is devoid of merits. Consequently, the appeal of the appellant is liable to be and is hereby dismissed. Record of the case be sent to the concerned trial Court. The appellant shall also bear the cost of the present respondents in respect of this appeal. A decree be drawn accordingly.

Appeal dismissed

I.L.R. [2018] M.P. 2194
APPELLATE CIVIL
Before Mr. Justice S.C. Sharma
F.A. No. 247/2000 (Indore) decided on 9 August, 2018

ZARINA (SMT.) …Appellant

Vs.

STATE OF M.P. & anr. …Respondents

***A. Law of Torts – Medical Negligence – Compensation – Entitlement* – Appellant undergone an operation under a Family Planning Programme in a government hospital whereby, evidence establishes that because of negligence of staff at hospital, she developed gangrene in her hand which finally resulted into amputation of her hand above elbow – Civil Suit was dismissed – Challenge to – Held – She was a daily wager and used to do stitching work – Documents on record proves 50% disability – Appellant has proved her case based on the documents which are not disputed by government, thus she is entitled for compensation – It's a State run hospital and thus State is liable to pay compensation – State directed to pay compensation of Rs. 1,85,000 (as claimed) alongwith interest @ 9% per annum from date of filing of suit.**

(Paras 3, 4, 5, 9, 14 & 19)

क. अपकृत्य विधि – चिकित्सीय उपेक्षा – प्रतिकर – हकदारी – अपीलार्थी ने शासकीय चिकित्सालय में परिवार नियोजन कार्यक्रम के अंतर्गत एक शल्यक्रिया करवाई जिससे, साक्ष्य यह स्थापित करते हैं कि चिकित्सालय में स्टाफ की उपेक्षा के कारण, उसके हाथ में गैंग्रीन विकसित हो गया जिसके परिणामस्वरूप अंततः कोहनी के ऊपर से उसके

हाथ का अंगोच्छेदन करना पड़ा – सिविल वाद खारिज किया गया था – को चुनौती – अभिनिर्धारित – वह दैनिक वेतन भोगी थी तथा सिलाई कार्य किया करती थी – अभिलेख पर दस्तावेज 50% निःशक्तता साबित करते हैं – अपीलार्थी ने दस्तावेज जो कि शासन द्वारा विवादित नहीं हैं, पर आधारित अपना प्रकरण साबित किया है, इसलिए वह प्रतिकर के लिए हकदार है – यह राज्य द्वारा संचालित एक चिकित्सालय है, इसलिए राज्य प्रतिकर का भुगतान करने हेतु दायी है – राज्य को, वाद प्रस्तुत किये जाने की तिथि से रू. 1,85,000 (यथा दावाकृत), 9 प्रतिशत प्रतिवर्ष ब्याज की दर सहित प्रतिकर का भुगतान करने हेतु निदेशित किया गया।

***B. Law of Torts – Medical Negligence – Onus of Proof* – Held – Once initial burden has been discharged by patient making out a case of negligence on part of hospital or doctor, the onus then shifts on hospital or doctors and it is for them to satisfy the Court that there was no lack of care of diligence – Appellant successfully discharged the burden of establishing negligence.**

(Para 10)

ख. अपकृत्य विधि – चिकित्सीय उपेक्षा – सबूत का भार – अभिनिर्धारित – एक बार चिकित्सालय या चिकित्सक की ओर से उपेक्षा किये जाने का प्रकरण बनाकर रोगी द्वारा प्रारंभिक भार का उन्मोचन कर दिया गया हो, तो फिर भार चिकित्सालय या चिकित्सकों पर आ जाता है तथा यह उन पर है कि न्यायालय को संतुष्ट करें कि तत्परता की सावधानी का कोई अभाव नहीं था – अपीलार्थी ने उपेक्षा स्थापित करने के भार का सफलतापूर्वक उन्मोचन किया।

Cases referred:

AIR 1989 SC 1570, AIR 1996 SC 2377, (2000) 5 SCC 182, (2005) 6 SCC 1, (2009) 6 SCC 1, (2010) 3 SCC 480, (2010) 5 SCC 513, (2014) 1 SCC 384, (2004) 8 SCC 56, (2014) 15 SCC 1, (2015) 11 SCC 423, (2015) 9 SCC 388, (2017) 3 SCC 115.

A.K. Tiwari, for the appellants.
Mukesh Kumawat, G.A. for the respondent No. 1/State.

O R D E R

S.C. SHARMA, J.:- Heard on I.A. No.1900/2018, which is an application under Order 41 Rule 27 r/w section 151 of the Code of Civil Procedure and the same stands allowed with the consent of the parties as the documents relate to the treatment of the petitioner in a Government Hospital.

The present First Appeal has been filed against the order dated 29.01.2000 passed by the learned III Additional District Judge, Ujjain in Civil Suit No.5-B/90 (New No.1- B/2000).

2. The facts of the case reveal that the present appellant before this Court,

who is a housewife, was admitted at Government District Hospital, Ujjain for a family planning operation on 06.12.1989 and while the operation was going on, she was administered saline/glucose. The undisputed facts reveal that after the saline was administered, later on, there was a swelling at the place, where the needle was inserted and on account of heavy swelling, she was shifted to M.Y. Hospital, which is again a Government Hospital at Indore. In spite of the treatment given to her, she developed gangrene and her hand was amputated above the elbow joint. The plaintiff, who is hailing from a poor family, was working as daily wager and was also involved in stiching (sic:stitching) work, became disabled and filed a civil suit claiming compensation from the Government to the tune of Rs.1,85,000/-. The plaintiff has claimed the amount as compensation on various heads, including loss of earning on account of permanent disability, which was more than 50%, the trauma, which she has suffered and the money spent on her treatment, while she has taken treatment in the Hospital and after she was discharged.

3. A written statement was filed before the trial Court on behalf of the State of Madhya Pradesh as well as on behalf of other defendant and the issues were framed by the trial Court. The plaintiff was examined before the trial Court and she has categorically stated before the trial Court that on 06.12.1989 saline was administered and on account of improper insertion of needle and on account of infection, she was feeling burning sensation in her hand and later on resulting into swelling in her hand and she was shifted to M.Y. Hospital, Indore, where her hand was amputated. The plaintiff has categorically stated that she has protested in the matter and she has submitted complaint to doctors, however, defendant No.2 - Dr. R.S. Chauhan did not pay any heed to her protest.

In spite of there being evidence on record, the trial Court has held the issues as not proved in respect of the aforesaid averments. The plaintiff as well as the other witnesses have sated (sic:stated) before the trial Court that she was having pain in her hand, she became critical and again this issue has been held as not proved even though the plaintiff was shifted from Government District Hospital, Ujjain to M.Y. Hospital, Indore.

Another issue, which was framed, was in respect of amputation and the trial Court has held that the doctors were not responsible in the matter of amputation.

One of the issues i.e. whether condition of the plaintiff became serious in the hospital on account of insertion of needle for administering saline has been held as proved by the trial Court.

Dr. R.S. Chauhan (D.W-1) was examined before the trial Court and he has admitted that the plaintiff was admitted on 06.12.1989. In paragraph-4 of his

statement, he has admitted that as she was having pain in her hand, she was referred to M.Y. Hospital, Indore. He has admitted that family planning operation took place on 06.12.1989, but he was not the person, who has given injection to the plaintiff. He has again categorically admitted in his cross-examination that he saw the swelling about which the complaint was lodged by the plaintiff. He has also admitted that the hand became slightly bluish and there was probability of gangrene also and later on he has admitted that after obtaining opinion from surgical expert, she was referred to M.Y. Hospital, Indore. The doctor, at the same time, stated that it was the nurse, who has given injection to the patient as well as inserted the saline drip in her hand.

In spite of the aforesaid clinching evidence, the trial Court has decided the issues against the plaintiff.

The statement of Smt. Zarina (P.W-1) establishes that she was subjected to operation and saline was given to her, which was finally resulted in gangrene and her hand was amputated above the elbow joint. She has also stated about loss of earning and about the disability suffered by her.

Smt. Mehrat Bee (P.W-2), who is sister-in-law of the plaintiff, has also stated about the operation and about the amputation and has supported the case of the plaintiff. She has given similar statement like the plaintiff.

The documents brought on record are the document relating to treatment of the plaintiff right from her admission at M.Y. Hospital, Indore, which is again a Government Hospital and she was shifted from Government District Hospital, Ujjain to M.Y. Hospital, Indore and the factum of amputation is also not in dispute. There is a disability certificate also and she has suffered 50% disability.

In the present case, the evidence produced before the trial Court establishes that on account of insertion of needle and improper post-operative care, she has developed gangrene in her hand and finally amputation has taken place on her hand above the elbow joint. There is certainly a loss of earning. She was working as a daily wager and also doing the stitching work and now she has to work only with one hand for the remaining years of her life.

4. The issue No.1 framed by the trial Court was in respect of the fact whether her problem was looked after properly or not at the relevant point of time by defendant No.2. The statement of defendant No.2 reveals that he was not the doctor, who has inserted needle in her hand and as per his statement it was some sister, who has inserted the needle resulting in amputation of her hand, and therefore, defendant No.2 cannot be made liable for payment of compensation.

The other issues relating to amputation on account of the lapses committed by the hospital, are being decided in favour of the plaintiff, as she went

inside the hospital as a hail and hearty woman with both the limbs. It was only after she was inserted the needle for administering saline, she developed gangrene resulting into amputation of her hand, and therefore the other issues in respect of payment of compensation are answered in favour of the plaintiff.

5. In the present case, the petitioner has undergone Tubectomy operation under a programme of the State Government in a Government Hospital. The Family Planning Programme has been launched throughout the country with laudable intentions, but it resulted in a disastrous medical misadventure in respect of the petitioner as there was some negligence while treating her, to be more specific, while administering saline to her, which finally resulted in amputation of her hand, above elbow.

6. Hon'ble the Supreme Court in the case of *A. S. Mittal & Ors. Vs. State of U.P. And others* reported in (AIR 1989 SC 1570), in paragraph 16 has held as under :

> 16. We are afraid in the circumstances of this case, the factual foundations laid before the Court and the limited scope of the proceedings no appeal could be made to the doctrine of State action. Shri Yogeshwar Prasad, learned Senior Counsel appearing for the State of Uttar Pradesh, submitted that the State would approach the matter not with the spirit of a litigant in any adversary action but would look upon the proceedings as a participatory exploration for relief to the victims. He further submitted that the State would indeed, be willing to render help to the victims within the constraints of its resources.
>
> Indeed, the factual foundations requisite for establishing the proximate causal-connection for the injury has yet to be established conclusively. These matters would have to be gone into in the criminal and other proceedings that may be pending or in the contemplation of the Government.
>
> However, we think that on humanitarian consideration, the victims should be afforded some monitary relief by the State Government. We direct that in addition to the sum of Rs. 5,000/- already paid by war of interim relief, the State Government shall pay a further sum of Rs. 12,500/- to each of the victims. The victims entitled to receive the additional payment shall be the same as those who had the benefit of the interim relief of Rs. 5,000/-. The amount shall be deposited, as was done in the matter of distribution of interim relief, with the District Judge who shall arrange to distribute the same in accordance with the procedure adopted at the time of administration of the interim relief. The deposit shall be made within two months from today and the District Judge shall ensure distribution within the next two months.

In the aforesaid case, eye camps were held and the eye operations resulted in irreversible damage and in those circumstances, compensation was awarded.

7. In the case of *Achutrao Haribhau Khodwa and others Vs. State of Maharashtra* reported in (AIR 1996 SC 2377), a mop was left in the body of a patient which resulted in pus formation eventually leading to her death. The apex Court in the aforesaid case has dealt with vicarious liability of the Government

and has also held that the doctrine of *res ipsa loquitur* clearly applies and the State Government is liable to pay damages. In the aforesaid case, there was no conclusive proof as to which Doctor or the Member of the Staff acted negligently and in those circumstances damages were granted by the apex Court. Paragraphs 18 and 19 of the aforesaid judgment reads as under :

> 18. Even if it be assumed that it is the second operation performed by Dr. Divan which led to the peritonitis, as has been deposed to by Dr. Purandare, the fact still remains that but for the leaving of the mop inside the peritoneal cavity, it would not have been necessary to have the second operation. Assuming even that the second operation was done negligently or that there was lack of adequate care after the operation which led to peritonitis, the fact remains that Dr. Divan was an employee of respondent No. 1 and the State must be held to be vicariously liable for the negligent acts of its employees working in the said hospital. The claim of the appellants cannot be defeated merely because it may not have been conclusively proved as to which of the doctors employed by the State in the hospital or other staff acted negligently which caused the death of Chandrikabai. Once death by negligence in the hospital is established, as in the case here, the State would be liable to pay the damages. In our opinion, therefore; the High Court clearly fell in error in reversing the judgment of the trial court and in dismissing the appellants' suit.
>
> 19. For the aforesaid reasons, this appeal is allowed, the judgment of the High Court of Bombay under appeal is set aside and the judgment and decree of the trial court is restored. The appellants will also be entitled to costs throughout.

8. In the case of *State of Haryana and others Vs. Santra (Smt)* reported in (2000) 5 SCC 182, the apex Court has dealt with negligence on the part of the Doctor in the matter of sterilisation operation at Government Hospital. The plaintiff was granted a sum of Rs.54,000/- along with interest by the trial Court and the decision was affirmed by the High Court and the appeal preferred in the matter was dismissed by the apex Court. Paragraphs 43 to 45 of the aforesaid judgment reads as under :

> 43. The contention as to the vicarious liability of the State for the negligence of its officers in performing the Sterilisation operation cannot be accepted in view of the law settled by this Court in N. Nagendra Rao & Co. v. State of A.P.; Common Cause, A Regd Society v. Union of India and Ors. and Achutrao Haribhau Khodwa and Ors. v. State of Maharashtra and Ors. The last case, which related to the fallout of a Sterilisation operation, deals, like the two previous cases, with the question of vicarious liability of the State on account of medical negligence of a doctor in a Govt. hospital. The theory of sovereign immunity was rejected.
>
> 44. Smt. Santra, as already stated above, was a poor lady who already had seven children. She was already under considerable monetary burden. The unwanted child (girl) born to her has created additional burden for her on account of the negligence of the doctor who performed Sterilisation operation upon her and, therefore, she is clearly entitled to claim full damages from the State Govt. to enable her to bring up the child at least till she attains puberty.

45. Having regard to the above facts, we find no merit in this appeal which is dismissed but without any order as to costs.

9. In the case of *Jacob Mathew Vs. State of Punjab and another* reported in (2005) 6 SCC 1, the apex Court while dealing with issue of criminal medical negligence and has also dealt with the negligence and actionability in respect of negligence. The apex Court in paragraphs 10, 11 and 48(1) has held as under :

11. The jurisprudential concept of negligence defies any precise definition. Eminent jurists and leading judgments have assigned various meanings to negligence. The concept as has been acceptable to Indian jurisprudential thought is well-stated in the Law of Torts, Ratanlal & Dhirajlal (Twenty-fourth Edition 2002, edited by Justice G.P. Singh). It is stated (at p.441-442) --

Negligence is the breach of a duty caused by the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff has suffered injury to his person or property.

... The definition involves three constituents of negligence:

(1) A legal duty to exercise due care on the part of the party complained of towards the party complaining the former's conduct within the scope of the duty; (2) breach of the said duty; and (3) consequential damage. Cause of action for negligence arises only when damage occurs; for, damage is a necessary ingredient of this tort.

2. According to Charles worth & Percy on Negligence (Tenth Edition, 2001), in current forensic speech, negligence has three meanings. They are: (i) a state of mind, in which it is opposed to intention; (ii) careless conduct; and (iii) the breach of duty to take care that is imposed by either common or statute law. All three meanings are applicable in different circumstances but any one of them does not necessarily exclude the other meanings. (Para 1.01) The essential components of negligence, as recognized, are three: "duty", "breach" and "resulting damage", that is to say:

1. the existence of a duty to take care, which is owed by the defendant to the complainant;

2. the failure to attain that standard of care, prescribed by the law, thereby committing a breach of such duty; and

3. damage, which is both causally connected with such breach and recognized by the law, has been suffered by the complainant.

If the claimant satisfies the court on the evidence that these three ingredients are made out, the defendant should be held liable in negligence.

49. We sum up our conclusions as under:-

(1) Negligence is the breach of a duty caused by omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a

> prudent and reasonable man would not do. The definition of negligence as given in Law of Torts, Ratanlal & Dhirajlal (edited by Justice G.P. Singh), referred to hereinabove, holds good. Negligence becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to the person sued. The essential components of negligence are three: 'duty', 'breach' and 'resulting damage.

In the light of the aforesaid and also keeping in view the evidence available on record, it can safely be gathered that the Staff at the Hospital was negligent and the same has resulted in damage to the plaintiff which has finally resulted in amputation of her hand and, therefore, the plaintiff, as she has proved her case based upon the documents, which have not been disputed by the Government, she is entitled for compensation, as claimed by her.

10. In the case of *Nizam's Institute of Medical Sciences Vs. Prasanth S. Dhananka and others* reported in (2009) 6 SCC 1, in paragraphs 49 to 51 the Hon'ble Supreme Court has held as under :

> 49. The observations in the aforesaid case were reiterated in State of Punjab vs. Shiv Ram & Ors. (2005) 7 SCC 1. In this case, a suit had been filed against State of Punjab and a lady doctor, a State Government employee, claiming damages for a failed tubectomy as the woman conceived and gave birth to a child notwithstanding the procedure. The suit was decreed against the State Government. This is what this Court had to say while allowing the appeal:
>
> "The plaintiffs have not alleged that the lady surgeon who performed the sterilization operation was not competent to perform the surgery and yet ventured into doing it. It is neither the case of the plaintiffs, nor has any finding been arrived at by any of the courts below that the lady surgeon was negligent in performing the surgery. The present one is not a case where the surgeon who performed the surgery has committed breach of any duty cast on her as a surgeon. The surgery was performed by a technique known and recognized by medical science. It is a pure and simple case of sterilization operation having failed though duly performed. The learned Additional Advocate General has also very fairly not disputed the vicarious liability of the State, if only its employee doctor is found to have performed the surgery negligently and if the unwanted pregnancy thereafter is attributable to such negligent act or omission on the part of the employee doctor of the State."
>
> 50. The Court further held forth a caution that if doctors were frequently called upon to answer charges having criminal and civil consequences, it would frustrate and render ineffective the functioning of the medical profession as a whole and if the medical profession was "hemmed by threat of action, criminal and civil, the consequence will be a loss to the patients..... and no doctor would take a risk, a justifiable risk in the circumstances of a given case, and try to save his patient from a complicated disease or in the face of an unexpected problem that confronts him during the treatment or the surgery."
>
> 51. The evidence in the present case has to be evaluated in the background of the above observations. It is clear that a mere misjudgment or error in medical treatment by itself would not be decisive of negligence towards the patient and

> the knowledge of medical practice and procedure available at the time of the operation and not at the date of trial, is relevant. It is also evident that a doctor rendering treatment to a patient is expected to have reasonable competence in his field.

In the aforesaid backdrop, in a case involving medical negligence, once initial burden has been discharged by the patient by making out a case of negligence on the part of the Hospital or the Doctor concerned, the onus then shifts on the Hospital or the attending Doctors and it is for the Hospital to satisfy the Court that there was no lack of care of diligence.

In the present case, the plaintiff has successfully discharged the burden of establishing negligence and lack of care on the part of the Hospital which has resulted in amputation of her limb and, therefore, she is certainly entitled for compensation.

11. In the case of *Kusum Sharma and others Vs. Batra Hospital and Medical Research Centre and others* reported in (2010) 3 SCC 480 in paragraph 63 has held as under :

> 66. Lord Atkin in his speech in Andrews v. Director of Public Prosecutions (1937) A.C. 576 stated, "Simple lack of care -- such as will constitute civil liability is not enough; for purposes of the criminal law there are degrees of negligence; and a very high degree of negligence is required to be proved before the felony is established." Thus, a clear distinction exists between "simple lack of care" incurring civil liability and "very high degree of negligence" which is required in criminal cases. Lord Porter said in his speech in the same case -- "A higher degree of negligence has always been demanded in order to establish a criminal offence than is sufficient to create civil liability. (Charlesworth & Percy on Negligence (10th Edn., 2001) Para 1.13).

In the present case, the lack of care has been established by the plaintiff, she did lodge a protest when saline was inserted, there was a swelling and irritation in the hand and she responded with quite promptitude and the Doctor who has examined the appellant has affirmed the same before the trial Court and, therefore, as there was a lack of care which resulted in amputation of limb and, therefore, in the light of the aforesaid judgment, the plaintiff is entitled for compensation, as prayed for.

12. In the case of *V. Kishan Rao Vs. Nikhil Super Speciality Hospital and another* reported in (2010) 5 SCC 513, the Hon'ble Supreme Court has again granted compensation, in similar circumstances, paragraph 50 of the aforesaid judgment reads as under :

> 50. In a case where negligence is evident, the principle of res ipsa loquitur operates and the complainant does not have to prove anything as the thing (res) proves itself. In such a case it is for the respondent to prove that he has taken care

and done his duty to repel the charge of negligence.

In the light of the aforesaid, it is the State which is required to pay compensation.

13. In the case of *Balram Prasad Vs. Kunal Saha and others* reported in (2014) 1 SCC 384, in paragraphs 136, 139 and 187, Hon'ble Supreme Court has held as under :

> 136. The liability of compensation to be apportioned by this Court on the appellant-AMRI Hospital is mentioned in paragraph 165 of the Malay Kumar Ganguly's case which reads as under:
>
> "165. As regards, individual liability of Respondents 4, 5 and 6 is concerned, we may notice the same hereunder. As regards AMRI, it may be noticed:
>
> (i)Vital parameters of Anuradha were not examined between 11-5- 1998 to 16-5-1998 (body temperature, respiration rate, pulse, BP and urine input and output).
>
> (ii) IV fluid not administered. (IV fluid administration is absolutely necessary in the first 48 hours of treating TEN.)"
>
> 139. Therefore, in the light of the rival legal contentions raised by the parties and the legal principles laid down by this Court in plethora of cases referred to supra, particularly, Savita Garg's case, we have to infer that the appellant-AMRI Hospital is vicariously liable for its doctors. It is clearly mentioned in Savita Garg's case that a Hospital is responsible for the conduct of its doctors both on the panel and the visiting doctors. We, therefore, direct the appellant-AMRI Hospital to pay the total amount of compensation with interest awarded in the appeal of the claimant which remains due after deducting the total amount of Rs.25 lakhs payable by the appellants-doctors as per the Order passed by this Court while answering the point no. 7.
>
> 187. The Civil Appeal No. 692/2012 filed by the appellant-AMRI Hospital is dismissed and it is liable to pay compensation as awarded in this judgment in favour of the claimant after deducting the amount fastened upon the doctors in this judgment with interest @ 6% per annum.

It was held by the apex Court that a Hospital is vicariously liable for its Doctors keeping in view the judgment delivered in the case of *Savita Garg Vs. National Heart Institute* reported in (2004) 8 SCC 56 and the liability was fixed upon the Hospital.

14. In the present case, it is a State run Hospital and the State of Madhya Pradesh is liable to pay compensation keeping in view the peculiar facts and circumstances of the case. The claim before the apex Court in the case of *Savita Garg* (supra) was running in crores and, in the present case, only a meager amount of Rs.1,85,000/- has been claimed by the lady and this Court is of the opinion that she is certainly entitled for compensation, as prayed for.

In the case of *Raman Vs. Uttar Haryana Bijli Vitran Nigam Ltd and others*

reported in (2014) 15 SCC 1, the issue regarding compensation / damages to a victim who was electrocuted and finally the same resulted in amputation of his both the arms and left leg upto knee, was taken into account and the Electricity Board was held liable to pay compensation keeping in view the Electricity Act, 2003.

15. In almost similar case, decided by the Hon'ble Supreme court reported in (2015) 11 SCC 423 *Alfred Benedict and another Vs. Manipal Hospital, Bangalore and others*, a child was administered I.V. Fluid in Hospital in artery instead of vein and finally amputation of right hand for gangrene took place, the child was awarded Rs.20.00 lacs compensation with interest @ 9% p.a., Paragraphs 10 to 14 of the aforesaid judgment reads as under :

> 10. We have heard Learned Counsel for the parties and have gone through the finding recorded by the State Commission as also the National Commission. We do not find any reason to differ with the finding that it was only because of the negligence on the part of the Hospital the two years' child developed gangrene resulting into amputation of her right arm.
>
> 11. However, taking into consideration the sufferings of the girl child, who is now 13 years of age, in our opinion the compensation awarded by the Commission is in a lower side. Learned Counsel appearing for the complainant submitted that every year she has to incur battery charges for the artificial limb, which costs ` 80,000/- annually. There cannot be any dispute that the girl will have to suffer throughout her life and has to live with artificial limb, Not only she would have to face difficulty in her education but would have also to face problem in getting herself married. Although the sufferings, agony and pain, which the girl child will carry cannot be compensated in terms of money, but, in our view, a compensation of ` 20,00,000/- (Rupees Twenty Lakhs only) will be just and reasonable in order to meet the problems being faced by her and also to meet future troubles that will arise in her life.
>
> 12. With the aforesaid reason, we allow the appeal filed by the complainants being Civil Appeal arising out of SLP(C) No. 35632 of 2013 by enhancing the compensation to ` 20,00,000/- (Rupees Twenty Lakhs only), which shall carry simple interest of 9 per cent per annum from the date of this order. It may be made clear that out of the total compensation, a sum of ` 10 lakhs shall be deposited in a long term fixed deposit in a nationalized bank so that this amount along with interest, that may accrue, shall take care of her future needs. The balance ` 10 lakhs shall be utilized by investing ` 5 lakhs in a short term fixed deposit in a nationalized bank so that this amount along with accrued interest will take care of her needs in near future. The rest ` 5 lakhs may be spent for her further medical treatment.
>
> 13. The aforesaid compensation amount shall be paid by owner of the Hospital within six weeks from today. It is needless to say that the amount, which has already been paid, shall be adjusted out of the amount awarded by this Court.
>
> 14. In the light of aforesaid order, the civil appeal filed by the Hospital, being appeal arising out of SLP(C)..CC No. 12025 of 2014, is dismissed.

16. In the case of *V. Krishnakumar Vs. State of Tamil Nadu and others* reported in (2015) 9 SCC 388, Hon'ble Justice Shri S. A. Bobde, while dealing with grant of compensation on account of negligent act, in paragraphs 16, 17, 18 and 19 has held as under :

> 16. The next question that falls for consideration is the compensation which the Respondents are liable to pay for their negligence and deficiency in service. The child called Sharanya has been rendered blind for life. The darkness in her life can never be really compensated for in money terms. Blindness can have terrible consequences. Though, Sharanya may have parents now, there is no doubt that she will not have that protection and care forever. The family belongs to the middle class and it is necessary for the father to attend to his work. Undoubtedly, the mother would not be able to take Sharanya out everywhere and is bound to leave the child alone for reasonable spells of time. During this time, it is obvious that she would require help and maybe later on in life she would have to totally rely on such help. It is therefore difficult to imagine unhindered marriage prospects or even a regular career which she may have otherwise pursued with ease. She may also face great difficulties in getting education. The parents have already incurred heavy expenditure on the treatment of Sharanya to no avail. It is, thus, obvious that there should be adequate compensation for the expenses already incurred, the pain and suffering, lost wages and the future care that would be necessary while accounting for inflationary trends.
>
> 17. There is no doubt that in the future Sharanya would require further medical attention and would have to incur costs on medicines and possible surgery. It can be reasonably said that the blindness has put Sharanya at a great disadvantage in her pursuit for making a good living to care for herself.
>
> 18. At the outset, it may be noted that in such cases, this Court has ruled out the computation of compensation according to the multiplier method. (See Balram Prasad v. Kunal Saha and Nizam's Institute of Medical Sciences v. Prashant S. Dhananka and Ors.
>
> The court rightly warned against the straightjacket approach of using the multiplier method for calculating damages in medical negligence cases.
>
> Quantification of Compensation
>
> 19. The principle of awarding compensation that can be safely relied on is restitutio in integrum. This principle has been recognized and relied on in Malay Kumar Ganguly v. Sukumar Mukherjee and in Balram Prasad's case (supra), in the following passage from the latter:
>
> 170. Indisputably, grant of compensation involving an accident is within the realm of law of torts. It is based on the principle of restitutio in integrum. The said principle provides that a person entitled to damages should, as nearly as possible, get that sum of money which would put him in the same position as he would have been if he had not sustained the wrong. (See Livingstone v. Rawyards Coal Co.).
>
> An application of this principle is that the aggrieved person should get that sum of money, which would put him in the same position if he had not sustained the wrong. It must necessarily result in compensating the aggrieved person for the

financial loss suffered due to the event, the pain and suffering undergone and the liability that he/she would have to incur due to the disability caused by the event.

The Hon'ble Supreme Court has taken into account the principle of restitutio in integrum and has held that based upon the aforesaid principle, the aggrieved person should get that sum of money which would put him in the same position if he had not sustained the wrong.

17. In the present case, the plaintiff who is a lady was earning her livelihood by working as a Labourer, she was involved in the job of stitching and now one entire limb has gone above the elbow and, therefore, this Court is of the considered opinion that the compensation claimed was too meager and the trial Court as there was sufficient evidence on record, has certainly erred in law and facts in dismissing her plaint.

18. The apex Court again on account of amputation of both the limbs while taking into account law of tort, has awarded Rs.90.00 lacs with interest to a child who lost both the arms on account of electrocution, in the case of *State of Himachal Pradesh and others Vs. Naval Kumar alias Rohit Kumar* reported in (2017) 3 SCC 115.

In the light of the aforesaid, this Court is of the considered opinion that the plaintiff has certainly made out a case. The issues framed in the matter are duly proved.

19. Resultantly, this Court is of the considered opinion that the plaintiff has been able to make out a case for grant of compensation, as prayed for, and the same is accordingly granted to her by allowing the prayer made in the plaint.

Keeping in view the totality of facts and circumstances of the case, specially in light of the percentage of the disability (amputation of one limb above elbow joint) and in the considered opinion of this Court, the plaintiff has prayed for a very meager amount of compensation to the tune of Rs.1,85,000/-, and therefore, the prayer made by the plaintiff is hereby allowed. The plaintiff shall be entitled for compensation to the tune of Rs.1,85,000/- along with interest @ 9% per annum right from the date on which the suit was filed.

With the aforesaid, the present First Appeal stands allowed with costs.

A decree be drawn accordingly.

Appeal allowed

I.L.R. [2018] M.P. 2207
APPELLATE CRIMINAL
Before Mr. Justice G.S. Ahluwalia
Cr.A. No. 663/2003 (Gwalior) decided on 26 April, 2018

KRISHNA GOPAL …Appellant

Vs.

STATE OF M.P. …Respondent

***A. Penal Code (45 of 1860), Section 304-B – Dowry Death – Appreciation of Evidence – Medical Evidence* – Held – Deceased wife died in matrimonial house in suspicious circumstances within seven years of marriage – Ante-mortem injuries not explained by accused husband – Doctor specifically opined the cause of death to be shock caused by poison which clearly negates the version/claim of appellant that when he alongwith his father and mother came home from their agricultural field, they found the deceased hanging and she was brought down by appellant – No ligature mark was found on neck of deceased in *postmortem* report, thus not a case of suicide – Prosecution established the case of dowry death whereby deceased was harassed, beaten and treated with cruelty – Conviction upheld – Appeal dismissed.**

(Para 9 & 10)

क. दण्ड संहिता (1860 का 45), धारा 304–बी – दहेज मृत्यु – साक्ष्य का मूल्यांकन – चिकित्सीय साक्ष्य – अभिनिर्धारित – मृतक पत्नी की मृत्यु विवाह के सात वर्ष के भीतर संदेहास्पद परिस्थितियों में दाम्पत्य निवास में हुई – अभियुक्त पति द्वारा मृत्यु पूर्व की चोटों को स्पष्ट नहीं किया गया – चिकित्सक ने विनिर्दिष्ट रूप से मत दिया कि मृत्यु का कारण जहर द्वारा कारित आघात है, जिससे अपीलार्थी के कथन/दावे का स्पष्ट रूप से खंडन होता है कि वह जब अपने माता–पिता के साथ उनके खेत से घर आया तब उन्होनें मृतिका को लटकता पाया और अपीलार्थी द्वारा उसे नीचे उतारा गया था – शव परीक्षण प्रतिवेदन में मृतिका के गले पर फंदे के निशान नहीं पाये गए, अतः आत्महत्या का प्रकरण नहीं – अभियोजन ने दहेज मृत्यु का प्रकरण स्थापित किया जिसमें मृतिका के साथ उत्पीड़न, मारपीट और क्रूरता का व्यवहार किया गया – दोषसिद्धि कायम रखी गई – अपील खारिज की गई।

***B. Criminal Procedure Code, 1973 (2 of 1974), Section 313 – Statement of Accused in Defence* – Held – Although maintaining silence by accused may not be a circumstance against him but where accused fails to explain incriminating circumstances or even fails to bring on record certain facts which are in his personal knowledge, then it can be said that in absence**

of any defence by accused in statement u/S 313, he fails to prove his defence.

(Para 10)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 313 – बचाव में अभियुक्त का कथन – अभिनिर्धारित – यद्यपि अभियुक्त द्वारा मौन बनाए रखना, उसके विरूद्ध एक परिस्थिति नहीं परंतु जहां अभियुक्त, फंसाने वाली परिस्थितियां स्पष्ट करने में या कतिपय तथ्य जो उसकी व्यक्तिगत जानकारी में है, को भी अभिलेख पर लाने में असफल होता है तब यह कहा जा सकता है कि अभियुक्त द्वारा धारा 313 के अंतर्गत कथन में किसी बचाव की अनुपस्थिति में वह अपना बचाव सिद्ध करने में विफल होता है।

***C. Criminal Trial – Practice – Chemical Analysis/Examination* – Held – Sometimes because of nature of poison consumed or administered by or to the deceased, same may not be noticed in chemical analysis – Where evidence is clinching and clear, same cannot be ignored or rejected merely on basis of medical evidence or chemical analyst report.**

(Para 9)

ग. दाण्डिक विचारण – पद्धति – रासायनिक विश्लेषण/परीक्षण – अभिनिर्धारित – कभी–कभी मृतक द्वारा प्राशन किये गये या मृतक को पिलाये गये जहर की प्रकृति के कारण उसे रासायनिक विश्लेषण में नहीं भी देखा जा सकता है – जहां साक्ष्य दृढ़ एवं स्पष्ट है, उक्त को मात्र चिकित्सीय साक्ष्य या रासायनिक विश्लेषक प्रतिवेदन के आधार पर अनदेखा या अस्वीकार नहीं किया जा सकता।

***D. Criminal Trial – Practice – Sentence – Quantum* – Held – Merely because appeal remained pending for 14 years would not *ipso facto* make appellant entitle for a lenient view while determining question of sentence.**

(Para 11)

घ. दाण्डिक विचारण – पद्धति – दण्डादेश – मात्रा – अभिनिर्धारित – मात्र इसलिए कि अपील 14 वर्षों तक लंबित रही, अपने आप से अपीलार्थी को दण्डादेश के प्रश्न का निर्धारण करते समय उदार दृष्टिकोण हेतु हकदार नहीं बनाएगा।

V.K. Saxena with *J.S. Kushwah,* for the appellant.
Sangeeta Pachauri, P.P. for the respondent/State.

J U D G M E N T

G.S. AHLUWALIA, J. :- This Criminal Appeal has been filed under Section 374 of CrPC against the judgment and sentence dated 16/10/2003, passed by Additional Sessions Judge, Seonda, District Datia in Sessions Trial No.99/2000, whereby the appellant has been convicted under Section 304-B of IPC and sentenced to undergo the rigorous imprisonment of ten years.

2. The undisputed fact for disposal of the present appeal is that the appellant

is the husband of the deceased Manju. The marriage of the appellant was performed with the deceased Manju about one year before her death. The prosecution story, in nutshell, is that an information was given by Bhagwan Singh Parihar (PW1) to the Police Station Pandokhar, to the effect that the deceased Manju, the wife of the appellant, has expired and on the basis of which an inquest enquiry was conducted. The enquiry was done by Sub-Inspector Hakim Singh Yadav and during enquiry, it was found that the appellant (husband of the deceased), Bhagwan Das (father-in-law of the deceased), Devabai (mother-in-law of the deceased) and Vikram (brother-in-law of the deceased) were harassing the deceased by making demand of motorcycle and money. It was also alleged that the deceased died because of hanging. On 14/4/2000, the co-accused Bhagwan Das along with Chowkidar informed the police that appellant Krishna Goptal (sic:Gopal), Devabai and he went to their field for harvesting the crops and the deceased Manju was all alone in the house and at about 09:00 am, the appellant along with her parents came back and found that the house was locked from inside. On knocking of the door, the grand- daughter of Bhagwan Das opened the door and he found that the deceased was hanging. The appellant brought her down and found that she was already dead. Devabai started weeping, as a result of which the neighbourers came there and they also noticed the dead body of the deceased Manju. After the inquest enquiry, as a case of dowry death was, *prima facie*, found against the accused persons, accordingly, FIR Ex.P3 was lodged on 15/04/2000. Lash Panchnama Ex.P2 was prepared. Certain injuries were found on the body of the deceased Maju (sic:Manju). The spot map ExP4 was prepared and the dead body of the deceased was sent for postmortem and the postmortem report is Ex.P8. The statements of the witnesses were recorded. Seized articles were sent for chemical examination to FSL, Sagar through Superintendent of Police, Datia and FSL report is ExP7. After completing the investigation, charge sheet was filed for offence under Section 304-B/34 of IPC against Bhagwan Das, Devabai, Vikram and the appellant. The trial Court by order dated 07/09/2000 framed charge under Section 304-B/34 of IPC.

3. The accused persons including the appellant, abjured their guilt and pleaded not guilty.

4. The prosecution, in order to prove its case, examined Bhagwan Singh Parihar (PW1), Kamlesh (PW2), Kallu (PW3), Usha (PW4), Kathule (PW5), Chiman(PW6), Mahendra Kumar (PW7), GC Sharma (PW8), Siroman Singh (PW9), Mukesh Kumar Shrivastava (PW10) and Dr. R.S. Dhengula (PW11). The appellant examined Parmanand (DW1), Mannulal (DW2) and Chhotelal (DW3), in their defence.

5. The trial Court after recording the evidence of the parties and hearing both the parties, acquitted Bhagwan Das, Devabai and Vikram by judgment dated 16th

October, 2003 passed in Sessions Trial No.99/2000, but convicted the appellant for offence under Section 304-B of IPC. Since the acquittal of Bhagwas Das, Devabai and Vikram has not been challenged, therefore, this appeal is being considered only against the judgment dated 16/10/2003 passed by trial Court in Sessions Trial No.99/2000 to the extent of conviction of the appellant.

6. The primary question for determination is that whether deceased Smt. Maju (sic:Manju) died a homicidal death or a natural death?

7. The undisputed fact is that the postmortem of the deceased was conducted by Dr.BK Shrivastava, Medical Officer, PHC, Bhander, District Datia and it was co-signed by Dr.RS Dhengula, Block Medical Officer, PHC, Bhander, District Datia. Dr. BK Shrivastava could not be examined as he expired during pendency of the trial and accordingly, on 03/07/2002, a prayer was made by the Prosecution that as Dr.BK Shrivastava has expired, therefore, the Prosecution be permitted to prove the postmortem report by examining Dr. RS Dhengula, who was present at the time of postmortem. Since this prayer was not opposed by the accused, therefore, the application was allowed and Dr. RS Dhengula was allowed to be examined to prove the postmortem report. Dr. RS Dhengula (PW11) has stated that at the time of postmortem the dead body of the deceased was found under severe putrefaction. On external appearance, the face was swollen and eyes were forced out from the socket. Tongue was protruded between teeth and lips. Frothy reddish fluid was coming out from nostrils and mouth, which was due to putrefaction. Greenish spots were found on the abdomen and chest. Fecal matter is coming out from anus. The following injuries were found on the body of the deceased.

> "(1) Abrasion on the right side of back of knee joint size 2"x2".
> (2) Burn mark present on the left thigh 1" above the knee joint 1/4"x1/4".
> (3) Burn mark present on the back of right scapula region 2"x1".
> ***No ligature mark seen in the neck.***
> (4) Abrasion on the right side of neck."

Dr. BK Shrivastava had opined that the death is due to shock caused by poison and for confirmation of kind of poison, viscera was sent for chemical analysis and all the injuries were found ante-mortem in nature and the duration of death was between 8-14 hours. Certain more internal organs were sent for chemical analysis and definite opinion was given by Autopsy Surgeon that the death of the deceased was due to shock caused by poison. The postmortem report is ExP8. This witness was cross-examined and he admitted that the entire postmortem report is in the handwriting of Dr. BK Shrivastava. He also admitted that whatever was found by Dr. BK Shrivastava at the time of postmortem, has been reflected in the postmortem report. This witness has further stated that he

was merely present with Dr. BK Shrivastava. He further clarified that the postmortem was conducted by Dr. BK Shrivastava and he had merely signed the postmortem because of his presence. He further admitted that in the postmortem report Ex.P8, Dr. BK Shrivastava had not pointed out any symptom of poison. He could not point out as to how the ante-mortem burn injuries were found on the body of the deceased.

8. By referring to FSL report Ex.P7, it is submitted by the learned Senior Counsel for the appellant, that since no poison was found in the viscera of the deceased, therefore, it is clear that the postmortem report ExP8 which indicates that the cause of death of the deceased was poison, is not correct. It is further submitted that under these circumstances, the prosecution has failed to prove beyond reasonable doubt that the deceased had died under suspicious circumstances within seven years from the date of her marriage and when the prosecution has failed to prove that the deceased had died either homicidal death or suicidal death or under suspicious circumstances, then it is clear that the appellant cannot be convicted for offence under Section 304-B of IPC.

9. The submissions made by the counsel for the appellant cannot be accepted for the following reasons:-

> **(i)** The deceased died in suspicious circumstances in her matrimonial house and the dead body of the deceased was noticed by the appellant and his parents. According to the information which was given to Police Station by Bhagwan Das (Co-accused), when Bhagwan Das, the father-in-law of the deceased entered inside the house, he found that the deceased was hanging and the appellant brought her down. This information was factually incorrect and was suppression of fact from the police and it was misleading information because Dr. BK Shrivastava did not find any ligature mark on the neck of the deceased, which clearly shows that she never committed suicide by hanging herself. Thus, the fact that the father-in-law of the deceased Bhagwan Das found that the deceased was hanging and she was brought down by the appellant is misleading and incorrect information. Under these circumstances, one thing is clear that the appellant had suppressed the very scene of occurrence which he had noticed after coming back from the field. Even the appellant has failed to prove that he had ever gone to field in the morning of the incident and when he came back, he found that his wife is dead. Ante-mortem injuries were found on the body of the deceased, which have not been explained by the appellant. Dr. BK Shrivastava had specifically opined that the cause of death of the deceased was due to shock

and was due to poison. This finding of Dr. BK Shrivastava is being challenged by the appellant by submitting that since no poison was found as per FSL report ExP7 and since no symptom of poison was mentioned by Dr.BK Shrivastava in his postmortem report, therefore, it cannot be said that the deceased had died because of consumption of poison.

(ii) For holding a person guilty under Section 304-B of IPC the requirement of law is that the deceased must have expired in suspicious circumstances otherwise than under normal circumstances within a period of seven years from the date of her marriage. This Court cannot lose sight of the fact that sometimes, because of nature of poison consumed or administered by or to the deceased, the same may not be noticed in the chemical analysis. Further, where the evidence is clinching and clear, then the same cannot be ignored or rejected merely on the basis of medical evidence or the report of chemical analyst.

(iii) Therefore, merely because no poison was found in the FSL report ExP7, it cannot be said that all other circumstances should be ignored and it should be held that the deceased had died natural death. If the deceased had died natural death, then there was no reason for the co-accused to give false and misleading information to the police that when the father-in-law of the deceased Bhagwan Das entered inside the house, he found that the deceased was hanging. Thus, the information which was given by co-accused Bhagwan Das that he had seen the dead body of the deceased for the first time and had found the dead body was hanging is not correct, as that claim is not supported by postmortem report, which specifically says that no ligature mark was found on the neck of the deceased. Thus, one thing is clear that the deceased did not commit suicide by hanging herself.

(iv) This Court again cannot go in deep with regard to the manner in which the deceased has died because neither a charge under Section 302 of IPC was framed nor the acquittal of Bhagwan Das, Devabai and Vikrant has been challenged. Therefore, one thing is clear that the deceased had never committed suicide by hanging herself. Had Bhagwan Das noticed that the deceased was lying on the ground or cot or anywhere because of natural death, then there was no need for him to give false information to the police that when he entered inside the house, he found the dead body of the deceased was hanging and the same was brought down by the

appellant. Since the deceased was residing along with the appellant and undisputedly she expired in her matrimonial house and only the appellant and his family members were present who had noticed the dead body of the deceased for the first time in the house, therefore, burden was on them to explain as to what was noticed by them when they entered inside the house? When the information given by Bhagwan Das with regard to the position of the dead body is false, it is clear that the appellant and his family members had suppressed the very genesis of the death of the deceased. Unfortunately, Dr. BK Shrivastava who had conducted the postmortem of the deceased, has expired during the pendency of the trial and, therefore, he could not be examined. Under the facts and circumstances of the case, this Court is of the considered opinion that the deceased had died in her matrimonial house in suspicious circumstances other than the normal circumstances within seven years from the date of her marriage and she had sustained antemortem injuries on her body, which have not been explained by the accused and no ligature mark has been found on the neck of the deceased which clearly, negates the claim of the appellant and his father that when they came back to the house and entered inside the house, they found that the deceased was hanging and she was brought down by the appellant. Thus, it is held that deceased Manju had died in suspicious circumstances other than normal circumstances within a period of seven years from the date of her marriage.

10. The next question for consideration is that whether the appellant has committed an offence under Section 304-B of IPC or not ?

Bhagwan Singh (PW1) has stated that he is Chowkidar of the village and he was called by the uncle of the appellant, namely, Dhobilal, who had informed that the deceased has committed suicide by hanging herself. He found that the deceased had expired and one rope was hanging from the roof of house. An information was given by this witness to the police that the wife of the appellant has expired, which is Ex.P1. Since eyes and mouth of the deceased were open, therefore, he came to a conclusion that the deceased has expired. In cross-examination, this witness admitted that the parental relatives of the deceased had reached the village on the same day on the information given by Manoj Yogi, resident of the village. This witness has further stated that he had never heard any confrontation between the deceased, the appellant and her mother-in-law. There are several houses surrounding the house of the appellant.

Kamlesh (PW2) is the maternal uncle of deceased Manju. He has stated

that the deceased was married to the appellant on 11th May, 1999 and she was brought up by this witness. He further stated that within one year of her marriage the deceased expired. Prior to her marriage, the deceased had visited the house of her relative in Village Pali and this witness had also gone there, where the deceased had informed that the appellant used to beat her and the injuries were also shown by the deceased to this witness. This witness was also informed by the deceased that the appellant is demanding Rs.1,50,000/- for procuring a job and also a vehicle. The information regarding the death of the deceased was given by son of the uncle of the appellant and when he went to the Village, he found that the deceased was lying dead. This witness was cross-examined and in cross-examination, he admitted that in his Case Diary statement Ex.D1 he had not stated to the police that when the deceased came to her house, then he had seen the injuries. *[In case diary statement, the information given by the deceased about the harassment by the appellant as well as demand of Rs.1,50,000/- and a vehicle is mentioned. In the case diary statement, it was mentioned in detail that on 8th March, the deceased had come to attend a marriage of the nephew of this witness, namely, Virendra and form (sic:from) there, she came to the house of this witness and at that time, she informed this witness about harassment and demand of dowry].*

Thus, it cannot be said that there is a material omission in the case diary statement of this witness, except that, there is an omission that this witness had seen the injuries. It is further stated by this witness that fifteen days thereafter, the deceased died. It is further admitted that even after noticing the injuries, they did not lodge the FIR. He further admitted that prior to death of the deceased no report was made. He denied the suggestion that the appellant had never demanded money and demanded the vehicle only. He further admitted that the accused are poor persons and are agriculturists only. He further admitted that the deceased committed suicide in the morning of 14/04/2000 and the postmortem and cremation of the deceased was done on 15th. He further denied that they had informed the police that the deceased has been killed by administering poison. He further denied that the deceased did not have any problem in her matrimonial house and she was never beaten. He further admitted that when they reached the village, the dead body of the deceased was lying in the house itself and her dead body was sent for postmortem only thereafter. He further admitted that for the postmortem, husband of the deceased and his friends as well as father of the deceased had gone. He further admitted that the deceased had sustained injuries on her body.

Kallu (PW3) is the father of the deceased, who has stated that the deceased was married to the appellant in the year 1999. On 14/04/2000, he was informed that the deceased has expired and when he reached the village, he found that the dead body of his daughter was lying on the ground and the police had already

reached there before him. The Dead Body Panchnama Ex.P2 was prepared. This witness has further stated that when the deceased had come for third time, then she informed that her in-laws are insisting that she should bring any vehicle, otherwise she would be killed. This witness has further stated that he was not willing to send his daughter but in spite of his objection her in-laws took her back. In cross-examination, he admitted that he got the information in the afternoon of 14th and reached the village in the evening of 14th at about 07:00-08:00 pm. He further stated that he does not know as to why the dead body of the deceased was kept in the house even for such a long period after her death. The dead body was taken for postmortem in the morning of 15th. He denied that he had suggested the Doctor to give an opinion that the deceased had died due to poison. He further stated that when the deceased had come for the third time, then she had informed about the demand of vehicle. He further admitted that this information was given by the deceased to her mother from whom he got the information. He further stated that the deceased was residing at the house of her maternal uncle at Jhansi and his daughter is more beautiful than that of the appellant. He further denied that the deceased was willing to open a beauty parlor at Jhansi. He further stated that he does not know that whether his daughter had done any beauty parlor course or not. He further denied that he does not know that whether his daughter had pressurized the appellant to shift to Jhansi for doing business and the appellant had refused to do so, as the appellant wanted to serve his father by residing with him. He further admitted that when his daughter came for the first time, then he was not willing to send her back as the accused persons were demanding vehicle. He denied that the deceased was saying that she would go back only after the appellant shifts to Jhansi. He also denied that the appellant was not liked by the deceased. He further admitted that the marriage was settled by him. He further denied that his relatives had scolded him that he has chosen a very unfit boy and he should have looked for a good boy. He also denied that he does not know that whether the appellant is doing any work except the agriculture or not. He further stated that as he was very upset because of death of his daughter, therefore, he could not give information to the police about certain things.

Usha (PW4) is the mother of the deceased, who has specifically stated that the appellant was demanding Rs.1 lac and a motorcycle. In cross-examination,she has stated that in the month of Ashadh (June-July), the deceased had informed that the appellant is demanding money and vehicle. This witness further clarified that Rs.1,50,000/- was demanded. She further admitted that maternal uncle of the deceased has been considered as a rich person in the society. She further denied that the financial condition of the appellant is better than that of the family of the deceased. She further stated that she is still upset because of death of the deceased. She further admitted that the marriage of her daughter was settled by her and her husband. However, she denied that she was ever scolded by her brother that they had not chosen a good boy and they ought to have married their daughter in some

good family. She further admitted that the deceased was usually staying with her maternal uncle as she was brought up by her maternal uncle only. She further denied that the deceased had done any course of beauty parlor and the deceased wanted to open a beauty parlor at Jhansi and she was insisting the appellant to shift to Jhansi and the appellant had refused to do so and had clarified that the appellant would stay at Talgaon itself.

Kathule (PW5) is the maternal grand-father of the deceased. He stated that after receiving the information, he went to the matrimonial house of the deceased and found certain injuries on her body. The deceased used to say that the appellant was demanding a motorcycle and had threatened that otherwise she would be killed. A specific suggestion was given to this witness, which was replied that when the deceased had shown her back to this witness and there were injuries, then he had requested the co-accused Bhagwan Das who took the responsibility of the deceased.

Chiman (PW6) is the uncle of the deceased. He has stated that the deceased was married to the appellant about 11 months prior to her death. He further stated that he does not know as to how the deceased has expired. It was further stated that the accused persons had come to take back the deceased and at that time, she was in Jhansi, therefore, the accused persons became aggressive and alleged that now in case, if she comes to her matrimonial house, then she would go back in a dead condition. However, this witness further stated that he does not know as to what had transpired prior to her death.

Mahendra Kumar (PW7) is the maternal uncle of the deceased. He has stated that the deceased used to inform that the appellant was demanding of Rs.1 lac for procuring a job. This witness has further stated that when he reached the village, he did not find any ligature mark on the neck of the deceased and further denied such part in his case diary statement Ex.D5. He further stated that he does not know as to how the police had written that question. He further could not clarify as to why the allegation of demand of Rs.1 lac was not mentioned in his case diary statement Ex.D5. He further clarified that he came to know about the demand of dowry after the death of the deceased through mother of the deceased.

On behalf of accused, Chhotelal has been examined as DW3. Chhotelal (PW3) has stated that since the deceased Manju was more beautiful than that of the appellant, therefore, she was not happy with her marriage with the appellant. The deceased was not willing to reside in the house of the appellant which is a *pucca* house of thatched roof (khapra). Even at the time of marriage, she had not garlanded the appellant and only with great difficulty and persuasion, she exchanged the garland *(Varmala)*. She was insisting the appellant that she would shift to Jhansi. The deceased had also written some incomplete letters, addressed to her parents in which she had expressed that she has been married by them with

an unfit boy. This witness has proved an inland letter Ex.D6. Although this letter is not signed by anybody and there is nothing on record that this letter was ever written by the deceased or this letter is in the handwriting of the deceased, but one thing is clear that the appellant himself has relied upon this letter, therefore, even for the sake of argument, if the contents of this letter are read, then it is clear that the deceased was not comfortable in her matrimonial house. When the appellant had already received this incomplete inland letter, on which even the address of the recipient was not mentioned, then the burden was on him to explain as to what was done by the appellant for redressal of grievance of the deceased. Even the appellant in his statement under Section 313 of CrPC has not taken a stand as the deceased was not satisfied with her marriage, therefore, she committed suicide. As this Court has already come to a conclusion that the deceased never committed suicide because it is the case of the appellant that when he reached the house, he found that the deceased was hanging, whereas no ligature mark was found on her neck, therefore, when the appellant himself has not taken a defence that the deceased was not happy with her marriage because the deceased was more beautiful than that of the appellant and secondly, that the deceased was pressurizing the appellant to shift to Jhansi so that she can open a beauty parlor, therefore, it cannot be said that she was not happy with her marriage. If the deceased had pressurized the appellant to shift to Jhansi, it is for the appellant to take a specific defence in that regard, but that has not been done. Although maintaining silence by the accused, may not be a circumstance against him, but where the accused fails to explain the incriminating circumstance or even fails to bring certain facts which are in his personal knowledge, then it can be said that in absence of any defence, by the appellant in his statement under Section 313 of CrPC, the appellant has failed to prove his defence that since the deceased was not happy, therefore, she committed suicide.

From the evidence of Kamlesh (PW3) Usha (PW4) and Kathule (PW5), it is clear that the deceased had informed these witnesses about the demand of motorcycle and an amount of Rs.1,50,000/-. The evidence of Usha (PW4) is supported by the evidence of Kathule (PW5) and Mahendra Kumar (PW7) who have stated that they were informed by Usha, that Maju(sic:Manju) has informed them about the demand of dowry and harassment. Although these witnesses have been cross-examined in detail by the defence, but nothing could be elicited from their evidence which may make the allegation of demand of dowry and harassment by the appellant, as unreliable. Thus, it is clear that the appellant had demanded Rs.1,50,000/- and a vehicle from the deceased and when the said demand could not be fulfilled by the deceased and her parents, then she was continuously harassed and beaten by the appellant. Beating at the hands of the appellant is fully corroborated by ante-mortem injuries found on the body of the deceased. Even some burn marks were found on the body of the deceased which indicate the extent of cruelty committed by the appellant.

Under these circumstances, this Court is of the considered view that the prosecution has succeeded in establishing beyond reasonable doubt that the appellant had demanded Rs.1,50,000/- and a vehicle and because of non-fulfillment of the said demand, the deceased was harassed, beaten and treated with cruelty and the deceased died in suspicious circumstances other than normal circumstances within seven years of marriage. Accordingly, it is held that the appellant is guilty of committing an offence under Section 304-B of IPC.

11. So far as the question of sentence is concerned, the trial Court has awarded a jail sentence of ten years to the appellant. It is submitted by the counsel for the appellant that the incident took place in the year 2000 and the appellant was convicted in the year 2003 and more than 18 years have passed from the death of the deceased, therefore, a lenient view may be adopted while awarding the jail sentence. Merely because the appeal remained pending for fourteen long years would not *ipso facto* make the appellant entitle for a lenient view while determining the question of sentence.

12. In the present case, the deceased died within one year of her marriage. Although the appellant had claimed that when he reached his house he found that the deceased was hanging and he brought her down but the doctor did not find any ligature mark on the neck of the deceased which clearly shows that the appellant has suppressed the information. Even Bhagwan Singh Parihar (PW1), who is Chowkidar of the village, had found that the deceased was lying in a dead condition and one rope was hanging from the roof, that means Bhagwan Singh Parihar, who is an independent witness, had reached the place of incident did not notice that the deceased was hanging and only one rope was hanging. Thus, under these facts and circumstances of the case, this Court is of the considered opinion that the trial Court has not committed any mistake in awarding the jail sentence of ten years.

(13) Accordingly, the judgment and sentence dated 16/10/2003 passed by Additional Sessions Judge, Seonda, District Datia in Sessions Trial No.99/2000 is hereby affirmed.

(14) The appellant is on bail. His bail bonds and surety bonds are immediately cancelled. He is directed to surrender before the trial Court for undergoing the remaining jail sentence.

(15) This appeal fails and is hereby dismissed.

Appeal dismissed

I.L.R. [2018] M.P. 2219 (DB)
APPELLATE CRIMINAL

Before Mr. Justice Anand Pathak & Mr. Justice Vivek Agarwal

Cr.A. No. 35/2007 (Gwalior) decided on 18 May, 2018

RAGHUVEER SINGH & ors. …Appellants

Vs.

STATE OF M.P. …Respondent

***A. Penal Code (45 of 1860), Sections 302 r/w 149 & 148 – Conviction – Life Imprisonment – Appreciation of Evidence – Eye Witnesses – Forensic Examination and Medical Report* – Held – Both eye witnesses contradict each other about use and mode of using weapon by appellants – Eye witnesses specifically mentions fact of use of axe and *farsa* by accused persons but no injuries of incised wound were found in medical report – Blood group of blood stains found over stick *(lathi)* was not referred for chemical/forensic examination nor the same was matched with blood group of deceased or accused persons and in this respect no explanation has been offered by prosecution – Blood stained clothes of deceased were also not seized and sent for chemical examination – No conclusive inference can be drawn to prove the guilt of appellants u/S 302 IPC.**

(Paras 16, 18, 19)

क. दण्ड संहिता (1860 का 45), धाराएँ 302 सहपठित धारा 149 व 148 – दोषसिद्धि – आजीवन कारावास – साक्ष्य का मूल्यांकन – चक्षुदर्शी साक्षीगण – न्यायालयिक विज्ञान परीक्षण एवं चिकित्सीय प्रतिवेदन – अभिनिर्धारित – दोनों चक्षुदर्शी साक्षीगण ने अपीलार्थीगण द्वारा आयुध का उपयोग तथा उपयोग करने के ढंग के बारे में एक दूसरे का खंडन किया – चक्षुदर्शी साक्षीगण ने विनिर्दिष्ट रूप से अभियुक्तगण द्वारा कुल्हाड़ी और फरसे के उपयोग के तथ्य का उल्लेख किया है, परंतु चिकित्सीय प्रतिवेदन में छिन्न घाव की कोई चोट नहीं पायी गई – लाठी पर पाये गये खून के धब्बों के रक्त समूह को रासायनिक/न्यायालयिक विज्ञान परीक्षण के लिए निर्दिष्ट नहीं किया गया था और न ही उक्त का मिलान मृतक या अभियुक्तगण के रक्त समूह के साथ किया गया था तथा इस संबंध में अभियोजन द्वारा कोई स्पष्टीकरण प्रस्तुत नहीं किया गया – मृतक के रक्त रंजित कपड़े भी जब्त नहीं किये गये एवं रासायनिक परीक्षण के लिए नहीं भेजे गये – भारतीय दण्ड संहिता की धारा 302 के अंतर्गत अपीलार्थीगण की दोषिता को साबित करने हेतु कोई निश्चायक निष्कर्ष नहीं निकाला जा सकता।

***B. Penal Code (45 of 1860), Section 302 & 304 Part I – Sudden Provocation – Single Blow* – Held – Complainant and accused party ploughing their respective field, indulged into verbal altercation and sudden fight broke over the issue of common passage *(Medh)* – No pre-meditated assault – No repeated blows by accused – Case falls under Section 304 Part I**

and appellants are accordingly convicted – Further held – Since accused undergone more than 10 yrs. imprisonment, deserves to sentence for period already undergone – Appeal allowed.

(Para 28 & 29)

ख. दण्ड संहिता (1860 का 45), धारा 302 व 304 भाग I– अचानक प्रकोपन – एकल वार – अभिनिर्धारित – अपने–अपने खेत में जुताई कर रहे परिवादी एवं अभियुक्त पक्ष में आम रास्ता (मेढ़) की बात पर मौखिक कहा–सुनी हुई और अचानक झगड़ा हो गया – किसी पूर्व चिंतन से हमला नहीं – अभियुक्त द्वारा बारंबार वार नहीं किये गये – प्रकरण धारा 304 भाग I के अंतर्गत आता है एवं अपीलार्थीगण तद्नुसार दोषसिद्ध किये गये – आगे अभिनिर्धारित – चूंकि अभियुक्त 10 वर्षों से अधिक का कारावास भुगत चुका है, भुगताई जा चुकी अवधि के दण्डादेश हेतु हकदार है – अपील मंजूर।

***C. Penal Code (45 of 1860), Section 149 – Common Object* – Held – Since fight broke out of sudden provocation, apart from appellant No. 1, 2 & 6 other appellants did not share common object, they were just doing agricultural work in the vicinity – Prosecution failed to prove and establish common object by these appellants making unlawful assembly to eliminate the deceased – Even in enquiry report, police official admitted that it is not possible to inflict injuries by six accused – These appellants deserve to be acquitted from charge u/S 302/149.**

(Paras 20 to 22)

ग. दण्ड संहिता (1860 का 45), धारा 149 – सामान्य उद्देश्य – अभिनिर्धारित – चूंकि झगड़ा अचानक प्रकोपन के कारण हुआ, अपीलार्थी क्र. 1, 2 व 6 के अलावा अन्य अपीलार्थीगण का सामान्य उद्देश्य नहीं था, वे केवल आस–पास कृषि कार्य कर रहे थे – अभियोजन, इन अपीलार्थीगण द्वारा मृतक की हत्या करने हेतु विधिविरूद्ध जमाव बनाने के सामान्य उद्देश्य को साबित करने एवं स्थापित करने में विफल रहा – जांच प्रतिवेदन में भी, पुलिस अधिकारी ने स्वीकार किया कि छः अभियुक्तों द्वारा चोटें पहुंचाना संभव नहीं है – ये अपीलार्थीगण धारा 302/149 के अंतर्गत आरोप से दोषमुक्ति के हकदार हैं।

Cases referred:

AIR 1979 SC 1408, AIR 1997 SC 3818, 1998 SCC (Cri) 369, 2017 (2) Cr.L.R. (SC) 433, AIR 1956 SC 51, AIR 1987 SC 1507, 2003 SCC (Cri) 1825, AIR 1980 SC 573, 2002 SCC (Cri) 616, AIR 2011 SC 1825, 2011 AIR SCW 2404, 1992 Supp (2) SCC 470, 1992 Supp (2) SCC 545, (2000) 3 SCC 557, (2013) 3 SCC (Cri) 460, 2014 (1) MPLJ (Cri.) 64, 1993 Supp. (2) SCC 356, (2012) 1 SCC 414.

Ram Kishore Sharma, for the appellant No. 2.
Sanjay Gupta, for the appellant No. 3.
S.S. Gautam, for the appellant No. 4.

Pradeep Katare, for the appellant No. 5.
Rajkumar Singh Kushwaha, for the appellant No. 6.
B.P.S. Chauhan, P.P. for the respondent-State.

J U D G M E N T

The Judgment of the Court was delivered by : **ANAND PATHAK, J.** :- The appellants-accused have preferred this appeal under Section 374(2) of Cr.P.C. against the judgment and order dated 11th December, 2006 passed by the Seventh Additional Sessions Judge (fast track) Gohad, District-Bhind in S.T. No.50/2004, whereby all appellants have been convicted under Section 302 r/w Section 149 of IPC and sentenced to undergo Life Imprisonment each with fine of Rs.100/- each and further convicted under Section 148 of IPC and sentenced to suffer 1 year RI each with fine of Rs.100/- each.

2. As per the case of the prosecution, on 04-11-2003 at around 4 pm complainant Lakhu Singh, his brother Ayodhya Singh and nephew Balister Singh went to agriculture field at village Moza Khera, District-Bhind for taking fodder. The agriculture field of the complainant was adjacent to the field of the Raguveer Singh and his brothers. On the fateful day, when Raghuveer Singh was taking fodder over the linhay (मेंढ़) of the field was objected by Ayodhya Singh, which resulted into verbal altercation. Immediately on the call of Raghuveer Singh, his family members i.e. present appellants who were performing agriculture activities were gathered and over exhortation of Raghuveer Singh and other appellants *viz*; Raju, Bheemsen, Dileep and Munna wielding Lathi, Bakeel wielding Kanta and Raghuveer Singh wielding an axe, came to the spot and Raghuveer Singh gave a blow of axe to Ayodhya over his head and Bakeel Singh gave a blow of Kanta (Farsa like weapon) over the head of Ayodhya and Dileep Singh inflicted blow of lathi over the head of Ayodhya. When complainant Lakhu Singh, Balister Singh tried to intervene and save the victim Ayodhya then Raju, Bheemsen and Munna caught hold of them and did not allow them to move further. When Ayodhya fell down and lying lifeless then Raghuveer Singh and other co-accompolice (sic:accomplice) moved away by hurling abusive language to the family of the deceased. Victim-Ayodhya was taken to Police Station but died midway. The case was registered vide Crime No.159/2003 under Sections 302, 147, 148 and 149 of IPC and matter was taken for investigation.

3. Body of the deceased was sent for autopsy at district hospital Bhind and statements of the witnesses were recorded. Spot map was prepared and from the spot, one stick, blood stained soil, plain soil and spectacles of the deceased were seized through seizure memo. Accused-Raghuveer Singh was arrested and on his statement, axe was seized whereas on the statement of another accused-Bakeel Singh, *farsa (kanta)* and on the statement of accused-Raju, *lathi* were seized and

respective seizure memos were prepared. Accused-Bheemsen was also arrested and *lathi* was seized from him. Seized articles were sent for chemical examination at Forensic Science Laboratory, Sagar and after investigation, charge-sheet was filed against the accused persons.

4. The matter was committed to the Court of Session where the charges were framed. The accused abjured their guilt therefore, trial was conducted.

5. In their defence and examination under Section 313 of Cr.P.C., appellants/ accused denied the prosecution story and took the plea of false implication. Dileep Singh took the plea of *Alibi* and for that, witness Rajveer (DW-1) was examined. Two other eye witnesses were also examined on behalf of the defence. Prosecution led as many as eight witnesses.

6. After considering the evidence ocular as well as medical and the documents exhibited, trial Court convicted the appellants/ accused as referred above. Therefore, the accused are before this Court in appeal.

7. Appellant-Raghuveer Singh s/o Vijay Singh Kushwah died during pendency of this appeal. Therefore, this appeal is to be considered at the instance of other appellants (appellants No.2 to 6).

8. Different counsel appearing for the appellants tried to establish the case of false implication on the basis of contradiction surfaced in the testimony of eye witnesses i.e. Lakhu Singh (PW-1) and Balister Singh (PW-3). As per the statements, the course of events as referred in the FIR and in the deposition contains sufficient contradictions to establish the theory of false implication. Injuries caused by the appellants are also factually differently described by two eye witnesses. It was also the case of the appellants that blood stained cloth of the deceased- Ayodhya were seized by the police and no blood was found on these articles and those weapons which was seized, were not sent for FSL examination. Therefore, the prosecution could not prove the case beyond reasonable doubt so as to render the appellants incarcerated for conviction and suffer substantive jail sentence as referred above.

9. As alternative argument, counsel for the appellants have tried to take shelter of Section 300 exception 4 of IPC to contend that it was culpable homicidal not amounting to murder because the alleged incident was the result of sudden fight in the heat of passion and therefore, appellants cannot be convicted for the offence under Section 302 of IPC for murder of deceased-Ayodhya.

10. Learned counsel for the respondent/ State opposed the prayer of the appellants and placing reliance over the findings of the trial Court, opposed the prayer and prayed for dismissal of the appeal.

11. Heard the learned counsel for the parties at length and perused the record.

12. The first and foremost question for consideration of the case in hand is the nature of death of deceased-Ayodhya. Dr. D.C. Shukla (PW-2), who was the medical officer and conducted autopsy over the corpse was examined. According to him, nature of injuries were as under:-

> *"(i) Lacerated wound 4x1/2 cm x 1x1/2 cm x deep bony on occipital parietal region at skull- clotted blood present around the wound.*
>
> *(ii) Stab wound 2x2 cm area occipital parietal region of skull deep bony*
>
> *(iii) Depressed occipital bone and skull."*

13. According to the injuries and his opinion as contend in para 2 of his deposition, nature of injuries were sufficient to cause death and therefore, death was homicidal in nature. Once the cause of death is ascertained then natural course is to ascertain and fix the responsibility if any, for such homicidal death.

14. In the present case, scriber of FIR is Lakhu Singh who in his FIR statement (Ex.D-1) narrated the events. In the FIR, he scribed the blow to Raghuveer Singh through axe, Bakeel through Kanta and Dileep through lathi over the head of Ayodhya. The other appellants were guilty of intercepting Lakhu Singh (PW-1) and his nephew Balister Singh (PW-3) and not allowing them to save the deceased-Ayodhya. Later on, statement under Section 161 Cr.P.C. were recorded in which Lakhu Singh (PW-1) has reiterated the events in same fashion but in his deposition on oath, he tried to improve upon the case by saying that Raghuveer Singh inflicted blow of axe from other side (blunt side) and thereafter, Dileep Singh inflicted the blow of lathi and Bakeel with farsa. In the medical examination according to Dr. D.C. Shukla (PW-2), injuries No.1 and 3 could not be inflicted through sharp cutting object or from the blow of axe. Only injury No.2 could have been caused through pointed weapon because injury No.2 was a stab wound. This aspect is further contradicted by Balister Singh (PW-3) in his deposition when he says that Raghuveer Singh inflicted the blow of axe from blunt side but the same has not been clarified in his statement under Section 161 of IPC vide Ex.D-2.

15. Similarly, Lakhu (PW-1) in FIR Ex.P-1 did not clarify the blow of axe by Raghuveer Singh through blunt side. Lakhu Singh (PW-1) in his deposition in para 29 has said that Raghuveer Singh inflicted the blow of Farsa from the side of sharp cutting edge because he says that he used the *farsa* from the side by which it is used for killing. This aspect is contradicted by Balister Singh (PW-3) who happens to be another eye witness, when he says in para 34 of his statement that Raghuveer Singh has inflicted the blow of axe from the back side. Therefore, both the alleged eye witnesses contradict each other about the use and mode of using

the weapon, whereas they should have been in unison about the incident. The Hon'ble Apex Court in the case of *Suraj Mal Vs. The State (Delhi Administration), AIR 1979 SC 1408* held that where witnesses make inconsistent statements in their evidence either at one stage or at two stages, testimony of such witnesses become unreliable and unworthy of credence and in absence of special circumstances, no conviction can be based on the evidence of such witnesses. This has been further reiterated in the case of *State of Bihar Vs. Bishwanath Rai and others,* AIR 1997 SC 3818 wherein it has been held that testimony of eye witnesses not consistent with medical evidence regarding injury caused to the deceased, thus inference is that eye witnesses not giving correct account of manner in which incident took place. In the case of *Anmol Singh Vs. Asharfi Ram and others*, 1998 SCC (Cri) 369, Hon'ble Apex Court reiterated the law that inconsistencies and improvements of version of eye-witness in FIR different from the version giving by him in the Court when witness making material improvements in his evidence, thus, the said evidence cannot be taken into consideration. In a recent judgment of Hon'ble Apex Court in the matter of *Mahindra* Vs. *Sajjan Galfa Rankhamb and others*, 2017 (2) Cr.L.R. (SC) 433, the law has been reiterated in the same manner.

16. In the FIR, it was stated by Lakhu Singh (PW-1) that first blow was inflicted by Raghuveer Singh then second blow by Bakeel Singh and third by Dillep Singh, but in his statement under Section 161 of Cr.P.C., he changed the order and said that first blow was inflicted by Raghuveer Singh, second by Dileep Singh and third by Bakeel Singh. Since eye witness account specifically mentions the fact about the use of axe and *farsa*, but no injuries of incised wound are found in the medical report therefore, use of axe and *farsa* allegedly wielded by accused persons comes into doubt while inflicting injuries over the deceased-Ayodhya.

17. The said medical report is further substantiated by the inconsistent statements of eye witnesses. In para 8 of his statement, Lakhu Singh (PW-1) says that his agriculture field is just adjacent to Ayodhya Singh but spot map (Ex.P-3) indicates that between Lakhu and deceased Ayodhya's field, it was the field of Maniram which bifurcated both the fields therefore, field of both the persons Lakhu and Ayodhya were not adjacent. Later on, in para 10 of his deposition, he again makes clarification regarding field of Maniram, but the same is contradictory to what he already said in para-8.

18. Perusal of FSL report (EX.P-18) shows that one stick vide article-D referred in the said documents contains blood stains alongwith soil article-A and B and spectacles article-C whereas on Ex-E, F and G which were seized weapons (axe and sticks) respectively blood stains were not found. Article-D which was a stick containing blood stains, was not referred for chemical examination alongwith the blood stained clothes of deceased to ascertain and to establish that the blood stains found over it was of the deceased-Ayodhya. In the present case

blood group of blood stains found over the stick (vide article-D) was never referred for any forensic/ chemical examination nor the said blood group found over the stick was matched with the blood group of the deceased nor with the blood group of accused persons. Even, the blood stained clothes of deceased were not seized and sent for chemical examination. In absence of such omission in the light of the judgment rendered by the Apex Court in the case of *Prabhu Babaji Navle Vs. State of Bombay*, AIR 1956 SC 51 and in the case of *Kansa Behera Vs. State of Orissa* [AIR 1987 SC 1507], it cannot be inferred that the death has been caused by the said lathi blow. In the said judgment it has been clarified that if the accused is to be convicted for the offence on the basis of blood stains, then grouping of that blood should be proved. Since the weapons seized (axe and *lathi*) (article-D) and blood stained clothes of deceased were not sent for chemical examination then without matching the blood group found on the alleged weapons with the blood of the deceased, no conclusive inference can be drawn to prove the guilt of the appellants. In the case of *Khima Vikamshi and others Vs. State of Gujarat*, 2003 SCC (Cri.) 1825, Hon'ble Apex Court held that failure on part of investigating agency to recover any bloodstained clothes from the witnesses, despite the fact that they were present at the time of incident, held the case of prosecution doubtful. The inference drawn by the Hon'ble Apex Court in absence of recovery of such bloodstained clothes and bloodstained earth at the place of incident and omission to send it for chemical examination, render the case of prosecution doubtful.

19. No blood was found on the articles-E, F and G and they were not sent for FSL examination and no explanation has been offered in this regard. Once over the article-D (stick), blood stains were found and the said stick was seized from the spot then it was the duty of the prosecution to sent it for FSL to establish the blood group of the deceased to establish full proof case of the appellants but the same has not happened and no explanation has been offered in this regard therefore, case of the prosecution becomes doubtful.

20. On behalf of the appellants/ defence, Additional S.P.-A.K. Jha (DW-3) was examined as he inquired into the matter and submitted the inquiry report dated 05-02-2004 to S.P. Bhind. He admitted in his report that no similarity exists between roping of six accused persons *vis a vis* the injuries caused to the deceased. It was also submitted that it is not possible to inflict injuries by six accused and case appears to be of sudden provocation and under the heat of passion.

21. Other three accused persons namely appellant No.3- Bheemsen, appellant No.4- Moti @ Munna and appellant No.5- Raju @ Jaichandra admittedly faced the allegations that they tried to halt or intervene the relatives of Ayodhya Singh when Lakhu Singh (PW-1) and Balister Singh (PW-3) tried to save the Ayodhya Singh. Injuries are only 3 in numbers, which were inflicted over the deceased and

admittedly as per the allegations, the said injuries were allegedly caused by Raghuveer Singh (deceased), Dillep Singh and Bakeel Singh. No injury has been caused by the above mentioned appellants even if the story of the prosecution is believed. Since the fight broke out on the question of linhay (मेंढ़) because of sudden provocation therefore, the appellant No.4-Moti @ Munna and appellant No.5-Raju @ Jaichandra did not share common object alongwith other appellants. They were just doing agriculture work in the vicinity. Theory of common object was not established by the prosecution. Therefore, they cannot be fastened with the liability with the aid of Section 149 of IPC. Since the deposition of Lakhu (PW-1) and Balister Singh (PW-3) are contradictory and do not stand to credence as discussed above therefore, accused referred above deserve to be acquitted from the charge of Section 302/149 of IPC.

In the case of *Mariadasam and others Vs. State of Tamil Nadu*, AIR 1980 SC 573, Hon'ble Apex Court held that where there was no satisfactory evidence to prove the formation of any unlawful assembly with the common object of committing crimes alleged and the whole fight started suddenly on the spur of the moment in a heat of passion the accused though more than five in number, could only be liable for the individual acts committed by them and could not be convicted under Sections 149, 148 or 147 of IPC. In the case of *Sukhbir Singh Vs. State of Haryana*, 2002 SCC (Cri) 616, Hon'ble Apex Court held that merely because co-accused persons accompanied the main accused when he inflicted the fatal blows to the deceased would not by itself prove existence of the common object. The common object shared by members of the assembly must pre exist the occurrence of incident. Here, in the present case, the prosecution could not prove the case beyond reasonable doubt about existence of common object harboured by members of unlawful assembly to eliminate the deceased. In the case of *Shaji and others Vs. State of Kerala*, AIR 2011 SC 1825, Hon'ble Apex Court considered the judgment rendered in the case of *Kuldip Yadav and others Vs. State of Bihar*, 2011 AIR SCW 2404 wherein it has been held that:

> *"It is not the intention of the legislature in enacting Section 149 to render every member of unlawful assembly liable to punishment for every offence committed by one or more of its members. In order to attract Section 149, it must be shown that the incriminating act was done to accomplish the common object of unlawful assembly and it must be within the knowledge of other members as one likely to be committed in prosecution of the common object. If the members of the assembly knew or were aware of the likelihood of a particular offence being committed in prosecution of the common object, they would be liable for the same under Section 149 IPC."*

22. Even the prosecution story and its witnesses nowhere attached any overt act over these three appellants as referred in preceding paragraphs to inflict injuries even to the complainant party. Lakhu (PW-1) and Balister Singh (PW-3) did not receive any injury in the hands of these three appellants therefore, in the fact situation of the case wherein sudden fight broke out, these three appellants deserve to be acquitted.

23. The spot map (Ex.P-3) indicates that the deceased- Ayodhya and appellant No.1-Raghuveer Singh shared a (linhay) Medh between their respective agriculture fields and therefore, it is common in rural area to indulge in verbal altercation and at times, it converts into fights on petty grounds like cutting fodder from others' agriculture field or taking animals or bullock carts from others' agriculture field.

24. It appears in the fact situation of the case that there sharing of agriculture field could not resulted in sharing of hearts and it is a case where a spark neglected burnt the house. Simple intrusion into the field of Ayodhya by Raghuveer Singh was objected by deceased Ayodhya which culminated into sudden provocation and at the exhortation of Raghuveer Singh, it appears that all other accused persons who were relatives of Raghuveer Singh might have visited the spot and the incident precipitated. Even if for a moment, it is assumed that all three blows were given by Raghuveer Singh (now deceased), Dileep Singh and Bakeel Singh even then, the blows were single in nature and if the version of eye witnesses although contradictory and doubtful (being relative also) are taken into account then also it appears that Raghuveer Singhs, Bakeel Singh used the axe and *farsa* from the blunt side and Dileep Singh caused injury of *lathi* blow only once. Therefore, intention does not appear to kill the deceased Ayodhya Singh, which resulted into culpable homicidal due to sudden provocation. Here it appears that appellants did not share common object to kill the deceased Ayodhya. Here the case appears to fall under Section 300 exception-4 of IPC. Said Exception-4 of Section 300 of IPC reads as under:-

> ***"Exception 4-*** *Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner."*

25. Appellant No.1-Raghuveer Singh has already passed away who as per evidence of Dr. D.C. Shukla (PW-2) gave two blows, whereas appellant No.2-Dileep Singh is in jail since 11- 11-2003 to 26-05-2005 and from 11-12-2006 till today, he has completed almost 14 years and 6 months whereas appellant No.3-Bheem Sen (since 31-01-2004 to 25-06-2004 and from 11-12-2006 to 14-05-

2007), Moti Singh @ Munna (since 12-03-2004 to 21-07-2004 and from 11-12-2006 till today) and Raju @ Jaichand (since 29-07-2004 to 16-11-2004 and from 11-12-2006 to 18-07-2007) and Bakeel Singh (since 25-11-2004 to 10-10-2005 and from 11-12-2006 to 01-09-2017), completed almost 12 years. The necessary ingredients of exception- 4 of Section 300 of IPC are:-

(1) a sudden fight;

(2) absence of pre meditation;

(3) no undue advantage or cruelty;

26. If an un-pre-meditated assault has been committed in the heat of passion upon sudden quarrel then it would come in exception-4 and it is necessary that all the three ingredients must be found. From the evidence on record it is established that while the complainant and the accused party were ploughing their respective fields, indulged into verbal altercation then sudden fight broke over the common passage linhay (मेंढ़) between them. In the circumstances, all the accused persons cannot be said to have the common object of committing murder of the deceased, though they may have knowledge that the blows inflicted by them may cause death. If anyone of the accused exceeded the common object and acted on his own that could be his individual act but in absence of any evidence as to who acted so, conviction of accused/ appellants under Section 302/ 149 of IPC and sentence of L.I. can be altered to Section 304 Part-I of IPC and can be sentenced for the jail sentence, already undergone which itself is more than 13-14 years in the present fact situation of the case. Sufficient period of Jail Sentence has already been served by them.

27. The Hon'ble Apex Court in the case of *Sukhdev Singh Vs. State of Punjab,* 1992 Supp (2) SCC 470 converted conviction from Section 302 to Section 304 Part II of IPC and in the case of *Janab Ali Shaikh Vs. State of West Bengal,* 1992 Supp (2) SCC 545 converted the sentence from Section 302 to Section 304 Part I of IPC with the aid of exceptions No.2&4 of Section 300 of IPC. Similarly, in the case of *Masumsha Hasansha Musalman* Vs. *State of Maharastra* (2000) 3 SCC 557 in the fact situation of the case, converted the sentence under Section 304 Part II of IPC. In the case of *Buddhu Singh and others Vs. State of Bihar* (Now Jharkhand), (2013) 3 SCC (Cri) 460, Hon'ble Apex Court converted the case from Section 302 to Section 304 Part II of IPC and Division Bench of this Court in the case of *Rajesh alias Jadu* S/o *Babulal* vs. *State of M.P.*, 2014(1) MPLJ (Cri.) 64 with the aid of exception -4 of Section 300 of IPC, conviction under Section 302 of IPC set aside and altered to Section 304 Part I of IPC. The ratio of all these decisions is that when the incident is occurred in a sudden quarrel without premeditation and accused gave a single blow and did not act in cruel or unusual manner, the case of accused would attract exception -4 to Section 300 of IPC.

Here, in the present case, inconsistencies in the statements of eye-witnesses account itself discarded the prosecution case but nonetheless injury appear to be inflicted by repeated blows by appellants and the case appears to be of sudden fight in the heat of passion (exception -4 under Section 300 of IPC) or on the basis of sudden provocation (exception -2 of Section 300 of IPC), therefore, appellants ought to be punished for offence under Section 304 Part -I. The judgment of the Apex Court in the case of *Sarman and Others* Vs. *State of M.P.*, 1993 Supp. (2) SCC 356 as well as in the case of *Ranjitham* Vs. *Basavaraj and Others*, (2012) 1 SCC 414 are worth consideration in this regard. One more aspect persuaded this Court to convert the said conviction and jail sentence under Section 300 exception-4 of IPC is the status of the appellants as agriculturists, because in the agriculture field, verbal altercation and breaking of sudden quarrel, is a common phenomenon in Rural India specially, over the ploughing and possession of linhay (मेंढ़).

28. Since appellants did not repeat the blows and fact situation indicates that it was a case of sudden provocation, under the heat of passion, therefore, on this count also appellants have strong case therefore, appellants are convicted for the offence under Section 304 part-I of IPC and deserves conviction for the period already undergone (already served more than 10 years) because it is sufficient period to treat them as undergone.

29. Resultantly, appeal preferred by the appellants is allowed and judgment and order of the trial Court dated 11th December, 2006 is modified to the extent that appellants are convicted under Section 304 Part-I of IPC and substantive jail sentence deserves to be reduced to the period they already undergone.

30. Since appellant No.1-Raghuveer Singh died therefore, in respect of him, the appeal stands abated. Appellant No.2-Dileep Singh and appellant No.4-Moti @ Munna are in jail. Appellant No.2-Dileep Singh suffered the sentence already undergone as awarded by this Court therefore, Registry is directed to issue supersession warrants for releasing him without any delay.

31. Appellant No.4- Moti @ Munna already acquitted by this Court. Therefore, Registry is directed to issue supersession warrant for releasing him without any delay.

32. Appellant No.3-Bheemsen and appellant No.5-Raju @ Jaichandra are hereby acquitted. Since they are on bail therefore, their bail bonds shall stand discharged.

33. Appellant No.6-Bakeel has also suffered more than the sentence already undergone as awarded by this Court. Since he is on bail therefore, his bail bond shall stand discharged.

34. Resultantly, appeal stands allowed in above terms.

35. Copy of this judgment be sent to the trial Court for record and information.

Appeal allowed

I.L.R. [2018] M.P. 2230 (DB)
APPELLATE CRIMINAL

Before Mr. Justice Sanjay Yadav & Mr. Justice S.A. Dharmadhikari

Cr.A. No. 287/2005 (Gwalior) decided on 25 May, 2018

MUKESH SHARMA …Appellant

Vs.

STATE OF M.P. …Respondent

(Alongwith Cr.A. No. 312/2005)

***Penal Code (45 of 1860), Section 302/34 & 457 – Murder – Conviction – Eye Witness – Appreciation of Evidence* – Held – All accused persons gone to hospital where deceased was admitted and all of them exhorted each other to kill him and in pursuance of such exhortation, fatal axe blow was given by co-accused and all of them fled together pushing the complainant – Injured eye-witness supported the prosecution version and categorically narrated role of appellants in commission of crime – It is established from evidence that appellants gathered at spot with premeditation and acted in unison and concert with common intention of killing the deceased – No illegality committed by trial Court in convicting appellants – Appeals dismissed.**

(Para 15, 17 & 23)

दण्ड संहिता (1860 का 45), धारा 302/34 व 457 – हत्या – दोषसिद्धि – चक्षुदर्शी साक्षी – साक्ष्य का मूल्यांकन – अभिनिर्धारित – सभी अभियुक्तगण चिकित्सालय गये जहां मृतक भर्ती था तथा उनमें से सभी ने उसकी हत्या करने हेतु एक दूसरे को उकसाया एवं उस उकसाहट के अनुसरण में, सह–अभियुक्त द्वारा कुल्हाड़ी से घातक वार किया गया एवं वे सभी परिवादी को धक्का देकर एकसाथ भाग गये – आहत चक्षुदर्शी साक्षी ने अभियोजन कहानी का समर्थन किया तथा अपराध कारित करने में अपीलार्थीगण की भूमिका स्पष्ट रूप से वर्णित की – साक्ष्य से यह स्थापित होता है कि अपीलार्थीगण पूर्वचिन्तन के साथ घटनास्थल पर एकत्रित हुए तथा मृतक की हत्या करने के सामान्य आशय के साथ सामंजस्य से एवं मिलकर कृत्य किया – विचारण न्यायालय द्वारा अपीलार्थीगण को दोषसिद्ध करने में कोई अवैधता कारित नहीं की गई – अपीलें खारिज।

Cases referred:

(2001) 4 SCC 193, AIR 1925 PC 1, (1996) 10 SCC 508, (2000) 4 SCC 110, (2001) 6 SCC 620, (2010) 8 SCC 407.

Rohit Mishra and *A.K. Jain,* for the appellants in Cr.A. No. 287/2005 &

Cr.A. No. 312/2005 respectively.

Devendra Choubey, P.P. for the respondent-State.

J U D G M E N T

The Judgment of the Court was delivered by : **S.A. DHARMADHIKARI, J.** :- Since both the appeals arise out of the common judgment regarding the same incident, they have been heard and are being decided by this common judgment.

2. The present appeals filed under Section 374(2) of the Code of Criminal Procedure assail the judgment of conviction and sentence dated 06/04/2005 passed in S.T. No. 65/2002 by which the appellants have been convicted under Section 302/34 of IPC and sentenced to suffer Life Imprisonment with fine of Rs. 5000/- each and under Section 457 of IPC to undergo R.I for three years with fine of Rs. 250/- each.

3. The appellants have been convicted for murder of deceased Ramniwas son of Sampatiya bai in an incident which took place on 22/04/2001 at about 3.30 pm. It is an admitted fact that co-accused Rajputa @ Pradeep and Kehri @ Khaihain have died in an police encounter.

4. According to the prosecution, a complaint was lodged by Sampatiya mother of the deceased Ramniwas on 22/04/2001, that at about 3.30 pm the deceased Ramniwas was admitted at the Public Health Centre, Jaura as he had suffered injuries due to old enmity with the Brahmins of Narhela who had assaulted him. During that time, accused Rajputa, Kehri, Mukesh and Mithilesh (present appellants) armed with Axe, Barchi, Lathi and Gun came on the spot. All the four accused came shouting "मार डालो साले को, बचने न पाये ? Rajputa pushed Sampatiya and gave a blow by Axe to Ramniwas which resulted in injury on his chin. As Ramniwas shouted, Rajputa gave a second blow on his chest which resulted in his death. After the incident all the four accused fled away from the spot.

5. On lodging of F.I.R. by the complainant Sampatiyabai (P.W.4), criminal law was triggered and set into motion, investigation agency arrived at the spot, prepared the Panchnama of the dead body and sent it for post-mortem; recorded the statement of the witnesses; prepared the spot map; arrested the appellants and the weapons which were used for commission of the offence were recovered at the behest of the accused and also the blood stained clothes were seized and sent to chemical examination.

6. After investigation was over, the charge sheet was submitted in the committal court, which in turn, committed the case to the court of Sessions, from where it was received by the trial court for its trial.

7. The learned trial Court framed charges which were denied by the appellants, who claimed to be tried. Appellant Mukesh produced the witness Nandkishore in his defence whereas the appellant Mithilesh did not produce any evidence in support of his defence. The sessions Court on the basis of evidence adduced before it, convicted and sentenced both the appellants under various counts as mentioned above. Being aggrieved, the appellants have filed the instant appeals.

8. Learned counsel for the appellants primarily contended that PW4 Sampatiya Bai and PW7 Bhuribai have been examined as eye-witnesses. It is submitted that PW7 Bhuribai has not supported the prosecution version. From perusal of her evidence, it appears that she is only a hearsay witness who cannot be relied upon. In pararagraph 2 of her examination-in-chief, she has stated that she had not seen Mukesh earlier but saw him on the date of incident. She further stated that Mukesh had inflicted two Axe blows on the body of Ramniwas, which is contrary to the version narrated in the FIR. It is submited that in view of such contradictions, no credence can be attached to the testimony of so called eye-witnesses and a serious doubt is created with regard to the presence of the appellants on spot at the time of incident. It is submitted that there are material contradictions and omissions in the evidence of PW4 Sampatiya Bai vis-a-vis her statements recorded under sections 161 and 164 of the Cr.P.C. It is submitted that PW3 Dr. Himanshu Sharma who conducted the post mortem found three old injuries over the body of the deceased which were not caused by sharp cutting object, which goes to show that deceased was of criminal bent of mind and was involved in various illegal activities.

On behalf of appellant Mithilesh it is submitted that he had not actively participated in commisson of crime, as is apparent from the FIR. The allegation against him is that he was armed with a Gun, but no gunshot injury has been found on body of the deceased. It is submitted that the main accused is Rajputa who had caused the injury. The so called eye-witness PW4 Sampatiyabai is an interested witness having enmity with the family members of the appellant who are prosecution witnesses against her family members in a case under section 307, IPC. Test Identification Parade of the appellant has not been conducted. There was darkness at the spot, as such it was not possible for the prosecution witnesses to establish his presence on the spot with veracity. No overt act has been attributed to the appellant. As such his conviction with aid of section 34 of the IPC is bad in law and liable to be set aside.

9. *Per contra* learned Public Prosecutor has drawn our attention to the reasoning assigned by the trial Court and to the deposition of PW3 Dr. Himanshu Sharma, PW Sampatiya Bai and PW7 Bhuri Bai, to contend that all the four accused persons were involved in the commisson of offence, as a result of which

multiple injuries were received by Ramniwas, as is evident from the post mortem report. It is submitted that the intention of the appellants is apparent from the ocular as well as medical evidence and, as such, the trial Court has not committed any error in convicting the appellants with the aid of section 34 of the IPC. With the aforesaid submissons, it is submitted that the appeal is liable to be dismissed.

10. We have heard learned counsel for the parties and perused the evidence on record.

11. Before adverting to the aspect of marshalling of evidence, it would be appropriate to delineate the injuries found on the body of the deceased. As per postmortem report (Ex.P/6) prepared by Dr. Himansh Sharma (P.W.3), following injuries were found on the body of the deceased Ramniwas :-

(i) Semi healed stitched 3.5 cm long wound over left frontal region of scalp.

(ii) Semi healed stitched 1.5 cm long wound over lower 1/3rd of right arm (posteriorly) .

(iii) Semi healed stitched wound 1.5 cm long over the medial surface of lower 1/3rd of right leg.

(iv) Incised wound size 11 cm x 4.5 cm x 4 cm up to bone deep filled with blood extending from mid of the chin to 2 cm below the angle of mandible with left side of neck. All around the wound muscles and tissues are cut. Lower margin of mandible cut into multiple fragments.

(v) Incised wound 9 cm x 0.5 cm x muscle deep extending from midline in front of the neck towards left side obliquely placed.

(vi) Incised wound obliquely placed 12cm x 5.5 x 9 cm deep up to the body of the 7th cervical vertebra extending from middle of the supraclavicular fossa of right side cutting the sternomastoid muscle right and midline of the neck up to the left sternoclavicular joint (joint is cut). Underlying structures are cut. Trachea fully cut and seperated. Right carotid artery and vein, superior venacava cut. Body of the 7th cervical vertbera is cut. Wound is filled with clotted blood.

Injury No. (i), (ii) and (iii) were in healing process, hence object of the

injuries can not be explained and duration of these injuries was within four days. Injury Nos. 4,5 and 6 were caused by sharp and cutting object. Death within 24 hrs. The injuries were anti mortem in nature. The post mortem report (Ex.P.16) reflecting the aforesaid injuries which stands proved by (P.W.3) Dr. Himanshu Sharma.

12. PW4 Sampatiya Bai, who is the complainant as well as eye witness to the incident, in her examination-in-chief has categorically deposed that 3-4 days prior to the incident, Rajputa, Mukesh, Khairi and Mithlesh had assaulted her son Ramniwas with Lathis and sustaining injuries, Ramniwas had been admitted to hospital. At about 3-3.30 a.m., when she and PW7 Bhuri Bai were sitting in the hospital besides Ramniwas who was sleeping on a cot, co-accused Rajputa, Khairi and present appellants Mukesh and Mithilesh came there. Khairi was armed with Luhangi, Mukesh with a Bhala, Rajputa with an Axe and Mithilesh was armed with a Gun. All of them exhorted to kill Ramniwas and Rajputa dealt an Axe blow on his chin and another one on his chest. Blood started oozing. All of them pushed the complainant and fled from the spot. In paragraph 5, she has categorically deposed that an agricultural field had been purchased by her some 15-20 years back and from last 1-2 years the accused persons were demanding the same. They used to extort donation from the entire Village and lived like goons. In her cross-examination in paragraph 16 also, she has narrated about giving of Axe blow by co-accused Rajputa and further stated that Mukesh, Khehri and Rajputa had pushed her. In paragraph 17 of her cross-examination she has deposed that Bhuri Bai had not escorted her to the Police Station and was sleeping. Initially she deposed that Bhuri Bai had not seen the incident as she was sleeping, but in the very next breath she deposed that Bhuri Bai had awakened after a blow of Axe was given by the miscreants and she had also shouted, but could not stand as she is an old woman.

13. PW7 Bhuri Bai in her examination-in-chief has deposed that appellant Mukesh was also present on the spot, who was armed with an Axe and had wielded two Axe blows on Ramniwas. In her cross-examination, she has deposed that she was not aware of the names of miscreants. In paragraph 6 of her cross-examination she has deposed that she awoke when the miscreants were fleeing after pushing Sampatiya. She saw them going out of the hospital and was informed by Sampatiya that the accused persons had killed Ramniwas. She further deposed that she had also seen the accused persons wielding Axe. In paragraph 8 she again reiterated that she had seen the miscreants fleeing from the spot and was informed by Sampatiya.

14. PW3 Dr. Himanshu Sharma who conducted the post mortem examination has categorically deposed that injury nos. 1 to 3 were in healing process, therefore, it was not possible to ascertain the weapon of offence. He further deposed that

injury nos. 4 to 6 were caused by sharp cutting object and were ante mortem injuries caused within 24 hours of post mortem examination. He found the death to be homicidal in nature.

15. PW1 Dalit Khan who is Ward Boy, though has been declared hostile, yet has admitted that he had seen blood oozing from the neck of Ramniwas when he visited the room and two women were crying. Similar deposition has been given by PW2 Yashvant Shakya who was the Compounder. The other prosecution witnesses who have turned hostile, are not the material witnesses. Thus, from the evidence of aforesaid witnesses, the presence of the appellants on the spot and their complicity in the offence is duly proved. PW4 Sampatiya Bai, who is the eye-witness and complainant, has been examined and cross-examined in detail. She has supported the prosecution version and categorically narrated the role of the appellants in commission of crime. Similarly Bhuri Bai has deposed about assault on deceased from right side, which is corroborated by medical evidence.

16. It has been argued by learned counsel for the appellants that the main thrust of allegations by the complainant is on co-accused Rajputa and the appellants were not actively involved in the offence, hence their conviction with the aid of section 34 of IPC is bad in law and is liable to be set aside. In this regard reliance has been placed on decision of the Apex Court in the case of *Mithu Singh* Vs. *State of Punjab* ((2001)4 SCC 193), wherein acquittal was recorded on the premise that appellant who was armed with a pistol did not share common intention to kill the deceased who was shot at by the co-accused.

17. However, the present case is clearly distinguishable on facts, inasmuch as in the present case all the accused persons had gone to the hospital and all of them exhorted each other to kill the deceased and in pursuance of such exhortation, the fatal blow was given by co-accused Rajputa. Thereafter, all of them fled together pushing the complainant. Thus, common intention to kill Ramniwas was very much present since their arrival in the hospital.

18. The case of *Barendra Kumar Ghosh* v. *King Emperor* (AIR 1925 PC 1) is a locus classicus and has been followed in a large number of cases. In this case, the Judicial Committee dealt with the scope of section 34 dealing with the acts done in furtherance of the common intention, making all equally liable for the results of all the acts of others. It was observed:

> ".....the words of Section 34 are not to be eviscerated by reading them in this exceedingly limited sense. By Section 33 a criminal act in Section 34 includes a series of acts and, further, `act' includes omissions to act, for example, an omission to interfere in order to prevent a murder being done before one's very eyes. By Section 37, when any

> offence is committed by means of several acts whoever intentionally co-operates in the commission of that offence by doing any one of those acts, either singly or jointly with any other person, commits that offence. Even if the appellant did nothing as he stood outside the door, it is to be remembered that in crimes as in other things 'they also serve who only stand and wait'. By Section 38, when several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act. Read together, these sections are reasonably plain.Section 34 deals with the doing of separate acts, similar or diverse, by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself, for 'that act' and 'the act' in the latter part of the section must include the whole action covered by 'a criminal act' in the first part, because they refer to it. Section 37 provides that, when several acts are done so as to result together in the commission of an offence, the doing of any one of them, with an intention to cooperate in the offence (which may not be the same as an intention common to all), makes the actor liable to be punished for the commission of the offence. Section 38 provides for different punishments for different offences as an alternative to one punishment for one offence, whether the persons engaged or concerned in the commission of a criminal act are set in motion by the one intention or by the other."
>
> *(emphasis supplied)*

19. In Krishnan & Another. v. State of Kerala (1996) 10 SCC 508, the Hon'ble Apex Court, even assuming that one of the appellants had not caused the injury to the deceased, upheld his conviction under Section 302/34 of the Penal Code holding:

> "15. Question is whether it is obligatory on the part of the prosecution to establish commission of overt act to press into service section 34 of the Penal Code. It is no doubt true that court likes to know about overt act to decide whether the concerned person had shared the common intention in question. Question is whether overt act has always to be established? I am of the view that establishment of a overt act is not a requirement of law to allow section 34 to

> operate inasmuch this section gets attracted when "a criminal act is done by several persons in furtherance of common intention of all". What has to be, therefore, established by the prosecution is that all the concerned persons had shared the common intention. Court's mind regarding the sharing of common intention gets satisfied when overt act is established qua each of the accused. But then, there may be a case where the proved facts would themselves speak of sharing of common intention: res ipsa loquitur."
>
> *(emphasis supplied)*

20. In *Surendra Chauhan* v. *State of M.P.* (2000) 4 SCC 110, the Hon'ble Apex Court held that apart from the fact that there should be two or more accused, two factors must be established - (i) common intention; and (ii) participation of the accused in the commission of the offence. If a common intention is proved but no overt act is attributed to the individual accused, Section 34 will be attracted as essentially it involves vicarious liability. Referring to its earlier judgment the Court held:

> "11. Under Section 34 a person must be physically present at the actual commission of the crime for the purpose of facilitating or promoting the offence, the commission of which is the aim of the joint criminal venture. Such presence of those who in one way or the other facilitate the execution of the common design is itself tantamount to actual participation in the criminal act. The essence of Section 34 is simultaneous consensus of the minds of persons participating in the criminal action to bring about a particular result. Such consensus can be developed at the spot and thereby intended by all of them. *Ramaswami Ayyangar* v. *State of T.N.* (1976) 3 SCC 779) The existence of a common intention can be inferred from the attending circumstances of the case and the conduct of the parties. No direct evidence of common intention is necessary. For the purpose of common intention even the participation in the commission of the offence need not be proved in all cases. The common intention can develop even during the course of an occurrence. *(Rajesh Govind Jagesha* v. *State of Maharashtra* (1999) 8 SCC 428). To apply Section 34 IPC apart from the fact that there should be two or more accused, two factors must be established" (i) common

> intention, and (ii) participation of the accused in the commission of an offence. If a common intention is proved but no overt act is attributed to the individual accused, Section 34 will be attracted as essentially it involves vicarious liability but if participation of the accused in the crime is proved and a common intention is absent, Section 34 cannot be invoked. In every case, it is not possible to have direct evidence of a common intention. It has to be inferred from the facts and circumstances of each case."

21. In *Gopi Nath @ Jhallar v. State of U.P.* (2001) 6 SCC 620 it was observed as under:

> "8. ..... As for the challenge made to the conviction under Section 302 read with Section 23 IPC, it is necessary to advert to the salient principles to be kept into consideration and often reiterated by this Court, in the matter of invoking the aid of Section 34 IPC, before dealing with the factual aspect of the claim made on behalf of the appellant. Section 34 IPC has been held to lay down the rule of joint responsibility for criminal acts performed by plurality or persons who jointed together in doing the criminal act, provided that such commission is in furtherance of the common intention of all of them. Even the doing of separate, similar or diverse acts by several persons, so long as they are done in furtherance of a common intention, render each of such persons liable for the result of them all, as if he had done them himself, for the whole of the criminal action - be it that it was not overt or was only covert act or merely an omission constituting an illegal omission. The Section, therefore, has been held to be attracted even where the acts committed by the different confederates are different when it is established in one way or the other that all of them participated and engaged themselves in furtherance of the common intention which might be of a pre-concerted or pre-arranged plan or one manifested or developed at the spur of the moment in the course of the commission of the offence. The common intention or the intention of the individual concerned in furtherance of the common intention could be proved either from direct evidence or by inference from the acts or attending circumstances of the case and conduct of the parties. The ultimate decision, at any rate, would

> invariably depend upon the inferences deducible from the circumstances of each case."
>
> *(emphasis supplied)*

22. The Apex Court in the case of *Virendra Singh* Vs. *State of M.P.* ((2010)8 SCC 407) held that

> "40. The dominant feature of section 34 is the element of intention and participation in action. This participation need not in all cases be by physical presence. Common intention implies acting in concert."

23. Thus in view of the aforesaid judicial pronoucements, in the attending facts and circumstances of the case, no illegality has been committed by the trial Court in convicting and sentencing the appellants, as it is well established from the evidence on record that the appellants had gathered at the spot with premeditation and had acted in unison and concert in fulfilling their common intention of doing away with the deceased.

The appeals fail and, are, accordingly dismissed. Appellant Mukesh Sharma in Criminal Appeal No. 287/2005 is on bail. His bail bonds are cancelled. Appellant Mukesh Sharma is directed to surrender immediately before the Trial Court, so that he be sent to the jail for execution of the remaining jail sentence.

A copy of judgment be also sent to the trial Court along with the record for information and to prepare the supersession warrant of appellant Mukesh Sharma and to get sentence executed by him.

A copy of this judgment be retained in the connected appeal.

Appeal dismissed

I.L.R. [2018] M.P. 2239 (DB)
APPELLATE CRIMINAL
Before Mr. Justice Sanjay Yadav & Mr. Justice Ashok Kumar Joshi
Cr.A. No. 600/2000 (Gwalior) decided on 29 June, 2018

PATRU …Appellant

Vs.

STATE OF M.P. …Respondent

(Alongwith Cr.A. No. 647/2000)

***A. Penal Code (45 of 1860), Sections 302/149, 324/149 & 325/149 – Murder – Conviction – Appreciation of Evidence – Injured/Interested Witnesses – Injuries & Medical Evidence* – Held – Three simple injuries and**

one internal injury in abdomen – Evidence of injured prosecution witnesses duly corroborated by medical evidence – Victim/deceased was operated for abdominal injury whereby he died after 20 days of incident – As per medical evidence, cause of death in postmortem report was failure in surgical operation – Homicidal death not proved – Conviction of each accused u/S 302/149 is erroneous and defective and is hereby set aside – Accused persons deserves to be and are convicted u/S 325/149 IPC and looking to their period of detention, are sentenced to period already undergone – Appeal partly allowed.

(Paras 31, 35, 38 to 41)

क. दण्ड संहिता (1860 का 45), धाराएँ 302/149, 324/149 व 325/149 – हत्या – दोषसिद्धि – साक्ष्य का मूल्यांकन – आहत/हितबद्ध साक्षीगण – चोटें व चिकित्सीय साक्ष्य – अभिनिर्धारित – पेट में तीन साधारण चोटें एवं एक आंतरिक चोट – आहत अभियोजन साक्षीगण का साक्ष्य चिकित्सीय साक्ष्य द्वारा सम्यक् रूप से संपुष्ट है – पीड़ित/मृतक की पेट में चोट की शल्यक्रिया की गई थी, जिससे घटना के 20 दिन के पश्चात् उसकी मृत्यु हो गई थी – चिकित्सीय साक्ष्य के अनुसार, शव परीक्षण प्रतिवेदन में मृत्यु का कारण शल्यक्रिया में विफलता थी – मानव वध स्वरूप की मृत्यु साबित नहीं – प्रत्येक अभियुक्त की धारा 302/149 के अंतर्गत दोषसिद्धि त्रुटिपूर्ण एवं दोषयुक्त है एवं एतद्द्वारा अपास्त – अभियुक्तगण, भारतीय दंड संहिता की धारा 325/149 के अंतर्गत दोषसिद्ध किये जाने योग्य हैं एवं दोषसिद्ध किये गये तथा उनकी निरोध अवधि को देखते हुए, पूर्व में भुगताई जा चुकी अवधि से दण्डादिष्ट किये गये – अपील अंशतः मंजूर।

***B. Penal Code (45 of 1860), Section 147 & 148 – Separate Conviction and Sentence* – Held – Offence u/S 148 IPC is graver offence than the one u/S 147 IPC – When each appellants has been convicted and sentenced u/S 148 IPC, separate conviction and sentence u/S 147 IPC appears unnecessary and unwarranted – Separate conviction and sentence u/S 147 IPC is set aside.**

(Para 36)

ख. दण्ड संहिता (1860 का 45), धारा 147 व 148 – पृथक दोषसिद्धि एवं दण्डादेश – अभिनिर्धारित – भारतीय दंड संहिता की धारा 148 के अंतर्गत अपराध भारतीय दंड संहिता की धारा 147 के अंतर्गत अपराध की तुलना में गुरूतर अपराध है – जब प्रत्येक अपीलार्थीगण को भारतीय दंड संहिता की धारा 148 के अंतर्गत दोषसिद्ध एवं दण्डादिष्ट किया गया है, भारतीय दंड संहिता की धारा 147 के अंतर्गत पृथक दोषसिद्धि एवं दण्डादेश अनावश्यक एवं अनपेक्षित प्रतीत होता है – भारतीय दंड संहिता की धारा 147 के अंतर्गत पृथक दोषसिद्धि एवं दण्डादेश अपास्त।

***C. Criminal Trial – Practice – Common Object* – Held – Three injured prosecution witnesses received only simple injuries, only one member received grievous injury which goes to show that here was no common object of unlawful assembly to cause murder of deceased or any of**

his family members – Trial Court's view is erroneous and contrary to medical evidence.

(Para 29)

ग. दाण्डिक विचारण – पद्धति – सामान्य उद्देश्य – अभिनिर्धारित – तीन आहत अभियोजन साक्षीगण को केवल साधारण चोटें आईं, केवल एक सदस्य को गंभीर चोट आई जो यह दर्शाता है कि यहाँ, मृतक या उसके परिवार के किसी भी सदस्य की हत्या कारित करने के लिए विधिविरूद्ध जमाव का कोई सामान्य उद्देश्य नहीं था – विचारण न्यायालय का दृष्टिकोण त्रुटिपूर्ण एवं चिकित्सीय साक्ष्य के प्रतिकूल है।

Case referred:

AIR 1965 SC 202.

R.K. Shrivastava, for the appellant in Cr.A. No. 600/2000.
R.K. Goyal, for the appellants in Cr.A. No. 647/2000.
B.P.S. Chouhan, P.P. for the respondent/State.

J U D G M E N T

The Judgment of the Court was delivered by :
ASHOK KUMAR JOSHI, J.:- By this common judgment being passed in Criminal Appeal No.600/2000, another Criminal Appeal No. 647/2000 is also being decided as both these appeals have been filed by relating appellant under Section 374 of the CrPC against the judgment dated 10th August, 2000, passed by Second Additional Sessions Judge, Ashoknagar, District Guna in Sessions Trial No. 53/1999, whereby each of the appellants of both these appeals has been convicted and sentenced under Section 302 of the IPC to undergo life imprisonment and a fine of Rs.200/- with default stipulation; under Section 325 of the IPC to undergo three years RI with a fine of Rs.100/- with default stipulation; under Section 324/149 of the IPC to undergo two years RI with a fine of Rs.100/- with default stipulation; under Section 148 of the IPC to undergo one year RI with fine of Rs.100/-; and under Section 147 of the IPC to undergo one year RI with fine of Rs.100/- with default stipulation, and it is also directed by the impugned judgment that all the main jail sentences of each appellant to run concurrently.

2. Admittedly appellants Lallu, Madan and Maniram are sons of appellant Parma and appellant Patru and co-accused Hamira are sons of Kapura and co-accused Hamira is a deaf and dumb person, hence the trial Court vide impugned judgment convicted Hamira for the above mentioned offences but it referred Hamira's case under Section 318 of the CrPC to this Court and this Court has decided the reference in relation to Hamira vide judgment dated 30.4.2001 passed in Misc. Cri. Case No. 2217/2000. Similarly, injured prosecution witnesses, complainant Munnalal (PW-1), Dulichand (PW-4), Udham (PW-5) and deceased Bharosa are real brothers and Parwati Bai (PW-3) is mother of the deceased and in

village Gata, both parties are neighbourers and deceased Bharosa and other injured prosecution witnesses were residing jointly in a house at the time of incident and the distance of village Gata from Police Station Shadora is about 8 Kms.

3. Prosecution's case in brief is that on the date of incident 8.8.1998 complainant Munnalal (PW-1) with his mother Parwati Bai and brothers Udham, Dulichand and Bharosa reached to Police Station Shadora and at 9=00 pm lodged FIR (Ex.P/2) regarding incident occurred at 7=00 pm of same day to the effect that at 7=00 pm after returning from field to house, he was putting his plough in his house, then all five appellants of both these appeals with Hamira came to complainant's house and asked the complainant that why he carried out his plough with oxen from their field, then complainant replied that his oxen were not climbing on par, therefore, he took out plough from their land and in future plough will not be carried out from their field. On this issue, appellant Maniram inflicted injury by his stick over Munnalal's left shoulder. Appellant Lallu caused farsa injury over the head of Munnalal and blood was oozing out, then complainant's mother Parwati Bai (PW-3) and his brothers Bharosa, Udham and Dulichand came on scene of occurrence to save complainant, then appellant Parma gave lathi blows to Parwati Bai and caused injuries. Appellant Lallu caused farsa injury over Bharosa's forehead and blood was oozing out from that injury. Other brothers of complainant Dulichand and Udham were jointly beaten by all the appellants and Hamira by sticks, farsa and axe. Appellants gave threatening to complainant and injured persons that if the matter is reported then they would be killed in future. The incident was seen by Shivraj Singh (PW-8), Ramdayal, Salman (PW-10), who also intervened. After incident by tractor all the injured persons with complainant reached police station and the FIR lodged by Munnalal (PW-1) was scribed by ASI Baijnath Singh (PW-17).

4. After lodging the FIR, injured persons were sent for medical examination to Primary Health Centre (PHC) Shadora, where Block Medical Education (BMO) Dr. H.H.N. Garg (PW-20) medically examined Bharosa, Munnalal, Dulichand, Parwati Bai and Udham Singh and recorded their MLCs (Ex.P/38 to P/42, respectively). Dr. Garg advised for radiological examination of some injuries of Parwati Bai and for abdomen injury of Bharosa. In the same night appellant Patru and his brother Hamira were also examined by Dr. H.H.N. Garg (PW-20), who recorded their MLCs (Ex. D/2 and D/3 respectively). The radiological examination of Parwati Bai and Bharosa was performed by Dr. R.K.Jain (PW-6) on 10.8.1998 at District Hospital, Guna and in x-ray investigation fracture of metacarpal bone of right hand's index finger of Parwati Bai was found and in this regard x-ray report (Ex.P/13) was recorded by Dr. Jain (PW-6). After radiological examination of abdomen of Bharosa on 10.8.1998, Dr. R.K.Jain (PW-6) referred his x-ray photoplates for expert opinion to Medical

College, Gwalior and Medical College Gwalior's radiological expert Dr. Gupta by his report (Ex.P/19) opined that no abnormality is found. During investigation, Head Constable Radheshyam (PW-19) on 8.8.1998 recorded police statements of injured Bharosa with some other witnesses. From 9.8.1998 Bharosa was admitted in District Hospital, Guna being referred from Shadora Hospital and at District Hospital, Guna during treatment, his abdomen was operated, but he died in District Hospital, Guna on 28.8.1998. After receiving report about death of admitted Bharosa from Guna Hospital, merg report (Ex. P/28) was registered by Head Constable Jagmohan (PW-14) at Police Station Guna and after receiving information regarding death of Bharosa at Police Station Shadora merg report (Ex.P/29) was recorded by Shiv Mangal Singh (PW-15) and in previously registered crime No. 120/1998 arisen on FIR of complainant Munnalal, offence punishable under Section 302 of the IPC was added.

5. Dr. N.K.Sharma (PW-9) on 28.8.1998 conducted autopsy of deceased Bharosa and recorded post-mortem report (Ex.P/22). Further investigation was conducted by S.H.O. Shadora Brijendra Singh Kushwaha (PW-16), who arrested present appellants and Hamira and seized a stick from Hamira vide seizure memo (Ex.P/36) and also seized a stick from appellant Parma vide seizure memo (Ex.P/37). During investigation, an axe was seized from appellant Patru, a farsa was seized from appellant Lallu. Seized weapons with blood-stained clothes of deceased were sent by S.P.Guna to Regional Forensic Science Laboratory Gwalior for examination vide a letter dated 30.10.1998. After completing the formalities of investigation, charge sheet was filed before JMFC, Ashok Nagar, who committed the relating criminal case to Sessions Judge, Guna, who transferred relating sessions trial to above mentioned trial Court.

6. The trial Court framed charge under Section 302/149, 147, 148, 325/149, 324/149 and 506 (Part-II) of the IPC against each appellant and Hamira. Present appellants and Hamira abjured the guilt. Before trial Court, twenty prosecution witnesses were examined. As accused Hamira was deaf and dumb, his examination could not be conducted. It was the defence of appellants that they have been falsely implicated. It was the specific defence of appellant Madan that on the date of incident he was at village Dhamnar. It was the specific defence of appellant Patru of Criminal Appeal No.600/2000 that in the evening on the date of incident he was seated with his deaf and dumb real brother Hamira at the platform of his house and in front his house there exists a Kharanja (made of stones) then Udham, Dulichand, Bharosa and complainant Munnalal came there, each having a stick and objected that his dumb brother Hamira made obstruction, when they passed through their agricultural land and above mentioned persons started hurling abuses, then he objected, thereafter above mentioned family members with complainant jointly gave beating to him and is brother Hamira, then in self-defence he and Hamira exercised right of their self-defence and at that time there

was darkness on spot, then prosecution witnesses caused injuries to each other in darkness and at that time Bharosa fell down on Kharanja by the side of his abdomen, hence, Bharosa received injury in his abdomen and actually he and his brother Hamira were beaten by complainant and his brothers and the matter was reported at Police Station Shadora by him. Defence witness Visheshwar Singh (DW-1) was examined regarding plea of alibi of appellant Madan that on the date of incident Madan was at Dhamnar.

7. Trial Court after hearing, placing reliance on eyewitness account given by injured prosecution witnesses including complainant, also treated the police statement of Bharosa, recorded on the date of incident under Section 161 of the CrPC by Head Constable Radheshyam (PW-19) as dying declaration and convicted each appellant and Hamira under Sections 147, 148, 302, 325 and 324 of the IPC and sentenced the present appellants as aforesaid.

8. Appearing counsel for the appellants vehemently contended that Bharosa was injured on 8.8.1998, whereas he died in District Hospital Guna on 28.8.1998 and it was clear from the evidence of Dr. N.K.Sharma (PW-9), who conducted his post-mortem that Bharosa died due to complications arose from post-surgical complication and cause of death was shown perforation peritonitis and according to evidence of Dr. H.H.N. Garg (PW-20), who examined injured Hamira on the date of incident, all his three visible external injuries were of simple nature and he advised for Bharosa's x-ray examination of abdomen as he was complaining pain in abdomen and according to the evidence of Dr. R.K.Jain (PW-6), the radiological expert of Medical College, Gwalior after seeing x-ray photoplate of Bharosa, opined that there was no abnormality in the abdomen and later on at the time of post-mortem of Bharosa, his two ribs on right side were also found fractured, hence the possibility of these fractures of ribs caused after the date of incident could not be ruled out. Therefore, it is argued that the trial Court erred in convicting each appellant under Section 302 of the IPC, whereas each appellant was charged under Section 302/149 of the IPC and on the basis of Ex. D/1 (report lodged by appellant Patru) on the date of incident at Police Station Shadora recorded for non-cognizable offences and MLCs of Patru and his brother Hamira proved by Dr. H.H.N. Garg, it is contended that the possibility of mutual fighting between two groups could not be ruled out and there was no explanation of injuries found on the body of accused Patru and his real brother Hamira. Hence, the evidence of family members of complainant could not be believed, as independent witnesses Bhanwarlal (PW-7), Shivraj Singh (PW-8) and Salman (PW-10) have not supported the prosecution's case and they were declared hostile. Hence, it is prayed that appeals filed by each appellant be allowed and he be acquitted from above mentioned offences.

9. Per Contra, Public Prosecutor appearing on behalf of the respondent/State supporting the impugned judgment contends that the evidence available on record has been minutely analyzed and appreciated by the trial Court and the police statement recorded of injured Bharosa by Head Constable Radheshyam (PW-19) was rightly treated by the trial Court as dying declaration, as later on Bharosa died during his continuous treatment and his police statement was relating to the reasons which are attributable for his death. Therefore, dismissal of both these appeals is prayed for.

10. Deceased Bharosa, in his life time, was examined on the date of incident 8.8.1998 by B.M.O. Dr. H.H.N. Garg (PW-20) at P.H.C. Shadora. It is clear from the evidence of Dr. Garg (PW-20) and his recorded MLC (Ex. P/38) that he found following injuries on the body of deceased :

(i) Incised Wound whose margins were clear cut of size ½ x ¼ x skin deep over right eyebrow lateral aspect, appearing to be caused by sharp cutting object and its nature was simple.

(ii) Contusion with abrasion size 4' x 1' on left side of back, lower one third part, appearing to be caused by hard and blunt object and its nature was simple.

(iii) Contusion 1' x ½' over left elbow posterior aspect, appearing to be caused by hard and blunt object and its nature was also simple.

(iv) Examined Bharosa was complaining pain in abdomen, where tenderness was appearing, hence x-ray examination was advised for abdomen of Bharosa.

11. Dr. H.H.N. Garg (PW-20) opined that nature of fourth injury of abdomen of Bharosa could be ascertained only after radiological examination.

12. Much emphasis has been given by the learned counsel for the appellants that except abdomen injury of Bharosa, other three injuries of Bharosa were of simple nature according to Dr. Garg's evidence. Dr. R.K.Jain (PW-6) deposed that on 10.8.1998 at District Hospital, Guna radiological examination of abdomen of Bharosa was conducted by him but relating x-ray photoplate was sent by him for getting expert opinion from the head of the radiological department of Medical College, Gwalior and his referral report is Ex.P/17 and from Medical College, Gwalior report (Ex.P/19) signed by Dr. Gupta was received, according to which no any fracture or abnormality was found by the above-mentioned expert. Dr. Jain deposed in cross-examination that in abdomen of Bharosa, no injury was found by the above-mentioned expert of Medical College.

13. It is clear from the evidence of Dr. N.K.Sharma (PW-9) and his post-mortem report (Ex.P/22) that on 28.8.1998 at 6=00 pm at the time of starting of post-mortem of dead body of Bharosa, about 40 years old, he found that rigor mortis was not present and found following injuries on the dead body :

(i) Healed wound, size 2.5 cm long over right eyebrow;

(ii) Healed contusion, size 10x2 cm over right side of back, which was 4 cm lateral from the midline;

(iii) Healed abrasion, size 2x2 cm on back side of right scapular region;

(iv) Healed contusion, size 5x2 cm on right iliac fossa of abdomen;

(v) A 12 cm long wound caused during operation appearing on right paramedian region of abdomen which was extending up to 2 cm below umbilicus and this wound was also appearing in healed condition and the stitches from this wound were removed, but about 4 cm lower portion of this wound was not healed and there was existing gap in this lower portion of wound.

14. Dr. N.K.Sharma (PW-9) deposed that in dis-section of the dead body he found that 7th and 8th ribs of the deceased were fractured on right side and the loops of small intestine were mutually sticked and the lower part of the small intestine which was stitched under operation, was found open and due to this fecal matter was coming out from that portion and the open part of small intestine was having about 2 cm diameter, wherein parts of previously stitched part of previously given stitches were appearing. Dr. Sharma opined that the healed external injuries found on the dead body were appearing to be caused about 2 to 3 weeks prior to the death and it was clear from the record that Bharosa was admitted in male surgical ward of District Hospital, Guna on 8.8.1998 as a referred patient from Shadora Hospital and his abdomen was operated in Guna Hospital due to internal injuries of the abdomen which were antimortem. He also opined that deceased had died due to cardio respiratory failure caused by perforation peritonitis and due to internal injuries of abdomen and its complication, within six hours from starting of his post-mortem. In cross-examination Dr. Sharma deposed that he had not seen the bedhead ticket of the deceased or record regarding operation of the deceased and he could not say that what were the reasons for operation of deceased, but he admitted that the deceased died due to operation because his intestine was found ruptured.

15. Dr. N.K.Sharma (PW-9) clearly deposed in para 3 of his statement that Bharosa died because of failure of operation of his abdomen. On this point his

evidence is not challenged by the prosecution, therefore, his abovementioned evidence is binding on prosecution. It is clear from Bharosa's MLC report recorded by Dr. H.H.N. Garg (PW-20) that Bharosa was complaining pain in his abdomen at the time of his examination by Dr. Garg, hence radiological examination of his abdomen was advised by Dr. Garg. There is no evidence or record available in the case that on which date operation of Bharosa was performed in the District Hospital, Guna.

16. The doctor who conducted autopsy found blunt injury on back of Bharosa and tenderness in Bharosa's abdomen and at the time of MLC examination Bharosa complained about pain in his abdomen, therefore, it is clear that whatever may be the internal injury or blunt injury caused on abdomen of Bharosa was caused only at the time of incident and thereafter he remained under medical examination or hospitalised at Shadora and Guna Hospital and died in the District Hospital, Guna.

17. Before the trial Court complainant Munnalal (PW-1) deposed that on the date of incident, in evening at 7=00 pm he returned to his house from his field taking back the plough, thereafter appellant Parma and other appellants asked him that from which land he has brought plough back, then he replied that as his oxen were not climbing on the par, therefore, he carried out the plough from the agricultural land, then appellant Maniram inflicted stick on his left hand and appellant Patru inflicted an axe blow over his head and appellant Lallu inflicted a falsa blow on his left hand and appellants were hurling abuses to him. After hearing noise, his brother Bharosa came out of his house and tried to save him, then appellant Lallu gave a farsa blow on forehead of Bharosa and appellant Patru gave axe belows(sic:blow) by its blunt side on abdomen and back of Bharosa. He also deposed that his brother Dulichand (PW-4), Udham (PW-5) and their mother Parwati Bai (PW-3) came on spot to save him, then appellants also gave beating to these witnesses and thereafter all the appellants jointly gave beating to Bharosa and appellants were threatening that if the matter is reported then in the way they will be killed. Complainant deposed that Shivraj Singh (PW-8), Ramdayal and Salman (PW-10) also came on spot and he and other injured witnesses were taken to Shadora Police Station by tractor driven by Shivraj (PW-8) and at Police Station he lodged FIR (Ex.P/2), which is signed by him and thereafter he and other injured witnesses were sent to Shadora Hospital and thereafter to Guna Hospital. Bharosa's wife Ramwati Bai (PW-2) deposed in cross-examination (para 2) that on the next morning after the date of incident, she took her husband Bharosa to Guna Hospital and at that time her husband was unable to speak properly and he was able only to speak incomplete or unclear words.

18. Complainant Munnalal's (PW-1) evidence is corroborated by evidence of other injured witnesses Parwati Bai (PW-3), Dulichand (PW-4) and Udham (PW-5)

and also by Bharosa's wife Parwati Bai (PW-2) but abovementioned witnesses Shivraj Singh (PW-8), Salman (PW-10) and one another Bhanwarlal (PW-7) have not supported the prosecution's case by their evidence. Therefore, Bhanwarlal (PW-7), Shivraj Singh (PW-8) and Salman (PW-10) were declared hostile and questions of the nature of cross-examination were put to them for the prosecution, wherein they denied from giving their relating police statements. Bhanwarlal (PW-7) deposed in his examination-in-chief that on the date of incident in the evening at 7=00 pm, when he came out from his house after hearing noise outside, then he saw that Hamira, Patru, Bharosa, Udham, Dulichand and Munna were quarreling but he immediately entered into his house and he did not saw any beating. Bhanwarlal deposed that appellants are his relatives and similarly deceased Bharosa was his Uncle's son. In cross-examination, he deposed that except Patru and his brother Hamira no other appellant was present at the scene of occurrence and appellant Maniram was with him at that time. It is clear from total evidence of Bhanwarlal (PW-7) that he was not ready to disclose all the facts.

19. Shivraj Singh (PW-8) deposed that on the date of incident Hamira returned to village at 7=00 pm and by signs indicated that he was beaten and thereafter Bharosa, Udham, Munnalal and Dulichand and thereafter appellant Patru came on spot and thereafter Bharosa, Udham, Munnalal and Dulichand started beating of Patru and Hamira. Much emphasis has been given by appellants' counsel that Shivraj Singh (PW-8) by his evidence has supported the defence version put by appellant Patru, but he deposed in cross-examination (para 6) that after the incident, by his tractor he brought complainant Munnalal (PW-1), Udham (PW-5), Dulichand (PW-4), Parwati Bai (PW-3) and Bharosa to Shadora Hospital and in his presence at Police Station complainant party's FIR was recorded. Hence, from total evidence of Shivraj Singh (PW-8), it is clear that he was also not ready to depose the entire truth.

20. Much emphasis has been given by learned counsel for the appellants on some contradictions on the point that which appellant caused which injury over which organ of injured prosecution witnesses. There appears some contradictions on this point but in the light of the case of *Masalti* and *others* vs. *State of UP* (AIR 1965 SC 202), it is clear that where beating of some persons was continued by some accused persons then such contradictions are natural and do not affect the core of the prosecution's case.

21. From spot map (Ex. P/3) prepared by Head Constable Radheshyam Yadav (PW-19) it is clear that incident occurred in front the house of complainant Munnalal (PW-1). Complainant Munnalal has deposed that at the time of incident he was living jointly with all his brothers and mother in a house.

22. It is clear from the evidence of Dr. H.H.N. Garg (PW-20) that injured prosecution witnesses Munnalal and Dulichand received incised wounds in the

incident. Hence, the evidence of these injured witnesses is corroborated by medical evidence available on record that during incident these prosecution witnesses and Bharosa received injuries by sharp cutting weapons like farsa and axe. It is clear from the evidence that Parwati Bai has received only blunt injuries caused by hard and blunt object and she received fracture in the metacarpal bone of her right index finger.

23. The trial Court has referred to the police statement of injured Bharosa, recorded by Head Constable Radheshyam Yadav (PW-19) during investigation and Bharosa in that police statement has clearly stated that at the time of incident when in front his house, his brother Munnalal was being beaten by appellants, after hearing crying of Munnalal he with his other brothers and mother reached after running, thereafter appellant Lallu inflicted farsa injury on his right eye-brow and Bharosa's above-mentioned statement is corroborated by medical evidence appearing from his MLC report. Bharosa stated in his police statement that thereafter appellant Maniram inflicted a stick (lathi) blow over his back, which caused blunt injury and Maniram gave his lathi's second knock over his abdomen and immediately he fell down and due to this, his body also received abrasion injury due to he being dragged. It is clear that internal injuries caused on Bharosa's abdomen during incident necessitated his operation. It is clear from total evidence that incident occurred on 8.8.1998 but Bharosa died on 28.8.1998.

24. Though the trial Court inferred that as per statement of N.K.Sharma (PW-9), grievous injuries in the shape of fracture of two ribs of Bharosa and his internal injury caused to the abdomen were sufficient in ordinary course of nature to cause death, but these facts are not mentioned in the post-mortem report recorded on 28.8.1998, but this inference drawn by learned trial Court is not supported by evidence of Dr. N.K.Sharma (PW-9) and his post-mortem report (Ex.P/22).

25. In the last paragraph of post-mortem report (Ex.P/22), Dr. N.K.Sharma (PW-9) opined as follows :

> "In our considered opinion the cause of death of Bharosa S/o Phosha was cardio respiratory failure due to perforation peritonitis (faeces) as a result of blunt injury of abdomen and its complications. The time since death within six hours."

26. Dr. N.K. Sharma deposed before the trial Court in his cross-examination that the reason of death of Bharosa was failure of surgical operation.

27. The meaning of 'perforation' given in Black's Medical Dictionary (41st Edition) is as follows:

"Perforation

The perforation of one of the hollow organs of the abdomen or major blood vessels may occur spontaneously in the case of an ulcer or an advanced tumour, or may be secondary to trauma such as a knife wound or penetrating injury from a traffic or industrial accident. Whatever the cause, perforation is a surgical emergency. The intestinal contents, which contain large numbers of bacteria, pass freely out into the abdominal cavity and cause a severe chemical or bacterial PERITONITIS. This is usually accompanied by severe abdominal pain, collapse or even death. There may also be evidence of free fluid or gas within the abdominal cavity. Surgical intervention, to repair the leak and wash out the contamination, is often necessary. Perforation or rupture of major blood vessels, whether from disease or injury, is an acute emergency for which urgent surgical repair is usually necessary. Perforation of hollow structures elsewhere than in the abdomen – for example, the heart or oesophagus – may be caused by congenital weaknesses, disease or injury. Treatment is usually surgical but depends on the cause."

28. There is no evidence on record or even it is not suggested to any prosecution witnesses like mother and brothers of the deceased that before the incident Bharosa was suffering from any severe disease, therefore, it appears that whatever the external and internal injuries were found on or in the body of Bharosa were caused at the time of incident.

29. It appears that the evidence of above-mentioned prosecution witnesses, who received injuries in the incident and their evidence is corroborated by available medical evidence and complainant Munnalal's (PW-1) evidence is substantially corroborated by his FIR (Ex.P/2) and it is clear from the spot map that the incident started with complainant Munnalal in front his house, where present appellants of both the appeals and co-accused Hamira came there and on the point of passing of plough through the appellants' land they started beating of complainant Munnalal and at that time after hearing noise Bharosa came out of his house and tried to save his brother complainant, then Bharosa was subjected to beating by the appellants and at the same time some other family members of complainant were also beaten, therefore, the inference drawn by the trial Court that the present appellants of both these appeals, who are in total five and Hamira constituted unlawful assembly, whose common object was to give beating to Munnalal by sharp cutting objects and hard and blunt objects and on intervention by Bharosa, Dulichand, Udham and Parwati Bai were also beaten by appellants but it is clear that only Parwati Bai received grievous injury, therefore it could not

be inferred that it was the common object of the constituted unlawful assembly to murder complainant Munnalal or any of his family members, who tried to save complainant Munnalal. As Munnalal, Udham and Dulichand received only simple injuries, therefore, the inference drawn by the trial Court that it was the common object of the unlawful assembly to cause murder of Bharosa or any of his family members, in view of the medical evidence available on record, appears to be erroneous and contrary to medical evidence.

30. As pointed out earlier, Bharosa received three simple injuries according to the medical evidence of Dr. H.H.N. Garg (PW-20) and his fourth internal injury is due to knocking by some hard and blunt object, but Bharosa died in District Hospital, Guna on 28.8.1998 and according to medical evidence of Dr. N.K.Sharma (PW-9) and his evidence, the reason of Bharosa's death was failure of operation and Dr. N.K.Sharma's above-mentioned evidence given in examination-in-chief, was not even challenged by the prosecution, therefore, it is binding on the prosecution. Hence, in view of above-mentioned total facts and circumstances, the inference drawn by trial Court that the injuries sufficient in ordinary course of nature to cause death were inflicted to Bharosa is contrary to the medical evidence available on record. Therefore, we are of the considered opinion that it was not proved by the evidence available on record that Bharosa's death was homicidal.

31. As pointed out earlier, three injured prosecution witnesses complainant Munnalal, Udham and Dulichand received only simple injuries and complainant's mother Parwati Bai received a grievous injury of fracture in metacarpal bone of her right index finger, which was also not on vital organ, and Bharosa died after twenty days after receiving injury on abdomen and his three injuries were of simple nature, which is clear by the evidence of Dr. H.H.N. Garg (PW-20) and Dr. R.K.Jain (PW-6), therefore, at the most, it was proved by the evidence available on record that common object of the unlawful assembly was to cause grievous injury to the family members of the complainant, who tried to save the complainant Munnalal during his beating given by appellants and Hamira.

32. We are of the considered opinion that the offence punishable under Section 302 of the IPC was not proved against any of the appellants, but in relation to deceased Bharosa, only the offence punishable under Section 325/149 of the IPC was proved against each of the appellants.

33. Much emphasis has been given by the learned counsel for the appellants on the report (Ex.D/1) lodged by appellant Patru at Police Station Shadora in the night on the date of incident and MLC reports of appellant Patru and his brother Hamira, Ex.D/2 and D/3 respectively, proved by above mentioned Dr. H.H.N. Garg (PW-20) but it is clear that lacerated wound of Patru found on left parietal

region of skull and contusion injury found on his right back, both appearing to be caused by hard and blunt object and were of simple nature and similarly one lacerated wound found on right eye-brow of Hamira and two contusion injuries found on right side of chest and right hand, all were of simple nature and caused by hard and blunt objects, whereas prosecution witnesses and Bharosa received injuries caused by sharp cutting weapons.

34. Appellant Patru in his examination conducted by the trial Court under Section 313 of the CrPC stated that when he was seated in front his house, then prosecution witnesses Udham, Dulichand, Munnalal and Bharosa came there with sticks and caused injuries to Patru and his deaf and dumb brother Hamira and both these brothers exercised their right of self-defence and in the dark, prosecution witnesses caused injuries to each other but it is clear from the spot map (Ex. P/3) prepared by Head Constable Radheshyam Yadav (PW-19) that incident had occurred in front the house of complainant Munnalal (PW-1) and it is clear that comparatively Patru and his brother Hamira received injuries only by hard and blunt object and were of simple nature. Hence, only due to this fact that some simple injuries were received by appellant Patru and his brother Hamira, the total evidence of the injured prosecution witnesses substantially corroborated by medical evidence could not be discarded.

35. It is clear from the above-mentioned discussion of the evidence available on record that the conviction and sentence recorded by the trial Court against each appellant under Section 302 of the IPC in relation to deceased Bharosa is erroneous and defective and on this point appeal filed by each appellant appears to be worthy of acceptance and in relation to deceased Bharosa, in above-mentioned peculiar facts and circumstances of the case, each appellant should have been convicted under Section 325/149 of the IPC.

36. Learned trial Court has convicted and sentenced separately under Sections 148 and 147 of the IPC, whereas it is well established that offence punishable under Section 148 of the IPC is graver offence than the offence punishable under Section 147 of the IPC. When each appellant was convicted and sentenced under Section 148 of the IPC, then separate conviction and sentence under Section 147 of the IPC appears to be unnecessary and unwarranted. Therefore, each appellant's separate conviction and sentence under Section 147 of the IPC is liable to be set aside.

37. Each appellant's conviction recorded by the trial Court under Section 325 of the IPC in reference to injured Parwati Bai appears to be justified, but on this count the sentence of three years RI with a fine of Rs.100/- appears to be harsh, excessive and unbalanced.

38. From the record it appears that after arrest, appellants Patru, Parma, Maniram and Lallu have suffered detention in jail for a period of more than one year and appellant-Madan after his arrest has suffered detention for a period of ten months and eighteen days. The incident occurred on 8.8.1998. Looking to the totality of the facts and circumstances of the case, it appears proper that the sentence to each of the appellants for the offence punishable under Section 325/149 of the IPC in relation to deceased Bharosa to the period of imprisonment already undergone by him with a fine of Rs.200/- and similarly the sentence to each of the appellants for the offence punishable under Section 325 of the IPC in relation to causing grievous injury to injured Parwati Bai to the period of imprisonment already undergone by him with a fine of Rs.100/- would meet the ends of justice.

39. The trial Court has convicted and sentenced each appellant under Section 324/149 of the IPC to undergo two years RI with a fine of Rs.100/- in reference to injured Munnalal and Dulichand. It appears proper that the sentence to each appellant under Section 324/149 of the IPC on each count to the period of imprisonment already undergone by him with a fine of Rs.100/- would meet the ends of justice.

40. The sentence recorded by the trial Court for the offence under Section 148 of the IPC regarding appellants Patru, Parma, Maniram and Lallu appears to be proper and so far as appellant Madan is concerned, since he has already suffered ten months eighteen days' detention, therefore, the ends of justice would meet if he is sentenced to the period of imprisonment already undergone by him for the offence punishable under Section 148 of the IPC. To above extent both these appeals appear to be worthy of acceptance.

41. Consequently, both these appeals filed by different appellants are partially allowed and each appellant's conviction and sentence under Section 302 of the IPC in reference to deceased Bharosa is set aside and each appellant is convicted in reference to injury caused to Bharosa under Section 325/149 of the IPC and each appellant is sentenced to the period already undergone by him with a fine of Rs.200/-; each appellant's separate conviction and sentence under Section 147 of the IPC is set aside; each appellant's conviction under Section 325 of the IPC in relation to injured Parwati Bai is affirmed, but each appellant's sentence as awarded by the trial Court on this point is set aside and each appellant is sentenced to the period of imprisonment already undergone by him with a fine of Rs.100/- in relation to injured Parwati Bai; each appellant's conviction under Section 324/149 of the IPC is affirmed, but each appellant's sentence awarded by the trial Court is set aside and each appellant is sentenced under Section 324/149 of the IPC to the period of imprisonment already undergone by him with a fine of Rs.100/-; and, conviction and sentence of appellants Patru, Parma, Maniram and Lallu under

Section 148 of the IPC is affirmed, however, the sentence to appellant Madan awarded by trial Court under Section 148 of the IPC is set aside and he is sentenced to the period of imprisonment already undergone by him with a fine of Rs.100/-.

42. All appellants were released on bail after suspending their jail sentence awarded by the trial Court and relating fine amount has already been deposited by them before the trial Court, hence their presence is no more required before this Court and, therefore, it is directed that bail bonds of each appellant shall stand discharged. The trial Court's order regarding disposal of seized property is affirmed.

With a copy of this judgment record of the trial Court be sent back immediately.

Appeal partly allowed

I.L.R. [2018] M.P. 2254
APPELLATE CRIMINAL
Before Mr. Justice B.K. Shrivastava
Cr.A. No. 4525/2018 (Jabalpur) decided on 10 August, 2018

RAMKUMAR …Appellant

Vs.

STATE OF M.P. & anr. …Respondents

***A. Penal Code (45 of 1860), Sections 376(2)(N), 342, 506 & 190, Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), Section 3(1)(W)(ii) & 3(2)(V) and Criminal Procedure Code, 1973 (2 of 1974), Section 438 – Anticipatory Bail – Ground* – Allegation that appellant committed sexual intercourse in pretext of service and marriage and because of which she delivered a girl child – Held – As per the available records, prosecutrix is not a fair lady, she delivered a child in the year, when she was in relation with other persons other than appellant – In another case, she admitted that the said girl child is from another person – Further held – Any act related to caste is not alleged in entire evidence – Prosecutrix lodged FIR against other persons also, in which they were acquitted by the Court – Anticipatory bail granted – Appeal allowed.**

(Para 24)

क. दण्ड संहिता (1860 का 45), धाराएँ 376(2)(एन), 342, 506 व 190, अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 3(1)(डब्ल्यू)(ii) व 3(2)(V) एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 438 – अग्रिम जमानत – आधार – अभिकथन है कि अपीलार्थी ने नौकरी और विवाह के बहाने

लैंगिक संभोग कारित किया एवं जिसकी वजह से उसने एक बच्ची को जन्म दिया – अभिनिर्धारित – उपलब्ध दस्तावेजों के अनुसार, अभियोक्त्री एक अच्छी महिला नहीं है, उसने एक बच्ची को उस वर्ष जन्म दिया, जब वह अपीलार्थी के अलावा अन्य व्यक्तियों के साथ संबंध में थी – अन्य प्रकरण में, उसने स्वीकार किया है कि कथित बच्ची दूसरे व्यक्ति की है – आगे अभिनिर्धारित – संपूर्ण साक्ष्य में जाति के संबंध में कोई कृत्य अभिकथित नहीं है – अभियोक्त्री ने अन्य व्यक्तियों के विरूद्ध भी प्रथम सूचना प्रतिवेदन दर्ज कराया, जिसमें वे न्यायालय द्वारा दोषमुक्त किये गये थे – अग्रिम जमानत प्रदान की गई – अपील मंजूर।

***B. Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), Section 18 and Criminal Procedure Code, 1973 (2 of 1974), Section 438 – Anticipatory Bail – Bar u/S 18 of Act of 1989* – Held – If offence is registered under the Act of 1989, anticipatory bail can be granted when Court *prima facie* find that offence is not made out – Court cannot reject the bail outrightly, simply writing that police have registered offence under the Act of 1989 and thus bar u/S 18 of the Act is applicable – While rejecting bail application, it is mandatory for the Judge to give a definitive finding on the basis of evidence available on record – In present case, looking to evidence on record, bar u/S 18 not applicable – Bail granted.**

(Para 14 & 25)

ख. अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 18 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 438 – अग्रिम जमानत – 1989 के अधिनियम की धारा 18 के अंतर्गत वर्जन – अभिनिर्धारित – यदि 1989 के अधिनियम के अंतर्गत अपराध पंजीबद्ध है, अग्रिम जमानत प्रदान की जा सकती है जब न्यायालय प्रथम दृष्ट्या यह पाता है कि कोई प्रकरण नहीं बनता – न्यायालय, साधारणतः यह लिखकर कि पुलिस ने 1989 के अधिनियम के अंतर्गत अपराध पंजीबद्ध किया है एवं इसलिए अधिनियम की धारा 18 के अंतर्गत वर्जन लागू होता है, जमानत को सिरे से अस्वीकार नहीं कर सकता – जमानत आवेदन अस्वीकार करते समय, न्यायाधीश के लिए अभिलेख पर उपलब्ध साक्ष्य के आधार पर एक निश्चायक निष्कर्ष देना, आज्ञापक है – वर्तमान प्रकरण में, अभिलेख पर मौजूद साक्ष्य को देखते हुए, धारा 18 के अंतर्गत वर्जन प्रयोज्य नहीं – जमानत प्रदान की गई।

Cases referred:

1991 JLJ 498, 1993 (1) MPJR 223, 1995 JLJ 584, (1992) 1 GLR 405, AIR 2002 SC 3316=(2012) 8 SCC 795, (2014) 3 SCC 471, AIR 2018 SC 1478.

Manikant Sharma and *A.K. Mishra*, for the appellant.
Ashutosh Tiwari, G.A. for the respondent/State.

J U D G M E N T

B.K. SHRIVASTAVA, J. : - This appeal has been filed under Section 14-A (1 & 2) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act,

1989 (for short "SC/ST Act") on 19.06.2018 on behalf of Ram Kumar against the order dated 15.06.2018 passed by Special Judge, Harda. By the order impugned, the learned lower Court dismissed the application filed by the appellant under Section 438 of Cr.P.C for anticipatory bail in connection with Crime No. 03/2018, registered at Police Station AJAKS, District Harda (M.P.) under Sections 376(2)(N), 342, 506, 190 of IPC and Sections 3(1)(W)(ii), 3(2)(V) of SC/ST Act.

2. As per lower court, the offences under section 3(1)(W)(ii) and 3(2)(V) of SC/ST Act have been registered, therefore Section 18 of the aforesaid Act is attracted, and as per aforesaid provision, anticipatory bail could not be granted.

3. It is submitted by the learned counsel for the appellant that the lower Court committed mistake by rejecting the application filed by the appellant for anticipatory bail. In this case no medical evidence is available in support of the contention. Provision of aforesaid Special Act are not attracted, therefore, anticipatory bail ought to be granted. Therefore, it is submitted that the order impugned is liable to be set aside and appellant is entitled to get anticipatory bail.

4. On the other side, State strongly opposed the application/ Appeal and submitted that FIR was also registered under Sections 3(1)(W)(ii) & 3(2)(V) of SC/ST Act and Provision of aforesaid Special Act are also attracted, therefore, anticipatory bail could not be granted.

5. The complainant was also noticed in this case but she did not turn up to contest the appeal.

6. It will be useful to quote Section 18 of the Act, which reads as under:-

> ***"18. Section 438 of the Code not to apply to persons committing an offence under the Act.***– Nothing in Section 438 of the Code shall apply in relation to any case involving the arrest of any person on an accusation of having committed an offence under this Act."

7. A bare reading of above provision makes it clear that Section 438 of Cr.P.C is not applicable to a person who committed the offence(s) under the Act. In this section word **"acquisition"** has been used. In *Ram Dayal Vs. State of M.P.* reported in 1991 JLJ, 498, it has been said that :-

> "Accusation against the accused should be real in essence and spirit. Where there is no material to reasonably raise a suspicion of commission of an offence under the Act, it cannot be said there is an accusation within the meaning of S. 18 of the Act and maintainability of application u/s 18 cannot be challenged".

8. Further in the case of *Dule Singh* Vs. *State of M.P.* reported in 1993 (1) MPJR, 223, it has been said that :-

> "Strict construction should be put on the word 'accusation' within the meaning of S. 18 of the Act. As such, 'intention' or 'intent' which is material ingredient of the offence under S. 3 (1) (x) of the Act not being clearly stated by the witnesses and there being no statement that the offence was committed because the complainant belonged to Scheduled Caste, it cannot amount to an 'accusation' of an offence within the meaning of S. 18 of the Act so as to bar an application for anticipatory bail u/s 18 of the Act".

9. Again in the case of *Mohar Singh Vs. State of M.P.*, reported in 1995 JLJ 584, High Court has observed as under:-

> "The word accusation used in S. 18 has not been defined anywhere, but it can be safely inferred that when there is an allegation either in the F.I.R. or in the statement of witnesses constituting offence punishable u/s of the Act, the bar u/s 18 is attracted."

10. In the case of *Pankaj D. Suthar Vs. State of Gujarat* (1992) 1 GLR 405, while considering the scope of Section 18 of Prevention of Atrocities Act, Gujarat High Court observed as under:-

> "Section 18 of the Atrocities Act gives a vision, direction and mandate to the Court as to the cases where the anticipatory bail must be refused, but it does not and it certainly cannot whisk away the right of any Court to have a prima facie judicial scrutiny of the allegations made in the complaint. Nor can it under its hunch permit provisions of law being abused to suit the mala fide motivated ends of some unscrupulous complainant."

11. In the case of *Vilas Pandurang Pawar and another Vs. State of Maharashtra and others*, AIR 2002 SC 3316 = (2012) 8 SCC 795, the police registered a case against the accused persons under Section 3(1)(x) of the Act in addition to other offences punishable under the IPC on the basis of the written complaint of the complainant. The Additional Sessions Judge rejected their application under Section 438 Cr.P.C., giving reasons thereof. Aggrieved by the said order, the accused persons filed the bail application before the High Court of Bombay, which granted anticipatory bail to some of the accused persons. The order of the High Court was challenged before the Supreme Court. The Supreme Court considered the provisions and scope of Section 18 of the Act and made the following observations in paras 8 and 9 (of AIR) of the decision -:

> **"8.** Section 18 of the SC/ST Act creates a bar for invoking Section 438 of the Code. However, a duty is cast on the court to verify the averments in the complaint and to find out whether an offence under Section 3(1) of the SC/ST Act has been prima facie made out. In other words, if there is a specific averment in the complaint, namely, in sultor intimidation with intent to humiliate by calling with caste name, the accused persons are not entitled to anticipatory bail.
>
> **9.** The scope of Section 18 of the SC/ST Act read with Section 438 of the Code is such that it creates a specific bar in the grant of anticipatory bail. When an offence is registered against a person under the provisions of the SC/ST Act, no court shall entertain an application for anticipatory bail, unless it prima facie finds that such an offence is not made out. Moreover, while considering the application for bail, scope for appreciation of evidence and other material on record is limited. The court is not expected to indulge in critical analysis of the evidence on record. When a provision has been enacted in the Special Act to protect the persons who belong to the Scheduled Castes and the Scheduled Tribes and a bar has been imposed in granting bail under Section 438 of the Code, the provision in the Special Act cannot be easily brushed aside by elaborate discussion on the evidence".

12. Hon'ble Supreme Court in the case of *Bachu Das Vs. State of Bihar* (2014) 3 SCC 471 also referred the aforesaid observation.

13. Recently in the case of *Dr. Subhash Kashinath Mahajan Vs. State of Maharastra*, reported in AIR 2018 SC 1478, Hon'ble Supreme Court considered the provision of Section 18 of SC/ST Act and observed as under:-

> "Exclusion of anticipatory bail has been justified only to protect victims of perpetrators of crime. It cannot be read as being applicable to those who are falsely implicated for extraneous reasons and have not committed offence on prima facie independent scrutiny. Access to justice being fundamental right, grain has to be separated from chaff, by independent mechanism. Liberty of one citizen cannot be placed at whim of another. Law has to protect innocent and punish guilty. Thus considered, exclusion has to be applied to genuine cases and not to false ones. This will help in achieving object of law. Restriction in S. 18 is only at stage of consideration of matter for anticipatory bail and no such restriction is available while matter is to be considered for grant of regular bail. Theoretically it is possible to say that

application under S. 438 of Code may be rejected by Court because of express restrictions in S. 18 of Act of 1898 but very same Court can grant bail under provisions of S. 437 of Code, immediately after arrest. There seems to be no logical rationale behind this situation of putting fetter on grant of anticipatory bail whereas there is no such prohibition in any way for grant of regular bail. It is, therefore, all the more necessary and important that express exclusion under S. 18 of Act of 1989 is limited to genuine cases and inapplicable where no prima facie case is made out. There can be no dispute with proposition that mere unilateral allegation by any individual belonging to any caste, when such allegation is clearly motivated and false, cannot be treated as enough to deprive person of his liberty without independent scrutiny. Thus, exclusion of provision for anticipatory bail cannot possibly, by any reasonable interpretation, be treated as applicable when no case is made out or allegations are patently false or motivated. If this interpretation is not taken, it may be difficult for public servants to discharge their bona fide functions and, in given cases, they can be black-mailed with threat of false case being registered under Act of 1989, without any protection of law. This cannot be scenario in civilized society. Similarly, even non-public servant can be black-mailed to surrender his civil rights. This is not intention of law. Such law cannot stand judicial scrutiny. It will fall foul of guaranteed fundamental rights of fair and reasonable procedure being followed if person is deprived of life and liberty. Thus, literal interpretation cannot be preferred in present situation. Thus, exclusion of S. 438 of Code applies when prima facie case of commission of offence under Act of 1989 is made. On the other hand, if it can be shown that allegations are prima facie motivated and false, such exclusion will not apply. This may have to be determined by Court concerned in facts and circumstances of each case in exercise of its judicial discretion. In doing so, well established principle of law that protection of innocent against abuse of law is part of inherent jurisdiction of Court being part of access to justice and protection of liberty against any oppressive action such as mala fide arrest is reiterated. Efficacy of S. 18 is not diluted in deserving cases where Court finds case to be prima facie genuine warranting custodial interrogation and pre-trial arrest and detention."

14. From the aforesaid observations, it is crystal clear that if the offence registered under SC/ST Act, anticipatory bail can be granted when the court *prima*

facie find that such an offence is not mate out. It is mandatory on the part of the Judge concerned, at the time of rejecting or granting bail under Section 438 Cr.P.C. to give a definitive finding upon the basis of the materials available before him that there is prima facie evidence available to hold that the accused has committed or not committed the offence(s) punishable under the Act. Meaning thereby the court cannot reject the bail outright by writing simply in the order concerned that the police have registered the case for the offence(s) punishable under the Act, therefore, the bar under Section 18 of the Act is applicable.

15. Now, we see the fact of present case. It is argued by the learned counsel for the appellant that appellant is permanent resident of District Harda and there is no likelihood of his absconding. Complainant was married in the year 2003 and given a birth to a male child. She left her husband and came to Harda from Betul. After that She herself made contacts with other rich person named Deepak Meena in the year 2012. She developed relationship with Deepak Meena and got married with him on oath in stamp paper on 05.01.2012 and got the marriage certificate from Chitragupt Mandir, Hoshangabad. She contacted to another rich person named Rajesh Sharma in the year 2014 and lived with him till 2016. She also delivered a baby child Divyani on 04.09.2015. She with a conspired mind to blackmail him, lodged a false complaint on 21.01.2016 against Rajesh Sharma, in which Rajesh Sharma was acquitted. She also lodged another complaint under Section 498 of IPC against Rajesh Sharma. But Rajesh Sharma acquitted in that case also. The prosecutrix was having intention for blackmailing. She is a habitual offender and used to blackmail rich persons and in habit of collecting huge money from them, who are in her target. She is a married lady who developed relations with three other persons and also used to blackmail them by lodging forged FIR.

16. FIR has been lodged by the prosecutrix on 30.05.2018 at 19:00 pm. As per this report first incident took place in November, 2013. It is stated in the FIR that the prosecutrix had gone to Balagoan in November, 2013. In December 2013 she came in the contact of Ram Kumar Soni, who gave assurance of service as well as marriage. He also provided a house on rent to the complainant. In that house he committed sexual intercourse with the prosecutrix on 27.12.2013 at about 10:00 pm in the night. Thereafter he repeated aforesaid the act and prosecutrix became pregnant and delivered a girl child named Divyani. On 29.05.2018 when the prosecutrix told the accused Ramkumar Soni that neither he arranged the service nor he married with the prosecutrix, upon this, accused became annoyed and assaulted her and also given threatened to life.

17. Therefore, it appears from the First Information Report that as per prosecutrix she was in sexual relationship with Ramakumar Soni since November, 2013 to 29.05.2018 and during this period she also delivered a girl child named Divyani.

18. On the other side, appellant submits various documents against the aforesaid version of the prosecutrix. Document Annexure A/2 at page No.17 is a document related to the marriage. This document was executed before the Notary on 05.01.2012 between prosecutrix and Deepak Kumar. In this document it is mentioned that the marriage has been solemnized between them by exchanging garlands. A certificate is also annexed at page No.21, which has been issued by Chitragupt Mandir, Hoshangabad, in shape of registration of marriage. In this certificate, photographs of both parties meaning Deepak and prosecutrix have been pasted and it is certified that the marriage has been solemnized on 14.01.2012. The aforesaid documents shows that the prosecutrix has done first marriage with Deepak on 14.01.2012 and they lived as husband and wife.

19. Annexure A/4 is an FIR of Crime No.11/2016 registered at Mahilla Thana, Bhopal under Sections 376, 506 of IPC and Section 3(1)(xii) and Section 3(2)(5) of SC/ST Act. This report was also lodged by the same prosecutrix. The offence was registered upon the written report submitted by the prosecutrix. As per this FIR the report was lodged on 21.01.2016, while the date of incident is mentioned as 28.04.2014. In this FIR she stated that she is living in Bhopal since 2 ½ years back and doing job in private company and also living in a rented house. She again stated that Rajesh Sharma (accused of that case) given her false assurance of marriage and committed sexual intercourse with her for a period of 1 ½ year. After sometime she came to know that Rajesh Sharma is a married person and also having two children. When the complainant asked him that he is married man then how he will marry with her, than he said that he will give divorce to his wife and thereafter marry with the prosecutrix. Important fact is also mentioned in this report that the prosecutrix became pregnant and asked for abortion but the accused Rajesh Sharma denied and assured that he will give name of father to the aforesaid child. After sometime Rajesh Sharma did not contact to the prosecutrix and prosecutrix delivered a girl child. Thereafter when girl was aged about 1 ½ months accused Rajesh Sharma created hurdle. Upon the instigation of Rajesh Sharma, landlord pressurized the prosecutrix to evict the house. It means that the girl child delivered by the prosecutrix during the relationship with Rajesh Sharma.

20. When the report of Crime No.11/2016 was lodged ,the prosecutrix was also examined before the JMFC, Bhopal on 01.02.2016 under Section 164 of Cr.P.C. In her statement she also stated that Rajesh Sharma given a false assurance of marriage and committed sexual intercourse and due to this relationship she became pregnant and gave birth to a girl child. Birth certificate of that girl child is also filed as Annexure A/3, in which father's name is mentioned as Rajesh Sharma and date of birth is mentioned as 04.09.2015.

21. Annexure A/6 is the copy of judgment dated 15.02.2018 passed by the Special Judge SC/ST, Bhopal in Special Case No.37/2016, which was based on previous FIR lodged against Rajesh Sharma. The Court acquitted the accused Rajesh Sharma in the aforesaid case. In para-12, it is mentioned by the Court that the prosecutrix examined as PW-8 and she deposed on oath that the accused Rajesh Sharma made sexual relationship with her since 2014 and she became pregnant in the year 2015 and delivered a girl child on 04.09.2015. In para 22, it is also mentioned that the prosecutrix and accused committed sexual intercourse with the consent of each other since January, 2014 to Jun (sic:June), 2017. Therefore it appear that in the previous First Information Report she alleged that Rajesh Sharma is the father of that girl child while in the present FIR she alleged that the present appellant Ramkumar is the father of that girl child.

22. Another judgment Annexure A/5 is also filed in this case. The complaint was lodged by the prosecutrix and the offence under Section 498-A of IPC was registered against Rajesh Sharma. By the judgment dated 20.10.2015 passed in Case No.8284/2015 by Shri Ashok Bhardwaj, JMFC, Bhopal the accused Rajesh Sharma was acquitted. In para-6 of the aforesaid judgment, it is mentioned that the prosecutrix became hostile and she did not support the FIR as well as her police statements. Therefore, it appears that the prosecutrix herself lodged the report and thereafter during trial she became hostile and did not support her own version which was given in the FIR.

23. Some photographs are also filed for showing the conduct of prosecutrix. These are at page Nos.49 to 55. In four photographs the prosecutrix is with Rajesh Sharma. Three photographs are with Deepak Meena. These photographs also indicate the intimate relationship as husband and wife.

24. Therefore, looking to the aforesaid entire documents and the case diary, it can be said that the prosecutrix is not a fair lady. She delivered a girl child on 04.09.2015. At that time she was in relationship with Rajesh Sharma. She also admitted in the previous case that Rajesh Sharma is the father of that girl child. But again in this case she made allegation against the present appellant by saying that he is father of that girl child. The period of living with Rajesh Sharma is also overlapping with the period to be said with the present appellant. Any act related to the cast is not alleged in the entire evidence. It is also proper to mention hear that in para 6(3) of the appeal memo, it is mentioned that initially complainant was married in her caste in the year 2003 and a baby was born during her marital life. Thereafter she married with Deepak Meena in the year 2012. Any divorce from any Court has not been obtained by the prosecutrix.

25. Therefore, it can be said that the bar created in Section 18 is not attracted in this case. Looking to all situations and the evidences, appeal is allowed. The impugned order passed by the trial Court is set-aside and it is directed that in the

event of arrest of the appellant Ramkumar shall be released on bail on his furnishing a personal bond in the sum of Rs.20,000/- (Rupees Twenty Thousand only) with one solvent surety in the like amount to the satisfaction of the Arresting Officer. It is also directed that the appellant shall abide by the conditions as enumerated under Section 438(3) of the Cr.P.C. The appellant shall remain present before the Investigating Officer as and when he is directed so and cooperate in investigation and he shall also appear before the trial Court.

26. Consequently, the present criminal appeal stands allowed and disposed of.

Certified copy as per rules.

Appeal allowed

I.L.R. [2018] M.P. 2263
APPELLATE CRIMINAL
Before Mr. Justice Sujoy Paul
Cr.A. No. 208/2006 (Jabalpur) decided on 24 August, 2018

SURENDRA SINGH & ors. …Appellants

Vs.

STATE OF M.P. …Respondent

***A. Penal Code (45 of 1860), Section 304-B and Evidence Act (1 of 1872), Section 113-B – Dowry Death within Seven Years of Marriage – Conviction – Appreciation of Evidence – Presumption* – Held – Prosecution failed to produce marriage card – Serious contradiction in statements of prosecution witnesses regarding date/year of marriage – No reliable and cogent evidence to prove date of marriage – Prosecution case goes out of purview of presumption u/S 113-B of Evidence Act – Prosecution miserably failed to establish that incident had taken place within seven years of the marriage – Conviction u/S 304-B IPC cannot be upheld and is set aside.**
(Para 10 & 12)

क. दण्ड संहिता (1860 का 45), धारा 304–बी एवं साक्ष्य अधिनियम (1872 का 1), धारा 113–बी – विवाह के सात वर्षों के भीतर दहेज मृत्यु – दोषसिद्धि – साक्ष्य का मूल्यांकन – उपधारणा – अभिनिर्धारित – अभियोजन, विवाह पत्रिका प्रस्तुत करने में विफल रहा – विवाह की तिथि/वर्ष के संबंध में अभियोजन साक्षीगण के कथनों में गंभीर विरोधाभास – विवाह की तिथि को साबित करने हेतु कोई विश्वसनीय एवं तर्कपूर्ण साक्ष्य नहीं है – अभियोजन प्रकरण साक्ष्य अधिनियम की धारा 113–बी के अंतर्गत उपधारणा की परिधि से बाहर है – अभियोजन यह स्थापित करने में बुरी तरह से विफल रहा कि विवाह के सात वर्षों के भीतर घटना घटित हुई – भारतीय दंड संहिता की धारा 304–बी के अंतर्गत दोषसिद्धि कायम नहीं रखी जा सकती एवं अपास्त की गई।

***B. Penal Code (45 of 1860), Section 498-A – Dowry Demands – Cruelty – Appreciation of Evidence* – Held – Prosecution witnesses established beyond reasonable doubt that deceased was used to be harassed, threatened and assaulted in relation to not fulfilling the demand of television and motorcycle – Appellants rightly convicted for offence u/S 498-A IPC – Word "Cruelty" discussed – Appeal partly allowed.**

(Para 15 & 16)

ख. दण्ड संहिता (1860 का 45), धारा 498–ए – दहेज की मांग – क्रूरता – साक्ष्य का मूल्यांकन – अभिनिर्धारित – अभियोजन साक्षीगण ने युक्तियुक्त संदेह से परे यह स्थापित किया कि मृतिका को टेलीविजन एवं मोटरसाईकिल की मांग को पूरा न करने के संबंध में उत्पीड़ित, धमकाया तथा मारा–पीटा जाता था – अपीलार्थीगण को भारतीय दंड संहिता की धारा 498–ए के अंतर्गत अपराध के लिए उचित रूप से दोषसिद्ध किया गया – शब्द ''क्रूरता'' विवेचित – अपील अंशतः मंजूर।

***C. Penal Code (45 of 1860), Section 304-B & 498-A – Criminal Practice – Interested & Related Witnesses* – Held – In Indian society, in normal circumstances, demand for dowry or harassment for same takes place within the boundaries of house – Statement of family members of deceased lady cannot be discarded on the ground that they are relatives and are interested witnesses – In present case, evidence of family members are recorded after a considerable long time from date of incident, thus minor variations are immaterial if deposition are examined in entirety.**

(Para 14)

ग. दण्ड संहिता (1860 का 45), धारा 304–बी व 498–ए – दाण्डिक पद्धति – हितबद्ध एवं संबंधित साक्षीगण – अभिनिर्धारित – भारतीय समाज में, सामान्य परिस्थितियों में, दहेज की मांग या उक्त के लिए उत्पीड़न घर की सीमाओं के भीतर होता है – मृतिका के परिवार के सदस्यों के कथन को इस आधार पर अस्वीकार नहीं किया जा सकता कि वे रिश्तेदार हैं तथा हितबद्ध साक्षीगण हैं – वर्तमान प्रकरण में, परिवार के सदस्यों के साक्ष्य घटना की तिथि से काफी लंबे समय के पश्चात् अभिलिखित किये गये हैं, इसलिए मामूली भिन्नता तत्वहीन हैं यदि अभिसाक्ष्य का संपूर्णता से परीक्षण किया जाता है।

Cases referred:

1993 Cr.L.J-3723, Cr.A. (SJ) No. 636/2002 decided on 05.01.2018 (Patna High Court), 1991 (3) SCC 371, 2015 (4) SCC 215, 2017 (11) SCC 176, 2017 (1) SCC 433.

Mamta Dubey, Amicus Curiae for the appellants.
Ashutosh Tiwari, G.A. for the respondent.

J U D G M E N T

SUJOY PAUL, J. :- This appeal under section 374(2) of the Cr.P.C is directed against the judgment dated 17.01.2006 passed by the Addl. Sessions

Judge Umaria in S.T.No.273/02 convicting the appellants for offences punishable under section 498-A and 304-B of the IPC for R.I 1 year with fine of Rs.1000/- each in first count while R.I. 10 years with fine of Rs.5000/- to appellant No.1 and R.I. 7 years with fine of Rs.2000/- to appellants No.2 and 3 in last count.

2. At the outset, learned counsel for the parties informed that appellant No.1 has undergone the entire sentence and is released from jail on 10.12.2010. Thus, the parties mainly confined their arguments in relation to conviction and sentence of appellant No.2 (father-in-law) and appellant No.3 (mother-in-law) of deceased.

3. Briefly stated, the story of the prosecution is that on 26.01.2002, appellant No.2 lodged a written report (Ex.P/7) in Police Station Naowrozabad that his daughter-in-law Shyamkala committed suicide by strangulating herself. On the basis of this report, the death intimation (Ex.P/6) was recorded. The body of deceased Shyamkala was recovered by preparing a Panchanama (Ex.P/2) and a Spot-map (Ex.P/4) was prepared. The body of deceased was sent for postmortem where Dr. B.K.Jain and Baghel conducted the postmortem and submitted its report. As per the postmortem report, the reason of death is suicide. The appellants categorically denied the charge alleged against them under section 498-A and 304-B IPC. After the matter was committed before the competent court, the prosecution led its evidence and thereafter statement of accused were recorded. The court below framed the question whether death of deceased is within seven years of her marriage. After recording the statement of prosecution witnesses, the court below came to hold that the death of deceased Shyamkala had taken place within seven years from the marriage. It was further held that the prosecution has successfully established that the appellants used to demand motorcycle, colour T.V etc. from the deceased. Since the court below opined that the death of Shyamkala Bai had taken place within seven years of her marriage, it applied the presumption mentioned in section 304-B of IPC and held that appellants are deemed to have caused death of the deceased. In support of this finding, the court below considered the statement of Khelawan Singh (P.W.1) brother of the deceased, who deposed that marriage of deceased Shyamkala Bai had taken placed three years before the date of death. Similar statement was made by Balram (P.W.4) father, Batti Bai (P.W.5) mother and Phukki Bai (P.W.6). On the strength of these statements, the court below came to hold that it is established by the prosecution that marriage of deceased had taken place within seven years from the date of death.

4. In defence, Jagannath Pathak Purohit (D.W.1) deposed that he is "Purohit" and he solemnized marriage of the deceased with appellant 11-12 years before. He produced the "lagan patrika" (Ex.P/5) which contains the description regarding marriage including the year i.e Samvat 2051 which means it was held in the year 1994. The court below disbelieved the statement of this witness on the ground that

signature of this witness is not there on Ex.P/5. There exists an over writing on this document. The name of appellant No.1 and deceased Shyamkala is mentioned in the "Patrika" but names of their parents were not mentioned. This witness admitted that he himself was not present when marriage had taken place.

5. The court below specifically held that the reason of death of deceased is because of strangulation and it is established that she committed suicide. Since the court below opined that marriage had taken place within seven years from the date of death of deceased, it invoked section 304-B of IPC. In addition, in view of statements made by various prosecution witnesses, the court below held that it was established by the prosecution that appellants have consistently demanded dowry from the deceased which became the reason for her death.

6. Ms. Mamta Dubey, learned *amicus curiae*, pointed out the discrepancies/ contradictions in the statement of the prosecution witnesses in relation to date of marriage of the deceased and further pointed out that the demand of dowry is mainly related with appellant No.1. She strenuously contended that the prosecution has failed to establish that marriage had taken place within seven years.

7. *Per contra*, Shri Ashutosh Tiwari, GA supported the prosecution story and argued that there is no error in the judgment of the court below which warrants interference by this court.

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

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

10. A careful reading of statement of P.W.1 Khilawan Singh (brother) shows that in examination-in-chief, he deposed that marriage had taken place three years before death of the deceased. However, during cross-examination, he candidly admitted that he does not remember the exact date of marriage but marriage had taken place in the year 1994. Bihari Lal Kol (P.W.2) did not depose anything about date of marriage. P.W.3 Dhaneshwar Singh (brother) deposed that marriage had taken place in the year 1999. P.W.4 Balram (father), P.W.5 Batti Bai (mother) and P.W.6 Phukki Bai deposed that marriage had taken place three years before the death. Thus, there is serious contradiction amongst the statement of the prosecution witnesses. Both the brothers of deceased have given different version about date of marriage. The question is whether on the basis of this kind of statements, it can be safely concluded that marriage had taken place within seven years. This point is no more *res integra*. This court in *Ratanlal and another Vs. State of M.P*- 1993 Cr.L.J-3723 held that when the prosecution wants to bring the case within the purview of Section 304-B of IPC, it is its duty to prove to the hilt that death was caused within seven years of the marriage. There is no reliable and cogent evidence to prove the date of marriage. Even the marriage card has not

been produced to prove the exact date of marriage. It was further held that P.W.5 in the said case, deposed that marriage was performed in summer. This witness was declared hostile and he was not cross-examined on this point. For these reasons it was held that the case of prosecution goes out of the purview of section 113-B of the Evidence Act and presumption under section 304-B of IPC can also not be drawn. As per settled principles of criminal jurisprudence, the prosecution must prove its case to the hilt and for this purpose, prosecution must lead cogent and reliable evidence which may prove the circumstances sufficient for raising such a presumption. Where prosecution has utterly failed to do so, the judgment of conviction cannot be upheld.

11. Pausing here for a moment, in the present case P.W.1 and P.W.3, brother of the deceased, have deposed that marriage had taken place in the year 1994 and 1999 respectively. These witnesses were not declared hostile. The marriage card is also not produced by the prosecution. In a recent judgment passed in Cr.A.(SJ) No.636/2002 *(Ram Bahadur Yadav & others Vs. State of Bihar)* decided on 05.01.2018, Shri Justice Rajendra Menon, Chief Justice of Patna High Court, held that no specific date with regard to marriage is indicated either in the "fard bayan" or in the statement recorded in the court. It was incumbent upon the prosecution to prove the date on which marriage was solemnized. In absence thereof, the question of applicability of section 304-B of IPC becomes very doubtful. The judgment of the court below was criticized as "absurd" and based on perverse findings which cannot be countenanced. In absence of any iota of material to establish the date of marriage, the statement of witnesses were disbelieved. The statement of father of deceased (P.W.8) was disbelieved by the High Court because he made a vague statement that marriage was solemnized five years back.

12. If the present case it tested on the anvil of judgment of *Ratanlal and Ram Bahadur Yadav (supra)*, it will be clear that the principles laid down in the said case are squarely applicable in the present case. The prosecution has miserably failed to establish the date of marriage. It did not produce the marriage card. The statement of witnesses are extremely contradictory in nature. It cannot be said that prosecution has established to the hilt that marriage had taken place within seven years from the date of death. Thus, I have no scintilla of doubt that the court below had committed an error in holding the appellants guilty under section 304-B of the IPC.

13. In 1991 (3) SCC 371 *(Smt. Shanti and another vs. State of Haryana)*, the Apex Court held that ‘cruelty’ is a common essential to both the sections namely, Section 304-B and 498-A IPC and that has to be proved. The Explanation to Section 498-A gives the meaning of ‘cruelty’ while in Section 304-B there is no such explanation about the meaning of ‘cruelty’. But having regard to the common background to these offences, the meaning of ‘cruelty' and 'harassment’

has to be taken to be the same as is in the explanation to Section 498-A under which 'cruelty' by itself amounts to an offence and is punishable. In the same judgment, it was also held that Sections 304-B and 498-A cannot be held to be mutually exclusive. These provisions deal with two distinct offences. Under Section 304-B it is the "dowry death" that is punishable and such death should have occurred within seven years of the marriage. No such period is mentioned in Section 498-A and the husband or his relative would be liable for subjecting the woman to "cruelty" any time after the marriage.

14. As analyzed above, the prosecution has failed to establish the offence under Section 304-B of IPC. Now the question is whether offence under Section 498-A could be established. PW/10 and PW/3 are brothers of the deceased who categorically deposed that the deceased informed them that appellant No.2 and 3 used to demand television and motorcycle. They harassed and assaulted the deceased because of said demand. Father and mother of the deceased PW/4 and PW/5 stated that the deceased informed that husband of deceased and appellant No.2 and 3 used to demand television and motorcycle. Mother of deceased categorically deposed that the husband used to assault the deceased and appellant No.2 and 3 used to abuse her for not bringing television and motorcycle. Learned Amicus Curiae argued that there is no independent witness which may support the story of the prosecution. The aforesaid witnesses were also cross-examined on the point whether they lodged any report regarding demand of dowry in the police station and whether this factual story was brought to the notice of Sarpanch, etc. In the Indian society, in normal circumstances, demand for dowry or harassment for the same takes place within the boundary of the house. Even the parents or relative of the girl will not be aware about all these unless they are informed either by the girl herself or demand is made directly to them. The police officials or others cannot depose anything about the harassment in connection with the demand of dowry in absence of any complaint or statement made by the witness under Section 161 Cr.P.C. Seldom, villagers, neighbours may come to know of the same. In this background, statement of family members of the deceased lady cannot be discarded on the ground that they are relatives and are interested witnesses. {See 2015 (4) SCC 215 *(Rajinder Kumar vs. State of Haryana)*} In the deposition of P.W.5, there is no such material contradiction which may be a reason to disbelieve the statement of the family members of the deceased. The court below has rightly held that evidence of the family members were recorded after considerable long time from the date of incident and therefore certain minor variations may take place which are immaterial if deposition are examined in entirety. I find no flaw in the said finding given by the court below.

15. In Explanation to Section 498-A, the 'cruelty' is divided into two parts namely (a) and (b). Explanation (a) shows that mental cruelty which has ingrained in the first limb of Section 498-A has nothing to do with the demand of dowry- it is

associated with mental cruelty that can drive a woman to commit suicide and depend upon the person concerned. See 2017 (11) SCC 176 *(K.V. Prakash Babu vs. State of Karnataka)*. In 2017 (1) SCC 433 *(Guurcharan Singh vs. State of Punjab)*, the Supreme Court held that though for the purposes of the case in hand, the first limb of the Explanation to Section 498-A IPC is otherwise germane, proof of the willful conduct actuating the woman to commit suicide or to cause grave injury or danger to life, limb or health, whether mental or physical, is the *sine qua non* for entering a finding of cruelty against the person charged. As per this judgment, any mental or physical cruelty which may likely to drive the woman to commit suicide or to cause grave injury for danger to life of a woman attracts Section 498-A. Clause (b) covers the cases of harassment of woman with a view to coercing her or any person related to her to meet any unlawful demand. A careful reading of clause (b) shows that it covers harassment of woman or crossing her or even any person related to her to meet any unlawful demand for property, security, etc. Clause (b) is applicable on such harassment and coercion which is based on failure by woman to fulfill the said demand. In view of difference of language employed in clause (a) and (b), I am of the considered view that both the clauses deal with different eventualities. Clause (a) is wide enough to cover any kind of cruelty, injury or willful conduct which is likely to drive the woman to commit suicide or to cause injury or danger to life, limb or health whereas clause (b) is related with such harassment with a view to coerce her in relation to unlawful demand or for not fulfilling the demand by a married woman.

16 In the instant case, the prosecution witnesses have established beyond reasonable doubt that there has been a harassment of deceased in relation to demand of television and motorcycle, etc. The deceased was harassed, threatened and assaulted for not fulfilling the said demand. Thus, the court below has rightly held the appellants as guilty under Section 498 IPC.

17. In view of aforesaid analysis, the impugned judgment dated 17.1.2006 passed by Additional District Judge, Umaria in S.T. No.273/2002 is liable to be interfered with so far appellants were held guilty under Section 304-B IPC. The impugned judgment to this extent is set aside. The judgment of court below to the extent appellants were held guilty under Section 498-A IPC is affirmed.

18. As noticed, the informed that appellant No.1 has already undergone the punishment. Hence, appellant No.2 and 3 shall undergo the remaining part of sentence imposed by court below under Section 498 IPC.

19. The appeal is **partly allowed.**

Appeal partly allowed

I.L.R. [2018] M.P. 2270
CRIMINAL REVISION
Before Mr. Justice G.S. Ahluwalia
Cr.R. No. 156/2009 (Gwalior) decided on 25 June, 2018

SARDAR SINGH & ors. …Applicants

Vs.

STATE OF M.P. …Non-applicant

***A. Penal Code (45 of 1860), Sections 148, 325/149 & 323/149 – Conviction* – Previous enmity between parties – Trial Court acquitted 17 accused persons out of 20 but allegations and evidence were consistent against applicants right from the FIR – It is established that injured persons were mercilessly beaten by applicants whereby they sustained multiple injuries even on vital part of body – No irregularity or illegality committed by Courts below in convicting the applicants – Revision dismissed.**

(Paras 33, 37 & 38)

क. दण्ड संहिता (1860 का 45), धाराएँ 148, 325/149 व 323/149 – दोषसिद्धि – पक्षकारों के मध्य पूर्व वैमनस्यता – विचारण न्यायालय ने 20 में से 17 अभियुक्तगण को दोषमुक्त किया परंतु प्रथम सूचना प्रतिवेदन के ठीक पश्चात् से ही आवेदकगण के विरूद्ध अभिकथन एवं साक्ष्य अविचल थे – यह स्थापित किया गया है कि आहत व्यक्तियों को आवेदकगण द्वारा निर्दयता से पीटा गया था जिससे उनके शरीर के कोमल अंग में भी कई चोटें आईं – निचले न्यायालयों द्वारा आवेदकगण को दोषसिद्ध करने में कोई अनियमितता या अवैधता कारित नहीं की गई – पुनरीक्षण खारिज।

***B. Evidence Act (1 of 1872), Section 145 – Omission or Improvement in Statement* – Held – In present case, none of prosecution witnesses was confronted with their previous statements as required u/S 145 of the Act of 1872 – It is settled principle of law that if witness is not confronted with his previous statement, then improvement or omission and the previous statement cannot be taken into consideration.**

(Para 22)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 145 – लोप या कथन में सुधार – अभिनिर्धारित – वर्तमान प्रकरण में, अभियोजन साक्षीगण में से किसी का भी उनके पूर्व कथनों से सामना नहीं कराया गया था जैसा कि 1872 के अधिनियम की धारा 145 के अंतर्गत अपेक्षित है – विधि का यह सुस्थापित सिद्धांत है कि यदि साक्षी का उसके पूर्व कथन से सामना नहीं कराया जाता, तो सुधार या लोप एवं पूर्व कथन को विचार में नहीं लिया जा सकता।

***C. Criminal Procedure Code, 1973 (2 of 1974), Section 397 & 401 – Revision – Jurisdiction & Powers of Revisional Court* – Held – Court while**

exercising powers u/S 397 and 401 Cr.P.C. cannot re-appreciate the findings of fact unless and until same are found to be perverse.

(Para 34)

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 397 व 401 – पुनरीक्षण – पुनरीक्षण न्यायालय की अधिकारिता व शक्तियां – अभिनिर्धारित – न्यायालय दण्ड प्रक्रिया संहिता की धारा 397 एवं 401 के अंतर्गत शक्तियों का प्रयोग करते समय तथ्य के निष्कर्षों को पुनर्मूल्यांकित नहीं कर सकती जब तक कि उक्त को विपर्यस्त नहीं पाया जाता है।

***D. Legal Maxim – "falsus in uno falsus in omnibus" – Applicability* – Held – In the present case, principle of "falsus in uno falsus in omnibus" has no application – Court must try to separate the grain from the chaff.**

(Para 33)

घ. विधिक सूत्र – ''एक बात में मिथ्या तो सब में मिथ्या'' – प्रयोज्यता – अभिनिर्धारित – वर्तमान प्रकरण में, ''एक बात में मिथ्या तो सब में मिथ्या'' के सिद्धांत की कोई प्रयोज्यता नहीं है – न्यायालय को भूसे से अनाज को पृथक करने का प्रयास करना चाहिए।

Cases referred:

(2003) 12 SCC 587, (2000) 4 SCC 298, 1952 SCR 812, (1971) 2 SCC 387, (2015) 9 SCC 588, (2003) 7 SCC 749, (2013) 12 SCC 399, (2016) 10 SCC 537, (2015) 11 SCC 43.

Rajiv Jain, for the applicants.
BPS Chauhan, P.P. for the non-applicant/State.

O R D E R

G. S. AHLUWALIA, J.:- This criminal revision under Section 397, 401 of Cr.P.C. has been filed against the judgment and sentence dated 24.2.2009 passed by 3rd ASJ, Vidisha in Criminal Appeal No.249/2008 thereby affirming the judgment and sentence dated 12.11.2008 passed by JMFC, Kurwai, District Vidisha in Criminal Case No.7/2005 by which the applicants have been convicted under Sections 148, 325/149 (2 counts), 323/149 (5 counts) and have been sentenced to six months RI and a fine of Rs.300/- with default imprisonment, one year RI and a fine of Rs.500/- with default imprisonment and three months RI and a fine of Rs.200/- with default imprisonment respectively. All the sentences have been directed to run concurrently.

2. The applicant No.1 Sardar Singh has expired during the pendency of this appeal and accordingly, the appeal filed by Sardar Singh was dismissed as having abated by order dated 20.4.2011 and the name of applicant No.1 Sardar Singh was deleted from the array of cause title.

3. The necessary facts for the disposal of the present revision in short are that the complainant lodged a report against the applicants as well as 17 other persons

alleging that on 27.11.2004 at about 10:00 AM when they had gone to a village in order to lift the engine of a tractor and while they were coming back, then 15 to 20 persons in furtherance of their common knowledge came there along with lathi and Farsa and started abusing them and assaulted the injured Bachna by lathi and Farsa, as a result of which he fell down from the tractor. Krishna, Kale, Radhey and Madho Singh were assaulted by lathi and Farsa. Mahendra Singh, Roop Singh, Khilan Singh son of Halkai, Bhujbal and 10 to 12 more persons were involved in the assault which are not known to the first informant. On the basis of information given by the first informant, the police registered the offence. The injured persons were sent for medical examination. The police after recording the statements of the witnesses and completing all other formalities, filed the charge sheet for offence under Sections 148, 294, 341/149, 325/149 (2 counts), 323/149 (4 counts), 324/149, 427/149 of IPC.

4. The Trial Court by order dated 5.4.2007 framed the charges under Sections 148, 294, 341/149, 325/149 (2 counts), 323/149 (4 counts), 324/149, 427/149 of IPC.

5. The applicants and other co-accused persons abjured their guilt and pleaded not guilty.

6. The prosecution in order to prove its case, examined Dr. A.K. Shrivastava (PW-1), Kale @ Karan Singh (PW-2), Bachan Lal (PW-3), Krishna (PW-4), Chandrabhan (PW-5), Pappu (PW- 6), Madho Singh (PW-7), Rana (PW-8), Ashok (PW-9), Shyamacharan (PW-10), Onkar Singh Chandel (PW-11) and Ram Swaroop (PW-12).

7. The applicants did not examine any witness in their defence.

8. The Trial Court after considering the evidence which had come on record, acquitted 17 accused persons and convicted the applicants and the deceased applicant Sardar Singh for the following offences:-

Sections	Injured	Imprisonment	Detail of fine/if deposited	Imprisonment in lieu of fine
148 IPC	Chandrabhan	6 months RI	Rs. 300/	1 month RI
325/149 IPC	Chandrabhan	1 Year RI	Rs.500/-	2 months RI
325/149 IPC	Rana	1 Year RI	Rs.500/-	2 months RI

323/149 IPC	Bachanlal	3 months RI	Rs.200/-	1 month RI
323/149 IPC	Kale	3 months RI	Rs.200/-	1 month RI
323/149 IPC	Pappu	3 months RI	Rs.200/-	1 month RI
323/149 IPC	Madho	3 months RI	Rs.200/-	1 month RI
323/149 IPC	Krishna	3 months RI	Rs.200/-	1 month RI

9. It is not out of place to mention that the acquittal of the co-accused persons is not under challenge.

10. Challenging the findings given by the courts below, it is submitted by the counsel for the applicants that Kale @ Karan Singh (PW-2) has stated that he was beaten by the applicants and he had sustained injury because of fall of trolley as well as the parts of the engine. It is submitted that the applicant No.2 Mahendra Singh was elected as a Sarpanch and since the complainant party had encroached upon the Government land and as it was objected by the applicant No.2, therefore, the applicants have been falsely implicated. It is further submitted that the witnesses in their Court evidence had completely changed their prosecution story and there is no allegation of specific overt act against the applicant No.2 Mahendra Singh. It is further submitted that once the Trial Court had found that the evidence of these witnesses in respect of 17 co-accused persons is not worth acceptance and accordingly, has acquitted 17 co-accused persons, then it is clear that the evidence of these witnesses is not reliable in respect of the applicants, also. There was an enmity between the parties on the question of encroachment of Government land and accordingly, the applicants have been falsely implicated.

11. Per contra, it is submitted by the counsel for the respondent/State that the FIR was lodged promptly within one hour of the incident and it is specifically stated that while they were coming back after loading the engine pipe, they were waylaid by the accused persons and they started assaulting the son of the first informant and as a result of which he fell down from the tractor and the other injured persons were also assaulted by lathi and farsa and applicant No.2 Mahendra Singh, applicant No.3 Khilan Singh son of Halkai, Roop Singh, Bhujbal along with 10 to 12 persons who were armed with lathi and axe etc. had assaulted the injured. It is further submitted by the counsel for the State that although it is submitted by the counsel for the applicant that there are certain

improvements in the evidence of the witnesses but none of the witnesses were confronted with their case diary statements and under these circumstances, in the light of Section 145 of the Evidence Act, it cannot be said that there was any contradiction or omission. It is further submitted that multiple injuries were sustained by the injured persons and it cannot be said that those injuries were sustained by them because of fall from the tractor/trolley.

12. Heard the learned counsel for the parties.

13. Dr. A.K. Shrivastava (PW-1) has found the following injuries:-

Injured Chandrabhan Singh:

1. A lacerated wound red clotted blood 8cmx1cmx1cm in the left parietal region of head.

2. Contusion 8cmx6cm in the left hand and arm.

3. Contusion 6cmx2cm in the right forearm.

Injured Bachanlal:

1. A lacerated wound red clotted blood 6cmx1cmx1cm in the occipital region.

2. Multiple contusions 4cmx2cm each in both upper limbs.

3. multiple contusions 4cmx2cm each in both arms and forearm.

4. Multiple contusions 6cmx2cm each both in lower limbs.

Injured Kale @ Karan Singh:

1. A lacerated wound 4cmx1cmx1cm in left parietal region of head.

2. contusions 6cmx2cm each in back and both thighs.

Injured Krishna:

1. Incised wound 5cmx1cmx1cm in the left parietal region of head.

2. Contusion 6cmx4cm in the left side of face.

3. Contusion 4cmx4cm Umbilical region of abdomen .

Injured Pappu:

1. A lacerated wound 3cmx1cmx1cm in the left parietal region.

2. Multiple contusions 10cmx2cm on the back.

3. Contusion 10cmx2cm in the left side of chest anterior.

4. Contusion 8cmx6cm in the left shoulder.

Injured Madho Singh:

1. A lacerated wound 4cmx1cmx1cm in the left parietal region of head.
2. Contusion 18cmx16cm in the l..... region back.
3. Contusion 13cmx10cm in the left shoulder.
4. A.C.W. 1Cmx1cmx0.5cm in the left wrist.

Injured Rana:

1. Contusion 12cmx5cm in the left hand.
2. 3 Contusion 8cmx4cm each in the left forearm.
3. Contusion 8cmx4cm in the left shoulder.
4. Contusion 8cmx4cm in the right hand.
5. Multiple contusions 10cmx2cm each in the back.
6. Multiple contusions 8cmx3cm in the both calves.

14. Similarly, Dr. A.K. Shrivastava (PW-1) found that Chandrabhan (PW-5) had suffered fracture of index finger and Rana (PW-8) had suffered fracture of little right finger. The xray report of Chandrabhan (PW-5) is Ex.P/13 and the x-ray plate of Chandrabhan (PW-5) is Ex.P/14 and the x-ray report of Rana (PW-8) is Ex.P/15 and the x-ray plate of Rana (PW-8) is Ex.P/16.

15. By referring to the evidence of Kale @ Karan Singh (PW- 2), it is submitted by the counsel for the applicants that in paragraph 6 of his cross-examination, Kale @ Karan Singh has stated that he was not assaulted by the applicants but he had sustained injuries because of fall of the spare parts of engine as well as the trolley. Thus, it is submitted that in fact none of the witnesses were beaten and all the witnesses had sustained injuries because of the fall of the spare parts of the engine as well as the trolley. It is further submitted that Kale @ Karan Singh (PW-2) has admitted that he along with Chandrabhan (PW-5) has encroached upon the Government land and there is a dispute between them and the villagers, on the question of public road. it is submitted that since the applicant No.2 Mahendra was elected as a Sarpanch and he was objecting to the encroachment made by Kale @ Karan Singh (PW-2) and Chandrabhan (PW-5), therefore, he has been falsely implicated.

16. Bachan Lal (PW-3), Krishna (PW-4), Chandrabhan (PW-5), Pappu (PW-6), Madho Singh (PW-7) and Rana (PW-8) are the injured witnesses. Though they have specifically stated that while they were coming back after loading the engine

on the tractor and trolley, they were waylaid by Sardar Singh, Mahendra, Pooran, Khilan, Pappu, Sillu etc. along with the other villagers and all of them assaulted the injured witnesses. Rana (PW-8) has also stated that a palm of his right hand is permanently damaged.

17. Ashok (PW-9) is an independent eyewitness who was working in his field situated nearby the place of incident. He has specifically stated that Bachan Lal (PW-3), Krishna (PW-4), Kale @ Karan Singh (PW-2), Rana (PW-8) and Madho Singh (PW-7) Pappu (PW-6) were coming back and they were waylaid by the applicants and other co-accused persons and they were beaten.

18. Shyamacharan (PW-10) has stated that the police had seized lathi and other articles from applicant No.2 Mahendra and applicant No.3 Khilan and other co-accused persons vide seizure memo Ex.P/21 to P/30. In cross-examination, he stated that the lathi which was seized from the possession of Mahendra, was fixed with iron.

19. Onkar Singh Chandel (PW-11) was the Investigating Officer, he has stated that he had sent the injured witnesses to the Hospital for medical examination and Chandrabhan (PW-5) had lodged the FIR in Crime No.307/2004 Ex.P/21. It is further submitted that at the instance of Ashok Pardi, a spot map (Ex.P/31) was prepared on 28.11.2004. Lathies were seized from the possession of applicant No.2 Mahendra, applicant No.3 Khilan and other co-accused persons vide seizure memo Ex.P/21 to P/30 which bears his signatures. The applicant No.2 Mahendra, applicant No.3 Khilan and other co-accused persons were arrested vide arrest memo Ex.P/30. A loss Panchnama of the loss/damage sustained by the tractor was prepared which is Ex.P/33 and a loss to the extent of Rs.5000/- was caused.

20. Ram Swaroop (PW-12) has stated that the loss panchnama Ex.P/33 was prepared in his presence and it bears his signatures. The prosecution witnesses, who had sustained injuries, had admitted that there is an enmity between the parties. It is submitted by the counsel for the applicants that the applicants have been falsely implicated because of the enmity which has been admitted by the prosecution witnesses.

21. It was one of the contentions of the counsel for the applicants that there are material improvements in the evidence of the prosecution witnesses which makes the case of the prosecution unreliable.

22. I have gone through the evidence of the prosecution witnesses. Unfortunately, none of the prosecution witnesses was confronted with their previous statements as required under Section 145 of the Evidence Act. It is well established principle of law that if a witness is not confronted with his previous statement, then the improvement or omission and the previous statement cannot be taken into consideration in the light of Section 145 of the Evidence Act.

23. The Supreme Court in the case of *Karan Singh Vs. State of M.P.* Reported in (2003) 12 SCC 587 has held as under :

> **5.** When a previous statement is to be proved as an admission, the statement as such should be put to the witness and if the witness denies having given such a statement it does not amount to any admission and if it is proved that he had given such a statement the attention of the witness must be drawn to that statement. Section 145 of the Evidence Act is clear on this aspect. The object is to give the witness a chance of explaining the discrepancy or inconsistency and to clear up the particular point of ambiguity or dispute. In the instant case, Ext. D-4 statement as such was not put to the witness nor was the witness given an opportunity to explain it. Therefore, Ext. D-4 statement, even if it is assumed to be a statement of PW 1 Hari Singh, that is of no assistance to the appellants to prove their case of private defence.

24. The Supreme Court in the case of *Rajender Singh Vs. State of Bihar* reported in (2000) 4 SCC 298 has held as under :

> **6.** So far as the second contention of Mr Mishra is concerned, it is no doubt true that on 4-7-1977 Satyanarain who has been examined as PW 8 in the course of trial had been examined by a Magistrate as he had been seriously injured and that statement has been exhibited as Exhibit B and in fact the Magistrate who had recorded the statement has been examined by the defence as DW 1. This statement of Satyanarain recorded by the Magistrate may be a former statement by Satyanarain relating to the same fact at about a time when the fight took place and when the said Satyanarain was examined as PW 8 during trial it would be open for a party to make use of the former statement for such purpose as the law provides. But if the witness during trial is intended to be contradicted by his former statement then his attention has to be drawn to those parts of the statement which are required to be used for the purpose of contradicting him before the said statement in question can be proved as provided under Section 145 of the Evidence Act. Mr Mishra, learned Senior Counsel appearing for the appellant relying upon the decision of this Court in *Bhagwan Singh v. State of Punjab* contended

before us that if there has been substantial compliance with Section 145 of the Evidence Act and if the necessary particulars of the former statement has been put to the witness in crossexamination then notwithstanding the fact that the provisions of Section 145 of the Evidence Act is not complied with in letter i.e.by not drawing the attention of the witness to that part of the former statement yet the statement could be utilised and the veracity of the witness could be impeached. According to Mr Mishra the former statement of PW 8 which has been exhibited as Exhibit B was to the effect that Kameshwar was assaulted with a bhala by Rajender and Surender and he did not see whether any other person had been assaulted or not, whereas in the course of trial the substantive evidence of the witness is that it is Rajender and Triloki who assaulted the deceased and, therefore, it belies the entire prosecution case. The question of contradicting evidence and the requirements of compliance with Section 145 of the Evidence Act has been considered by this Court in the Constitution Bench decision in the case of *Tahsildar Singh v. State of U.P.* The Court in the aforesaid case was examining the question as to when an omission in the former statement can be held to be a contradiction and it has also been indicated as to how a witness can be contradicted in respect of his former statement by drawing particular attention to that portion of the former statement. This question has been recently considered in the case of *Binay Kumar Singh v. State of Bihar* and the Court has taken note of the earlier decision in *Bhagwan Singh* and explained away the same with the observation that on the facts of that case there cannot be a dispute with the proposition laid down therein. But in elaborating the second limb of Section 145 of the Evidence Act it was held that if it is intended to contradict him by the writing his attention must be called to those parts of it which are to be used for the purpose for contradicting him. It has been further held that if the witness disowns to have made any statement which is inconsistent with his present stand, his testimony in court on that score would not be vitiated until the cross-examiner proceeds to comply with the procedure prescribed in the second limb of Section 145 of the Evidence Act.....

25. The Supreme Court in the case of *Bhagwan Singh Vs. State of Punjab* reported in 1952 SCR 812 has held as under:

> **22.** A witness is called and he says in chief, "I saw the accused shoot X". In crossexamination he resiles and says "I did not see it at all." He is then asked "but didn't you tell A, B & C on the spot that you had seen it?" He replies "yes, I did." We have, of set purpose, chosen as an illustration a statement which was not reduced to writing and which was not made either to the police or to a Magistrate. Now, the former statement could not be used as substantive evidence. It could only be used as corroboration of the evidence in chief under Section 157 of the Evidence Act or to shake the witness's credit or test his veracity under Section 146. Section 145 is not called into play at all in such a case. Resort to Section 145 would only be necessary if the witness denies that he made the former statement. In that event, it would be necessary to prove that he did, and if the former statement was reduced to writing, then Section 145 requires that his attention must be drawn to those parts which are to be used for contradiction. But that position does not arise when the witness admits the former statement. In such a case all that is necessary is to look to the former statement of which no further proof is necessary because of the admission that it was made.

26. The Supreme Court in the case of *Major Som Nath Vs. Union of India* reported in (1971) 2 SCC 387 has held as under :

> **24.** ..... The learned advocate for the respondent also tried to support the stand taken by the High Court. It is true that when a witness has admitted having signed his previous statements that is enough to prove that some statement of his was recorded and he had appended his signature thereto. The only question is, what use can be made of such statements even where the witness admits having signed the statements made before the Military Authorities. They can at best be used to contradict in the cross-examination of such a witness when he gives evidence at the trial court of the accused in the manner provided under Section 145 of the Evidence Act. If it is intended to contradict the witness by the writing, the attention of the witness should be called before the writing

> can be proved to those parts of it which are to be used for the purpose of contradicting him. If this is not done, the evidence of the witnesses cannot be assailed in respect of those statements by merely proving that the witness had signed the document. Then the witnesses are contradicted by their previous statements in the manner aforesaid, then that part of the statements which has been put to the witness will be considered along with the evidence to assess the worth of the witness in determining his veracity. The whole of the previous statement however cannot be treated as substantive evidence.

27. The Supreme Court in the case of *V.K. Mishra Vs. State of Uttarakhand* reported in (2015) 9 SCC 588 has held as under :

> **19.** Under Section 145 of the Evidence Act when it is intended to contradict the witness by his previous statement reduced into writing, the attention of such witness must be called to those parts of it which are to be used for the purpose of contradicting him, before the writing can be used. While recording the deposition of a witness, it becomes the duty of the trial court to ensure that the part of the police statement with which it is intended to contradict the witness is brought to the notice of the witness in his cross-examination. The attention of witness is drawn to that part and this must reflect in his cross-examination by reproducing it. If the witness admits the part intended to contradict him, it stands proved and there is no need to further proof of contradiction and it will be read while appreciating the evidence. If he denies having made that part of the statement, his attention must be drawn to that statement and must be mentioned in the deposition. By this process the contradiction is merely brought on record, but it is yet to be proved. Thereafter when investigating officer is examined in the court, his attention should be drawn to the passage marked for the purpose of contradiction, it will then be proved in the deposition of the investigating officer who again by referring to the police statement will depose about the witness having made that statement. The process again involves referring to the police statement and culling out that part with which the maker of the statement was

> intended to be contradicted. If the witness was not confronted with that part of the statement with which the defence wanted to contradict him, then the court cannot suo motu make use of statements to police not proved in compliance with Section 145 of the Evidence Act that is, by drawing attention to the parts intended for contradiction.

28. It was next contended by the counsel for the applicants that as the Trial Court itself has found that the witnesses are not reliable in respect of 17 co-accused persons out of 20, therefore, the evidence of these witnesses in respect of the present applicants be also discarded. The submissions made by the counsel for the applicants cannot be accepted.

29. The Supreme Court in the case of *Shakila Abdul Gafar Khan (Smt.) vs. Vasant Raghunath Dhoble & Anr.* reported in (2003) 7 SCC 749 has observed as under:

> **"25.** It is the duty of the court to separate the grain from the chaff. Falsity of a particular material witness or a material particular would not ruin it from the beginning to end. The maxim *"falsus in uno falsus in omnibus"* has no application in India and the witnesses cannot be branded as liars. The maxim *"falsus in uno falsus in omnibus"* has not received general acceptance nor has this maxim come to occupy the status of rule of law. It is merely a rule of caution. All that it amounts to is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a court may apply in a given set of circumstances, but it is not what may be called "a mandatory rule of evidence". (See *Nisar Ali v. State of U.P.*)
>
> **26.** The doctrine is a dangerous one especially in India for if a whole body of the testimony were to be rejected, because the witness was evidently speaking an untruth in some aspect, it is to be feared that administration of criminal justice would come to a dead stop. Witnesses just cannot help in giving embroidery to a story, however true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of acceptance, and merely because in some respects the court considers the

> same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well. The evidence has to be sifted with care. The aforesaid dictum is not a sound rule for the reason that one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate an exaggeration, embroideries or embellishment. (See *Sohrab v. State of M.P.* and *Ugar Ahir v. State of Bihar*) An attempt has to be made to, as noted above, in terms of felicitous metaphor, separate the grain from the chaff, truth from falsehood. Where it is not feasible to separate the truth from falsehood, because grain and chaff are inextricably mixed up, and in the process of separation an absolutely new case has to be reconstructed by divorcing essential details presented by the prosecution completely from the context and the background against which they are made, the only available course to be made is to discard the evidence in toto. (See *Zwinglee Ariel v. State of M.P. and Balaka Singh v. State of Punjab.*) As observed by this Court in *State of Rajasthan v. Kalki* normal discrepancies in the evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there, however honest and truthful a witness may be. Material discrepancies are those which are not normal, and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so. These aspects were highlighted recently in *Krishna Mochi v. State of Bihar, Gangadhar Behera v. State of Orissa and Rizan v. State of Chhattisgarh.*"

30. The Supreme Court in the case of *Yogendra Alias Yogesh & Ors. vs. State of Rajasthan* reported in (2013) 12 SCC 399 has observed as under:

> "13. The argument advanced by Shri Altaf Hussain, learned counsel for the appellants, stating that the evidence which has been disbelieved in respect of certain accused, cannot be enough to convict the present appellants, has no

force. This Court, in *Ranjit Singh v. State of M.P.* has dealt with a similar issue. The Court herein, considered its earlier judgments in *Balaka Singh v. State of Punjab, Ugar Ahir v. State of Bihar* and *Nathu Singh Yadav v. State of M.P.* and has referred to the doctrine *falsus in uno, falsus in omnibus* and held, that the same has no application in India. The court must assess the extent to which the deposition of a witness can be relied upon. The court must make every attempt to separate falsehoods from the truth, and it must only be in exceptional circumstances, when it is entirely impossible to separate the grain from the chaff, for the same are so inextricably intertwined, that the entire evidence of such a witness must be discarded."

31. The Supreme Court in the case of *Bhagwan Jagannath Markad & Ors. vs. State of Maharashtra* reported in (2016) 10 SCC 537 has observed as under:

"19. While appreciating the evidence of a witness, the court has to assess whether read as a whole, it is truthful. In doing so, the court has to keep in mind the deficiencies, drawbacks and infirmities to find out whether such discrepancies shake the truthfulness. Some discrepancies not touching the core of the case are not enough to reject the evidence as a whole. No true witness can escape from giving some discrepant details. Only when discrepancies are so incompatible as to affect the credibility of the version of a witness, the court may reject the evidence. Section 155 of the Evidence Act enables the doubt to impeach the credibility of the witness by proof of former inconsistent statement. Section 145 of the Evidence Act lays down the procedure for contradicting a witness by drawing his attention to the part of the previous statement which is to be used for contradiction. The former statement should have the effect of discrediting the present statement but merely because the latter statement is at variance to the former to some extent, it is not enough to be treated as a contradiction. It is not every discrepancy which affects the creditworthiness and the trustworthiness of a witness. There may at times be exaggeration or embellishment not affecting the credibility. The court has to sift the chaff from the grain and find out the truth. A statement may be partly rejected or partly accepted. Want of independent witnesses or unusual behaviour of witnesses of a crime is not enough

to reject evidence. A witness being a close relative is not enough to reject his testimony if it is otherwise credible. A relation may not conceal the actual culprit. The evidence may be closely scrutinised to assess whether an innocent person is falsely implicated. Mechanical rejection of evidence even of a "partisan" or "interested" witness may lead to failure of justice. It is well known that principle "*falsus* in uno, *falsus* in *omnibus*" has no general acceptability. On the same evidence, some accused persons may be acquitted while others may be convicted, depending upon the nature of the offence. The court can differentiate the accused who is acquitted from those who are convicted. A witness may be untruthful in some aspects but the other part of the evidence may be worthy of acceptance. Discrepancies may arise due to error of observations, loss of memory due to lapse of time, mental disposition such as shock at the time of occurrence and as such the normal discrepancy does not affect the credibility of a witness."

32. The Supreme Court in the case of *Raja Alias Rajinder vs. State of Haryana* reported in (2015) 11 SCC 43 has observed as under:

"20. Another circumstance which needs to be noted is that Sukha PW 7, a taxi driver, has deposed that on 18-1-2003 about 11.00 p.m. while he was going to Fatehabad for taking passengers, he saw a bullock cart parked in front of the house of the accused and certain persons were tying a bundle in a "palli". On query being made by him, the accused persons told him that they are carrying manure to the fields. Though, this witness has given an exaggerated version and stated differently about the time of arrest, yet his testimony to the effect that he had seen the accused with a bundle in "palli" at a particular place cannot be disbelieved. The maxim falsus in uno, *falsus in omnibus*, is not applicable in India. In *Krishna Mochi v. State of Bihar*, it has been held thus: (SCC pp. 113-14, para 51)

> "51. … The maxim *falsus in uno, falsus in omnibus* has no application in India and the witnesses cannot be branded as liars. The maxim *falsus in uno*, *falsus in omnibus* (false in one thing, false in everything) has not received general acceptance nor has this maxim

> come to occupy the status of the rule of law. It is merely a rule of caution. All that it amounts to is, that in such cases testimony may be disregarded, and not that it must be disregarded."

21. In *Yogendra v. State of Rajasthan*, it has been ruled that: (SCC p. 404, para 13)

> "13. … The court must assess the extent to which the deposition of a witness can be relied upon. The court must make every attempt to separate falsehoods from the truth, and it must only be in exceptional circumstances, when it is entirely impossible to separate the grain from the chaff, for the same are so inextricably intertwined, that the entire evidence of such a witness must be discarded."

Thus viewed, the version of PW 7 to the extent that has been stated hereinabove is totally acceptable and credible."

33. It is well established principle of law that *"falsus in Uno falsus in omnibus"* has no application and the Court must try to separate the grain from the chaff. The Trial Court after appreciating the evidence led by the prosecution witnesses very minutely had acquitted 17 co-accused persons out of 20. The allegations against the applicants were consistent right from the FIR.

34. It is well established principle of law that this Court while exercising the powers under Section 397, 401 of Cr.P.C. cannot re-appreciate the findings of fact unless and until the same are found to be perverse. No perversity could be pointed out by the counsel for the applicants. Accordingly, the applicants are held guilty for committing the following offences:-

> "Sections 148, 325/149, 325/149 (2 counts) and 323/149 (5 counts)."

35. Thus, this Court is of the considered opinion that the Trial Court and Appellate Court did not commit any mistake in holding the applicants guilty and accordingly, the applicants are held guilty for committing the following offences:-

> "Sections 148, 325/149, 325/149 (2 counts) and 323/149 (5 counts)."

36. It is next contended by the counsel for the applicants that the incident took place in the year 2004 and near about 14 years have passed and, therefore, the applicants may be sentenced to the period already undergone by enhancing the fine amount.

37. In order to consider the submissions made by the counsel for the applicants, it would be essential to consider the number of injuries which were caused by the applicants to the injured witnesses. As already pointed out by this Court that in the previous paragraph, Chandrabhan (PW-5) had sustained three injuries out of one lacerated wound, Bachan Lal (PW-3) had sustained one lacerated wound and multiple contusions on both upper limbs, multiple contusions on both arms and forearm and multiple contusions on lower leg. Krishna (PW-4) had sustained an incised wound on his parietal region and two contusions. Pappu (PW-6) had sustained a lacerated wound on parietal region, multiple contusions on back and two contusions. Madho Singh (PW-7) had sustained a lacerated wound on parietal region and three other injures. Rana (PW-8) had sustained four contusions on hand, forearm, shoulder, left hand, right hand and multiple contusions on back and multiple contusions on both calves and apart from that, Rana (PW-8) and Chandrabhan (PW-5) had sustained fracture of little and index fingers of right hand. Thus, it is clear that the injured persons were mercilessly beaten by the applicants, as a result of which they had sustained multiple injuries on the part of the bodies and also on the vital part of the bodies. Deterrence is one of the important factor of sentencing policy.

38. By awarding the jail sentence of rigorous imprisonment of six months, one year and three months respectively by the Trial Court, in the considered opinion of this Court, a very lenient view has been adopted by the Trial Court and, therefore, the jail sentence awarded by the Trial Court and confirmed by Appellate Court does not call for any interference.

39. Accordingly, the judgment and sentence dated 12.11.2008 passed by CJM, Kurwai, District Vidisha in Criminal Case No.7/2005 and judgment dated 24.2.2009 passed by 3rd ASJ, Vidisha in Criminal Appeal No.249/2008 are hereby affirmed.

40. The applicants are on bail. Their bail bonds and surety bonds are hereby cancelled. The applicants are directed to immediately surrender before the Trial Court for undergoing the jail sentence.

41. Accordingly, the revision is hereby **dismissed.**

Revision dismissed

I.L.R. [2018] M.P. 2287
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice Vivek Rusia
M.Cr.C. No. 20916/2017 (Indore) decided on 13 August, 2018

ACHAL RAMESH CHAURASIA …Applicant

Vs.

STATE OF M.P. & ors. …Non-applicants

***A. Criminal Procedure Code, 1973 (2 of 1974), Section 482 and Penal Code (45 of 1860), Sections 420, 465, 468, 470 r/w Section 120-B – Quashment of FIR – Gambling activities through Online Games* – Held – Applicant/company designed fun games by name of Casino and Teen Patti – Video parlours are being run as Casinos – It is all gambling in which skill is not involved – Gambling is absolutely prohibited in M.P. – Enough material is available in case diary that points earned by players are being converted into money by applicant – Through bank account details, prosecution trying to establish that money is transferred to company/accused persons in regular manner by franchisee/video parlours – It is a matter of evidence which can be proved by prosecution by way of evidence – No case for interference – Application dismissed.**

(Paras 22 to 24)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 एवं दण्ड संहिता (1860 का 45), धाराएँ 420, 465, 468, 470 सहपठित धारा 120–बी – प्रथम सूचना प्रतिवेदन अभिखंडित किया जाना – ऑनलाईन खेल के जरिए द्यूत क्रियाकलाप – अभिनिर्धारित – आवेदक/कंपनी ने कसीनों और तीन पत्ती के नाम से मनोरंजक खेल विकसित किये – वीडियो पार्लरों को कसीनों के तौर पर चलाया जा रहा है – यह सब द्यूत है जिसमें कुशलता शामिल नहीं है – म.प्र. में द्यूत को पूर्णतया प्रतिषिद्ध किया गया है – केस डायरी में पर्याप्त सामग्री उपलब्ध है कि खिलाड़ियों द्वारा अर्जित अंको को आवेदक द्वारा रूपयों में संपरिवर्तित किया जा रहा है – बैंक खाता विवरणों के जरिए अभियोजन यह स्थापित करने का प्रयास कर रहा है कि फ्रेंचाइजी/वीडियो पार्लरों द्वारा नियमित ढंग से कंपनी/अभियुक्तगण को रूपये अंतरित किये गये है – यह एक साक्ष्य का मामला है जिसे अभियोजन द्वारा साक्ष्य के जरिए साबित किया जा सकता है – हस्तक्षेप हेतु प्रकरण नहीं – आवेदन खारिज।

***B. Criminal Procedure Code, 1973 (2 of 1974), Section 482 – Scope and Jurisdiction* – Held – In a petition u/S 482 for quashment of FIR, Court has to see whether the allegations made in complaint, if proved, make out a prima facie offence or not – At this stage, sifting or weighing of evidence in petition u/S 482 Cr.P.C. is neither permitted nor expected – Courts have to strictly confined to the scope and ambit of provision.**

(Para 11)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – व्याप्ति एवं अधिकारिता – अभिनिर्धारित – प्रथम सूचना प्रतिवेदन को अभिखंडित किये जाने हेतु धारा 482 के अंतर्गत याचिका में न्यायालय को यह देखना होता है कि क्या परिवाद में किये गये अभिकथन यदि साबित किये जाते है तब प्रथम दृष्ट्या अपराध बनता है अथवा नहीं – इस प्रक्रम पर, धारा 482 दं.प्र.सं. के अंतर्गत याचिका में साक्ष्य का सूक्ष्म परीक्षण या मूल्यांकन, न तो अनुज्ञेय है और न ही अपेक्षित है – न्यायालयों को कठोरता से उपबंध की व्याप्ति एवं परिधि तक सीमित रहना चाहिए।

Cases referred:

Cr.Application No. 911/2012 decided on 12.12.2012 (High Court of Bombay), 1995 6 SCC 289, 1997 AIR SCW 950 : AIR 1997 SC 987, (2007) 12 SCC 1, (2012) 10 SCC 303, 1992 Supp (1) SCC 335 (1992 AIR SCW 237 : AIR 1992 SC 604, (2009) 4 SCC 443, AIR 2010 SC (Supp) 864, AIR 2014 SC 3352, (2013) 11 SCC 673, 2008 (4) SCC 471, 2009 (4) SCC 439, 2014 (3) SCC 389, AIR 2013 SC 506.

R.K. Gondale, for the applicant.
Bhuwan Gautam, G.A. for the non-applicant/State.

(Supplied: Paragraph numbers)

J U D G M E N T

VIVEK RUSIA, J. : - The petitioner has filed the present petition under Section 482 of the Cr.P.C seeking quashment of FIR registered under the Crime No.12/2016 420, 465, 468, 470 read with Section 120 B of Indian Penal Code at P.S. Crime Branch, Indore.

2. During pendency of this petition, investigation has been completed and final report has been filed.

3. The Officer in Charge of Crime Branch Police Station received an information that Rafik Tention, Shahid Ranga and Dhiraj Yadav are indulging into gambling activities through online games at Anand Bajar, Opposite Canara Bank, Palasia, Indore. They are cheating with dishonest intention to the people by luring them to win Rupees 9 against Rupee 1 and Rupees 36 against Rupee 1. In order to enquire, the team of Crime Branch visited the spot and arrested the accused and registered an FIR No.12 of 2012 under Sections 420, 465, 468, 470 read with Section 120 B of Indian Penal Code. The Police recorded the statements of the aforesaid accused persons and also made Mr. Rahul Chaurasia and present petitioner as co-accused in the FIR .

4. According to the petitioner, he is a Director of Private Limited Company incorporated under the provisions of Indian Companies Act, 1956 having its registered office at Flat No.2701 C, Lodha Belismo Delie Road, Mumbai. The

Company is registered in the name of "Gameking Pvt. Ltd.". The Memorandum of Association of the Company is filed as Exhibit C along with present M.Cr.C. The company is engaged in manufacturing of amusement Video Game machines, designing and providing software and gaming solutions both online and offline. The Company is ISO 9001 certified company carrying on its business since the year 1991. The said company, in the course of its business providing software and technological support to run the Video Games both online and offline to various parties viz. Card games, Rummy, Five Cards India Poker, Skill Wheel Game etc. The said games can be played at cyber cafe, Video Parlours or even at home through mobile or computer. The player is require to obtain an online account and thereafter, he can download the game from the website of the company or he can play the same either at cyber cafe, video parlour, or can download on his computer, iPad or mobile phone. According to the petitioner, all the games are voluntary in nature and no one is compelled to play the games and all the games are purely for amusement and entertainment. The company only charges to give ID and the person playing the game gets points after winning stage by stage.

5. The petitioner has granted various franchises agreement to various Cyber Cafes and Video Parlours and as per Clause 8.3 of the agreement, the points won by the members in the Gameking Games section are to be used by them for surfing or playing more games. These points do not have any cash value, but a member can gift the same to other member.

6. The petitioner has been made accused only on the basis of statements recorded under Section 27 of the Indian Evidence Act. No material has been collected against the petitioner. In support of his case, the applicant has placed reliance over the letter dated 27.02.2017 written by the DIG (Complaints), Headquarter Bhopal by which he has advised for filing of closure report.

7. Learned counsel for the petitioner has also placed reliance over the judgement passed by the High Court of Judicature at Bombay in Criminal Application No.911/2012, decided on 12.12.2012 in which similar FIR has been quashed. Relevant portion of the aforesaid judgement is reproduced below:

> ***"3.*** **The app*licant Achal or his Company entered into franchisee agreement with Original Accused No.5 – Sudhir Hegde for providing franchisee of his chain of cyber cafes. An Internet Cafe was allegedly conducted by Original Accused No.5 under the name and style Royal Video Game at Bandra (West), which was raided by the Respondent on 09.05.2011.***
>
> ***4. Considering the limited role of the Applicant to be a Director of supply of the machine of Video Game to franchisee, no personal role can be attributed to him. His case deserves for discharge.***

5. In identically placed matter in Criminal Application No.1109 of 2011 by Ramesh Chaurasia (father of the present Applicant), a Director in the same Company, this Court has quashed and set aside the prosecution arising out of same events dated 09.05.2011."

8. Shri. R.K. Gondale, learned counsel for the petitioner submits that in view of the above, present petition deserves to be allowed and FIR registered against the applicant is liable to be quashed with cost. In support of his contention he has placed reliance over para 10 of the judgement passed by the Apex Court in case of *M.J. Sivani and Others Vs. State of Karnataka and Others*, reported in 1995 6 SCC 289 which is reproduced below:

"10. Gaming, therefore, is an inclusive definition which includes a game of chance and skill combined or a pretended game of chance or of chance and skill combined. Gaming house would mean any house, room, tent etc. whether enclosed or open or any place whatsoever in which the instruments of gaming are kept or used for profits or gain by the person occupying, using or keeping such house, room, tent etc. whether by way of charge or otherwise. The instrument of gaming would include any article used or intended to be used as a subject of means of gaming, any document used or intended to be used as a register or record or evidence of gaming, the profits of any gaming or any winnings or prizes in money or otherwise distributed or intended to be distributed or money's worth in gaming. Place would include a building or a tent etc. whether permanent or temporary or any area whether enclosed or open. Place of public amusement means any place where any gain or means of carrying on the gain is provided in which the public are admitted and includes a road or a street or a way whether a thoroughfare or not and a landing place in which the public are granted access or have a right to resort or over which they have a right to pass. The elements of gaming are the presence of prizes or consideration, chance and prizes are reward and games includes a contrivance which has for its object to furnish sport, recreation or amusement. Amusement would mean diversion, pastime or enjoyment or a pleasurable occupation of the senses, or that which furnished it. A common gaming house is a place or public place kept or used for playing therein any game of chance, or any mixed game of chance and skill, in which the organiser keeps one or more of the players. It is also a place in which any game is played, the chances of which are not favourable alike to all the players. Gaming is to play any game whether of skill or chance for money or money's worth

and the act is not less gaming because the game played is not in itself unlawful and whether it involved or did not involve skill".

9. Shri Bhuwan Gautam, learned GA for the respondent/State submits that the present case is distinguishable from the case before the High Court of Judicature at Bombay. In the case in hand, there is specific allegation and material available on record which shows that the petitioner has designed the game in such a way that there would be no chance of winning by the player and he is bound to loose his money. There is enough material available in the case diary and challan to establish that the money is being siphoned to the Company Gameking Pvt. Ltd. The statements of the complainants have been recorded who have categorically stated that by playing these games they have lost Rs.15,000/- to Rs.20,000/- and some of them have lost upto Rs.50,000/-. The gambling is prohibited in the state of Madhya Pradesh, therefore, no case for interference by the High Court in a petition under Section 482 of the Cr.P.C is made out.

10. Before appreciating the facts of the case in hand it would be trite to observe the legal position with regard to exercise of jurisdiction by the High Court under section 482 of Cr.P.C. for quashing the First Information Report and other consequential proceedings.

11. The Hon'ble Supreme court of India time and again has held that the power under Section 482 of Cr.P.C. is extra ordinary in nature and this power has to be exercised sparingly and with great care and caution only to give effect to an order under the Code or to prevent abuse of process of the Court or to otherwise secure the ends of justice and only in the cases where attaining facts and circumstances satisfy that possibilities of miscarriage of justice will arise in case of non-use of power. In quashing the proceeding, the High Court has to see whether the allegations made in the complaint, if proved, make out a *prima facie* offence. in such a situation only the High Court should entertain the Petition under section 482 otherwise must relegate the applicant to face the trial. At this stage before the High court sifting or weighing of the evidence is neither permitted nor expected. While considering the petition under Section 482 of Cr.P.C., the Courts have to be strictly confined to the scope and ambit of the provision.

12. It is held in *Krishnanan Vs. Krishnaveni* (1997 AIR SCW 950 : AIR 1997 SC 987) that when the High Court on examination of the record finds that there is grave miscarriage of justice or abuse of process of the Courts or the required statutory procedure has not been complied with or there is failure of justice or order passed or sentence imposed by the Magistrate requires correction, it is the duty of the High Court to have it corrected at the inception lest grave miscarriage of justice would ensue. It is, therefore, to meet the ends of justice or to prevent abuse of the process that the High Court is preserved with inherent power and would be justified, under such circumstances, to exercise the inherent power. It

may be exercised sparingly so as to avoid needless multiplicity of procedure, unnecessary delay in trial and protract on of proceedings.

13. In Inder *Mohan Goswami And Another Vs State of Uttaranchal and others* (2007) 12 SCC 1 Hon'ble the Apex Court observed:

> ***27. The powers possessed by the High Court under Section 482 of the Code are very wide and the very plenitude of the power requires great caution in its exercise. The court must be careful to see that its decision in exercise of this power is based on sound principles. The inherent power should not be exercised to stifle a legitimate prosecution. The High Court should normally refrain from giving a prima facie decision in a case where all the facts are incomplete and hazy; more so, when the evidence has not been collected and produced before the court and the issues involved, whether factual or legal, are of such magnitude that they cannot be seen in their true perspective without sufficient material. Of course, no hard and fast rule can be laid down in regard to cases in which the High Court will exercise its extraordinary jurisdiction of quashing the proceedings at any stage.***

14. The Apex Court in case of *Gian Singh Vs State of Punjab*, reported in (2012)10 SCC 303 has held as under :-

> ***53. Section 482 of the Code, as its very language suggests, saves the inherent power of the High Court which it has by virtue of it being a superior court to prevent abuse of the process of any court or otherwise to secure the ends of justice. It begins with the words, 'nothing in this Code' which means that the provision is an overriding provision. These words leave no manner of doubt that none of the provisions of the Code limits or restricts the inherent power. The guideline for exercise of such power is provided in Section 482 itself i.e., to prevent abuse of the process of any court or otherwise to secure the ends of justice. As has been repeatedly stated that Section 482 confers no new powers on High Court; it merely safeguards existing inherent powers possessed by High Court necessary to prevent abuse of the process of any Court or to secure the ends of justice. It is equally well settled that the power is not to be resorted to if there is specific provision in the Code for the redress of the grievance of an aggrieved party. It should be exercised very sparingly and it should not be exercised as against the express bar of law engrafted in any other provision of the Code.***

54. In different situations, the inherent power may be exercised in different ways to achieve its ultimate objective. Formation of opinion by the High Court before it exercises inherent power under Section 482 on either of the twin objectives, (i) to prevent abuse of the process of any court or (ii) to secure the ends of justice, is a sine quanon.

55. In the very nature of its constitution, it is the judicial obligation of the High Court to undo a wrong in course of administration of justice or to prevent continuation of unnecessary judicial process. This is founded on the legal maxim quando lex aliquid alicui concedit, conceditur et id sine qua res ipsa esse non potest. The full import of which is whenever anything is authorised, and especially if, as a matter of duty, required to be done by law, it is found impossible to do that thing unless something else not authorised in express terms be also done, may also be done, then that something else will be supplied by necessary intendment. Ex debito justitiae is inbuilt in such exercise; the whole idea is to do real, complete and substantial justice for which it exists. The power possessed by the High Court under Section 482 of the Code is of wide amplitude but requires exercise with great caution and circumspection.

56. It needs no emphasis that exercise of inherent power by the High Court would entirely depend on the facts and circumstances of each case. It is neither permissible nor proper for the court to provide a straitjacket formula regulating the exercise of inherent powers under Section 482. No precise and inflexible guidelines can also be provided."

15. The Hon'ble Supreme Court in case of *State of Haryana v. Bhajan Lal*, 1992 Supp (1) SCC 335 (1992 AIR SCW 237 : AIR 1992 SC 604) explained the circumstances under which such power of sec.482 could be exercised, where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused. It is observed in para 102 as under:

"102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of

the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formula and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there

is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

16. This propositions of law are being followed in the judgments passed in a case of *Mahesh Chaudhary v. State of Rajasthan* (2009) 4 SCC 443), *Shakson Belthissor v. State of Kerala and Anr*, AIR 2010 SC (Supp) 864 and *Mosiruddin Munshi v. Md. Siraj* AIR 2014 SC 3352 and in many other cases.

17. Similar view has been taken by apex court in case of in *Paramjeet Batra Vs State of uttarakhand and others* (2013) 11 SCC 673. Relevant para of this judgement reads thus:

7. While exercising its jurisdiction under Section 482 of the Code the High Court has to be cautious. This power is to be used sparingly and only for the purpose of preventing abuse of the process of any court or otherwise to secure ends of justice. Whether a complaint discloses a criminal offence or not depends upon the nature of facts alleged therein. Whether essential ingredients of criminal offence are present or not has to be judged by the High Court. A complaint disclosing civil transactions may also have a criminal texture. But the High Court must see whether a dispute which is essentially of a civil nature is given a cloak of criminal offence. In such a situation, if a civil remedy is available and is, in fact, adopted as has happened in this case, the High Court should not hesitate to quash criminal proceedings to prevent abuse of process of court.

18. In case of *C.B.I Vs K.M Sharan* reported in 2008(4) SCC 471 & in *Mahesh Choudhary Vs State of Rajasthan* reported in 2009(4) SCC 439 also the principles

and scope of the inherent power under Section 482 Cr.P.C. to quash charge-sheet and held that the High Court is not supposed to "embark upon the inquiry whether the allegations in FIR and the charge-sheet were reliable or not and thereupon to render definite finding about truthfulness or veracity of the allegations" High Court should have limited its considerations to "... Whether allegations made in the FIR and the charge-sheet taken on their face value and accepted in their entirely would prima facie constitute an offense for making out a case against the accused"

19. In the case of *Vijayander Kumarb Vs State of Rajasthan* reported in 2014(3) SCC 389 it has again been reiterated the same principles. Para 8 of the judgement is as follows

> ***8. On behalf of the appellants reliance has been placed upon judgments of this Court in the case of Thermax Limited and Others Vs. K.M.Johny and Others[1] and in case of Dalip Kaur and Others vs. Jagnar Singh and another[2]. There can be no dispute with the legal proposition laid down in the case of Anil Mahajan vs. Bhor Industries Limited[3] which has been discussed in paragraph 31 in the case of Thermox Limited (supra) that if the complaint discloses only a simple case of civil dispute between the parties and there is an absolute absence of requisite averment to make out a case of cheating, the criminal proceeding can be quashed. Similar is the law noticed in the case of Dalip Kaur (supra). In this case the matter was remanded back to the High Court because of non-consideration of relevant issues as noticed in paragraph 10, but the law was further clarified in paragraph 11 by placing reliance upon judgment of this Court in R.Kalyani vs. Janak C.Mehta[4]. It is relevant to extract paragraph 11 of the judgment which runs as follows:***
>
> ***"11.There cannot furthermore be any doubt that the High Court would exercise its inherent jurisdiction only when one or the other propositions of law, as laid down in R. Kalyani v. Janak C. Mehta is attracted, which are as under:***
>
> ***"(1) The High Court ordinarily would not exercise its inherent jurisdiction to quash a criminal proceeding and, in***

particular, a first information report unless the allegations contained therein, even if given face value and taken to be correct in their entirety, disclosed no cognizable offence.

(2) For the said purpose the Court, save and except in very exceptional circumstances, would not look to any document relied upon by the defence.

(3) Such a power should be exercised very sparingly. If the allegations made in the FIR disclose commission of an offence, the court shall not go beyond the same and pass an order in favour of the accused to hold absence of any mens rea or actus reus.

(4) If the allegation discloses a civil dispute, the same by itself may not be ground to hold that the criminal proceedings should not be allowed to continue."

20. The Apex court has made it clear in the case of *Sathish Mehra Vs. State of N. C. T. of Delhi* AIR 2013 SC 506 that powers under section 482 of the Cr.P.C. is exercisable at threshold as well as at advanced stage of trial. Para 15 of the judgement reads thus:

15. The power to interdict a proceeding either at the threshold or at an intermediate stage of the trial is inherent in a High Court on the broad principle that in case the allegations made in the FIR or the criminal complaint, as may be, prima facie do not disclose a triable offence there can be reason as to why the accused should be made to suffer the agony of a legal proceeding that more often than not gets protracted. A prosecution which is bound to become lame or a sham ought to interdicted in the interest of justice as continuance thereof Will amount to an abuse of the process of the law. This is the core basis on which the power to interfere with a pending criminal proceeding has been recognized to be inherent in every High Court. The power, though available, being extra-ordinary in nature has to be exercised sparingly and only if the attending facts and circumstances satisfies the narrow test indicated above,

namely, that even accepting all the allegations levelled by the prosecution, no offence is disclosed. However, if so warranted, such power would be available for exercise not only at the threshold of a criminal proceeding but also at a relatively advanced stage thereof, namely, after framing of the charge against the accused. In fact the power to quash a proceeding after framing of charge would appear to be somewhat wider as, at that stage, the materials revealed by the investigation carried out usually comes on record and such materials can be looked into, not for the purpose of determining the guilt or innocence of the accused but for the purpose of drawing satisfaction that such materials, even if accepted in its entirety, do not, in any manner, disclose the commission of the offence alleged against the accused.

21. The contention of learned counsel for the applicant is that there is no involvement of money in these games and the winner gets the points only after crossing the stage successfully.

22. As per the prosecution story, the details of the bank account of the accused and the company have been collected and from which the prosecution is trying to establish that the money is being transferred to the company/accused persons in a regular manner by a franchisee/Video Parlours. Apart from this, the prosecution has recorded the statements of the complaints and the victims under Section 161 of the Cr.P.C in which they have clearly disclosed that by playing the online games i.e. "Casino" from the "Dream World Parlour", he lost Rs15,000/- to Rs.20,000/-. He was given the lure of getting Rs.9/- by investing Rs.1/- in the game. One of the statement recorded by the prosecution for example is reproduced below:

''विलास पिता रामनाथ कुटे उम्र 36 साल, व्यवसाय – कोरियर का काम, निवासी म.नं. –8, न्यू जायफलवाडी तारदेव , तारदेव पुलिस कम्पाउण्ड के पीछे थाना तारदेव, मुम्बई 4000034 मोबाईल नम्बर 9029387152 9987341939

मैं उक्त पते पर जन्म से निवास करता हूँ मैं कक्षा 10 वी तक पढ़ा हूँ और कोरियर का काम करता हूँ। मैं सेमसंग का गेलक्सी नोट 3 वी का उपयोग करता हूँ। जिसका आय.एम.ई.आय. नम्बर 358021057539607 है। मेरे परिवार में पत्नी गीता मोबाईल नम्बर 9594519227 है तथा दो लड़की है। तारदेव में घांसवाला कम्पाउण्ड में रमेश चौरसिया एवं अचल चौरसिया द्वारा फनगेम के नाम से केसिनों

का काम किया जाता था। पूर्व में वीडियो केसिनों खेला करता था। लगभग ढेड वर्ष पूर्व एण्ड्राईड बेस्ड एप आ जाने से उनके द्वारा मेरे सेमसंग मोबाईल में एण्ड्राईड एप फनगेम डाउनलोड किया गया था मगर इससे मोबाईल गरम होने से यह गेम मैने बाद में अपने मोबाईल से डिलीट कर दिया। अब मैं इस गेम को खेलने के लिए उनके पार्लर में जाता हूँ जहां कम्प्यटूर पर यह गेम खिलाया जाता है इसके लिए वहां एक आय.डी. व पासवर्ड रखा जाता है जिसको उपयोग कर मैं गेम खेलता हूँ। इस आय.डी. के माध्यम से मैने फन गेम में 1 प्वाईंट के 9 प्वाईंट मिलते थे इसमें मैं लगभग रूपये 50 हजार रूपये हार चुका हूँ। मुझे 1 रूपये के 9 रूपये मिलने का प्रलोभन देकर मेरे मोबाईल में यह गेम डाउनलोड कराया गया था। घांसवाला कम्पाउण्ड टूटने के बाद गुलाब भवन में ड्रीमवर्ल्ड के नाम से यह पार्लर चल रहा है आज दिनांक 28.6.2016 को मैं यह गेम खेलने के लिए गुलाब भवन स्थित ड्रीमवर्ल्ड पार्लर पर आया था जिसके मैनजेर संजय चौरसिया है। फनगेम में प्वाईंट डालने का काम संजय चौरसिया और सुरेन्द्र कुमार चौरसिया करता है। यह कथन अपनी पूर्ण जानकारी के आधार पर पूर्णतः सत्य दे रहा हूँ कथन पढे सही होने पर हस्ताक्षर किये।''

23. The applicant/company has designed the fun game in the name of "Casino" or "Teen Patti" etc. by coding/decoding in PL/SQL language in which there is a master ID and further provision of generation of minor Ids. The company generates the password for minor IDs by way of recharge and some percentage of the said amount goes to the master ID and then there is a provision of betting of particular number in a wheel and after investment of money in all the numbers, the wheel stops on a particular number in which less amount is invested and by doing this the company make money out of it. It is all gambling in which the skill is not involved. The gambling is absolutely prohibited in the state of Madhya Pradesh. That enough material is available in the case diadry (sic:diary) that points earned by the players are being converted into money by the co-accused. That applicant has appointed his son as Manager in the Indore City as earlier Manager was not efficient in respect of promotion of the Game. The Video Parlours are being run as Casinos. Police has earlier registered number of cases under the Gambling Act in these Video Parlours run by the co-accused. Apart from this it is a matter of evidence which can be proved by the prosecution by way of evidence, therefore, it is not a fit case in which the high Court can exercise its power under Section 482 of the Cr.P.C. to quash the FIR.

24. So far as the letter dated 27.02.2017 written of DIG is concerned, the respondents in their return has clearly stated that the aforesaid letter was written

only on the basis of statements of the complainants, but other material were not available with the same authority and now the investigation has been completed and challan has been filed on 22.01.2018, therefore, that letter would not help the applicant. No case for interference is made out.

Present petition is accordingly **dismissed**.

Application dismissed