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No. 2 OF 2019

THE MADHYA PRADESH GOODS AND SERVICES TAX (AMENDMENT) ACT, 2019

[Received the assent of the Governor on the 7th February, 2019; assent first published in the "Madhya Pradesh Gazette (Extra-ordinary)", dated the 8 February 2019, page Nos. 106(13) to 106(24)].

An Act further to amend the Madhya Pradesh Goods and Services Tax Act, 2017.

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

1. Short title and commencement. (1) This Act may be called the Madhya Pradesh Goods and Services Tax (Amendment) Act, 2019.

(2) Save as otherwise provided, the provisions of this Act shall come into force on such date as the State Government may, by notification in the official Gazette, appoint:

Provided that different dates may be appointed for different provisions of the Act and any reference in any such provision to the commencement of this Act shall be construed as a reference to the coming into force of that provision.

2. Amendment of Section 2. In Section 2 of the Madhya Pradesh Goods and Services Tax Act, 2017 (No. 19 of 2017) (hereinafter referred to as the principal Act) —

(a) in clause (4), for the words "the Appellate Authority and the Appellate Tribunal", the words, bracket and figures "the Appellate Authority, the Appellate Tribunal and the Authority referred to in sub-section (2) of Section 171" shall be substituted;

(b) in clause (16) for the words "Central Board of Excise and Customs", the words "Central Board of Indirect Taxes and Customs" shall be substituted;

(c) in clause (17), for sub-clause (h), the following sub-clause shall be substituted, namely:—

"(h) activities of a race club including by way of totalisator or a license to book maker or activities of a licensed book maker in such club; and";

(d) clause (18) shall be omitted;

(e) with effect from the 1st day of July, 2017 clause (21) shall be deemed to have been omitted;

(f) with effect from the 1st day of July, 2017 clauses (22) to (111) shall be deemed to have been renumbered as clauses (21) to (110) respectively;

(g) in clause (35) as so renumbered, for the word, bracket and letter "clause (c)", the word, bracket and letter "clause (b)" shall be substituted;

(h) in clause (69) so renumbered, in sub-clause (f), after the word and figure "article 371", the words, figure and letter "and article 371J" shall be inserted;

(i) in clause (102) so renumbered, the following Explanation shall be inserted, namely:—

"Explanation.- For the removal of doubts, it is hereby clarified that the expression "services" includes facilitating or arranging transactions in securities;";

(j) with effect from the 1st day of July, 2017 after the clause (110) so renumbered, the following clause shall be deemed to have been inserted, namely:—

"(111) "the Central Goods and Services Tax Act, 2017" means the Central Goods and Services Tax Act, 2017 (No. 12 of 2017);".

3. Amendment of Section 6. For the marginal heading of Section 6 of the principal Act, the following marginal heading shall be substituted, namely:—

"Authorisation of officers of central tax as proper officer in certain circumstances".

4. Amendment of Section 7. In Section 7 of the principal Act, with effect from the 1st day of July, 2017,—

(a) in sub-section (1),—

(i) in clause (b), after the words "or furtherance of business;", the word "and" shall be inserted and shall always be deemed to have been inserted;

(ii) in clause (c), after the words "a consideration", the word "and shall be omitted and shall always be deemed to have been omitted;

(iii) clause (d) shall be omitted and shall always be deemed to have been omitted;

(b) after sub-section (1), the following sub-section shall be inserted and shall always be deemed to have been inserted, namely:—

"(1A) Where certain activities or transactions constitute a supply in accordance with the provisions of sub-section (1), they shall be treated either as supply of goods or supply of services as referred to in Schedule II.";

(c) in sub-section (3), for the words, brackets and figures "sub-sections (1), and (2)" the words, brackets, figures and letter "sub-section (1), (1A) and (2)" shall be substituted.

5. Amendment of Section 9. In Section 9 of the principal Act, for sub-section (4), the following sub-section shall be substituted, namely:—

"(4) The government may, on the recommendations of the Council, by notification, specify a class of registered persons who shall, in respect of supply of specified categories of goods or services or both received from an unregistered supplier, pay the tax on reverse charge basis as the recipient of such supply of goods or services or both, and all the provisions of this Act shall apply to such recipient

as if he is the person liable for paying the tax in relation to such supply of goods or services or both.".

6. Amendment of Section 10. In Section 10 of the principal Act,—

(a) in sub-section (1),—

(i) for the words "in lieu of the tax payable by him, an amount calculated at such rate", the words, brackets and figures "in lieu of the tax payable by him under sub-section (1) of Section 9, an amount of tax calculated at such rate" shall be substituted;

(ii) in the existing proviso, for the words "one crore rupees", the words "one crore and fifty lakh rupees" shall be substituted;

(iii) after the existing proviso, the following proviso shall be inserted, namely:—

"Provided further that a person who opts to pay tax under clause (a) or clause (b) or clause (c) may supply services (other than those referred to in clause (b) of paragraph 6 of Schedule II), of value not exceeding ten per cent of turnover in a State in the preceding financial year or five lakh rupees, whichever is higher";

(b) in sub-section (2), for clause (a), the following clause shall be substituted, namely:—

"(a) save as provided in sub-section (1), he is not engaged in the supply of services;".

7. Amendment of Section 12. In Section 12 of the principal Act, in sub-section (2), in clause (a), the words, bracket and figure "sub-section (1) of " shall be omitted.

8. Amendment of Section 13. In Section 13 of the principal Act, in sub-section (2), the words, brakets and figure "sub-section (2) of " occurring at both the places, shall be omitted.

9. Amendment of Section 16. In Section 16 of the principal Act, in sub-section (2),—

(a) in clause (b), for the Explanation, the following Explanation shall be substituted, namely:—

"Explanation.- For the purposes of this clause, it shall be deemed that the registered person has received the goods or, as the case may be, services,—

(i) where the goods are delivered by the supplier to a receipent or any other person on the direction of such registered person, whether acting as an agent or otherwise, before or during movement of goods, either by way of transfer of documents of title to goods or otherwise;

(ii) where the services are provided by the supplier to any person on the direction of and on account of such registered persons.";

(b) in clause (c), for the word and figure "section 41", the words, figures and letter "section 41 or section 43A" shall be substituted.

10. Amendment of Section 17. In Section 17 of the principal Act,—

(a) in sub-section (3), the following Explanation shall be inserted, namely:—

"Explanation.- For the purposes of this sub-section, the expression "value of exempt supply" shall not include the value of activities or transactions specified in Schedule III, except those specified in paragraph 5 of the said Schedule.";

(b) in sub-section (5), for clauses (a) and (b), the following clauses shall be substituted, namely:—

"(a) motor vehicles for transportation of persons having approved seating capacity of not more than thirteen persons (including the driver), except when they are used for making the following taxable supplies, namely:—

(A) further supply of such motor vehicles; or

(B) transportation of passengers; or

(C) imparting training on driving such motor vehicles;

(aa) vessels and aircraft except when they are used—

(i) for making the following taxable supplies, namely:—

(A) further supply of such vessels of aircraft; or

(B) transportation of passengers; or

(C) imparting training on navigating such vessels; or

(D) imparting training on flying such aircraft;

(ii) for transportation of goods;

(ab) services of general insurance, servicing, repair and maintenance in so far as they relate to motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa):

Provided that the input tax credit in respect of such services shall be available,—

(i) where the motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa) are used for the purpose specified therein;

(ii) where received by a taxable person engaged—

(I) in the manufacture of such motor vehicles, vessels or aircraft; or

(II) in the supply of general insurance services in respect of such motor vehicles, vessels or aircraft insured by him;

(b) the following supply of goods or services or both,—

(i) food and beverages, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, leasing, renting or hiring of motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa) except when used for the purposes specified therein, life insurance and health insurance:

Provided that the input tax credit in respect of such goods or services or both shall be available where an inward supply of such goods or services or both is used by a registered person for making an outward taxable supply of the same category of goods or services or both or as an element of a taxable composite or mixed supply;

(ii) membership of a club, health and fitness centre; and

(iii) travel benefits extended to employees on vacation such as leave or home travel concession:

Provided that the input tax credit in respect of such goods or services or both shall be available, where it is obligatory for an employer to provide the same to its employees under any law for the time being in force,".

11. Amendment of Section 20. In Section 20 of the principal Act, in the Explanation, in clause (c), for the words and figure "under entry 84,", the words, figures and letter "under entries 84 and 92A" shall be substituted.

12. Amendment of Section 22. In Section 22 of the principal Act,—

(a) in sub-section (1), after the proviso, the following proviso shall be inserted, namely:—

"Provided further that the Government may, at the request of a special category State and on the recommendations of the council, enhance the aggregate turnover referred to in the first proviso from ten lakh rupees to such amount, not exceeding twenty lakh rupees and subject to such conditions and limitations, as may be so notified.";

(b) in the Explanation, for clause (iii), the following clause shall be substituted, namely:—

"(iii) the expression "special category States" shall mean the States as specified in sub-clause (g) of clause (4) of article 279A of the Constitution except the State of Jammu and Kashmir, Arunachal Pradesh, Assam, Himachal Pradesh, Meghalaya, Sikkim and Utterakhand.".

13. Amendment of Section 24. In Section 24 of the principal Act, in clause (x), after the words "commerce operator" the words and figure "who is required to collect tax at source under-section 52" shall be inserted.

14. Amendment of Section 25. In Section 25 of the principal Act,—

(a) in sub-section (1), after the existing proviso and before the Explanation, the following proviso shall be inserted, namely:—

"Provided further that a person having a unit, as defined in the Special Economic Zones Act, 2005, in a Special Economic Zone or being a Special Economic Zone developer shall have to apply for a separate registration, as distinct from his place of business located outside the Special Economic Zone in the same State.".

(b) in sub-section (2), for the existing proviso, the following proviso shall be substituted, namely:—

"Provided that a person having multiple places of business in a State may be granted a separate registration for each such place of business, subject to such conditions as may be prescribed.".

15. Amendment of Section 29. In Section 29 of the principal Act,—

(a) for the marginal heading, the following marginal heading shall be substituted, namely:—

"Cancellation or suspension of Registration.";

(b) in sub-section (1), after clause (c), the following proviso shall be inserted, namely:—

"Provided that during pendency of the proceedings relating to cancellation of registration filed by the registered person, the registration may be suspended for such period and in such manner as may be prescribed.";

(c) in sub-section (2), after the existing proviso, the following proviso shall be inserted, namely:—

"Provided further that during pendency of the proceedings relating to cancellation of registration, the proper officer may suspend the registration for such period and in such manner as may be prescribed.".

16. Amendment of Section 34. In section 34 of the principal Act,—

(a) in sub-section (1),-

(i) for the words "Where a tax invoice has", the words "where one or more tax invoices have" shall be substituted;

(ii) for the words "a credit note", the words "one or more credit notes for supplies made in financial year" shall be substituted;

(b) in sub-section (3),—

(i) for the words "Where a tax invoice has", the words "Where one or more tax invoices have" shall be substituted;

(ii) for the words "a debit note", the words "one or more debit notes for supplies made in a financial year" shall be substituted.

17. Amendment of Section 34. In Section 35 of the principal Act, in sub-section (5), the following proviso shall be inserted, namely:—

"Provided that nothing contained in this sub-section shall apply to any department of the Central Government or a State Government or a local authority, whose books of account are subject to audit by the Comptroller and Auditor-General of India or an auditor appointed for auditing the accounts of local authorities under any law for the time being in force.".

18. Amendment of Section 39. In Section 39 of the principal Act,—

(a) in sub-section (1),—

(i) for the words "in such form and manner as may be prescried", the words "in such form, manner and within such time as may be prescried" shall be substituted;

(ii) the words "on or before the twentieth day of the month succeeding such calendar month or part thereof" shall be omitted;

(iii) the following proviso shall be inserted, namely:—

"Provided that the Government may, on the recommendations of the Council, notify certain classes of registered persons who shall furnish return for every quarter or part thereof, subject to such conditions and safeguards as may be specified therein.";

(b) in sub-section (7), the following proviso shall be inserted, namely:—

"Provided that the Government may, on the recommendations of the Council, notify certain classes of registered persons who shall pay to the Government the tax due or part thereof as per the return on or before the last date on which he is required to furnish such return, subject to such conditions and safeguards as may be specified therein.";

(c) in the sub-section (9),—

(i) for the words "in the return to be furnished for the month or quarter during which such omission or incorrect particulars are noticed", the words "in such form and manner as may be prescribed" shall be substituted;

(ii) for the proviso, the following proviso shall be substituted, namely:—

"Provided that no such rectification of any omission or incorrect particulars shall be allowed after the due date for furnishing of return for the month of September or second quarter following the end of the financial year to which such details pertain, or the actual date of furnishing of relvant annual return, whichever is earlier.".

19. Insertion of Section 43A. After section 43 of the pricipal Act, the following section shall be inserted, namely:—

"43A. Procedure for furnishing return and availing input tax credit.

(1) Notwithstanding anything contained in sub-section (2) of section 16, section 37 or section 38, every registered person shall in the returns furnished under sub-section (1) of section 39 verify, validate, modify or dalete the details of supplies furnished by the suppliers.

(2) Notwithstanding anything contained in section 41, section 42 or section 43, the procedure for availing of input tax credit by the recipienty and verification thereof shall be such as may be prescried.

(3) The procedure for furnishing the details of outward supplies by the supplier on the common portal, for the purposes of availing input tax credit by the recipient shall be such as may be prescrided.

(4) The procedure for availing input tax credit in respect of outward supplies not furnished under sub-section (3) shall be such as may be prescried and such procedure may include the maximum amount of the input tax credit which can be so availed, not exceeding twenty per cent. of the input tax credit available, on the basis of details furnished by the suppliers under the said sub-section.

(5) The amount of tax, specified in the outward supplies for which the details have been furnished by the supplier under sub-section (3) shall be deemed to be the tax payeble by him under the provisions of the Act.

(6) The supplier and the recipient of a supply shall be jointly and severally liable to pay tax or to pay the input tax credit availed, as the case may be, in relation to outward supplies for which whe details have been furnished under sub-section (3) or sub-section (4) but return thereof has not been furnished.

(7) For the purposes of sub-section (6), the recovery shall be made in such manner as may be prescribed and such procedure may provide for non-recovery of an amount of tax or input tax credit wrongly availed not exceeding one thousand rupees.

(8) The procedure, safeguards and threshold of the tax amount in relation to outward supplies, the details of which can be furnished under sub-section (3) by a registered person,—

(i) within six months of taking registration;

(ii) who has defaulted in payment of tax and where such default has continued for more than two months from the due date of payment of such defaulted amount, shall be such as may be prescribed.".

20. Amendment of Section 48. In section 48 of principal Act, in sub-section (2), after the words and figures "return under section 39 or section 44 or section 45", the words "and to perform such other functions" shall be inserted.

21. Amendment of Section 49. In section 49 of the principal Act,—

(a) in sub-section (2), for the word and figures "Section 41", the words, figures and letter "Section 41 or section 43A" shall be substituted;

(b) In sub-section (5),—

(i) in clause (c), the following proviso shall be inserted, namely:—

"Provided that the input tax credit on account of State tax shall be utilised towards payment of integrated tax only where the balance of the input tax credit on account of cerntal tax is not available for payment of integrated tax;";

(ii) in clause (d), the following proviso shall be inserted, namely:—

"Provided that the input tax credit on account of Union territory tax shall be utilised towards payment of integrated tax only where the balance of the input tax credit on account of central tax is not available for payment of integrated tax;".

22. Insertion of Sections 49A and 49B. After section 49 of the principal Act, the following sections shall be inserted, namely:—

"49A. Utilisation of input tax credit subject to certain conditions.

Notwithstanding anything contained in section 49, the input tax credit on account of State tax shall be utilised towards payment of integrated tax or State tax, as the case may be, only after the input tax credit available on account of integrated tax has first been utilised fully towards such payment.

49B. Order of utilisation of input tax credit.

Notwithstanding anything contained in this Chapter and subject to the provisions of clause (e) and clause (f) of sub-section (5) of section 49, the Government may, on the recommendations of the Council, prescribe the order and manner of utilisation of the input tax

credit on account of integrated tax, central tax, State tax or Union territory tax, as the case may be, towards payment of any such tax.".

23. Amendment of Section 52. In Section 52 of the principal Act, in sub-section (9), for the word and figures "section 37", the words and figures "section 37 or section 39" shall be substituted.

24. Amendment of Section 54. In section 54 of the principal Act,—

(a) in sub-section (8), in clause (a), for the words "zero-rated supplies" occurring twice, the words "export" and "exports" shall respectively be substituted;

(b) in the Explanation, in clause (2),—

(i) in sub-clause (c), in item (i), after the words "foreign exchange", the words "or in Indian rupees wherever permitted by the Reserve Bank of India" shall be inserted;

(ii) for sub-clause (e), the following sub-clause shall be substituted namely:—

"(e) in the case of refund of unutilised input tax credit under clause (ii) of the first proviso to sub-section (3), the due date for furnishing of return under section 39 for the period in which such claim for refund arises;".

25. Amendment of Section 67. With effect from the 1st day of July, 2017, in sub-section (2) of section 67 of the principal Act, for the opening paragraph, the following paragraph shall be substituted, namely:—

"Where the proper officer, not below the rank of Joint Commissioner, either pursuant to an inspection carried out under sub-section (1) or otherwise, has reasons to believe that any goods liable to confiscation or any documents or books or things, which in his opinion shall be useful for or relevant to any proceedings under this Act, are secreted in any place, he may authorise in writing any other officer of State tax to search and seize or may himself search and seize such goods, documents or books or things.".

26. Amendment of Section 79. In Section 79 of the principal Act, after sub-section (4), the following Explanation shall be inserted, namely:—

"Explanation.- for the purposes of this section, the word "person" shall include "Distinct Persons" as referred to in sub-section (4) or, as the case may be, sub-section (5) of section 25.".

27. Amendment of Section 107. In Section 107 of the principal Act, in sub-section (6), for clause (b), the following clause shall be substituted, namely:—

"(b) a sum equal to ten per cent of the remaining amount of tax in dispute arising from the said order, in relation to which the appeal has been filed, subject to a maximum of twenty-five crore rupees.".

28. Amendment of Section 112. In Section 112 of the principal Act, in sub-section (8), for clause (b), the following clause shall be substituted, namely:—

"(b) in addition to the amount paid under sub-section (6) of section 107, a sum equal to twenty per cent of the remaining amount of tax, in dispute arising from the said order, in relation to which the appeal has been filled, subject to a maximum of fifty crore rupees.".

29. Amendment of Section 129. In Section 129 of the principal Act, —

(a) with effect from first day of July, 2017, in sub-section (1) for clause (b), the following clause shall be substituted, namely:—

"(b) on payment of the applicable tax and penalty equal to the fifty per cent. of the value of the goods reduced by the tax amount paid thereon and, in case of exempted goods, on payment of an amount equal to five per cent of the value of goods or twenty five thousand rupees, whichever is less, where the owner of the goods does not come forward for payment of such tax and penalty;".

(b) in sub-section (6), for the words "Seven days", the words "fourteen days" shall be substituted.

30. Amendment of Section 140. With effect from the Ist day of July, 2017, in Section 140 of the principal Act.-

(a) in sub-section (4), for the opening paragraph, the following paragraph shall be substituted, namely:—

"A registered person, who was engaged in the sale of taxable goods as well as exempted goods or tax free goods by whatever name called, under the existing law but which are liable to tax under this Act, shall be entitled to take, in his electronic credit ledger,—";

(b) in sub-section (6), for the opening paragraph, the following paragraph shall be substituted, namely:—

"A registered person, who was either paying tax at fixed rate or paying under the existing law shall be entitled to take, in his electronic credit ledger, credit of value added tax in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day subject to the following conditions, namely:—".

31. Amendment of section 142. With effect from the 1st day of July, 2017, in Section 142 of the principal Act.—

(a) in sub-section (1), for the opening paragraph, the following paragraph shall be substituted, namely:—

"(1) where any goods on which tax, if any, had been paid under the existing law at the time of sale thereof not being earlier than six months prior to the appointed day, are returned to any place of business on or after the appointed day, the registered person shall be eligible for refund of the tax paid under the existing law where such goods are returned by a person, other than a registered person, to the said place of business within a period of six months from the appointed day and such goods are identifiable to the satisfaction of the proper officer:";

(b) in sub-section (7), for clause (a), the following clause shall be substituted, namely:—

"(a) Every proceeding of appeal, revision, review or reference relating to any output tax liability intimated whether before, on or after the appointed day under the existing law, shall be disposed of in accordance with the provisions of the existing law, and if any amount becomes recoverable as a result of such appeal, revision, review or reference, the same shall, unless recovered under the existing law, be recovered as an arrear of tax under this Act and the amount so recovered shall not be admissible as input tax credit under this Act.".

32. Amendment of Section 143. In Section 143 of the principal Act, in sub-section (1), in clause (b), after the proviso, the following proviso shall be inserted, namely:—

"Provided further that the period of one year and three years may, on sufficient cause being shown, be extended by the commissioner for a further period not exceeding one year and two years respectively.".

33. Amendment of Section 165. With effect from 1st day of July 2017, for Section 165 of the principal Act, the following section shall be substituted, namely:—

"165. Power to make regulations.

The Government may, by notification, make regulations consistent with this Act and the rules made thereunder to carry out the provisions of this Act.".

34. Amendment of Section 166. with effect from 1st day of July, 2017, for Section 166 of the principal Act, the following section shall be substituted, namely:—

166. Laying of rules, regulations and notifications.

Every rule made by the Government, every regulation made by the Government and every notification issued by the Government under this Act, shall be laid, as soon as may be after it is made or issued, before the State Legislature, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, the State Legislature agrees in making any modification in the rule or regulation or in the notification, as the case may be, or the State Legislature agrees that the rule or regulation or the notification should not be made, the rule or regulation or notification, as the case may be, shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or regulation or notification, as the case may be.".

35. Amendment of Section 174. with effect from 1st day of July, 2017, for Section 174 of the principal Act,—

(a) in sub-section (2), for clause (f), the following clause shall be substituted, namely:—

"(f) affect any proceedings including that relating to an appeal, revision, review or reference, instituted before, on or after the appointed day under the said amended Act or repealed Acts or the rules made thereunder and such proceedings shall be

continued under the said amended Acts or repealed Acts as if this Act had not come into force and the said Acts had not been amended or repealed.";

(b) for sub-section (3), the following sub-section shall be substituted, namely:-

"(3) The mention of the particular matters referred to in section 173 and sub-section (1) shall not be held to prejudice or affect the general application of the Madhya Pradesh General Clauses Act, 1957 (No. 3 of 1958) with regard to the effect of repeal.".

36. Amendment of Schedule I. In Schedule I of the principal Act, in paragraph 4, for the words "taxable person", the word "person" shall be substituted.

37. Amendment of Schedule II. In Schedule II of the principal Act, in the heading, after the word "ACTIVITIES", the words "OR TRANSACTIONS" shall be inserted and shall always be deemed to have been inserted with effect from the 1st day of July, 2017.

38. Amendment of Schedule III. In Schedule III of the principal Act,—

(a) after paragraph 6, the following paragraphs shall be inserted, namely:—

"7. Supply of goods from a place outside India to another place outside India without such goods entering into India.

8.(a) Supply of warehoused goods to any person before clearance for home consumption;

(b) Supply of goods by the consignee to any other person, by endorsement of documents of title to the goods, after the goods have been dispatched from the port of origin located outside India but before clearance for home consumption.";

(b) the Explanation shall be numbered as Explanation 1 and after Explanation 1 as so numbered, the following Explanation shall be inserted, namely:—

"Explanation 2.- For the purposes of paragraph 8, the expression "warehoused goods" shall have the same meaning as assigned to it in the Customs Act, 1962 (No. 52 of 1962).".

39. Repeal and saving. (1) The Madhya Pradesh Goods and Services Tax (Amendment) Ordinance, 2018 (No. 11 of 2018) is hereby repealed.

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

NOTES OF CASES SECTION

Short Note
****(52)***
Before Mr. Justice G.S. Ahluwalia
M.A. No. 759/2016 (Gwalior) decided on 22 January, 2019

GURKHO BAI (SMT.) & ors. …Appellants

Vs.

KUVER SINGH & ors. …Respondents

***A. Motor Vehicles Act (59 of 1988), Section 166 & 173 – Enhancement – Future Prospects – Entitlement* – Held – Apex Court concluded that future prospects are payable even when deceased is self employed – Deceased, a fruit vendor aged about 45 yrs. at the time of incident – Claimants entitled for 40% of total income by way of future prospects.**

क. मोटर यान अधिनियम (1988 का 59), धारा 166 व 173 – वृद्धि – भविष्य की संभावनाएं – हकदारी – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि मृतक के स्वनियोजित होने पर भी भविष्य की संभावनाएं देय हैं – मृतक, एक फल विक्रेता जिसकी आयु घटना के समय लगभग 45 वर्ष थी – दावाकर्तागण, भविष्य की संभावनाओं के माध्यम से कुल आय का 40% के हकदार हैं।

***B. Motor Vehicles Act (59 of 1988), Section 173 – Appeal & Cross-Objection – Practice* – Respondent contending that under the head of loss of estate, loss of consortium as well as funeral expenses, excessive amount has been awarded by Tribunal – Held – In absence of any appeal or cross objection by respondents, no adverse orders can be passed against appellants.**

ख. मोटर यान अधिनियम (1988 का 59), धारा 173 – अपील व प्रत्याक्षेप – पद्धति – प्रत्यर्थी द्वारा यह तर्क प्रस्तुत किया गया कि संपदा की हानि, साथ (कन्सार्टियम) की हानि के साथ साथ अंत्येष्टि के खर्चे के मद के अंतर्गत, अधिकरण द्वारा अत्याधिक राशि अधिनिर्णीत की गई – अभिनिर्धारित – प्रत्यर्थीगण द्वारा किसी अपील अथवा प्रत्याक्षेप की अनुपस्थिति में, अपीलार्थीगण के विरूद्ध कोई प्रतिकूल आदेश पारित नहीं किये जा सकते।

Cases referred:

(2017) 16 SCC 680, C.A. Nos. 12088-12089/2018 decided on 14.12.2018 (Supreme Court), AIR 2016 SC 193.

Akhilesh Gupta, for the appellants.
N.S. Tomar, for the respondent No. 3.

NOTES OF CASES SECTION

Short Note
****(53)***
Before Mr. Justice G.S. Ahluwalia
M.Cr.C. No. 39835/2018 (Gwalior) decided on 25 January, 2019

IN THE MATTER OF STATE OF M.P. …Applicant

Vs.

DESHRAJ SINGH JADON …Non-applicant

A. Criminal Procedure Code, 1973 (2 of 1974), Section 439(2) and Witnesses Protection Scheme, 2018 – Cancellation of Bail – Ground – **Complainant filed application u/S 439(2) Cr.P.C. seeking cancellation of bail of respondent/accused, however before hearing of application, complainant committed suicide – Held – Record shows that because of harassment at the hands of respondent to compromise the matter, complainant committed suicide – It is a glaring example of threatening the witnesses and non grant of protection of police – Where bail/liberty granted to accused is misused by him, then it is a good ground to cancel the bail – Bail order recalled – Bail cancelled.**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 439(2) एवं गवाह संरक्षण योजना, 2018 – जमानत का रद्दकरण – आधार – परिवादी ने प्रत्यर्थी/अभियुक्त की जमानत का रद्दकरण चाहते हुए सि.प्र.सं. की धारा 439(2) के अंतर्गत आवेदन प्रस्तुत किया, तथापि आवेदन पर सुनवाई के पूर्व ही परिवादी ने आत्महत्या कर ली – अभिनिर्धारित – अभिलेख दर्शाता है कि मामले में समझौता करने को लेकर प्रत्यर्थी द्वारा उत्पीड़न के कारण, परिवादी ने आत्महत्या कारित की – यह साक्षीगण को धमकाने तथा पुलिस द्वारा संरक्षण प्रदान न किये जाने का एक स्पष्ट उदाहरण है – जहाँ अभियुक्त को दी गई जमानत/स्वतंत्रता का उसके द्वारा दुरूपयोग किया जाता है, तो यह जमानत रद्द करने का एक उचित आधार है – जमानत आदेश वापस लिया गया – जमानत रद्द।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 439(2) – Cancellation of Bail – Suo Motu **Exercise of Power – Held – Apex Court concluded that High Court can also *suo motu* exercise power u/S 439(2) Cr.P.C.**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 439(2) – जमानत का रद्दकरण – स्वप्रेरणा से शक्ति का प्रयोग – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि उच्च न्यायालय भी स्वप्रेरणा से, दं.प्र.सं. की धारा 439(2) के अंतर्गत शक्ति का प्रयोग कर सकता है।

Cases referred:

(2000) 2 SCC 391, (2014) 10 SCC 754, W.P. (Criminal) No. 156/2016 order passed on 05.12.2018 (Supreme Court).

RVS Ghuraiya, P.P. for the applicant/State.
Mukesh Sharma, for of the complainant.
V.S. Chauhan, for the non-applicant.

Short Note
****(54)***
Before Mr. Justice Rajeev Kumar Shrivastava
M.Cr.C. No. 24121/2019 (Gwalior) decided on 21 June, 2019

JEETU KUSHWAHA …Applicant

Vs.

STATE OF M.P. …Non-applicant

***A. Criminal Procedure Code, 1973 (2 of 1974), Sections 437, 438 & 439 and Penal Code (45 of 1860), Section 457 & 380 – Bail – Principle & Grounds* – Allegation of recovery of two stolen *katta* of gram (*chana*) from house of applicant – Held – There are no hard and fast rules regarding grant or refusal of bail, each case has to be considered on its own merits – The basic concept "Bail is rule and jail is exception" should continue – Basis of bail lies in principle that there is a presumption of innocence of a person till he is found guilty – Application allowed.**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 437, 438 व 439 एवं दण्ड संहिता (1860 का 45), धारा 457 व 380 – जमानत – सिद्धांत व आधार – चोरी हुये, चने के दो कट्टों की आवेदक के घर से बरामदगी का अभिकथन – अभिनिर्धारित – जमानत प्रदान करने अथवा नामंजूर करने के संबंध में कोई पक्के नियम नहीं हैं, प्रत्येक प्रकरण पर उसके गुणदोषों के आधार पर विचार किया जाना चाहिए – यह मूल संकल्पना कि ''जमानत नियम है तथा जेल अपवाद है'' जारी रहना चाहिए – जमानत का आधार इस सिद्धांत में निहित है कि किसी व्यक्ति के निर्दोष होने की उपधारणा तब तक है जब तक कि वह दोषी नहीं पाया जाता – आवेदन मंजूर।

***B. Criminal Practice – Bail – Grounds* – Factors relevant for consideration, discussed and enumerated.**

ख. दाण्डिक पद्धति – जमानत – आधार – विचार किये जाने के लिए सुसंगत कारक, विवेचित एवं प्रगणित।

Cases referred:

AIR 1931 All 356, (1997) 3 Crimes 135 (HP), AIR 2003 SC 707, (2018) 3 SCC 22.

O.P. Mathur, for the applicant.
Sunil Dubey, P.L. for of the non-applicant/State.

NOTES OF CASES SECTION

Short Note
****(55)***
Before Mr. Justice Rajendra Kumar Srivastava
Cr.R. No. 3975/2018 (Jabalpur) decided on 9 May, 2019

MOHD. NASEEM …Applicant

Vs.

JAINAV FATIMA & ors. …Non-applicants

***A. Criminal Procedure Code, 1973 (2 of 1974), Section 125 – Divorced Muslim Woman – Iddat Period – Entitlement* – Held – Divorced muslim woman is entitled for maintenance u/S 125 Cr.P.C. beyond the *iddat* period till her remarriage or according to conditions enumerated u/S 125 Cr.P.C.**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125 – तलाकशुदा मुस्लिम महिला – इद्दत अवधि – हकदारी – अभिनिर्धारित – तलाकशुदा मुस्लिम महिला दं.प्र.सं. की धारा 125 के अंतर्गत इद्दत अवधि के पश्चात् उसका पुनर्विवाह होने तक अथवा दं.प्र.सं. की धारा 125 के अंतर्गत प्रगणित शर्तों के अनुसार भरणपोषण के लिए हकदार है।

***B. Criminal Procedure Code, 1973 (2 of 1974), Section 125 – Income of Husband – Proof* – Held – No document regarding income of husband produced before Court – Petitioner is a skilled labour, doing work of mobile repairing – As per State Government guidelines, income of applicant cannot be assessed more than 7000-8000 pm – Applicant directed to pay Rs. 2500 pm to wife and Rs. 2000 pm to daughter as maintenance.**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125 – पति की आय – सबूत – अभिनिर्धारित – पति की आय के संबंध में कोई दस्तावेज न्यायालय के समक्ष प्रस्तुत नहीं किया गया – याची एक कुशल श्रमिक, जो मोबाईल रिपेयरिंग का कार्य करता है – राज्य सरकार के दिशानिर्देशों के अनुसार, आवेदक की आय 7000–8000 प्रतिमाह से अधिक निर्धारित नहीं की जा सकती – आवेदक को 2500 रू. प्रतिमाह पत्नी को तथा 2000 रू. प्रतिमाह पुत्री को भरणपोषण के रूप में भुगतान करने हेतु निदेशित किया गया।

***C. Criminal Procedure Code, 1973 (2 of 1974), Section 125 – Scope* – Held – In a proceeding u/S 125 Cr.P.C., it is not necessary for Court to ascertain as to who was in wrong between husband and wife – Specific allegation against husband regarding demand of dowry – Husband stated that he divorced his wife – Sufficient reason to live separately.**

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125 – व्याप्ति – अभिनिर्धारित – दं.प्र.सं. की धारा 125 के अंतर्गत कार्यवाही में, न्यायालय के लिए यह अभिनिश्चित करना कि पति और पत्नी के बीच कौन गलत था, आवश्यक नहीं है – पति के

विरूद्ध दहेज की मांग के संबंध में विनिर्दिष्ट अभिकथन – पति ने कथन किया कि उसने अपनी पत्नी को तलाक दे दिया – पृथक रहने हेतु पर्याप्त कारण।

Cases referred:

(2001) 7 SCC 740, (2010) 1 SCC 666, (2014) 16 SCC 715, (1985) 2 SCC 556.

A.D. Mishra, for the applicant.
Bhavil Pandey, for the non-applicants.

Short Note
****(56)***
Before Mr. Justice G.S. Ahluwalia
W.P. No. 1241/2016 (S) (Gwalior) decided on 24 January, 2019

RN MISHRA …Petitioner

Vs.

STATE OF M.P. …Respondent

***A. Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rule 29 – Departmental Enquiry – Second Charge-sheet – Maintainability* – Held – Petitioner earlier exonerated of similar charges which has been levelled against him in second charge-sheet, issued under instructions of Lokayukt – Once an order has been passed under CCA Rules, 1966, it can only be reviewed in accordance with provisions of Rule 29, which has not been exercised in present case – No rule pointed out empowering respondents to initiate second departmental enquiry on similar allegations – Subsequent charge-sheet quashed – Petition allowed.**

क. सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 29 – विभागीय जांच – द्वितीय आरोप–पत्र – पोषणीयता – अभिनिर्धारित – याची को पूर्व में भी समान आरोपों से दोषमुक्त किया गया था जो लोकायुक्त के अनुदेशों के अनुसार द्वितीय आरोप पत्र में उसके विरूद्ध लगाये गये हैं – 1966 के सी.सी.ए. नियमों के अंतर्गत एक बार आदेश पारित हो जाने पर, उसका केवल नियम 29 के उपबंधों के अनुसार ही पुनर्विलोकन किया जा सकता है, जिसका वर्तमान प्रकरण में प्रयोग नहीं किया गया – समान अभिकथनों पर द्वितीय विभागीय जांच आरंभ करने हेतु प्रत्यर्थीगण को सशक्त बनाने के लिए कोई नियम इंगित नहीं किया गया – पश्चात्वर्ती आरोप–पत्र अभिखंडित – याचिका मंजूर।

***B. Double Jeopardy* – Held – Rule of double jeopardy does not bar a second enquiry but the proceedings can be reopened only if Rule permits the government.**

ख. *दोहरा संकट* – अभिनिर्धारित – दोहरे संकट का नियम, द्वितीय जांच का वर्जन नहीं करता लेकिन कार्यवाहियों पर नये सिरे से विचार केवल तब किया जा सकता है यदि नियम शासन को अनुमति प्रदान करता हो।

Cases referred:

AIR 1975 SC 2277, (2006) 3 SCC 251, (2012) 3 SCC 580.

Prashant Sharma, for the petitioner.
A.K. Nirankari, G.A. for the respondents/State.

I.L.R. [2019] M.P. 1595 (SC)
SUPREME COURT OF INDIA

Before Mr. Justice Arun Mishra & Mr. Justice Navin Sinha

C.A. No. 6221/2011 decided on 28 February, 2019

THE REGIONAL PROVIDENT FUND COMMISSIONER (II) WEST BENGAL …Appellant

Vs.

VIVEKANANDA VIDYAMANDIR & ors. …Respondents

(Alongwith C.A. Nos. 3965-3966/2013, 3969-3970/2013, 3967-3968/2013 & T.C. (C) No. 19/2019)

***A. Employees' Provident Funds and Miscellaneous Provisions Act (19 of 1952), Section 2(b)(ii) & 6 – Deductions – Expression "Basic Wages" – Allowances* – Held – No material placed by establishments to show that allowances paid to employees were either variable or were linked to any incentive for greater output by employee and were not paid across the board to all employees in a particular category or were being paid especially to those who availed opportunity – Wage structure and components of salary examined on facts by the authority and Appellate Authority and concluded that allowances were essentially a part of basic wages camouflaged as part of allowance so as to avoid deductions and contribution to provident fund account of employees – Such allowance fall within the definition of "Basic Wages" – Appeals preferred by establishments are dismissed and the one preferred by Regional PF Commissioner is allowed. (Para 14)**

क. कर्मचारी भविष्य–निधि और प्रकीर्ण उपबंध अधिनियम (1952 का 19), धारा 2(बी)(ii) व 6 – कटौती – अभिव्यक्ति ''मूल वेतन'' – भत्ते – अभिनिर्धारित – स्थापनाओं द्वारा यह दर्शाने हेतु कोई सामग्री प्रस्तुत नहीं की गई कि कर्मचारियों को संदत्त भत्ते या तो परिवर्ती थे या कर्मचारी से अधिक आउटपुट हेतु किसी प्रोत्साहन से जुड़े थे तथा एक विशिष्ट श्रेणी के सभी कर्मचारियों को एक समान रूप से संदत्त नहीं किये गये थे या विशिष्ट रूप से उन्हें संदत्त किये गये थे जिन्होंने अवसर का उपभोग किया था – वेतन संरचना एवं वेतन के संघटकों का प्राधिकारी तथा अपीली प्राधिकारी द्वारा तथ्यों पर परीक्षण किया गया और निष्कर्षित किया गया कि भत्ते आवश्यक रूप से मूल वेतन का हिस्सा थे, जिसे कर्मचारियों के भविष्य निधि खाते में अंशदान एवं कटौती से बचने के लिए भत्तों के भाग के रूप में छद्म रूप से प्रस्तुत किया गया था – उक्त भत्ता, ''मूल वेतन'' की परिभाषा के भीतर आता है – स्थापनाओं द्वारा प्रस्तुत अपीलें खारिज की गई तथा क्षेत्रीय भविष्य निधि आयुक्त द्वारा प्रस्तुत अपील मंजूर की गई।

***B. Employees' Provident Funds and Miscellaneous Provisions Act (19 of 1952), Section 2(b)(ii) & 6 – "Basic Wages" – Exclusions* – Held – This Court earlier concluded that any variable earning which may vary from**

individual to individual according to their efficiency and diligence will stand excluded from the term "Basic Wages". (Para 10)

ख. कर्मचारी भविष्य–निधि और प्रकीर्ण उपबंध अधिनियम (1952 का 19), धारा 2(बी)(ii) व 6 – ''मूल वेतन'' – अपवर्जन – अभिनिर्धारित – इस न्यायालय ने पूर्व में निष्कर्षित किया कि कोई परिवर्ती उपार्जन जो कि व्यक्ति से व्यक्ति, उनकी कार्यक्षमता एवं तत्परता के अनुसार बदल सकता है, शब्द ''मूल वेतन'' से अपवर्जित होगा।

Cases referred:

(1963) 3 SCR 978, AIR 1960 SC 985, (2008) 5 SCC 428, (2014) 4 SCC 37, (1998) 8 SCC 90.

J U D G M E N T

The Judgment of the Court was delivered by :
NAVIN SINHA, J.:- The appellants with the exception of Civil Appeal No. 6221 of 2011, are establishments covered under the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the "Act"). The appeals raise a common question of law, if the special allowances paid by an establishment to its employees would fall within the expression "basic wages" under Section 2(b)(ii) read with Section 6 of the Act for computation of deduction towards Provident Fund. The appeals have therefore been heard together and are being disposed by a common order.

2. It is considered appropriate to briefly set out the individual facts of each appeal for better appreciation.

Civil Appeal No. 6221 of 2011: The respondent is an unaided school giving special allowance by way of incentive to teaching and non-teaching staff pursuant to an agreement between the staff and the management. The incentive was reviewed from time to time upon enhancement of the tuition fees of the students. The authority under the Act held that the special allowance was to be included in basic wage for deduction of provident fund. The Single Judge set aside the order. The Division Bench initially after examining the salary structure allowed the appeal on 13.01.2005 holding that the special allowance was a part of dearness allowance liable to deduction. The order was recalled on 16.01.2007 at the behest of the respondent as none had appeared on its behalf. The subsequent Division Bench dismissed the appeal holding that the special allowance was not linked to the consumer price index, and therefore did not fall within the definition of basic wage, thus not liable to deduction.

Civil Appeal Nos. 3965-66 of 2013: The appellant was paying basic wage + variable dearness allowance(VDA) + house rent allowance(HRA) + travel allowance + canteen allowance + lunch incentive. The special allowances not

having been included in basic wage, deduction for provident fund was not made from the same. The authority under the Act held that only washing allowance was to be excluded from basic wage. The High Court partially allowed the writ petition by excluding lunch incentive from basic wage. A review petition against the same by the appellant was dismissed.

Civil Appeal Nos. 3969-70 of 2013: The appellant was not deducting Provident Fund contribution on house rent allowance, special allowance, management allowance and conveyance allowance by excluding it from basic wage. The authority under the Act held that the allowances had to be taken into account as basic wage for deduction. The High Court dismissed the writ petition and the review petition filed by the appellant.

Civil Appeal Nos. 3967-68 of 2013: The appellant company was not deducting Provident Fund contribution on house rent allowance, special allowance, management allowance and conveyance allowance by excluding it from basic wage. The authority under the Act held that the special allowances formed part of basic wage and was liable to deduction. The writ petition and review petition filed by the appellant were dismissed.

Transfer Case (C) No.19 of 2019 (arising out of T.P. (C) No. 1273 of 2013): The petitioner filed W.P. No. 25443 of 2010 against the show cause notice issued by the authority under the Act calling for records to determine if conveyance allowance, education allowance, food concession, medical allowance, special holidays, night shift incentives and city compensatory allowance constituted part of basic wage. The writ petition was dismissed being against a show cause notice and the statutory remedy available under the Act, including an appeal. A Writ Appeal (Civil) No.1026 of 2011 was preferred against the same and which has been transferred to this Court at the request of the petitioner even before a final adjudication of liability.

3. We have heard learned Additional Solicitor General, Shri Vikramajit Banerjee and Shri Sanjay Kumar Jain appearing for the Regional Provident Fund Commisioner and Shri Ranjit Kumar, learned Senior Counsel who made the lead arguments on behalf of the Establishment-appellants, and also Mr. Anand Gopalan, learned counsel appearing for the petitioner in the transfer petition.

4. Shri Vikramajit Banerjee, learned Additional Solicitor General appearing for the appellant in Civil Appeal No. 6221 of 2011, submitted that the special allowance paid to the teaching and non-teaching staff of the respondent school was nothing but camouflaged dearness allowance liable to deduction as part of basic wage. Section 2(b)(ii) defined dearness allowance as all cash payment by whatever name called paid to an employee on account of a rise in the cost of living. The allowance shall therefore fall within the term dearness allowance,

irrespective of the nomenclature, it being paid to all employees on account of rise in the cost of living. The special allowance had all the indices of a dearness allowance. A bare perusal of the breakup of the different ingredients of the salary noticed in the earlier order of the Division Bench dated 13.01.2005 makes it apparent that it formed part of the component of pay falling within dearness allowance. The special allowance was also subject to increment on a time scale. The Act was a social beneficial welfare legislation meant for protection of the weaker sections of the society, i.e. the workmen, and was therefore, required to be interpreted in a manner to sub-serve and advance the purpose of the legislation. Under Section 6 of the Act, the appellant was liable to pay contribution to the provident fund on basic wages, dearness allowance, and retaining allowance (if any). To exclude any incentive wage from basic wage, it should have a direct nexus and linkage with the amount of extra output. Relying on *Bridge and Roof Co. (India) Ltd. vs. Union of India,* (1963) 3 SCR 978, it was submitted that whatever is payable by all concerns or earned by all permanent employees had to be included in basic wage for the purpose of deduction under Section 6 of the Act. It is only such allowances not payable by all concerns or may not be earned by all employees of the concern, that would stand excluded from deduction. It is only when a worker produces beyond the base standard, what he earns would not be a basic wage but a production bonus or incentive wage which would then fall outside the purview of basic wage under Section 2(b) of the Act. Since the special allowance was earned by all teaching and non-teaching staff of the respondent school, it has to be included for the purpose of deduction under Section 6 of the Act. The special allowance in the present case was a part of the salary breakup payable to all employees and did not have any nexus with extra output produced by the employee out of his allowance, and thus it fell within the definition of "basic wage".

5. The common submission on behalf of the appellants in the remaining appeals was that basic wages defined under Section 2(b) contains exceptions and will not include what would ordinarily not be earned in accordance with the terms of the contract of employment. Even with regard to the payments earned by an employee in accordance with the terms of contract of employment, the basis of inclusion in Section 6 and exclusion in Section 2(b)(ii) is that whatever is payable in all concerns and is earned by all permanent employees is included for the purpose of contribution under Section 6. But whatever is not payable by all concerns or may not be earned by all employees of a concern are excluded for the purposes of contribution. Dearness allowance was payable in all concerns either as an addition to basic wage or as part of consolidated wages. Retaining allowance was payable to all permanent employees in seasonal factories and was therefore included in Section 6. But, house rent allowance is not paid in many concerns and sometimes in the same concern, it is paid to some employees but not to others, and

would therefore stand excluded from basic wage. Likewise overtime allowance though in force in all concerns, is not earned by all employees and would again stand excluded from basic wage. It is only those emoluments earned by an employee in accordance with the terms of employment which would qualify as basic wage and discretionary allowances not earned in accordance with the terms of employment would not be covered by basic wage. The statute itself excludes certain allowance from the term basic wages. The exclusion of dearness allowance in Section 2(b)(ii) is an exception but that exception has been corrected by including dearness allowance in Section 6 for the purpose of contribution.

6. Attendance incentive was not paid in terms of the contract of employment and was not legally enforceable by an employee. It would therefore not fall within basic wage as it was not paid to all employees of the concern. Likewise, transport/conveyance allowance was similar to house rent allowance, as it was reimbursement to an employee. Such payments are ordinarily not made universally, ordinarily and necessarily to all employees and therefore will not fall within the definition of basic wage. To hold that canteen allowance was paid only to some employees, being optional was not to be included in basic wage while conveyance allowance was paid to all employees without any proof in respect thereof was unsustainable.

7. Basic wage, would not *ipso-facto* take within its ambit the salary breakup structure to hold it liable for provident fund deductions when it was paid as special incentive or production bonus given to more meritorious workmen who put in extra output which has a direct nexus and linkage with the output by the eligible workmen. When a worker produces beyond the base or standard, what he earns was not basic wage. This incentive wage will fall outside the purview of basic wage.

8. We have considered the submissions on behalf of the parties. To consider the common question of law, it will be necessary to set out the relevant provisions of the Act for purposes of the present controversy.

> "Section 2 (b): "Basic Wages" means all emoluments which are earned by an employee while on duty or (on leave or on holidays with wages in either case) in accordance with the terms of the contract of employment and which are paid or payable in cash to him, but does not include-
>
> (i) The cash value of any food concession;
>
> (ii) Any dearness allowance (that is to say, all cash payments by whatever name called paid to an employee on account of a rise in the cost of living), house-rent allowance, overtime allowance, bonus, commission or any other similar allowance payable to the employee in respect of his employment or of work done in such employment.

(iii) Any presents made by the employer;

Section 6: Contributions and matters which may be provided for in Schemes.- The contribution which shall be paid by the employer to the Fund shall be ten percent. Of the basic wages, dearness allowance and retaining allowance, if any, for the time being payable to each of the employees whether employed by him directly or by or through a contractor, and the employees' contribution shall be equal to the contribution payable by the employer in respect of him and may, if any employee so desires, be an amount exceeding ten percent of his basic wages, dearness allowance and retaining allowance if any, subject to the condition that the employer shall not be under an obligation to pay any contribution over and above his contribution payable under this section:

Provided that in its application to any establishment or class of establishments which the Central Government, after making such inquiry as it deems fit, may, by notification in the Official Gazette specify, this section shall be subject to the modification that for the words "ten percent", at both the places where they occur, the words "12 percent" shall be substituted:

Provided further that where the amount of any contribution payable under this Act involves a fraction of a rupee, the Scheme may provide for rounding off of such fraction to the nearest rupee, half of a rupee, or quarter of a rupee.

Explanation I - For the purposes of this section dearness allowance shall be deemed to include also the cash value of any food concession allowed to the employee.

Explanation II. - For the purposes of this section, "retaining allowance" means allowance payable for the time being to an employee of any factory or other establishment during any period in which the establishment is not working, for retaining his services."

9. Basic wage, under the Act, has been defined as all emoluments paid in cash to an employee in accordance with the terms of his contract of employment. But it carves out certain exceptions which would not fall within the definition of basic wage and which includes dearness allowance apart from other allowances mentioned therein. But this exclusion of dearness allowance finds inclusion in Section 6. The test adopted to determine if any payment was to be excluded from basic wage is that the payment under the scheme must have a direct access and linkage to the payment of such special allowance as not being common to all. The crucial test is one of universality. The employer, under the Act, has a statutory obligation to deduct the specified percentage of the contribution from the employee's salary and make matching contribution. The entire amount is then required to be deposited in the fund within 15 days from the date of such collection. The aforesaid provisions fell for detailed consideration by this Court in *Bridge & Roof* (supra) when it was observed as follows:

"7. The main question therefore that falls for decision is as to which of these

two rival contentions is in consonance with s. 2(b). There is no doubt that "basic wages" as defined therein means all emoluments which are earned by an employee while on duty or on leave with wages in accordance with the terms of the contract of employment and which are paid or payable in cash. If there were no exceptions to this definition, there would have been no difficulty in holding that production bonus whatever be its nature would be included within these terms. The difficulty, however, arises because the definition also provides that certain things will not be included in the term "basic wages", and these are contained in three clauses. The first clause mentions the cash value of any food concession while the third clause mentions that presents made by the employer. The fact that the exceptions contain even presents made by the employer shows that though the definition mentions all emoluments which are earned in accordance with the terms of the contract of employment, care was taken to exclude presents which would ordinarily not be earned in accordance with the terms of the contract of employment. Similarly, though the definition includes "all emoluments" which are paid or payable in cash, the exception excludes the cash value of any food concession, which in any case was not payable in cash. The exceptions therefore do not seem to follow any logical pattern which would be in consonance with the main definition.

8. Then we come to clause (ii). It excludes dearness allowance, house-rent allowance, overtime allowance, bonus, commission or any other similar allowance payable to the employee in respect of his employment or of work done in such employment. This exception suggests that even though the main part of the definition includes all emoluments which are earned in accordance with the terms of the contract of employment, certain payments which are in fact the price of labour and earned in accordance with the terms of the contract of employment are excluded from the main part of the definition of "basic wages". It is undeniable that the exceptions contained in clause (ii) refer to payments which are earned by an employee in accordance with the terms of his contract of employment. It was admitted by counsel on both sides before us that it was difficult to find any one basis for the exceptions contained in the three clauses. It is clear however from clause (ii) that from the definition of the word "basic wages" certain earnings were excluded, though they must be earned by employees in accordance with the terms of the contract of employment. Having excluded "dearness allowance" from the definition of "basic wages", s. 6 then provides for inclusion of dearness allowance for purposes of contribution. But that is clearly the result of the specific provision in s. 6 which lays down that contribution shall be 6-1/4 per centum of the basic wages, dearness allowance and retaining allowance (if any). We must therefore try to discover some basis for the exclusion in clause (ii) as also the inclusion of dearness allowance and retaining allowance (for any) in s. 6. It seems that the basis of inclusion in s. 6 and exclusion in clause (ii) is that whatever is payable in all concerns and is earned by all permanent employees is

> included for the purpose, of contribution under s. 6, but whatever is not payable by all concerns or may not be earned by all employees of a concern is excluded for the purpose of contribution. Dearness allowance (for examples is payable in all concerns either as an addition to basic wages or as a part of consolidated wages where a concern does not have separate dearness allowance and basic wages. Similarly, retaining allowance is payable to all permanent employees in all seasonal factories like sugar factories and is therefore included in s. 6; but house-rent allowance is not paid in many concerns and sometimes in the same concern it is paid to some employees but not to others, for the theory is that house-rent is included in the payment of basic wages plus dearness allowance or consolidated wages. Therefore, house-rent allowance which may not be payable to all employees of a concern and which is certainly not paid by all concern is taken out of the definition of "basic wages", even though the basis of payment of house-rent allowance where it is paid is the contract of employment. Similarly, overtime allowance though it is generally in force in all concerns is not earned by all employees of a concern. It is also earned in accordance with the terms of the contract of employment; but because it may not be earned by all employees of a concern it is excluded from "basic wages". Similarly, commission or any other similar allowance is excluded from the definition of "basic wages" for commission and other allowances are not necessarily to be found in all concerns; nor are they necessarily earned by all employees of the same concern, though where they exist they are earned in accordance with the terms of the contract of employment. It seems therefore that the basis for the exclusion in clause (ii) of the exceptions in s. 2(b) is that all that is not earned in all concerns or by all employees of concern is excluded from basic wages. To this the exclusion of dearness allowance in clause (ii) is an exception. But that exception has been corrected by including dearness allowance in s. 6 for the purpose of contribution. Dearness allowance which is an exception in the definition of "basic wages", is included for the propose of contribution by s. 6 and the real exceptions therefore in clause (ii) are the other exceptions beside dearness allowance, which has been included through S. 6."

10. Any variable earning which may vary from individual to individual according to their efficiency and diligence will stand excluded from the term "basic wages" was considered in *Muir Mills Co. Ltd., Kanpur Vs. Its Workmen,* AIR 1960 SC 985 observing:

> "11. Thus understood "basic wage" never includes the additional emoluments which some workmen may earn, on the basis of a system of bonuses related to the production. The quantum of earning in such bonuses varies from individual to individual according to their efficiency and diligence; it will vary sometimes from season to season with the variations of working conditions in the factory or other place where the work is done; it will vary also with variations in the rate of

> supplies of raw material or in the assistance obtainable from machinery. This very element of variation, excludes this part of workmen's emoluments from the connotation of "basic wages"..."

11. In *Manipal Academy of Higher Education vs. Provident Fund Commissioner,* (2008) 5 SCC 428, relying upon Bridge Roof 's case it was observed:

> "10. The basic principles as laid down in Bridge Roof's case (supra) on a combined reading of Sections 2(b) and 6 are as follows:
>
> (a) Where the wage is universally, necessarily and ordinarily paid to all across the board such emoluments are basic wages.
>
> (b) Where the payment is available to be specially paid to those who avail of the opportunity is not basic wages. By way of example it was held that overtime allowance, though it is generally in force in all concerns is not earned by all employees of a concern. It is also earned in accordance with the terms of the contract of employment but because it may not be earned by all employees of a concern, it is excluded from basic wages.
>
> (c) Conversely, any payment by way of a special incentive or work is not basic wages."

12. The term basic wage has not been defined under the Act. Adverting to the dictionary meaning of the same in *Kichha Sugar Company Limited through General Manager vs. Tarai Chini Mill Majdoor Union, Uttarakhand,* (2014) 4 SCC 37, it was observed as follows:

> "9. According to http://www.merriam-webster.com (Merriam Webster Dictionary) the word 'basic wage' means as follows:
>
> 1. A wage or salary based on the cost of living and used as a standard for calculating rates of pay
>
> 2. A rate of pay for a standard work period exclusive of such additional payments as bonuses and overtime.
>
> 10. When an expression is not defined, one can take into account the definition given to such expression in a statute as also the dictionary meaning. In our opinion, those wages which are universally, necessarily and ordinarily paid to all the employees across the board are basic wage. Where the payment is available to those who avail the opportunity more than others, the amount paid for that cannot be included in the basic wage. As for example, the overtime allowance, though it is generally enforced across the board but not earned by all employees equally. Overtime wages or for that matter, leave encashment may be available to each workman but it may vary from one workman to other. The extra bonus depends upon the extra hour of work done by the workman whereas leave encashment shall depend upon the number of days of leave available to workman. Both are variable. In

> view of what we have observed above, we are of the opinion that the amount received as leave encashment and overtime wages is not fit to be included for calculating 15% of the Hill Development Allowance."

13. That the Act was a piece of beneficial social welfare legislation and must be interpreted as such was considered in *The Daily Partap vs. The Regional Provident Fund Commissioner, Punjab, Haryana, Himachal Pradesh and Union Territory, Chandigarh,* (1998) 8 SCC 90.

14. Applying the aforesaid tests to the facts of the present appeals, no material has been placed by the establishments to demonstrate that the allowances in question being paid to its employees were either variable or were linked to any incentive for production resulting in greater output by an employee and that the allowances in question were not paid across the board to all employees in a particular category or were being paid especially to those who avail the opportunity. In order that the amount goes beyond the basic wages, it has to be shown that the workman concerned had become eligible to get this extra amount beyond the normal work which he was otherwise required to put in. There is no data available on record to show what were the norms of work prescribed for those workmen during the relevant period. It is therefore not possible to ascertain whether extra amounts paid to the workmen were in fact paid for the extra work which had exceeded the normal output prescribed for the workmen. The wage structure and the components of salary have been examined on facts, both by the authority and the appellate authority under the Act, who have arrived at a factual conclusion that the allowances in question were essentially a part of the basic wage camouflaged as part of an allowance so as to avoid deduction and contribution accordingly to the provident fund account of the employees. There is no occasion for us to interfere with the concurrent conclusions of facts. The appeals by the establishments therefore merit no interference. Conversely, for the same reason the appeal preferred by the Regional Provident Fund Commissioner deserves to be allowed.

15. Resultantly, Civil Appeal No. 6221 of 2011 is allowed. Civil Appeal Nos. 3965-66 of 2013, Civil Appeal Nos. 3967-68 of 2013, Civil Appeal Nos. 3969-70 of 2013 and Transfer Case (C) No.19 of 2019 are dismissed.

Order accordingly

I.L.R. [2019] M.P. 1605 (SC)
SUPREME COURT OF INDIA

Before Mr. Justice A.K. Sikri, Mr. Justice S. Abdul Nazeer & Mr. Justice M.R. Shah

Cr.A. No. 349/2019 decided on 5 March, 2019

STATE OF M.P. …Appellant

Vs.

LAXMI NARAYAN & ors. …Respondents

(Alongwith Cr.A. No. 350/2019)

***A. Criminal Procedure Code, 1973 (2 of 1974), Section 320 & 482 and Penal Code (45 of 1860), Section 307/34 & 308 – Quashment of Proceedings – Ground* – Held – High Court quashed the proceedings on basis of compromise between accused and complainant, without considering the gravity and seriousness of offence and its social impact and also without considering that offences alleged were non-compoundable u/S 320 Cr.P.C. – High Court quashed the proceedings mechanically without considering the distinction between private/personal wrong and a social wrong – Quashment of FIR on the ground that matter has been compromised and there is no possibility of recording conviction, is erroneous – Impugned orders quashed – Trial may proceed as per law – Appeals allowed.**

(Paras 4, 6.1, 9.1, 11 & 14 to 16)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 320 व 482 एवं दण्ड संहिता (1860 का 45), धारा 307/34 व 308 – कार्यवाहियाँ अभिखंडित की जाना – आधार – अभिनिर्धारित – उच्च न्यायालय ने अपराध की गुरूता और गंभीरता तथा उसके सामाजिक प्रभाव पर विचार किये बिना एवं यह भी विचार में लिये बगैर कि अपराध दं.प्र.सं. की धारा 320 के अंतर्गत अशमनीय थे, अभियुक्त तथा परिवादी के मध्य समझौते के आधार पर कार्यवाहियों को अभिखंडित किया – उच्च न्यायालय ने निजी/व्यक्तिगत दोष अथवा एक सामाजिक दोष में विभेद किये बिना यांत्रिक रूप से कार्यवाहियों को अभिखंडित किया – प्रथम सूचना प्रतिवेदन को इस आधार पर अभिखंडित किया जाना कि मामले में समझौता हो गया है तथा दोषसिद्धि अभिलिखित करने की कोई संभावना नहीं है, त्रुटिपूर्ण है – आक्षेपित आदेश अभिखंडित किये गये – विधि अनुसार आगे विचारण किया जा सकता है – अपीलें मंजूर।

***B. Criminal Procedure Code, 1973 (2 of 1974), Section 320 & 482 – Exercise of Inherent Jurisdiction – Powers of High Court* – Scope, grounds & factors to be considered, discussed, explained and enumerated. (Para 13)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 320 व 482 – अंतर्निहित अधिकारिता का प्रयोग – उच्च न्यायालय की शक्तियाँ – विस्तार, आधार व कारकों को विचारित, विवेचित, स्पष्ट एवं प्रगणित किया गया।

Cases referred:

(2014) 6 SCC 466, (2014) 4 SCC 149, (2011) 10 SCC 705, (2012) 10 SCC 303, (2014) 10 SCC 285, (2015) 8 SCC 307, (2016) 12 SCC 179, (2016) 12 SCC 471, (2017) 9 SCC 641, 2019 SCC Online SC 7, Cr.A. No. 14/2019 decided on 04.01.2019 (Supreme Court), (2014) 15 SCC 29.

J U D G M E N T

The Judgment of the Court was delivered by : **M.R. SHAH, J. :-**

Criminal Appeal No.349 of 2019

A two Judge bench of this Court vide its order dated 08.09.2017, in view of the apparent conflict between the two decisions of this Court in the cases of *Narinder Singh vs. State of Punjab* (2014) 6 SCC 466 and *State of Rajasthan vs. Shambhu Kewat* (2014) 4 SCC 149, has referred the matter to a Bench of three Judges, and that is how the matter is placed before a Bench of three Judges.

1.1 Vide order dated 19.11.2018, since the same question of law is involved, this Court tagged the connected appeal with the main appeal.

2. Feeling aggrieved and dissatisfied with the impugned judgment and order dated 7.10.2013 passed by the High Court of Madhya Pradesh, Bench at Gwalior in Miscellaneous Criminal Case No. 8000/2013, by which the High Court has allowed the said application, preferred by the respondents herein/original accused (hereinafter referred to as the 'Accused'), and in exercise of its powers under Section 482 of the Code of Criminal Procedure, has quashed the proceedings against the accused for the offences punishable under Sections 307 and 34 of the IPC, relying upon the decision of this Court in the case of *Shiji @ Pappu & others vs. Radhika and another* (2011) 10 SCC 705, the State of Madhya Pradesh has preferred the present appeal.

2.1 Office report dated 18.08.2017 indicates that service of show cause notice on the respondents is complete, and respondent nos. 1 to 3 are represented by Ms. Mridula Ray Bhardwaj, Advocate, but during the course of hearing, nobody appeared for the respondents.

3. The facts leading to this appeal are, that an FIR was lodged against the respondents herein and two unknown persons at Police Station Raun, District Bhind, for the offences punishable under Sections 307 and 34 of the IPC, which was registered as Crime No.36/13. It was alleged that on 03.03.2013 at about 9:30 p.m., the complainant - Charan Singh, who is an operator of LNT machine is extracting sand of Sindh River at Indukhi Sand Mine and at that time firing from other side of river started and the counter firing from this side also

started then he heard that take away your machine from here. It is alleged that some people came there from which Sanjeev (respondent no.2 herein), Lature (respondent no.1 herein), Sant Singh (respondent no.3 herein) and two unknown persons came near to the complainant and his machine and told him to run away, then somebody told to Sanjeev (respondent no.2 herein) to fire and then Sanjeev fired on the complainant and then they ran away. The complainant fell from the machine. The bullet hit the complainant on elbow of right hand. Somehow the complainant managed to reach the village and a person called a car and admitted the complainant in District Hospital.

3.1 That on 04.03.2013, the duty doctor in the District Hospital informed the police and on the basis of the statement of the complainant, a Dehati Nalishi bearing No. 0/13 was registered under Sections 307 and 34 of the IPC.

3.2 That the medical examination of the injured complainant was conducted at District Hospital and five injuries were found on his body and injuries nos. 1 to 4 were opined to be caused by fire arm and injury no.5 was advised for x-ray.

3.3 That on 05.03.2013, the police reached on the spot and prepared spot map; statement of witnesses were recorded under Section 161 of the Cr.P.C. and the police seized simple soil, blood stained soil and other articles from the spot of the incident and prepared their seizure memos.

3.4 That the accused filed Miscellaneous Criminal Case No. 8000 of 2013 under Section 482 of Cr.P.C. before the High Court of Madhya Pradesh, Bench at Gwalior for quashing the criminal proceedings against the accused arising out of the FIR, on the sole ground of a compromise arrived at between the accused and the complainant.

4. That, by the impugned judgment and order, the High Court, in exercise of its powers under Section 482 of Cr.P.C., has quashed the criminal proceedings against the accused solely on the ground that the accused and the complainant have settled the disputes amicably. While quashing the criminal proceedings against the accused, the High Court has considered and relied upon the decision of this Court in the case of *Shiji* (supra).

5. Feeling aggrieved and dissatisfied by the impugned judgment and order, quashing the criminal proceedings against the accused for the offences punishable under Sections 307 and 34 of the IPC, the State of Madhya Pradesh has preferred the present appeal.

6. Learned advocate appearing on behalf of the State of Madhya Pradesh has vehemently submitted that the High Court has committed a grave error in quashing the FIR which was for the offences under Sections 307 and 34 of the IPC.

6.1 It is vehemently submitted by the learned counsel appearing on behalf of the appellant-State that in the present cases the High Court has quashed the FIR mechanically and solely on the basis of the settlement/compromise between the complainant and the accused, without even considering the gravity and seriousness of the offences alleged against the accused persons.

6.2 It is further submitted by the learned counsel appearing on behalf of the appellant-State that while exercising the powers under Section 482 of the Cr.P.C. and quashing the FIR, the High Court has not at all considered the fact that the offences alleged were against the society at large and not restricted to the personal disputes between the two individuals.

6.3. It is further submitted by the learned counsel appearing on behalf of the appellant-State that the High Court has misread the decision of this Court in the case of *Shiji* (supra), while quashing the FIR. It is vehemently submitted by the learned counsel that the High Court ought to have appreciated that in all the cases where the complainant has compromised/entered into a settlement with the accused, that need not necessarily mean resulting into no chance of recording conviction and/or the entire exercise of a trial destined to be exercise of futility. It is vehemently submitted by the learned counsel appearing on behalf of the appellant-State that in a given case despite the complainant may not support in future and in the trial in view of the settlement and compromise with the accused, still the prosecution may prove the case against the accused persons by examining the other witnesses, if any, and/or on the basis of the medical evidence and/or other evidence/material. It is submitted that in the present cases the investigation was in progress and even the statement of the witnesses was recorded and the medical evidence was also collected. It is submitted that therefore in the facts and circumstances of the case, the High Court has clearly erred in considering and relying upon the decision of this Court in the case of *Shiji* (supra).

6.4 It is further submitted by the learned counsel appearing on behalf of the appellant-State that the accused were hard core criminals and many criminal cases were registered against them and they are a serious threat to the society. It is submitted that all these aforesaid circumstances and the conduct on the part of the accused were required to be considered by the High Court while quashing the FIR in exercise of its inherent powers under Section 482 of the Cr.P.C., and more particularly when the offences alleged were against the society at large, namely, attempt to murder, which is a non-compoundable offence. In support of his submissions, learned counsel for the appellant-State has placed reliance on the decisions of this Court in the cases of *Gian Singh vs. State of Punjab* (2012) 10 SCC 303; *State of Rajasthan vs. Shambhu Kewat*, (2014) 4 SCC 149; *State of Madhya Pradesh vs. Deepak* (2014) 10 SCC 285; *State of Madhya Pradesh vs. Manish* (2015) 8 SCC 307; *J.Ramesh Kamath vs. Mohana Kurup* (2016) 12 SCC

179; *State of Madhya Pradesh vs. Rajveer Singh* (2016) 12 SCC 471; *Parbatbhai AAhir vs. State of Gujarat* (2017) 9 SCC 641; and 2019 SCC Online SC 7, *State of Madhya Pradesh vs. Kalyan Singh*, decided on 4.1.2019 in Criminal Appeal No. 14/2019, *State of Madhya Pradesh vs. Dhruv Gurjar*, decided on 22.02.2019 in Criminal Appeal @ SLP(Criminal) No.9859/2013.

6.5 Making the above submissions and relying upon the aforesaid decisions of this Court, learned counsel appearing on behalf of the appellant-State has prayed to allow the present appeal and quash and set aside the impugned judgment and order passed by the High Court quashing and setting aside the FIR, in exercise of its inherent powers under Section 482 of the Cr.P.C.

7. As observed hereinabove, nobody appeared on behalf of the respondents - accused.

8. We have heard the learned counsel for the appellant at great length.

9. At the outset, it is required to be noted that in the present appeals, the High Court in exercise of its powers under Section 482 of the Cr.P.C. has quashed the FIR for the offences under Sections 307 and 34 of the IPC solely on the basis of a compromise between the complainant and the accused. That in view of the compromise and the stand taken by the complainant, considering the decision of this Court in the case of *Shiji* (supra), the High Court has observed that there is no chance of recording conviction against the accused persons and the entire exercise of a trial would be exercise in futility, the High Court has quashed the FIR.

9.1 However, the High Court has not at all considered the fact that the offences alleged were non-compoundable offences as per Section 320 of the Cr.P.C. From the impugned judgment and order, it appears that the High Court has not at all considered the relevant facts and circumstances of the case, more particularly the seriousness of the offences and its social impact. From the impugned judgment and order passed by the High Court, it appears that the High Court has mechanically quashed the FIR, in exercise of its powers under Section 482 Cr.P.C. The High Court has not at all considered the distinction between a personal or private wrong and a social wrong and the social impact. As observed by this Court in the case of *State of Maharashtra vs. Vikram Anantrai Doshi*, (2014) 15 SCC 29, the Court's principal duty, while exercising the powers under Section 482 Cr.P.C. to quash the criminal proceedings, should be to scan the entire facts to find out the thrust of the allegations and the crux of the settlement. As observed, it is the experience of the Judge that comes to his aid and the said experience should be used with care, caution, circumspection and courageous prudence. In the case at hand, the High Court has not at all taken pains to scrutinise the entire conspectus of facts in proper perspective and has quashed the criminal proceedings mechanically. Even, the quashing of the FIR by the High Court in the present case

for the offences under Sections 307 and 34 of the IPC, and that too in exercise of powers under Section 482 of the Cr.P.C. is just contrary to the law laid down by this Court in a catena of decisions.

9.2 In the case of *Gian Singh* (supra), in paragraph 61, this Court has observed and held as under:

> "61. The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz.: (*i*) to secure the ends of justice, or (*ii*) to prevent abuse of the process of any court. In what cases power to quash the criminal proceeding or complaint or FIR may be exercised where the offender and the victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have a serious impact on society. Similarly, any compromise between the victim and the offender in relation to the offences under special statutes like the Prevention of Corruption Act or the offences committed by public servants while working in that capacity, etc.; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and predominatingly civil flavour stand on a different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, the High Court may quash the criminal proceedings if in its view, because of the compromise between the offender and the victim, the possibility of conviction is remote and bleak and continuation of the criminal case would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and the wrongdoer and whether to secure the ends of justice, it is appropriate that the criminal case is put to an end and if the answer to the above question(s) is

in the affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding."

9.3 In the case of *Narinder Singh vs. State of Punjab* (2014) 6 SCC 466, after considering the decision in the case of *Gian Singh* (supra), in paragraph 29, this Court summed up as under:

"29. In view of the aforesaid discussion, we sum up and lay down the following principles by which the High Court would be guided in giving adequate treatment to the settlement between the parties and exercising its power under Section 482 of the Code while accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings:

29.1. Power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with caution.

29.2. When the parties have reached the settlement and on that basis petition for quashing the criminal proceedings is filed, the guiding factor in such cases would be to secure:

(*i*) ends of justice, or

(*ii*) to prevent abuse of the process of any court.

While exercising the power the High Court is to form an opinion on either of the aforesaid two objectives.

29.3. Such a power is not to be exercised in those prosecutions which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Similarly, for the offences alleged to have been committed under special statute like the Prevention of Corruption Act or the offences committed by public servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender.

29.4. On the other hand, those criminal cases having overwhelmingly and predominantly civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes should be quashed when the parties have resolved their entire disputes among themselves.

29.5. While exercising its powers, the High Court is to examine as to whether the possibility of conviction is remote and bleak and continuation

of criminal cases would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal cases.

29.6. Offences under Section 307 IPC would fall in the category of heinous and serious offences and therefore are to be generally treated as crime against the society and not against the individual alone. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to proving the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used, etc. Medical report in respect of injuries suffered by the victim can generally be the guiding factor. On the basis of this prima facie analysis, the High Court can examine as to whether there is a strong possibility of conviction or the chances of conviction are remote and bleak. In the former case it can refuse to accept the settlement and quash the criminal proceedings whereas in the latter case it would be permissible for the High Court to accept the plea compounding the offence based on complete settlement between the parties. At this stage, the Court can also be swayed by the fact that the settlement between the parties is going to result in harmony between them which may improve their future relationship.

29.7. While deciding whether to exercise its power under Section 482 of the Code or not, timings of settlement play a crucial role. Those cases where the settlement is arrived at immediately after the alleged commission of offence and the matter is still under investigation, the High Court may be liberal in accepting the settlement to quash the criminal proceedings/investigation. It is because of the reason that at this stage the investigation is still on and even the charge-sheet has not been filed. Likewise, those cases where the charge is framed but the evidence is yet to start or the evidence is still at infancy stage, the High Court can show benevolence in exercising its powers favourably, but after prima facie assessment of the circumstances/material mentioned above. On the other hand, where the prosecution evidence is almost complete or after the conclusion of the evidence the matter is at the stage of argument, normally the High Court should refrain from exercising its power under Section 482 of the Code, as in such cases the trial court would be in a position to decide the case finally on merits and to come to a conclusion as to whether the offence under Section 307 IPC is committed or not. Similarly, in those cases where the conviction is already recorded by the trial court and the matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same resulting in acquittal of the offender who has already been convicted by the trial court. Here charge is proved under Section 307 IPC and

conviction is already recorded of a heinous crime and, therefore, there is no question of sparing a convict found guilty of such a crime."

9.4 In the case of *Parbatbhai Aahir* (supra), again this Court has had an occasion to consider whether the High Court can quash the FIR/complaint/ criminal proceedings, in exercise of the inherent jurisdiction under Section 482 Cr.P.C. Considering a catena of decisions of this Court on the point, this Court summarised the following propositions:

"(1) Section 482 CrPC preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognises and preserves powers which inhere in the High Court.

(2) The invocation of the jurisdiction of the High Court to quash a first information report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 CrPC. The power to quash under Section 482 is attracted even if the offence is non-compoundable.

(3) In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power.

(4) While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised (i) to secure the ends of justice, or (ii) to prevent an abuse of the process of any court.

(5) the decision as to whether a complaint or first information report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulate.

(6) In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences.

(7) As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing insofar as the exercise of the inherent power to quash is concerned.

(8) Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute.

(9) In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and

(10) There is yet an exception to the principle set out in Propositions (8) and (9) above. Economic offences involving the financial and economic well-being of the State have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance."

9.5 In the case of *Manish* (supra), this Court has specifically observed and held that, when it comes to the question of compounding an offence under Sections 307, 294 and 34 IPC, by no stretch of imagination, can it be held to be an offence as between the private parties simpliciter. It is observed that such offences will have a serious impact on the society at large. It is further observed that where the accused are facing trial under Sections 307 read with Section 34 IPC, as the offences are definitely against the society, accused will have to necessarily face trial and come out unscathed by demonstrating their innocence.

9.6 In the case of *Deepak* (supra), this Court has specifically observed that as offence under Section 307 IPC is non-compoundable and as the offence under Section 307 is not a private dispute between the parties inter se, but is a crime against the society, quashing of the proceedings on the basis of a compromise is not permissible. Similar is the view taken by this Court in a recent decision of this Court in the case of *Kalyan Singh* (supra) *and Dhruv Gurjar* (supra).

10. Now so far as the decision of this Court in the case of *Narinder Singh* (supra) is concerned, this Court in paragraph 29.6 admitted that the offences under Section 307 IPC would fall in the category of heinous and serious offences and therefore are to be generally treated as crime against the society and not against the individual alone. However, this Court further observed that the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed. Its further corroboration with the medical evidence or other evidence is to be seen, which will be possible during the trial only. Hence, the decision of this case in the case of *Narinder Singh* (supra) shall be of no assistance to the accused in the present case.

11. Now so far as the reliance placed upon the decision of this Court in the case of *Shiji* (supra), while quashing the FIR by observing that as the complainant has compromised with the accused, there is no possibility of recording a conviction, and/or the further trial would be an exercise in futility is concerned, we are of the opinion that the High Court has clearly erred in quashing the FIR on the aforesaid ground. It appears that the High Court has misread or misapplied the said decision to the facts of the cases on hand. The High Court ought to have appreciated that it is not in every case where the complainant has entered into a compromise with the accused, there may not be any conviction. Such observations are presumptive and many a time too early to opine. In a given case, it may happen that the prosecution still can prove the guilt by leading cogent evidence and examining the other witnesses and the relevant evidence/material, more particularly when the dispute is not a commercial transaction and/or of a civil nature and/or is not a private wrong. In the case of *Shiji* (supra), this Court found that the case had its origin in the civil dispute between the parties, which dispute was resolved by them and therefore this Court observed that, 'that being so, continuance of the prosecution where the complainant is not ready to support the allegations...will be a futile exercise that will serve no purpose'. In the aforesaid case, it was also further observed 'that even the alleged two eyewitnesses, however, closely related to the complainant, were not supporting the prosecution version', and to that this Court observed and held 'that the continuance of the proceedings is nothing but an empty formality and Section 482 Cr.P.C. can, in such circumstances, be justifiably invoked by the High Court to prevent abuse of the process of law and thereby preventing a wasteful exercise by the courts below. Even in the said decision, in paragraph 18, it is observed as under:

> "18. Having said so, we must hasten to add that the plenitude of the power under Section 482 CrPC by itself, makes it obligatory for the High Court to exercise the same with utmost care and caution. The width and the nature of the power itself demands that its exercise is sparing and only in cases where the High Court is, for reasons to be recorded, of the clear view that continuance of the prosecution would be nothing but an abuse of the process of law. It is neither necessary nor proper for us to enumerate the situations in which the exercise of power under Section 482 may be justified. All that we need to say is that the exercise of power must be for securing the ends of justice and only in cases where refusal to exercise that power may result in the abuse of the process of law. The High Court may be justified in declining interference if it is called upon to appreciate evidence for it cannot assume the role of an appellate court while dealing with a petition under Section 482 of the Criminal Procedure Code. Subject to the above, the High Court will have to consider the facts and circumstances of each case to determine whether it is a fit case in which the inherent powers may be invoked."

11.1 Therefore, the said decision may be applicable in a case which has its origin in the civil dispute between the parties; the parties have resolved the dispute; that the offence is not against the society at large and/or the same may not have social impact; the dispute is a family/matrimonial dispute etc. The aforesaid decision may not be applicable in a case where the offences alleged are very serious and grave offences, having a social impact like offences under Section 307 IPC. Therefore, without proper application of mind to the relevant facts and circumstances, in our view, the High Court has materially erred in mechanically quashing the FIR, by observing that in view of the compromise, there are no chances of recording conviction and/or the further trial would be an exercise in futility. The High Court has mechanically considered the aforesaid decision of this Court in the case of S*hiji* (supra), without considering the relevant facts and circumstances of the case.

12. Now so far as the conflict between the decisions of this Court in the cases of *Narinder Singh* (supra) *and Shambhu Kewat* (supra) is concerned, in the case of *Shambhu Kewat* (supra), this Court has noted the difference between the power of compounding of offences conferred on a court under Section 320 Cr.P.C. and the powers conferred under Section 482 Cr.P.C. for quashing of criminal proceedings by the High Court. In the said decision, this Court further observed that in compounding the offences, the power of a criminal court is circumscribed by the provisions contained in Section 320 Cr.P.C. and the court is guided solely and squarely thereby, while, on the other hand, the formation of opinion by the High Court for quashing a criminal proceedings or criminal complaint under Section 482 Cr.P.C. is guided by the material on record as to whether ends of justice would justify such exercise of power, although ultimate consequence may be acquittal or dismissal of indictment. However, in the subsequent decision in the case of *Narinder Singh* (supra), the very Bench ultimately concluded in paragraph 29 as under:

> "29. In view of the aforesaid discussion, we sum up and lay down the following principles by which the High Court would be guided in giving adequate treatment to the settlement between the parties and exercising its power under Section 482 of the Code while accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings:
>
> 29.1. Power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with caution.

29.2. When the parties have reached the settlement and on that basis petition for quashing the criminal proceedings is filed, the guiding factor in such cases would be to secure:

(i) ends of justice, or

(ii) to prevent abuse of the process of any court.

While exercising the power the High Court is to form an opinion on either of the aforesaid two objectives.

29.3. Such a power is not to be exercised in those prosecutions which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Similarly, for the offences alleged to have been committed under special statute like the Prevention of Corruption Act or the offences committed by public servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender.

29.4. On the other hand, those criminal cases having overwhelmingly and predominantly civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes should be quashed when the parties have resolved their entire disputes among themselves.

29.5. While exercising its powers, the High Court is to examine as to whether the possibility of conviction is remote and bleak and continuation of criminal cases would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal cases.

29.6. Offences under Section 307 IPC would fall in the category of heinous and serious offences and therefore are to be generally treated as crime against the society and not against the individual alone. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to proving the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used, etc. Medical report in respect of injuries suffered by the victim can generally be the guiding factor. On the basis of this prima facie analysis, the High Court can examine as to whether there is a strong possibility of conviction or the chances of conviction are remote and bleak. In the former case it can refuse to accept the settlement and quash the criminal proceedings whereas in the latter case it would be permissible for the High Court to accept the plea

compounding the offence based on complete settlement between the parties. At this stage, the Court can also be swayed by the fact that the settlement between the parties is going to result in harmony between them which may improve their future relationship.

29.7. While deciding whether to exercise its power under Section 482 of the Code or not, timings of settlement play a crucial role. Those cases where the settlement is arrived at immediately after the alleged commission of offence and the matter is still under investigation, the High Court may be liberal in accepting the settlement to quash the criminal proceedings/investigation. It is because of the reason that at this stage the investigation is still on and even the charge-sheet has not been filed. Likewise, those cases where the charge is framed but the evidence is yet to start or the evidence is still at infancy stage, the High Court can show benevolence in exercising its powers favourably, but after prima facie assessment of the circumstances/material mentioned above. On the other hand, where the prosecution evidence is almost complete or after the conclusion of the evidence the matter is at the stage of argument, normally the High Court should refrain from exercising its power under Section 482 of the Code, as in such cases the trial court would be in a position to decide the case finally on merits and to come to a conclusion as to whether the offence under Section 307 IPC is committed or not. Similarly, in those cases where the conviction is already recorded by the trial court and the matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same resulting in acquittal of the offender who has already been convicted by the trial court. Here charge is proved under Section 307 IPC and conviction is already recorded of a heinous crime and, therefore, there is no question of sparing a convict found guilty of such a crime."

13. Considering the law on the point and the other decisions of this Court on the point, referred to hereinabove, it is observed and held as under:

i) that the power conferred under Section 482 of the Code to quash the criminal proceedings for the non-compoundable offences under Section 320 of the Code can be exercised having overwhelmingly and predominantly the civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes and when the parties have resolved the entire dispute amongst themselves;

ii) such power is not to be exercised in those prosecutions which involved heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society;

iii) similarly, such power is not to be exercised for the offences under the special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender;

iv) offences under Section 307 IPC and the Arms Act etc. would fall in the category of heinous and serious offences and therefore are to be treated as crime against the society and not against the individual alone, and therefore, the criminal proceedings for the offence under Section 307 IPC and/or the Arms Act etc. which have a serious impact on the society cannot be quashed in exercise of powers under Section 482 of the Code, on the ground that the parties have resolved their entire dispute amongst themselves. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to framing the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used etc. However, such an exercise by the High Court would be permissible only after the evidence is collected after investigation and the charge sheet is filed/charge is framed and/or during the trial. Such exercise is not permissible when the matter is still under investigation. Therefore, the ultimate conclusion in paragraphs 29.6 and 29.7 of the decision of this Court in the case of *Narinder Singh* (supra) should be read harmoniously and to be read as a whole and in the circumstances stated hereinabove;

v) while exercising the power under Section 482 of the Code to quash the criminal proceedings in respect of non-compoundable offences, which are private in nature and do not have a serious impact on society, on the ground that there is a settlement/compromise between the victim and the offender, the High Court is required to consider the antecedents of the accused; the conduct of the accused, namely, whether the accused was absconding and why he was absconding, how he had managed with the complainant to enter into a compromise etc.

14. Insofar as the present case is concerned, the High Court has quashed the criminal proceedings for the offences under Sections 307 and 34 IPC mechanically and even when the investigation was under progress. Somehow, the accused managed to enter into a compromise with the complainant and sought quashing of the FIR on the basis of a settlement. The allegations are serious in nature. He used the fire arm also in commission of the offence. Therefore, the gravity of the offence and the conduct of the accused is not at all considered by the High Court and solely on the basis of a settlement between the accused and the complainant, the High Court has mechanically quashed the FIR, in exercise of power under Section 482 of the Code, which is not sustainable in the eyes of law. The High Court has also failed to note the antecedents of the accused.

15. In view of the above and for the reasons stated, the present appeal is allowed. The impugned judgment and order dated 07.10.2013 passed by the High Court in Miscellaneous Criminal Case No. 8000 of 2013 is hereby quashed and

set aside, and the FIR/investigation/criminal proceedings be proceeded against the accused, and they shall be dealt with, in accordance with law.

Criminal Appeal No.350 of 2019

16. So far as Criminal Appeal arising out of SLP 10324/2018 is concerned, by the impugned judgment and order, the High Court has quashed the criminal proceedings for the offences punishable under Sections 323, 294, 308 & 34 of the IPC, solely on the ground that the accused and the complainant have settled the matter and in view of the decision of this Court in the case of *Shiji*(supra), there may not be any possibility of recording a conviction against the accused. Offence under Section 308 IPC is a non-compoundable offence. While committing the offence, the accused has used the fire arm. They are also absconding, and in the meantime, they have managed to enter into a compromise with the complainant. Therefore, for the reasons stated above, this appeal is also allowed, the impugned judgment and order dated 28.05.2018 passed by the High Court in Miscellaneous Criminal Case No. 19309/2018 is hereby quashed and set aside, and the FIR/investigation/ criminal proceedings be proceeded against the accused, and they shall be dealt with, in accordance with law.

Appeal allowed

I.L.R. [2019] M.P. 1620 (SC)
SUPREME COURT OF INDIA
Before Mr. Justice Dr. Dhananjaya Y. Chandrachud &
Mr. Justice Hemant Gupta
Cr.A. No. 483/2019 decided on 13 March, 2019

RIPUDAMAN SINGH …Appellant

Vs.

BALKRISHNA …Respondent

(Alongwith Cr.A. No. 484/2019)

***A. Negotiable Instruments Act (26 of 1881), Section 138 – Maintainability – Payment in Pursuance to Agreement to Sell* – Complaint quashed by High Court u/S 482 Cr.P.C. – Held – Cheques were issued under and in pursuance of agreement to sell, though it does not create any interest in immovable property, but it constitutes a legally enforceable contract between parties to it – Payment made in pursuance of such an agreement is hence a payment made in pursuance of a duly enforceable debt or liability for purpose of Section 138 – Complaint maintainable – Impugned order quashed – Appeal allowed. (Para 13)**

क. परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 – पोषणीयता – विक्रय के करार के अनुसरण में भुगतान – परिवाद को उच्च न्यायालय द्वारा धारा 482 दं.प्र.सं. के अंतर्गत अभिखंडित किया गया – अभिनिर्धारित – विक्रय के करार के अंतर्गत तथा अनुसरण में चैक जारी किये गये थे, यद्यपि यह अचल संपत्ति में कोई हित सृजित नहीं करता किंतु यह इसके पक्षकारों के बीच एक विधिक रूप से प्रवर्तनीय संविदा गठित करता है – अतः, ऐसे किसी करार के अनुसरण में किया गया भुगतान, धारा 138 के प्रयोजन हेतु एक सम्यक् रूप से प्रवर्तनीय ऋण अथवा दायित्व के अनुसरण में किया गया एक भुगतान है – परिवाद पोषणीय – आक्षेपित आदेश अभिखंडित – अपील मंजूर।

***B. Criminal Procedure Code, 1973 (2 of 1974), Section 482 – Scope & Jurisdiction* – Held – Question as to whether there was a dispute as contemplated under a clause of the said agreement which obviated obligation of purchaser to honour the cheque, furnished in pursuance of the said agreement to the vendor, cannot be the subject matter of a proceeding u/S 482 Cr.P.C. and is a matter to be determined on basis of evidence which may be adduced at the trial. (Para 15)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – व्याप्ति एवं अधिकारिता – अभिनिर्धारित – प्रश्न कि क्या वहां कोई विवाद था जैसा कि उक्त करार के एक खंड के अंतर्गत अनुध्यात है, जिससे उक्त करार के अनुसरण में विक्रेता को दिये गये चेक के आदरण की क्रेता की बाध्यता दूर हुई थी, धारा 482 दं.प्र.सं. के अंतर्गत कार्यवाही की विषय वस्तु नहीं हो सकता तथा एक ऐसा मामला है जिसे साक्ष्य के आधार पर अवधारित किया जाएगा जिन्हें विचारण में प्रस्तुत किया जा सकता है।

(Supplied: Paragraph numbers)

J U D G M E N T

The Judgment of the Court was delivered by : **DR. DHANANJAYA Y. CHANDRACHUD, J. :-** Leave granted.

2. These appeals arise from a judgment of a learned Single Judge of the High Court of Madhya Pradesh at its Bench at Indore dated 31 March 2016. The learned Single Judge has allowed a petition under Section 482 of the Code of Criminal Procedure, 1973[1] and quashed the complaints instituted by the appellants under Section 138 of the Negotiable Instruments Act, 1881.

3. The appellants are spouses. Claiming to be owners of certain agricultural land they entered into an agreement to sell dated 28 May 2013 with the Respondent. The sale consideration was Rs. 1.75 crores. The agreement records that an amount of Rs. 1.25 crores was paid in cash and as for the balance, two post dated cheques were issued, each in the amount of Rs 25 lakhs.

4. The cheques were issued by the respondent in favour of the two appellants in the present appeals. The details of the cheques are as follows:

1 "CrPC'

(i) Cheque No. 297251 dated 03.06.2013 drawn on Indusind Bank, Indore for an amount of Rs. 25,00,000/- (Rupees twenty-five lacs only) favouring Ripudaman Singh;

(ii) Cheque No. 297252 dated 02.07.2013 drawn on Indusind Bank, Indore for an amount of Rs. 25,00,000/- (Rupees twenty-five lacs only) favouring Smt. Usha.

5. Together with the agreement, the appellants executed a General Power of Attorney in favour of the respondent. The first of the two cheques was deposited for payment. On 18 June 2013 it was returned unpaid with the remarks "Insufficient funds". The second cheque dated 2 July 2013 was returned with the same remark by the banker, upon deposit.

6. After issuing legal notices dated 21 June 2013 and 13 August 2013, the appellants instituted complaints under Section 138 of the Negotiable Instruments Act, 1881. Process was issued by the Judicial Magistrate, First Class.

7. The respondent filed two separate applications seeking discharge in the respective complaint cases. Those applications were dismissed by the Judicial Magistrate, First Class, Indore on 3 September 2014. On 8 October 2014, charges were framed under Section 138.

8. The respondent then filed a petition under Section 482 CrPC before the High Court in which the impugned order has been passed. While allowing the petition, the High Court has adverted to Clause 4 of the agreement between the parties which is in the following terms:

> "That on the above property of the seller there is no family dispute of any type nor is any case pending in the court. If due to any reason any dispute arises then all its responsibility would remain of the selling party and the payment of cheques would be after the resolution of the said disputes."

9. The High Court held that a suit in respect of the land, Civil Suit No. 4-A of 2012 is pending before the XlVth Additional Sessions Judge, Indore since 2 September 2011 in which the complainants are arraigned as parties.

10. On this basis, the High Court held that under the terms of clause 4 of the agreement, the cheques could not have been presented for payment. The cheques, according to the High Court, have not been issued for creating any liablity or debt but for the payment of balance consideration. Holding that the respondent did not owe any money to the complainants, the complaint under Section 138 have been quashed.

11. Assailing the judgment of the High Court, Mr. Shyam Divan, learned senior counsel submits that as a matter of fact, acting on the strength of the General Power of Attorney which was issued by the appellants in both the cases, the respondent entered into a sale transaction in respect of the same property on 3

August 2013 for a total consideration of Rs. 3.79 crores. Hence, it has been submitted that the order passed by the High Court is manifestly misconceived.

12. On the other hand, learned counsel appearing on behalf of the respondent submitted that clause 4 of the agreement to sell postulated that there was no dispute in respect of the land which was the subject of the agreement to sell nor was there any case pending before the Court. Moreover, it was stated that if a dispute was to arise, it was the duty of the vendor to get it resolved and the payment of cheques would be after the resolution of the dispute.

13. We find ourselves unable to accept the finding of the learned Single Judge of the High Court that the cheques were not issued for creating any liability or debt, but 'only' for the payment of balance consideration and that in consequence, there was no legally enforceable debt or other liability. Admittedly, the cheques were issued under and in pursuance of the agreement to sell. Though it is well settled that an agreement to sell does not create any interest in immoveable property, it nonetheless constitutes a legally encforceable contract between the parties to it. A payment which is made in pursuance of such an agreement is hence a payment made in pursuance of a duly enforceable debt or liablity for the purposes of Section 138.

14. Moreover, acting on the General Power of Attorney, the respondent entered into a subsequent transaction on 3 August 2013. Evidently that transaction was after the legal notice dated 21 June 2013 and hence could not have been adverted to in the legal notice. Recourse to the jurisdiction of the High Court under Section 482 was a clear abuse of process.

15. The question as to whether there was a dispute as contemplated in clause 4 of the Agreement to Sell which obviated the obligation of the purchaser to honor the cheque which was furnished in pursuance of the agreement to sell to the vendor, cannot be the subject matter of a proceeding under Section 482 and is a matter to be determined on the basis of the evidence which may be adduced at the trial.

16. For these reasons, we are of the view that the order passed by the High Court in the petition under Section 482 CrPC was unsustainable. We allow the appeals and set aside the impugned judgment and order of the High Court.

17. However, we clarify that we have not expressed any opinion on the merits of the issues which may arise during the course of the trial.

18. The appeals are, accordingly, disposed of.

19. Pending application(s), if any, shall stand disposed of.

Appeal allowed

I.L.R. [2019] M.P. 1624 (SC)
SUPREME COURT OF INDIA

Before Mr. Justice Dr. Dhananjaya Y Chandrachud &
Mr. Justice Hemant Gupta

Cr.A. No. 485/2019 decided on 13 March, 2019

STATE OF M.P. …Appellant

Vs.

DEEPAK …Respondent

***A. Penal Code (45 of 1860), Section 306, Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), Section 3(2)(v) and Criminal Procedure Code, 1973 (2 of 1974), Section 227 – Discharge – Grounds* – Held – Several complaints filed by deceased against respondent, last of them was filed a few days before suicide – Specific dying declaration by deceased regarding harassment by respondent – Sufficient material on record to uphold framing of charge by Trial Court – High Court erred in discharging the respondent – Impugned order set aside. (Para 16)**

क. दण्ड संहिता (1860 का 45), धारा 306, अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 3(2)(v) एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 227 – आरोपमुक्त – आधार – अभिनिर्धारित – मृतक द्वारा प्रत्यर्थी के विरूद्ध अनेक परिवाद प्रस्तुत किये गये, उनमें से अंतिम आत्महत्या के कुछ दिनों पूर्व प्रस्तुत किया गया था – प्रत्यर्थी द्वारा उत्पीड़न के संबंध में मृतक का विनिर्दिष्ट मृत्युकालिक कथन – विचारण न्यायालय द्वारा आरोप की विरचना को मान्य ठहराने हेतु अभिलेख पर पर्याप्त सामग्री – उच्च न्यायालय ने प्रत्यर्थी को आरोपमुक्त करके त्रुटि की है – आक्षेपित आदेश अपास्त।

***B. Criminal Procedure Code, 1973 (2 of 1974), Section 227 – Discharge – Consideration* – Held – At the stage of framing of charge, Court must ascertain whether there is "sufficient ground for proceedings against accused" or there is ground for "presuming" that accused has committed the offence. (Para 15)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 227 – आरोपमुक्त – विचार किया जाना – अभिनिर्धारित – आरोप विरचना के प्रक्रम पर, न्यायालय को यह अवश्य अभिनिश्चित करना चाहिए कि क्या ''अभियुक्त के विरूद्ध कार्यवाहियों के लिए पर्याप्त आधार'' हैं अथवा यह ''उपधारणा करने'' हेतु आधार है कि अभियुक्त ने अपराध कारित किया है।

Cases referred:

(2012) 9 SCC 460, (2017) 3 SCC 198, (2009) 16 SCC 605, (2006) 4 SCC 51.

J U D G M E N T

The Judgment of the Court was delivered by : **Dr. Dhananjaya Y. Chandrachud, J. :-** Leave granted.

2. The present appeal arises from a judgment dated 31 January, 2018 of a learned Single Judge of the Indore Bench of the High Court of Madhya Pradesh[1] discharging the Respondent from charges framed by the Special Judge, Neemuch. The Special Judge, Neemuch had by an order dated 13.10.17 in Special Case No. 51 of 2017 framed charges against the respondent under Section 306 of the Indian Penal Code, 1860[2] and Section 3(2)(V) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989.

3. In pursuance of the notice issued by this Court on 19 November, 2018, the respondent has entered appearance through learned counsel. We have heard the Deputy Advocate General for the State of Madhya Pradesh and learned counsel for the respondent.

4. On 9 August 2017, Jyoti Sharma committed suicide by consuming poison at her residence at Neemuch. Immediately after she consumed poison, she was moved to the District hospital for treatment. The dying declaration of the victim was recorded on 9 August 2017 in the presence of the Naib Tehsildar, Neemuch. The relevant part of the dying declaration is extracted below:

> "Question: What has happened to you?
> Answer: I have consumed poison.
> Question: Why you have consumed poison?
> Answer: I am not able to get the job, wherever I go, Deepak Bhamawat R/o Jeeran, get me sacked out from the job. Earlier he had molested me, on which, I had instituted a case against him, since then, he is harassing me.
> Question: Whether you want to say anything else?
> Answer: No."

5. Jyoti Sharma died on 10 August 2017 at a hospital in Udaipur where she was admitted for treatment. The First Information Report[3] was registered on 16 August 2017. During the course of the investigation, the respondent was arrested on 6 September 2017. On the completion of the investigation, the investigating officer submitted a charge-sheet on 22 September 2017 under Section 306 of the Penal Code and Section 3(2)(v) and Section 3(2)(v)(a) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act before the Special Judge, Neemuch. Cognizance was taken on 13 October 2017. Charges were framed on

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[1] In Criminal Revision No. 458 of 2018
[2] "Penal Code"
[3] "FIR"

10 January 2018. Challenging the order framing charges, a Criminal Revision was filed before the High Court.

6. The Single Judge, by the order impugned in these proceedings, set aside the order of the trial judge and directed that the respondent be discharged.

7. The Deputy Advocate General has adverted to the charge-sheet which has been submitted after the investigation was completed. Learned counsel submitted that there is a dying declaration of the victim which was recorded on 9 August 2017. It was urged that the investigation has disclosed that the respondent and the deceased were employees in the Central Bank. The respondent had obtained a loan in the name of the deceased, allegedly after forging her signature. The loan was not paid, as a result of which on 3 August, 2017, Central Bank issued a notice to the deceased for the repayment of the loan. During the course of the investigation, the investigating agency found that three complaints were submitted by the victim: on 1 November 2016 to the Station House Officer, P.S. Jeeran; in December 2016 at P.S. Jeeran and another on 6 January 2017 to the Collector, Neemuch making specific allegations that the respondent was harassing her. The respondent is alleged to have caused the deceased to be terminated from employment and also allegedly caused her landlord to oust her from possession. On this material, which has emerged in the course of the investigation, it is urged that the case for discharge was not made out.

8. On the other hand, learned counsel appearing on behalf of the respondent placed reliance on the fact that in the FIR all that has been adverted to is that the respondent had got the deceased terminated from her job in the Central Bank and thereby harassed her and tortured her as a woman belonging to a Scheduled Caste for depositing the installments of the loan. Learned counsel submitted that on the contents of the FIR, the High Court was justified in coming to the conclusion that there was no provocation, inducement or incitement that would fall within the description of 'abetment' to sustain a charge under Section 306 of the Penal Code.

9. The only circumstance which has weighed with the High Court in passing the impugned order is what has been stated in the following extract:

> "11.....Merely the deceased was failing to get any job and she is under impression that the petitioner is creating burden and hence she did not get any new job. He never intended that deceased should commit suicide."

The High Court held thus :

> "16....in the facts and circumstances of the present case, there is no evidence with regard to provocation incitement or encouragement for commitment of suicide by the deceased..."

10. We shall now examine whether the High Court has correctly exercised its revisional jurisdiction under Section 397 read wtih 401 of the Code of Criminal Procedure, 1973[4] in discharging the respondent of the charges framed by the Special Judge, Neemuch.

11. In *Amit Kapoor V Ramesh Chander*[5] a two-judge bench of this Court elucidated on the revisional power of the Court under Section 397. Justice Swatanter Kumar noted thus :

> "**12.** Section 397 of the Code vests the court with the power to call for and examine the records of the inferior court for the purposes of satisfying itself as to the legality and regularity of any proceedings or order made in a case. The object of this provision is to set right a patent defect or an error of jurisdiction or law. There has to be a well-founded error and it may not be appropriate for the court to scrutinise the orders, which upon the face of it bears a token of careful consideration and appear to be in accordance with law. If one looks into the various judgments of this Court, it emerges that the revisional jurisdiction can be invoked where the decisions under challenge are grossly erroneous, there is no compliance with the provisions of law, the finding recorded is based on no evidence, material evidence is ignored or judicial discretion is exercised arbitrarily or perversely. These are not exhaustive classes, but are merely indicative. Each case would have to be determined on its own merits.
>
> **13.** Another well-accepted norm is that the revisional jurisdiction of the higher court is a very limited one and cannot be exercised in a routine manner. One of the inbuilt restrictions is that it should not be against an interim or interlocutory order. The Court has to keep in mind that the exercise of revisional jurisdiction itself should not lead to injustice ex facie. Where the Court is dealing with the question as to whether the charge has been framed properly and in accordance with law in a given case, it may be reluctant to interfere in exercise of its revisional jurisdiction unless the case substantially falls within the categories afore-stated. Even framing of charge is a much advanced stage in the proceedings under the CrPC."

The Court also enunciated a set of principles which the High Courts must keep in mind while exercising their jurisdiction under the provision:

4 "Procedure Code"
5 (2012) 9 SCC 460

"**27**. .. At best and upon objective analysis of various judgments of this Court, we are able to cull out some of the principles to be considered for proper exercise of jurisdiction, particularly, with regard to quashing of charge either in exercise of jurisdiction under Section 397 or Section 482 of the Code or together, as the case may be:

27.2. The Court should apply the test as to whether the uncontroverted allegations as made from the record of the case and the documents submitted therewith prima facie establish the offence or not. **If the allegations are so patently absurd and inherently improbable that no prudent person can ever reach such a conclusion and where the basic ingredients of a criminal offence are not satisfied then the Court may interfere.**

27.3. The High Court should not unduly interfere. No meticulous examination of the evidence is needed for considering whether the case would end in conviction or not at the stage of framing of charge or quashing of charge.

27.4. Where the exercise of such power is absolutely essential to prevent patent miscarriage of justice and for correcting some grave error that might be committed by the subordinate courts even in such cases, the High Court should be loath to interfere, at the threshold, to throttle the prosecution in exercise of its inherent powers.

27.9. Another very significant caution that the courts have to observe is that it cannot examine the facts, evidence and materials on record to determine whether there is sufficient material on the basis of which the case would end in a conviction; the court is concerned primarily with the allegations taken as a whole whether they will constitute an offence and, if so, is it an abuse of the process of court leading to injustice.

27.13. Quashing of a charge is an exception to the rule of continuous prosecution. Where the offence is even broadly satisfied, the Court should be more inclined to permit continuation of prosecution rather than its quashing at that initial stage. The Court is not expected to marshal the records with a view to decide admissibility and reliability of the documents or records but is an opinion formed prima facie."

(Emphasis supplied)

12. In *State of Rajasthan v Fatehkaran Mehdu*[6], a two-judge bench of this Court has elucidated on the scope of the interference permissible under Section 397 with regard to the framing of a charge. Justice Ashok Bhushan held thus:

> "**26.** The scope of interference and exercise of jurisdiction under Section 397 CrPC has been time and again explained by this Court. Further, the scope of interference under Section 397 CrPC at a stage, when charge had been framed, is also well settled. **At the stage of framing of a charge, the court is concerned not with the proof of the allegation rather it has to focus on the material and form an opinion whether there is strong suspicion that the accused has committed an offence, which if put to trial, could prove his guilt. The framing of charge is not a stage, at which stage final test of guilt is to be applied.** Thus, to hold that at the stage of framing the charge, the court should form an opinion that the accused is certainly guilty of committing an offence, is to hold something which is neither permissible nor is in consonance with the scheme of the Code of Criminal Procedure."
>
> (Emphasis supplied)

13. In view of the above decisions of this Court, we shall now determine whether the High Court has correctly exercised its revisional jurisdiction. The High Court had held that the lower court had erred in framing charges in the present case as there was no evidence with regard to provocation, incitement or encouragement which would lead to the commission of suicide by the deceased.

14. It is of relevance to refer to certain judgements of this Court. In *Chitresh Kumar Chopra v. State (NCT of Delhi)*[7], the appellant and two other individuals were charged under Section 306 read with Section 34 of the Penal Code. It had been alleged that the appellant and the other accused persons had forcibly compelled the deceased to sign a settlement giving up a part of his share in the profits from the sale of certain land. This led to a dispute and as a result of the mental harassment suffered by the deceased, he committed suicide. The Court affirmed the framing of charges by the trial court. The two-judge Bench of this Court laid down the ingredients of the offence of abetment of suicide. Justice D K Jain held thus:

> "**19**. As observed in *Ramesh Kumar* [(2001) 9 SCC 618 : 2002 SCC (Cri) 1088], **where the accused by his acts or by a continued course of conduct creates such circumstances that the deceased was left with no other option except to commit suicide, an "instigation" may be**

[6] (2017) 3 SCC 198
[7] (2009) 16 SCC 605

inferred. In other words, in order to prove that the accused abetted commission of suicide by a person, it has to be established that:

(*i*) the accused kept on irritating or annoying the deceased by words, deeds or willful omission or conduct which may even be a willful silence until the deceased reacted or pushed or forced the deceased by his deeds, words or willful omission or conduct to make the deceased move forward more quickly in a forward direction; and

(*ii*) that the accused had the intention to provoke, urge or encourage the deceased to commit suicide while acting in the manner noted above. Undoubtedly, presence of *mens rea* is the necessary concomitant of instigation."

(Emphasis supplied)

After due consideration of the facts and circumstances, the Court noted that *prima facie*, the offence of abetment of suicide was made out:

"**22**. In the present case, apart from the suicide note, extracted above, statements recorded by the police during the course of investigation, tend to show that on account of business transactions with the accused, including the appellant herein, the deceased was put under tremendous pressure to do something which he was perhaps not willing to do. ***Prima facie***, **it appears that the conduct of the appellant and his accomplices was such that the deceased was left with no other option except to end his life and therefore, clause Firstly of Section 107 IPC was attracted."**

(Emphasis supplied)

It was also noted that at the stage of framing of charges, the Court has to consider the material only with a view to find out if there is a ground for "presuming" that the accused had committed the offence:

"**25**. It is trite that at the stage of framing of charge, the court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom, taken at their face value, disclose the existence of all the ingredients constituting the alleged offence or offences. For this limited purpose, the court may sift the evidence as it cannot be expected even at the initial stage to accept as gospel truth all that the prosecution states. At this stage, the court has to consider the material only with a view to find out if there is ground for "presuming" that the accused has committed an offence and not for the purpose of arriving at the conclusion that it is not likely to lead to a conviction."

15. A two-judge Bench of this Court, in *Rajbir Singh v State of U P*[8] noted that in accordance with Section 227, the High Court must ascertain whether there is

[8] (2006) 4 SCC 51

"sufficient ground for proceeding against the accused" or there is ground for "presuming" that the offence has been committed. Justice G P Mathur held thus:

> "**9**. In *Stree Atyachar Virodhi Parishad v. Dilip Nathumal Chordia*, the Court while examining the scope of Section 227 held as under:
>
> "... Section 227 itself contains enough guidelines as to the scope of inquiry for the purpose of discharging an accused. It provides that 'the judge shall discharge when he considers that there is no sufficient ground for proceeding against the accused'. The 'ground' in the context is not a ground for conviction, but a ground for putting the accused on trial. It is in the trial, the guilt or the innocence of the accused will be determined and not at the time of framing of charge. The court, therefore, need not undertake an elaborate inquiry in sifting and weighing the material. Nor is it necessary to delve deep into various aspects. **All that the court has to consider is whether the evidentiary material on record, if generally accepted, would reasonably connect the accused with the crime."**
>
> **10**. **The High Court did not at all apply the relevant test, namely, whether there is sufficient ground for proceeding against the accused or whether there is ground for presuming that the accused has committed an offence. If the answer is in the affirmative an order of discharge cannot be passed and the accused has to face the trial.** The High Court after merely observing that "as the firing was aimed at the other persons and accidentally the deceased Pooja Balmiki was passing through that way and she was hit" and further observing that "the applicant neither intended to kill the deceased nor was she aimed at because of the reason that she was a Scheduled Caste" set aside the order by which the charges had been framed against Respondent 2. There can be no manner of doubt that the provisions of Section 301 IPC have been completely ignored and the relevant criteria for judging the validity of the order passed by the learned Special Judge directing framing of charges have not been applied. The impugned order is, therefore, clearly erroneous in law and is liable to be set aside."
>
> (Emphasis supplied)

16. In the present case, there is sufficient material on record to uphold the order framing charges of the Trial Court. The discharge of the accused was not justified. The High Court has evidently ignored what has emerged during the course of the investigation. The material indicates that several complaints were filed by the deceased. The last of them was filed a few days before the suicide. It is alleged that the respondent had taken a loan of Rs 5 lakhs through fraudulent means in the name of the deceased and an altercation took place between him and

the deceased in that regard. Moreover, the respondent is alleged to have got the deceased evicted from a rented house as well as terminated from her employment at Central Bank. There is a dying declaration.

17. We, however, clarify that this judgment shall not affect the merits of the trial.

18. For the above reasons, we allow the appeal and set aside the impugned judgment and order of the High Court dated 31 January 2018.

Appeal allowed

I.L.R. [2019] M.P. 1632 (DB)
WRIT APPEAL

Before Mr. Justice Sanjay Yadav & Mr. Justice Vivek Agarwal

W.A. No. 83/2007 (Gwalior) decided on 31 July, 2019

STATE OF M.P. …Appellant

Vs.

M/S. GODREJ G.E. APPLIANCE LTD. & anr. …Respondents

***A. Stamp Act, Indian (2 of 1899), Section 27 & 47-A – Valuation of Property – Considerations* – Held – For determining the stamp duty on a instrument recording sale of property, which is presented for registration, it is the market value of the property and all other facts and circumstances affecting the chargeability of said instrument, on the date of presentation is to be taken into consideration as per Section 27 of the Act of 1899 – Collector has not exceeded his jurisdiction in determining market value of property on date of execution of sale deed – Writ appeal allowed. (Paras 15 to 17)**

क. स्टाम्प अधिनियम, भारतीय (1899 का 2), धारा 27 व 47–ए – संपत्ति का मूल्यांकन – विचार – अभिनिर्धारित – संपत्ति का विक्रय अभिलिखित करते हुए लिखत जिसे रजिस्ट्रीकरण हेतु प्रस्तुत किया गया है, पर स्टाम्प शुल्क अवधारण के लिए प्रस्तुतिकरण की तिथि को संपत्ति का बाजार मूल्य तथा उक्त लिखत पर प्रभार को प्रभावित करने वाले अन्य सभी तथ्यों एवं परिस्थितियों को विचार में लिया जाना चाहिए जैसा कि 1899 के अधिनियम की धारा 27 में दिया गया है – कलेक्टर ने विक्रय विलेख के निष्पादन की तिथि को संपत्ति का बाजार मूल्य अवधारित करने में अपनी अधिकारिता का अतिलंघन नहीं किया है – रिट अपील मंजूर।

***B. Stamp Act, Indian (2 of 1899), Section 27 & 47-A – Undervaluation of Property – Effect* – Held – On date of execution of sale deed of the land, a super structure was standing thereon, which was not considered for valuation purpose – As per Section 27 of the Act, it was incumbent upon the vendor and vendee to have disclosed this fact in the**

instrument of transfer and also pay stamp duty as per valuation – State can recover the deficit stamp duty and the penalty imposed. (Para 15 & 17)

ख. स्टाम्प अधिनियम, भारतीय (1899 का 2), धारा 27 व 47–ए – संपत्ति का कम मूल्यांकन – प्रभाव – अभिनिर्धारित – भूमि के विक्रय विलेख के निष्पादन की तिथि को उस पर एक भव्य संरचना खड़ी थी जिसे मूल्यांकन के प्रयोजन हेतु विचार में नहीं लिया गया था – अधिनियम की धारा 27 के अनुसार विक्रेता एवं क्रेता को यह तथ्य अंतरण के लिखत में प्रकट करना तथा मूल्यानुसार स्टाम्प शुल्क अदा करना भी जरूरी था – राज्य, स्टाम्प शुल्क की कमी एवं अधिरोपित शास्ति की वसूली कर सकता है।

Cases referred :

2005 (1) M.P.L.J. 481, AIR 2003 Allahabad 220, (2012) 1 SCC 656, (1977) 3 SCC 247, (2015) 5 SCC 775, AIR 1961 MP 6.

Pratip Visoriya, G.A. for the appellant/State.
Mahesh Goyal, for the respondent No. 1.
S.D. Singh Bhadauria, for the respondent No. 2.

J U D G M E N T

The Judgment of the Court was delivered by :

VIVEK AGARWAL, J. :- This Writ Appeal has been filed by the State being aggrieved by order dated 4.4.2006 passed by the learned Single Judge in Writ Petition No.750/2002. It raises a short question as to whether the Collector of Stamps was justified in passing an order demanding additional stamp duty on account of under valuation of the property set forth in the sale-deed.

2. It is submitted by the learned counsel for the State that in the present case, an agreement to sell was effected between respondent No.1 and respondent No.2 on 17.12.1991 whereby it was agreed to sell a parcel of land contained in survey No.447 admeasuring 7426 sq.ft. situated at 21-A, Ravi Nagar, Gwalior. It is submitted that sale-deed was executed on 16.4.1993 suppressing actual valuation of the property on the date of transfer of such property in the name of the vendee thereby evading stamp duty.

3. When this fact was brought to the notice of the Collector of Stamps, he issued a show-cause notice to the vendor and vendee and after giving an opportunity of hearing to them, so also to file evidence, passed order dated 8.4.1994 holding that on the date of transfer of property in favour of the vendee through registered sale-deed a structure stood erected on the said property after taking all necessary permissions in the name of the vendor and such structure was erected by one Mobha Builders, and therefore, on the date of registration of sale-deed correct valuation was not mentioned in the deed of sale as is mandated under the provisions of Section 27 of the Indian Stamp Act, and therefore, exercising

his authority under Section 47-A(3), impugned order was passed directing the vendee to pay stamp duty on excess valuation of the instrument which was admittedly undervalued as per the provisions contained in M.P. Prevention of Undervaluation of Instruments Rules 1975.

4. This order was put to challenge before the Commissioner, Gwalior Division, Gwalior, which affirmed the order of Collector of Stamps vide order dated 15.11.1994, Annexure P/5, but this matter was taken to Board of Revenue by respondents No.1 and 2, when vide order dated 31st July, 1995, Board of Revenue set aside the orders of Collector of Stamps and the order of Commissioner, Gwalior Division, Gwalior.

5. State being aggrieved of such order passed by the Board of Revenue challenged said order before the High Court by filing Writ Petition No.1951/96. Vide order dated 16.11.98 learned Single Judge set aside the order passed by Board of Revenue and remanded the matter back to the Board of Revenue with a direction that Board of Revenue shall hear the parties afresh and give a specific finding of fact in the light of the observations mentioned hereinabove after taking into consideration the entire material on record in accordance with law.

6. Learned counsel for the State submits that on remand learned Board of Revenue instead of framing questions germane to the controversy i.e. as to the valuation of the property on the date of execution of sale-deed, groped into irrelevant facts like whether construction was carried out by Godrej Company prior to actual transfer with the permission of the vendor or whether the receipt of payment contains a clause of handing over of possession of the said property in favour of the vendee and whether vendor had given permission to obtain all necessary sanctions for construction of building in his name. It has also dealt with the issue of permission from income tax department and has hypothetically concluded that since time was taken to obtain permission from the income tax department, therefore, the vendee was not left with any option, but to carry on construction on the piece of land agreed to be purchased from the vendor. This order passed by the Board of Revenue was again put to challenge in Writ Petition No.750/2002 wherein learned Single Judge also erred in not framing an appropriate question as to the aspect of undervaluation of the property in violation of the mandate of Section 27 of the Stamps Act and dealt with peripheral issues ignoring the core issue and dismissed the writ petition filed by the State. It is submitted that reliance on the judgment of this Court in the case of *SRF Ltd. vs. State of M.P. & Ors.* as reported in 2005(1) M.P.L.J. 481 is also misplaced inasmuch as issue involved in the case of SRF Ltd. is not in the teeth of Section 27 of the Stamp Act and is not relevant to the facts of the present case.

7. It is submitted by learned counsel for the State that Allahabad High Court in the case of *Shri Abdul Waheed & Ors. Vs. U.P. State* as reported in AIR 2003

Allahabad 220 answered similar contentions raised therein by the counsel for the petitioner which have been reproduced in para 5, which are as under :

> "5. Learned counsel representing the petitioners has raised following three contentions :
>
> (i) It is the option of the vendor and vendee to sell only the land leaving out the building standing on the land and in such an event it is the value of the land, alone which is to be examined for the purposes of determining the stamp duty payable on the sale deed.
>
> (ii) On the facts of this case the building was not standing on the land at the time of sale deed and the finding to that effect recorded by the subordinate authorities suffers from an error of law.
>
> (iii) the reference under Section 47-A could not have been made by the Sub-Registrar after the sale deed had been registered and therefore all consequential proceedings are vitiated."

While dealing with such contentions in para 13, the Court answered issue No.1 as under :-

> "13. Thus the law appears to be that every instrument of transfer must truly set forth the entire property which, from the point of view of practical considerations, is the subject matter of transfer. Therefore where a structure is standing on land, the land alone can not be transferred without the structure unless before transferring the structure is removed. However, the converse may not be correct, as it may be possible to transfer the structure alone without transferring the land. "

This answer squarely covers the controversy in the present case.

8. Learned counsel for the appellant/State also places reliance on the decision of the Supreme Court in the case of *Suraj Lamp and Industries Private Ltd. vs. State of Haryana and another* as reported in (2012) 1 SCC 656 wherein it has been held that a contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties. It does not, of itself, create any interest in or charge on such property. Therefore, scope of an agreement to sell is different from an actual sale-deed as has been held in the case of *Suraj Lamp* (supra) referring to the judgment of the Supreme Court in the case of *Narandas Karsondas v. S.A.Kamtam and Anr.* as reported in (1977) 3 SCC 247, where it has been held that it is thus clear that a transfer of immovable property by way of sale can only be by a deed of conveyance (sale deed). In the absence of a deed of conveyance (duly stamped and registered as required by law), no right, title or interest in an immovable property can be transferred. Thus, it is submitted that value of the property is to be seen on the date of transfer i.e. the

execution of the sale-deed and this aspect has been overlooked by the Board of Revenue as well as learned Single Judge.

9. Learned counsel for respondent No.1 Shri Mahesh Goyal in his turn submits that it was respondent No.1- M/s, Godrej G.E. Appliance Ltd. which had entered into an agreement to sell and obtained possession of the land so contracted to be purchased. Thereafter all the permissions were obtained in the name of the vendor and contract was given to Mobha builder to whom money was paid by respondent No.1, and therefore, respondent No.1 is not liable to pay stamp duty on the money spent by them in erecting a structure on the land sought to be purchased after entering into an agreement to sell.

10. Learned counsel for respondent No.1 has placed reliance on a judgment of the Supreme Court in the case of *Sanjeev Lal and others vs. Commissioner of Income Tax, Chandigarh and Anr.* as reported in (2015) 5 SCC 775 and submitted that for the purpose of capital gains it has been held that since execution of agreement to sell extinguishes some right of vendor in capital asset as after such execution, he cannot sell the property to someone else, therefore, execution of agreement to sell also creates some right in favour of vendee and he can get sale-deed executed in his favour by enforcing specific performance of agreement. Placing reliance on such judgment, it is submitted that since vendee had attained certain rights by virtue of execution of agreement to sell, therefore, issue of valuation of property on the date of execution of the sale-deed becomes secondary and loses its relevance.

11. After hearing arguments of learned counsel for the parties and going through the record, the issue which is germane to the controversy has been aptly paraphrased by Allahabad High Court in the case of *Shri Abdul Waheed* in para 13 supra.

12. As per the provisions contained in Section 27(1) of the Indian Stamp Act it is incumbent on the parties to the instrument to set forth in instrument, the market value of the property and all other facts and circumstances affecting the chargeability of any instrument with duty or the amount of the duty with which it is chargeable.

13. Sub-section (2) of Section 27 of the India Stamp Act provides as under :-

> "(2) In the case of instrument relating to immovable property chargeable with an ad valorem duty on the market value of the property, and not on the value set-forth, the instrument shall fully and truly set-forth the annual land revenue in the case of revenue paying land, the annual rental or gross assets, if any, in the case of other immovable property, the local rates, municipal or other taxes, if any, to which such property may be subject, and any other particulars which may be prescribed by rules made under this Act."

14. Section 47-A provides for a mechanism to deal with undervalued instrument. Section 47A(2) & 47A(3) reads as under :

> **"47-A. Instruments undervalued how to be dealt with.**
>
> (1) .....
>
> (2) On receipt of a reference under sub-section (1), the Collector shall, after giving the parties a reasonable opportunity of being heard and after holding an enquiry in such manner, as may be prescribed, determine the market value of the property which is the subject matter of such instrument and the duty as aforesaid. The difference, if any, in the amount of duty shall be payable by the person liable to pay the duty.
>
> (3) The Collector may suo-motu, within five years from the date of registration of any instrument not already referred to him under sub-section (1), call for and examine the instrument for the purpose of satisfying himself as to the correctness of the market value of the property which is the subject matter of any such instrument and the duty payable thereon and if after such examination, he has reason to believe that the market value of such property has not been truly set forth in the instrument, he may determine the market value of such property and the duty as aforesaid in accordance with the procedure provided for in sub-section (2). The difference, if any, in the amount of duty, shall be payable by the person liable to pay the duty:
>
> Provided that nothing in this sub-section shall apply to any instrument registered prior to the date of the commencement of the Indian Stamp (Madhya Pradesh Amendment) Act, 1975."

15. In view of the provisions contained in Section 27, the issue in regard to value of the property alone is to be examined for the purpose of determining stamp duty on the sale-deed. There is no dispute that a super-structure was standing on the land contracted to be purchased on the date of execution of the sale-deed and valuation of such super-structure has not been taken into consideration while executing such sale-deed whereas it was part of the land contracted to be purchased and its valuation was ingrained in the valuation of the property sought to be conveyed by the registered sale-deed. Therefore, as per the provisions contained in Section 27, it was incumbent upon the vendor and the vendee to have disclosed this fact in the instrument of transfer and also pay stamp duty as per the valuation.

16. All the arguments put forth by learned counsel for the respondent as to obtaining all permissions etc. can be aptly answered in terms of the judgment in the case of *Suraj Lamp* (supra) which categorically lays down proposition of law that a transfer of immovable property by way of sale can only be by a deed of

conveyance (sale-deed). In the absence of a deed of conveyance (duly stamped and registered as required by law) no right, title or interest in an immovable property can be transferred.

17. As far as law laid down in the case of *Sanjeev Lal and others* (supra) is concerned, it is a case of purposive construction of a fiscal statute wherein Supreme Court has held that purposive interpretation should be given to provisions of Income Tax Act. In that case, the Supreme Court has referred to Section 2(47) of the Income Tax Act, 1961 wherein term transfer has been defined and intention of the legislature has been described in para 23 in the following terms:-

> "23.In addition to the fact that the term "transfer" has been defined under Section 2(47) of the Act, even if we looked at the provisions of Section 54 of the Act which gives relief to a person who has transferred his one residential house and is purchasing another residential house either before one year of the transfer or even two years after the transfer, the intention of the Legislature is to give him relief in the matter of payment of tax on the long term capital gain. If a person, who gets some excess amount upon transfer of his old residential premises and thereafter purchases or constructs a new premises within the time stipulated under Section 54 of the Act, the Legislature does not want him to be burdened with tax on the long term capital gain and therefore, relief has been given to him in respect of paying income tax on the long term capital gain. The intention of the Legislature or the purpose with which the said provision has been incorporated in the Act, is also very clear that the assessee should be given some relief."

Thus, when law laid down in the case of *Sanjeev Lal and others* (supra) is examined, it has a contextual purposive interpretation in terms of the provisions contained in the Income Tax Act which are not applicable in the present case in view of specific provisions contained in Section 27 and 47-A of the India Stamp Act. Therefore, as has been held in the case of *Vinayak Dattatraya v. Hasanali Haji Nazarali* as reported in AIR 1961 MP 6 "the real question as to whether the Allahabad view that in Article 33 the words "as set forth" refer to "value" and not to property is correct, has been answered as undoubtedly it is. Otherwise, the significance of as will be missed. It is not property "set forth", but "value ... as set forth", the rule of proximity being broken by the preposition "as"." In the present case, in terms of the language used in Section 27, it is the market value of the property which affects the chargeability of an instrument, and therefore, Collector of Stamps has not exceeded his jurisdiction in determining the market value of the property on the date of execution of the sale-deed as per Section 27 and then proceeding with his authority under Section 47-A(3). These aspects having been glossed over by the Board of Revenue and learned Single Judge, resultantly writ appeal is allowed. The order passed by learned Single Judge is set aside and the order of Board of Revenue is quashed. Order passed by the Collector

of Stamps is upheld. The appellant/ State of Madhya Pradesh and its functionaries are at liberty to recover the amount of deficit stamp duty and the penalty imposed.

In above terms, appeal is disposed of.

Parties to bear their own cost.

Appeal allowed

I.L.R. [2019] M.P. 1639
WRIT PETITION
Before Mr. Justice S.A. Dharmadhikari

W.P. No. 4591/2017 (Gwalior) decided on 24 June, 2019

VEDVRAT SHARMA & ors. …Petitioners

Vs.

STATE OF M.P. & ors. …Respondents

***A. Constitution – Article 226 – Government Lands* – Private lands purchased by petitioners (colonizers), layout plan was sanctioned by Municipal Corporation, taxes were paid, colony was developed, Nazool Department issued NOC, plots allotted to general public where they started their house construction and later in 2017, respondents ordered to record the said land as government land on the ground that by playing fraud in the year 1950, it was mutated as private lands by some *Bhumafia* – Held – If such recourse is permitted to prevail, no sanctity would be attachable to permissions/approvals of Government based whereupon public invested their lifetime savings and hard earned money for building a home – Such action is colourable exercise of power and wholly without jurisdiction – Impugned order quashed – Petition allowed. (Paras 13 to 15)**

क. संविधान – अनुच्छेद 226 – सरकारी भूमियां – याचीगण (कॉलोनाईजर) द्वारा प्राईवेट भूमियां क्रय की गई, नगरपालिका निगम द्वारा अभिन्यास योजना मंजूर की गई थी, कर अदा किये गये थे, कॉलोनी विकसित की गई थी, नजूल विभाग ने अनापत्ति प्रमाणपत्र जारी किया, साधारण जनता को भूखंड आबंटित किये गये जहां उन्होंने अपना मकान निर्माण शुरू किया और बाद में, 2017 में, प्रत्यर्थीगण ने उक्त भूमि को सरकारी भूमि के रूप में इस आधार पर अभिलिखित करने के लिए आदेशित किया कि 1950 में कपट द्वारा किसी भू–माफिया द्वारा प्राईवेट भूमियों के रूप में नामांतरित किया गया था – अभिनिर्धारित – यदि ऐसे अवलंब को अभिभावी होने की अनुमति दी गई तो सरकार की अनुमतियां / अनुमोदन, जिस पर आधारित होकर जनता ने मकान बनाने हेतु अपनी जीवन भर की बचत एवं मेहनत से कमाये धन का निवेश किया, की पवित्रता संबद्ध नहीं हो पायेगी – उक्त कार्रवाई, शक्ति का छद्म प्रयोग है तथा पूर्णतः बिना अधिकारिता के है – आक्षेपित आदेश अभिखंडित – याचिका मंजूर।

B. ***Land Revenue Code, M.P. (20 of 1959), Section 115 – Correction of Wrong Khasra Entries – Scope & Jurisdiction – Competent Authority – Principle of Natural Justice*** **– Held – The Collector, by directing Tehsildar to record the land as Government land, has usurped the jurisdiction vested in Tehsildar u/S 115 of the Code – Further, such exercise cannot be resorted without providing opportunity of hearing to aggrieved party – Impugned order is gross violation of principle of natural justice and totally without jurisdiction. (Para 11 & 12)**

ख. भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 115 – गलत खसरा प्रविष्टियों का सुधार – व्याप्ति एवं अधिकारिता – सक्षम प्राधिकारी – नैसर्गिक न्याय का सिद्धांत – अभिनिर्धारित – कलेक्टर ने तहसीलदार को भूमि, सरकारी भूमि के रूप में अभिलिखित करने के लिए निदेशित कर, संहिता की धारा 115 के अंतर्गत तहसीलदार में निहित अधिकारिता को हड़प लिया है – इसके अतिरिक्त, उक्त प्रयोग का अवलंब, व्यथित पक्षकार को सुनवाई का अवसर प्रदान किये बिना नहीं लिया जा सकता – आक्षेपित आदेश नैसर्गिक न्याय के सिद्धांत का घोर उल्लंघन है तथा पूर्णतः बिना अधिकारिता के है।

C. ***Land Revenue Code, M.P. (20 of 1959), Section 115 – Correction of Wrong Khasra Entries – Limitation*** **– Held – Respondents failed to demonstrate any record of date of knowledge of any such fraud – It ought to have come to their knowledge while scrutinizing the entries and granting Nazool NOC in year 2010/2012 – Impugned order passed in 2017 after a lapse of 7 yrs., is certainly beyond limitation – Full Bench held, a period of 180 days from the date of detection of fault to be a reasonable period for exercise of *suo motu* powers. (Para 9)**

ग. भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 115 – गलत खसरा प्रविष्टियों का सुधार – परिसीमा – अभिनिर्धारित – प्रत्यर्थीगण, ऐसे किसी कपट ज्ञात होने की तिथि का कोई अभिलेख दर्शाने में असफल रहे – यह उनके ज्ञान में, प्रविष्टियों की संवीक्षा एवं वर्ष 2010/2012 में नजूल अनापत्ति प्रमाणपत्र प्रदान करते समय आ जाना चाहिए था – 7 वर्ष व्यपगत होने के पश्चात्, 2017 में पारित किया गया आक्षेपित आदेश निश्चित रूप से परिसीमा के परे है – पूर्ण न्यायपीठ ने, स्व–प्रेरणा से शक्तियों के प्रयोग हेतु, त्रुटि पता चलने की तिथि से 180 दिनों की अवधि को युक्तियुक्त अवधि अभिनिर्धारित किया है।

D. ***Words & Phrases – "Irreparable Loss"*** **– Held – Petitioners/ purchasers acquired ownership and possession of lands by way of registered sale deeds under a statute – Their dispossession comes within purview of "Irreparable loss". (Para 9)**

घ. शब्द एवं वाक्यांश – ''अपूरणीय हानि'' – अभिनिर्धारित – याचीगण/क्रेताओं ने एक कानून के अंतर्गत, रजिस्ट्रीकृत विक्रय विलेखों द्वारा भूमियों का स्वामित्व एवं कब्जा अर्जित किया – उन्हें बेकब्जा किया जाना ''अपूरणीय हानि'' की परिधि में आता है।

E. Words & Phrases – Rule of "audi alteram partem" – **Held – Impugned order is an exception to the rule of "*audi alteram partem*" as no notice or opportunity of hearing was granted to petitioner while passing the order. (Para 9)**

ङ. शब्द एवं वाक्यांश – ''दूसरे पक्ष को भी सुनो'' का नियम – अभिनिर्धारित – आक्षेपित आदेश, ''दूसरे पक्ष को भी सुनो'' के नियम के अपवाद में है क्योंकि आदेश पारित करते समय याची को कोई नोटिस या सुनवाई का अवसर प्रदान नहीं किया गया था।

F. Civil Practice – Title – Adjudication & Jurisdiction – **Held – Entry in revenue records is not a document of title and Revenue authorities cannot decide the question of title. (Para 10)**

च. सिविल पद्धति – हक – न्यायनिर्णयन व अधिकारिता – अभिनिर्धारित – राजस्व अभिलेखों में प्रविष्टि, हक का एक दस्तावेज नहीं है तथा राजस्व प्राधिकारीगण, हक के प्रश्न का विनिश्चय नहीं कर सकते।

Cases referred :

(2010) 8 SCC 383, 2010 (5) MPHT 137 FB, (2002) 3 SCC 137, AIR 1985 SC 1147, 2016 (2) RN 251, (2008) 8 SCC 12, (2007) 6 SCC 186, ILR (2007) M.P. 1282 (SC), 2008 RN 162, 2013 (2) MPLJ 642.

K.N. Gupta with *Sanjay Dwivedi*, for the petitioners.
Rajendra Jain, G.A. for the respondents-State.

O R D E R

S.A. DHARMADHIKARI, J. :- In this petition, under Article 226 of the Constitution of India, petitioners have assailed the legality, validity and propriety of the order dated 19/1/2017 (Annexure P/2) passed by respondent no.3-Additional Collector on a note-sheet and ratified by respondent no.2/Collector, whereby lands belonging to the petitioners falling in Survey No. 452/1/Min-1 admeasuring 1.881 hectares (new number 452/3) and Survey No. 452/1/Min-2 admeasuring 0.805 hectare (new number 452/1) situate at Dongapur, Putlighar, Patwari Halka No.78, Tahsil and District Gwalior have been directed to be recorded in the revenue records as Government Land. The revision preferred against the said order has also been dismissed by the Board of Revenue vide order dated 4/7/2017 (Annexure P/1) for want of jurisdiction against administrative proceedings, which is also subject matter of challenge in this petition.

2. Brief facts leading to filing of this case are that petitioner nos. 1,2 and 3 are partners having created a partnership firm in the name and style of M/s Indra Creators/respondent no.4. The Firm is registered as a Colonizer under the provisions of M.P. Municipal Corporation Act, 1956 and the rules framed

thereunder. The petitioners purchased land bearing Survey No. 452/1/Min-1 admeasuring 1.881 hectares situate at Dongarpur, Patwari Halka No. 78, RI Circle 5, Morar, Block Morar, Tahsil and District Gwalior vide registered sale deed dated 31/7/2012 (Annexure P/5) from one Shri Rambaran Singh Gurjar for a consideration of Rs.1,00,00,000/- (Rupees one crore). Thereafter, they purchased another piece of land located at Survey No. 452/1/Min-2, admeasuring 0.805 hectare located at Dongarpur, Patwar (sic : Patwari) Halka No.78, Tahsil and District Gwalior vide registered sale deed dated 20/3/2013 (Annexure P/6) from one Sunil Gandhi for a consideration of Rs.1,00,00,000/- (Rupees one crore). It is relevant to mention here that the Nazool department has issued No Objection Certificates in favour of Rambaran Singh and Sunil Gandhi, who are predecessors-in-title of the petitioners, with respect to the lands in question on 23/5/2012 (Annexure P/7) and 28/8/2010 (Annexure P/8) respectively. After purchase of the said lands, name of petitioners was recorded in the revenue records as Bhumiswami in the year 2012-2013, as is reflected in corresponding Khasra (Annexure P/9) and Bhuadhikar and Rin Pustika (Annexure P/10) was also issued in favour of the petitioners. Thereafter, demarcation of the land was done by the Revenue Department vide order dated 6/2/2013 and Survey No.452/1/min-1 admeasuring 1.881 hectares and Survey No.452/1/min-2 admeasuring 0.805 hectare have been renumbered as Survey Nos. 452/3 and 452/1 respectively. Then, vide order dated 14/8/2013 (Annexure P/12), permission was granted by Joint Director, Town and Country Planning, Gwalior for development of residential colony on the land in question. On 17/9/2013, diversion order (Annexure P/13) in respect of the land in question was passed in favour of the petitioner no.4/Firm. The petitioners paid the municipal taxes on 10/12/2013 and 20/3/2015 of Rs.2,70,918/- and Rs.1,23,332/- respectively vide receipts (Annexure P/14). For the purpose of colonization, a part of land was mortgaged by the petitioners to the Municipal Corporation vide registered mortgage deed dated 24/3/2014 (Annexure P/15). The layout plan of the colony was sanctioned by the Municipal Corporation and the sanction letter/certificate dated 25/3/2014 along with corresponding receipt of Municipal Corporation amounting to Rs.34,32,260/- has been brought on record as Annexure P/16. Thereafter, the colony was developed on the land in question in the name of "Shrinkhla Enclave" and the Municipal Corporation, after finding that the development of colony was as per norms executed registered deed of redemption of mortgage (Annexure P/17) in favour of the petitioners on 9/3/2016. Petitioners further paid taxes to the Municipal Corporation to the tune of Rs.1,02,816/- vide receipt dated 21/2/2016 (Annexure P/18). After development of the colony, petitioners have sold plots to the public at large. Some of the plot holders, after obtaining building permission from the Municipal Corporation, have also started construction of houses.

However, on 19/1/2017 the impugned order (Annexure P/2) has been passed declaring the lands in question to be Government lands. It is mentioned in the impugned order that Khasras of Village Dongarpur were scrutinized with respect to Khatauni of Samvat 2007 (Calendar year 1950) and it was found that there had been manipulation in the original record and new entries are found to have been made in as many as 23 Survey Numbers including the survey numbers belonging to the petitioners in different ink, due to which the same has been recorded as private land. It is also mentioned therein that despite such concoction in the said 23 survey numbers, 8 still continue to be recorded as Government Lands. It is further mentioned therein that by committing such interpolation, valuable Government land has been recorded as Private Land. Accordingly, Tahildar (sic : Tahsildar) Gwalior has been directed by the Collector to register the same as Government land, Nazool Officer Morar has been directed not to issue No Objection in respect of the same, Joint Director, Town and Country Planning has been directed to consider the same as Government land while sanctioning any layout, Commissioner, Municipal Corporation has been directed not to issue building/development permission on the said land, the diversion orders, Nazool NOC and development permissions granted earlier in respect of the said land have been revoked.

Aggrieved by the said order, petitioners approached the Board of Revenue, but their revision has been dismissed for want of jurisdiction against administrative proceedings.

3. The impugned order (Annexure P/2) has been assailed by the petitioners *inter alia* on the following grounds:-

(a) The petitioners are bonafide purchasers of the lands in question, having purchased the same by registered sale deeds dated 31/7/2012 and 20/3/2013 after paying hefty consideration amount of about 2 crores for development of a residential colony. The predecessors-in-title of the petitioners were duly issued No Objection Certificates by the Nazool Department of the State vide orders dated 23/5/12 and 28/8/10 (Annexures P/7 and P/8) respectively, meaning thereby that the land in question was never a Government land. Thereafter, they have been granted all the requisite permissions for development of colony by the respondents. Now, the impugned order directing to register the land in question as Government land, in effect, is trying to set at naught the registered sale deeds executed in favour of the petitioners by an executive *fiat,* which concept is alien to law. For this, reliance has been placed on decision of he (sic : the) Apex Court in the case of *Meghmala and others Vs. G.Narasimha Reddy and others* ((2010)8 SCC 383), wherein it has been held as under:-

> *"48. Even the State authorities cannot dispossess a person by an executive order. The authorities cannot become the law unto*

themselves. It would be in violation of the rule of law. Government can resume possession only in a manner known to or recognised by law and not otherwise."

Moreover, the impugned order has been passed in hot haste without affording any opportunity of hearing to the petitioners, in gross violation of the principles of natural justice, which speaks volumes about the conduct of the respondents.

(b) The impugned order (Annexure P/2) dated 19/1/17 passed by respondent no.3-Additional Collector to undo the revenue entries of the year 2012 and 2013 amounts to *suo motu* revision, but the same is hopelessly barred by limitation which is 180 days from the date of knowledge, as has been laid down by Full Bench of this Court in *Ranveer Singh & Others Vs. State of M.P.* (2010 (5) MPHT 137 FB). In this regard, it is submitted that date of knowledge of State ought to be deemed from 2010 and 2012 when No Objection permission was granted by the Nazool department to predecessors-in-title of the petitioners, as the same would be presumed to have been granted after due inquiry and scrutiny of the corresponding revenue records. The State Authorities cannot be allowed to backtrack after issuing all the permissions, as it would amount to chopping the hands of not only the petitioners, but also, of subsequent purchasers, who after taking huge loan from banks, relying upon the permissions granted by the State Authorities, have purchased plots and are in process of raising construction. Such an action of the mighty executive to put on hold the fate of hundreds of plot-holders, cannot be allowed to stand. To buttress the contention, reliance has been placed on decision of the Apex Court in the case of *S.R.Ejaz Vs. T.N.Handloom Weavers Cooperative Society Ltd.* ((2002)3 SCC 137), wherein it has been held as under:-

"8. In our view, if such actions by the mighty or powerful are condoned in a democratic country, nobody would be safe nor the citizens can protect their properties. Law frowns upon such conduct. The Court accords legitimacy and legality only to possession taken in due course of law. If such actions are condoned, the fundamental rights guaranteed under the Constitution of India or the legal rights would be given go bye either by the authority or by rich and influential persons or by musclemen. Law of jungle will prevail and 'might would be right' instead of 'right being might'. This Court in State of U.P. and others vs. Maharaja Dharmander Prasad Singh and others [(1989) 2 SCC 505] dealt with the provisions of Transfer of Property Act and observed that a lessor, with the best of title, has no right to resume possession extra-judicially by use of force, from a lessee, even after the expiry or earlier termination of the lease by forfeiture or otherwise. Under law, the possession of a lessee, even after the expiry or its earlier termination is juridical possession and forcible dispossession is prohibited. The Court also held that there is no question of Government withdrawing or

appropriating to it an extra judicial right of re-entry and the possession of the property can be resumed by the Government only in a manner known to or recognized by law. "

(c) The respondent no.3/Additional Collector has no jurisdiction to order for correction of revenue entries, as such powers lie with the Tahsildar only under section 115 of the M.P. Land Revenue Code and that too after due notice. In the instant case no notice has ever been issued to the petitioners. Further, limitation for correction of entries at the instance of an aggrieved person is 1 year under section 116 of the Code. As such, the impugned order is totally without jurisdiction.

4. *Per contra,* counter-affidavit in the nature of "short reply" has been filed by the State. It is stated therein that information was received from the OIC record room with respect to fraudulent entries being made in the revenue records with the help of revenue authorities or *Bhumafia,* therefore, it was rightly thought to enquire into the matter and on the basis of apprehension and with an intention and object to stop illegal colonization and to stop *Bhumafia,* direction was given by the learned Collector to all the Tahsildar to enquire into the matter, in respect whereof, a letter was written by the Collector, Gwalior on 6/5/2016 and matter was taken up for investigation of 23 survey numbers, total area 192 bigha and 1 biswa. During investigation, it was found that aforesaid survey numbers were recorded as Government land in Samvat 2007. Thereafter, notices were issued to the concerning that without there being any order of any of the competent Authority, there had been manipulation and interpolation of records. Considering the enquiry report, it was directed by the Collector that all subsequent proceedings and the orders which have been passed, considering the manipulated record, are nonest and void *ab initio* and to correct the corresponding entries. It is further submitted that the decision of the Full Bench of this Court in the case of *Ranveer Singh* (Supra) is of no avail to the petitioners in view of settled position of law that fraud vitiates everything and no limitation is applicable in case of fraud. It is further stated therein that as soon as the fact regarding illegality being committed and fraud being played came to the knowledge of the respondent Authorities, matter was investigated and in the investigation fact regarding fraud being played was clearly visible, therefore, order has been passed holding that with the connivance of officers records have been manipulated. It is further stated in the reply that the land is valuable land which was recorded in the name of Government in Samvat 2007 and without there being any orders from the competent Authority regarding changing the name in the revenue records, name of private persons have been recorded. It is also pleaded therein that the petitioners have alternative efficacious remedy of filing appeal under section 44 of the M.P. Land Revenue Code, 1959 against the impugned order before the Commissioner. Some of the persons have already preferred an appeal before

Additional Commissioner and the same is pending consideration. It is further contended that detailed enquiry was conducted with respect to Survey No. 452/min-2 admeasuring area 0.805 hectare situated at Village Dongarpur, Tahsil and District Gwalior. In the enquiry report, the said survey number finds place at S.No.19 and detail particulars from very initial stage i.e. from Samvat 2007 (Calendar year 1950) were taken into consideration. In the records of Samvat 2007, 2008 and 2009, no name was recorded in Col.5 and all of a sudden, without the order of any competent Authority, the name of private individuals have been entered in the revenue records. Therefore, the matter was taken up into investigation and after completion of enquiry and passing of order dated 19/7/17 by Additional Collector, records have been corrected and the name of State Government has been recorded in the revenue records. Enquiry has also been directed to find out the persons responsible for manipulating the records and for taking suitable action against them. Accordingly, it has been prayed that the writ petition may be dismissed.

5. Petitioners have tendered rejoinder denying the contentions made in the above said counter-affidavit. Petitioners have categorically refuted that notices were ever issued or served upon them. The said notices are also not annexed to the reply. With regard to availability of alternative remedy under section 44 of the M.P.Land Revenue Code, 1959, it is submitted that the impugned order is totally without jurisdiction and only with an intent to harass the petitioners for extraneous reasons. Therefore, availing such alternative remedy would have been a totally futile exercise, much like *Caeser's appeal to Caeser's wife.* For this, reliance has been placed on decision of the Apex Court in the case of *Ram and Shyam Company Vs. State of Haryana and Others* (AIR 1985 SC 1147), wherein it has been held as under:-

> *"More often, it has been expressly stated that the rule which requires the exhaustion of alternative remedies is a rule of convenience and discretion rather than rule of law. At any rate it does not oust the jurisdiction of the Court. In fact in the very decision relied upon by the High Court in The State of Uttar Pradesh v. Mohammad Nooh it is observed that there is no rule, with regard to certiorari as there is with mandamus, that it will lie only where there is no other equally effective remedy. It should be made specifically clear that where the order complained against is alleged to be illegal or invalid as being contrary to law, a petition at the in stance of person adversely affected by it, would lie to the High Court under Art. 226 and such a petition cannot be rejected on the ground that an appeal lies to the higher officer or the State Government. An appeal in all cases cannot be said to provide in all situations an alternative effective remedy keeping aside the nice distinction between jurisdiction and merits."*

It is also pointed out that to compare the alleged correction/interpolation, the respondents have not filed copies of relevant Khasras, the enquiry report is, therefore, dubiuos and has been prepared in an arbitrary manner.

6. Thereafter, the respondents have sought to adopt the return filed in W.P. Nos. 1672/2017, 4415/2017 and 4589/2017 by moving I.A. No. 890/19, which was permitted vide order dated 19/3/19. The said return *inter alia* details that a Five Member Committee was constituted to inquire into the genuineness and veracity of entries in the original record of Samvat-2007 of various pieces of lands including the lands in question. The Committee found various manipulations in the original revenue records. A detailed report in that regard is submitted in tabular form on the basis of which the impugned decision was taken. It reveals that fraud has been played with connivance of certain functionaries of the State to cause unlawful entries in the revenue/Nazul records of land which are extremely precious and meant exclusively for public purpose. It is further reiterated that it is a mere case of correction in the entries in revenue records against which there is remedy available to petitioners under the relevant statute and, therefore, the present petition is not maintainable

7. Heard, learned counsel for the parties.

8. Admittedly, petitioners are colonizers and their Firm "Indra Creators"/ petitioner no.4 is a registered partnership Firm. The lands in question have been purchased by them vide registered sale deeds dated 31/7/2012 and 20/3/2013 from Rambaran Singh Gurjar and Sunil Gandhi, who have been issued NOC from the Nazool Department on 23/5/2012 (Annexure P/7) and 28/8/2010 (Annexure P/8) respectively. Thereafter, the land has been demarcated, permission has been obtained from Town and Country Planning Department, the land has been diversified and colony has been developed after mortgaging some part of the land with the Municipal Corporation, which after completion of the colony as per norms has been redeemed. The petitioners have also paid all the taxes to the Corporation and thereafter sold plots to various subsequent purchasers. It has also come on record that the subsequent purchasers have taken loans from banks and some of them have also been granted building permission by the Municipal Corporation and they are in the process of raising construction.

9. In the aforesaid backdrop, the impugned order has been passed on 19/1/2017 mentioning that some fraud with regard to interpolation in Khasra entries had come to knowledge of the respondents/Authorities and after enquiry and comparing it with the Khasra/Khatauni of Samvat 2007 (Calendar Year 1950), it was found that the land in question was recorded as Government Land in Samvat 2007 and all of a sudden after Samvat 2009 (Calendar year 1952) the same has been recorded in the name of private individuals in the revenue records, without there being any order to that effect. Here it is to be noted that NOC from

the Nazul Department has been granted to the predecessors-in-title of the petitioners in the years 2010 and 2012 certifying that the same is not a Government Land. For ready reference, the No Objection Certificates dated 23/5/2012 (Annexure P/7) and 28/8/2010 (Annexure P/8) are reproduced *infra:*

कार्यालय कलेक्टर जिला ग्वालियर मध्यप्रदेश

पृष्ठ क्रमांक क्यू. अ./752/2011 –12/बी–121 ग्वालियर, दिनांक 23 मई 2012

//अनापत्ति प्रमाण पत्र//

आवेदक श्री रामवरन सिंह पुत्र हरीराम गुर्जर निवास नैनागिर तहसील व जिला ग्वालियर द्वारा भूमि ग्राम डोगरपुर पुतलीघर के सर्वे क्रमांक 452/1 मिन 1 रकवा 1.881 हे0 भूमि पर नजूल अनापत्ति प्रमाण चाहा गया।

प्रकरण की जॉच राजस्व निरीक्षक एवं सहायक भू–मापन अधिकारी नजूल द्वारा कराई गई। सहायक भू–मापन अधिकारी द्वारा राजस्व निरीक्षक की रिपोर्ट के आधार पर प्रतिवेदन प्रस्तुत कर प्रतिवेदन किया कि उक्त आवेदित भूमि स्थित ग्राम डोगरपुर पुतलीघर मे स्थित है। प्रश्नाधीन भूमि मिसिल बन्दोबस्त 1997 में सर्वे नं0 452 के खाना नं0 6 में अकमल खां खाना नं0 8 रिक्त खाना 29 चरनोई दर्ज है। सवंत 2007 में सर्वे क्रमांक नं0 452 के खाना नं0 03 में अकमल खां व0नं0 103 खाना नं0 5 में कुन्तो वशरह नं0 444 खाना नं0 द23 पड़त जदीद दर्ज है। वर्तमान पचंशाला खसरा में सर्वे नं0 सर्वे 452/1 मिन रकवा 1.881 खाना नं0 3 में रामवरन पुत्र हरीराम भूमि स्वामी दर्ज है खाना 12 में नामन्तरण दर्ज है। राजस्व निरीक्षक एवं सहायक भू–मापन अधिकारी नजूल द्वारा प्रश्नाधीन भूमि ग्राम डोगरपुर पुतलीघर के सर्वे नम्बर 452/1मिन 1 रकवा 1.881 हेक्टेयर भूमि पर अनापत्ति प्रमाण पत्र जारी किये जाने की अनुशंसा की गई है।

अतः प्रकरण में संलग्न अभिलेख एवं राजस्व निरीक्षक व सहायक भू–मापन अधिकारी नजूल की अनुशंसा अनुसार प्रश्नगत भूमि स्थित ग्राम डोगरपुर पुतलीघर 452/1मिन 1 रकवा 1.881 हेक्टेयर भूमि पर नजूल अनापत्ति प्रमाण पत्र इस शर्त के साथ जारी किया जा रहा है कि निमार्ण के पूर्व विधि अनुसार वॉछित अनुमति नगर तथा ग्राम निवेश एवं नगर निगम से प्राप्त करेंगे। भूमि के उपविभाजन एवं अंतरण के लिये भी विहित प्रक्रिया का अनुपालन कर नगर तथा ग्राम निवेश, नगर निगम (संबंधित स्थानीय निकाय) से अनुमति प्राप्त करेंगे। तदनुसार आगामी कार्यवाही सुनिश्चित करेंगे, साथ ही प्रश्नाधीन सम्पत्ति यदि मुख्य मार्ग अथवा सहायक मार्ग पर स्थित है एवं नगर सौन्दर्यीकरण के अन्तर्गत सड़क चौड़ीकरण के लिये उसका कुछ भाग प्रभावित होता है तो अनुज्ञा में प्रभावित क्षेत्रफल सम्मिलित नहीं माना जावेगा। यह पत्र स्वत्व विषयक प्रमाण मान्य नहीं किया जावेगा एवं विवाद की स्थिति में स्वतः निरस्त माना जावेगा।

सही/–

प्रभारी अधिकारी
नजूल
झांसी रोड क्षेत्र ग्वालियर

पृ. क्रमांक क्यू/न. अ./752/2011–12 /बी–121 ग्वालियर, दिनांक 23 मई 2012

प्रतिलिपि
1/आयुक्त, नगर निगम ग्वालियर की ओर सूचनार्थ।
2/ श्री रामवरन सिंह पुत्र हरीराम गुर्जर निवासी नैनागिर तहसील व जिला ग्वालियर

सही/–
प्रभारी अधिकारी
नजूल
झांसीरोड क्षेत्र ग्वालियर

कार्यालय कलेक्टर जिला ग्वालियर मध्यप्रदेश

क्रमांक/क्यू/न.अ./410/2009–10/बी–121 ग्वालियर दिनांक अगस्त 2010

//अनापत्ति प्रमाणपत्र//

आवेदक सुनील गांधी पुत्र श्री शिवलाल गांधी निवासी– 17बी, श्रीराम कॉलोनी, झांसी रोड़ ग्वालियर भूमि स्थित ग्राम डोंगरपुर पुतलीघर सर्वे क्रमांक 452 मिन 2 रकवा 0.805 हैक्टेयर भूमि का नजूल अनापत्ति प्रमाणपत्र चाहा गया है।

प्रकरण की जॉच राजस्व निरीक्षक नजूल एवं सहायक भू मापन अधिकारी नजूल से कराई गई। राजस्व निरीक्षक एवं सहायक भू मापन अधिकारी नजूल ने जॉच प्रतिवेदन प्रस्तुत कर प्रतिवेदित किया है कि उक्त आवेदित भूमि ग्राम डोंगरपुर पुतलीघर में स्थित है। जो आवेदक की स्वत्व, स्वामित्व की भूमि है। खसरा पंचशाला वर्ष 2009–10 के कॉलम नं. 2 में सर्वे क्र. 452 मिन 2 रकवा 0.805 हैक्टेयर पर कॉलम नं. 3 में श्रीमती सुनीता पत्नी हरीश शर्मा श्रीमती कमला पत्नी विष्णुदत्त शर्मा निवासी– 16 नेहरू कॉलोनी दर्ज है। आवेदक सुनील गांधी पुत्र शिवलाल गांधी को विक्रेतागणों द्वारा उक्त भूमि रजिस्ट्री दिनांक 7.4.2010 को विक्रय कर दी है। मिसिल बंदोबस्त संवत 1997 के अनुसार सर्वे क्रं.452 पर कॉलम नं. 3 में अकमल खॉ दर्ज है, कॉलम नं. 8 निरंक है। अतः संवत 2007 का अवलोकन किया गया जिसके अनुसार कॉलम नं. 3 में अकमल खॉ तथा कॉलम नं. 5 में कन्दो बगैरह वशरह नंबर 444 पक्का कृषक दर्ज है।

राजस्व निरीक्षक नजूल सहायक भू मापन अधिकारी नजूल द्वारा उक्त आधार पर नजूल अनापत्ति जारी किये जाने की अनुशंसा की गई है। राजस्व निरीक्षक एवं सहायक भू मापन अधिकारी नजूल की रिपोर्ट से सहमत होते हुये प्रश्नगत भूमि स्थित ग्राम डोंगरपुर पुतलीघर सर्वे क्रमांक 452 मिन 2 रकवा 0.805 हैक्टेयर भूमि पर निर्माण स्वीकृति हेतु अनापत्ति प्रमाणपत्र जारी किया जाता है। यह पत्र स्वत्व विषयक प्रमाण में मान्य नहीं किया जावेगा एवं विवाद की स्थिति में स्वत्व निरस्त माना जावेगा।

नजूल अधिकारी
सही/–
28/8/10
जिला ग्वालियर म.प्र.

क्रमांक / क्यू / न.अ. / 2009–10 / बी–121 ग्वालियर दिनांक अगस्त 2010
प्रतिलिपि–
1 आयुक्त नगर निगम की ओर सूचनार्थ
2 सुनील गांधी पुत्र श्री शिवलाल गांधी निवासी– 17बी. श्रीराम कॉलोनी, झांसी रोड़, ग्वालियर

सही / –
28 / 8 / 10
नजूल अधिकारी
जिला ग्वालियर म.प्र.

(Emphasis supplied)

Thus, a bare perusal of the above Nazul NOCs reveals that the same have been issued after due verification with Khasra entries of Samvat 2007 and finding that the land in question is not recorded in the name of Government. Now after an elapse of about 7 years from 2010, the State Authorities have come up with a case that in Samvat 2007 (Calendar Year 1950) the land in question was recorded as Government land and that this fact had come to the knowledge of Collector in 2016 and then he wrote a letter for investigation in that behalf on 6/5/2016. However, no such letter has been brought on record by the respondents to reflect their date of knowledge. A Full Bench of this Court in the case of *Ranveer Singh* (Supra) has held that a period of 180 days from the date of detection of illegality, impropriety and/or irregularity of the order/proceedings committed by Revenue Authority subordinate to Revisional Authority would be a reasonable period for exercise of *suo motu* powers despite involvement of Government land or public interest in cases involving irreparable loss. It is also clarified therein that although "irreparable loss" cannot be defined and no exhaustive list thereof can be given, yet dispossession, when possession was having basis of some right accrued under some statute or law or some order of any officer or under a statute, is irreparable loss. In the case in hand, the petitioners and the subsequent purchasers have acquired ownership and possession of the lands in question by way of registered sale deeds under a statute and, therefore, their dispossession obviously comes within the purview of "irreparable loss". It has further been held therein as under:-

> "52. I may further hasten to add that this would be upper-ceiling of limitation for exercise of such powers and the person suffering an irreparable loss would be within his rights to show that such power ought to have been exercised in lesser period in view of the attending facts and circumstances of the case, causing irreparable loss prior to such exercise."

As indicated above, the respondents have not been able to bring on record any conclusive proof to demonstrate their date of knowledge. Fraud/

manipulation, if any, ought to have come to the knowledge of respondents at the time of granting Nazool NOCs in the years 2010 and 2012 which clearly reflect that Khasras of Samvat 2007 were scrutinized at that time and while granting other permissions for development of colony from time to time. As such, the impugned order is certainly beyond limitation, besides the fact that there is no formal order invoking *suo motu* power of revision in form of show cause notice or final order passed u/S. 50 of Madhya Pradesh Land Revenue Code, 1959 *(Umrao Singh Vs. Lal Singh* (2016(2) RN 251, referred to). It is also noteworthy that the enquiry report annexed to the return based whereupon the impugned order has been passed is not supported by copies of current Khasras and those of Samvat 2007. The impugned order is also an exception to the rule of *audi alteram partem,* as no notice or opportunity of hearing has been granted to the petitioner while passing the impugned order.

10. Further, undoubtedly by the impugned order, respondent/State has attempted to gain title of the land in question on the basis of so called entry in Khasra/Khatauni records of Samvat 2007. However, it is well settled that an entry in the revenue records is not a document of title. Revenue Authorities cannot decide a question of title *(Faqruddin (Dead) through LRs. v. Tajuddin (Dead) through LRs.* [(2008) 8 SCC 12], referred to) . In this regard, the Apex Court in the case of *Suraj Bhan Vs. Financal Commr.* ((2007)6 SCC 186) has held as under:

> "It is well settled that an entry in Revenue Records does not confer title on a person whose name appears in Record of Rights. It is settled law that entries in the Revenue Records or Jamabandi have only 'fiscal purpose' i.e. payment of land-revenue, and no ownership is conferred on the basis of such entries. So far as title to the property is concerned, it can only be decided by a competent Civil Court (vide *Jattu Ram v. Hakam Singh and Ors.,* AIR 1994 SC 1653)"
>
> *(Emphasis supplied)*

11. Besides, the objection of the respondents as to availability of alternative remedy under section 44 of the M.P. Land Revenue Code, 1959 does not weigh with this Court, in view of the fact that not only the order impugned is totally without jurisdiction, but also is in gross violation of principles of natural justice. In this regard, the Apex Court in the case of *M.P. State Agro Industries Development Corporation Limited Vs. Jahan Khan,* ILR ((2007) M.P. 1282 (SC)) held as under:-

> "The Rule of exclusion of writ jurisdiction due to availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of availability of an alternative remedy, a Writ Court may still exercise its discretionary jurisdiction of judicial review. In at least three contingencies, namely (i) where the writ petition seeks enforcement of the fundamental rights, (ii) where there is failure

> of principle of natural justice or (iii) where the orders or proceedings are wholly without jurisdiction or the views of an Act is challenged. In these circumstances, an alternative remedy does not operate as a bar."
>
> (Emphasis supplied)

12. Even otherwise, provisions of section 115 of the M.P. Land Revenue Code, 1959 (for short "the Code") that deal with correction of wrong entries by Tahsildar, cannot be resorted to without providing opportunity of hearing to the aggrieved party. For ready reference, section 115 (pre- amended) of the Code is quoted thus:-

> **"115. Correction of wrong entry in khasra and any other land records by superior officers.-** If any Tahsildar finds that a wrong or incorrect entry has been made in the land records prepared under section 114 by an officer sub-ordinate to him, he shall direct necessary changes to be made therein in red ink after making such enquiry from the person concerned as he may deem fit after due written notice"

Thus, it is clear that power under the above section can be exercised by Tahsildar only for correction of wrong/incorrect entry in the land records prepared by his subordinate officer after making enquiry after due written notice. It is well settled that change in Khasra entries cannot be made without affording opportunity of hearing to the interested parties. The Apex Court in the case of *Mahant Ram Khilawan Das Vs. State of M.P.* (2008 RN 162), while considering the provisions of section 115 of the M.P. Land Revenue Code, 1959, has held that adverse inference can be drawn for correction of revenue records without notice to the opposite party. In the case of *State of M.P. Vs. Shree Ranchor Teekam Mandir* (2013(2) MPLJ 642), the name of Collector was endorsed as *Vyavasthapak* of the temple in question. The said action of the State Government was found to be *de hors* Section 115 of the Code and it was held that without holding an enquiry and giving notice to the person interested, there cannot be any change in the revenue record.

That apart, by directing the Tahsildar to record the land in question as Government land, the Collector has, in effect, usurped the jurisdiction vested in Tahsildar under section 115 of the Code because then the Tahsildar is left with no other option but to carry out such administrative orders and the protection to the opposite party, as envisaged in the above section in the nature of giving audience to him, is clearly bypassed. Moreover, the respondents have not been able to point out that under which provision of the Code such a direction has been issued by the Collector.

13. It has also been brought to the notice of this Court by learned counsel for the petitioners that the colony has been developed after taking loan from Bank and thereafter several plot holders/subsequent purchasers have also taken loans from

different banks. Such loans have been granted by the Banks after conducting detailed search/scrutiny of the revenue records and relying upon the permissions granted by the State Agencies. Now, by way of impugned order, respondents have revoked all the permissions granted earlier by a stroke of pen, on the basis of alleged Khasra/Khatauni entries of about 70 years back (Samvat 2007), putting at stake not only the fate of petitioners but also that of more than hundred plot holders/subsequent purchasers. If such a course is permitted to prevail, then no sanctity would ever be attachable to the permission/approvals granted by the State Government, based whereupon people invest their lifetime savings and hard-earned money for building a home, as they would be revisable/revokable after any duration of time. As such, in the opinion of this Court, such an action of the respondents is nothing more than colorable exercise of power and wholly without jurisdiction.

14. On 25/10/2017, this Court had granted interim relief in the nature of *status quo*. However, certain documents have been brought on record by way of I.A. No.1593/19 to demonstrate the fact that the order (Annexure P/2) has been implemented and the land of the petitioners falling in Survey No. 452/1 and 452/3 has been recorded as Government land.

15. In the result, the impugned order dated 19/1/17 (Annexure P/2) cannot withstand the scrutiny of law. The same, so far as it relates to land in question of the petitioners falling in Survey Nos. 452/1 and 452/3, is hereby quashed. As an obvious consequence, the order passed by the Board of Revenue (Annexure P/1) is also set aside. Any alteration in revenue records done in pursuance of order (Annexure P/2) with respect to the land of the petitioners in the aforesaid survey numbers be recalled. However, the respondents/State shall be at liberty to ventilate its grievances, if any, in accordance with law, if so advised.

With the aforesaid, the petition stands allowed to the extent indicated above.

Petition allowed

I.L.R. [2019] M.P. 1654
WRIT PETITION
Before Mr. Justice Sheel Nagu
W.P. No. 535/2003 (Gwalior) decided on 27 June, 2019

SUNIL KUMAR KHARE …Petitioner

Vs.

M.P. STATE ELECTRICITY BOARD & ors. …Respondents

Service Law – Adverse Remark – Scope **– Held – If an incident of misconduct is found not proved in departmental enquiry, then the same misconduct cannot be a cause for an adverse remark – Such remark in ACR is quashed – Petition partly allowed. (Paras 4 to 6)**

सेवा विधि – प्रतिकूल टिप्पणी – विस्तार – अभिनिर्धारित – यदि विभागीय जांच में अवचार की कोई घटना साबित नहीं पाई जाती है, तब उक्त अवचार प्रतिकूल टिप्पणी के लिए एक कारण नहीं हो सकता – वार्षिक गोपनीय प्रतिवेदन में उक्त टिप्पणी अभिखंडित – याचिका अंशतः मंजूर।

D.P. Singh, for the petitioner.
None, for the respondents/State.

O R D E R

SHEEL NAGU, J.:- The challenge in this petition under Article 226/227 of the Constitution is to the communication contained in *Annexure P/1* dated 18/03/2002 whereby an adverse remark in the ACR of 1996-97 has been communicated. The adverse remark is to the following extent:-

> *"His performance during the year 96-97 has not been found satisfactory. He executed the unauthorized extension of LT line."*

2. The challenge is to the aforesaid is based on various grounds.

3. The reply filed by the employer reveals that though the first part of the adverse remark i.e. "His performance during the year 96-97 has not been found satisfactory" is of generic nature lacking specificity but has been made after overall assessment of the conduct, performance and behavior of petitioner rendered during the relevant period and therefore, it is submitted that the same is immune from judicial review.

3.1 However, the second part of the adverse remark which is more specific and incident related is to the effect "He executed the unauthorized extension of LT line". In this regard it is revealed in the return that disciplinary proceedings were held against the petitioner in which charge No.5 related to unauthorized extension of LT line which was not found proved in the enquiry report/charge-sheet (Vide

Annexure R/1), however, due to the other charges having been found proved/partially proved, the petitioner was inflicted with penalty.

4. In view of above, it is obvious that once the petitioner has been not found guilty in a disciplinary proceedings for alleged misconduct of unauthorized extension of LT Line, it is beyond comprehension that the blemish should continue to haunt the petitioner in shape of an adverse remark.

5. The findings of the enquiry officer qua the charge of unauthorized extension of LT line framed against the petitioner have not been found proved and therefore, impugned adverse remark so far as it pertains to the remark "He executed the unauthorized extension of LT line" become unsustainable in the eyes of law and deserve to be interfered with and therefore, the petition is partly allowed.

6. Pertinently, an incident which is alleged as misconduct is subjected to the rigours of disciplinary proceedings by testing the same on the anvil of preponderance of probabilities. If this test fails to establish the misconduct, then there is no occasion for the same misconduct to become a cause for an adverse remark in ACR where the standards of scrutiny are subjective, approximate and occasionally opinionated. Thus, when a thing is not proved by applying stricter standard (preponderance of probability), the question of justifying the same thing by lesser standards, does not arise.

7. The impugned orders dated 18/03/2002 (Annexure P/1) and 13/10/1997 (Annexure P/2) so far as it relates to the adverse remark "He executed the unauthorized extension of LT line" stands quashed.

8. The remaining part of the remark i.e. "His performance during the year 96-97 has not been found satisfactory", shall remain intact.

9. Accordingly, the present petition stands partly allowed.

Petition partly allowed

I.L.R. [2019] M.P. 1655
WRIT PETITION

Before Ms. Justice Vandana Kasrekar

W.P. No. 18422/2018 (Indore) decided on 2 July, 2019

SHANTI EDUCATIONAL SOCIETY …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

A. Right to Children of Free and Compulsory Education Act (35 of 2009) and National Commission for Minority Educational Institutions Act,

***2004 (2 of 2005) – Minority Institutions* – Applicability of Provisions of Act of 2009 on Minority Institutions – Held – Provisions of Act of 2009 are not applicable to Minority Institutions – Respondents directed to remove/delete the name of school from portal of RTE (Right To Education) and confer all rights to petitioner society under the Act of 2004. (Paras 20 to 22)**

क. निःशुल्क और अनिवार्य बाल शिक्षा का अधिकार अधिनियम (2009 का 35) एवं राष्ट्रीय अल्पसंख्यक शिक्षा संस्था आयोग अधिनियम, 2004 (2005 का 2) – अल्पसंख्यक संस्थाएं – अल्पसंख्यक संस्थाओं पर 2009 के अधिनियम के उपबंधों की प्रयोज्यता – अभिनिर्धारित – 2009 के अधिनियम के उपबंध अल्पसंख्यक संस्थाओं पर लागू नहीं होते – प्रत्यर्थीगण को, आर.टी.ई. (शिक्षा का अधिकार) के पोर्टल से विद्यालय का नाम हटाने/मिटाने तथा 2004 के अधिनियम के अंतर्गत याची सोसाइटी को समस्त अधिकार प्रदत्त करने हेतु निदेशित किया गया।

***B. National Commission for Minority Educational Institutions Act, 2004 (2 of 2005), Section 2(g) & 10(3) – No Objection Certificate – Time Period* – Held – Petitioner submitted application for NOC and for according status of Minority Educational Institution – Application not decided within 90 days nor petitioner has received any communication regarding acceptance or rejection of the same – As per Section 10(3) of the Act of 2004, in such circumstances, permission is deemed to have been granted. (Para 18)**

ख. राष्ट्रीय अल्पसंख्यक शिक्षा संस्था आयोग अधिनियम, 2004 (2005 का 2), धारा 2(जी) व 10(3) – अनापत्ति प्रमाण–पत्र – समय अवधि – अभिनिर्धारित – याची ने अनापत्ति प्रमाण–पत्र हेतु तथा अल्पसंख्यक शिक्षा संस्था के समान हैसियत/दर्जा पाने हेतु आवेदन प्रस्तुत किया – आवेदन का विनिश्चय 90 दिनों के भीतर नहीं किया गया, न ही उक्त के स्वीकार अथवा अस्वीकार किये जाने के संबंध में याची को कोई सूचना प्राप्त हुई – 2004 के अधिनियम की धारा 10(3) के अनुसार, ऐसी परिस्थितियों में, अनुमति प्रदान की गई समझी जाएगी।

Case referred :

(2014) 8 SCC 1.

Mudit Maheshwari, for the petitioner.
Nilesh Jagtap, G.A. for the respondent/State.

O R D E R

VANDANA KASREKAR, J. :- The petitioner has filed the present petition challenging the Circular dated 1/08/2018 as well as the letter dated 7/08/2018, passed by the respondent no.2.

2. The petitioner is a Society registered under the provisions of Madhya Pradesh Registrikaran Adhiniyam, 1973. The petitioner/Society is running a minority educational institute as defined under Section 2(g) of the National

Commission for Minority Educational Institutions Act, 2004 (hereinafter referred to as "Act of 2004") under the name of "Ekayanaa School" at Kanadiya Road Junction, Indore. The school is presently affiliated with CBSE and provides educational services to the children from class Nursery to IXth.

3. The petitioner submitted an application on 29/09/2016 for obtaining the "No Objection Certificate" to establish Minority Educational Institution with the office of the Commissioner, backward Classes and Minority Welfare, Satpura Bhawan, Bhopal in accordance with Section 10 of the Act, 2004 which was duly acknowledged on 29/09/2016. Another application was also filed on 29/09/2016 for grant of minority status to the school Ekayanna run by the petitioner with the same authority.

4. That, as per Section 10 of the Act of 2004, the application is to be decided within a period of 90 days from the date of receipt of application. However, since the Competent Authority neither granted such certificate nor communicated that the application has been rejected within the prescribed period of 90 days from the date of receipt of the application, the petitioner is deemed to have been granted "No Objection Certificate" after the expiry of 90 days period from the date of application in accordance with Section 10(3) of the Act of 2004.

5. In the present case, as period of 90 days has already been expired, therefore, the petitioner vide letter dated 1/06/2018 apprised the respondents no.2 and 3 that by virtue of Section 10 of the Act of 2004, it has been granted NOC/accorded status of minority educational institution and requested the respondents to delete their name from the portal for RTE admission to avoid unnecessary inconvenience to the applicants.

6. Upon the application filed by the petitioner, the National Commission for Minority Educational Institutions vide letter dated 11/07/2018 declared Ekayanaa School as minority educational institution under Section 2(g) of the Act, 2004.

7. The respondent no.2, thereafter, issued a Circular dated 1/08/2018 disregarding the status of the minority educational institution accorded to the Ekayanna school of the petitioner by virtue of Section 10(3) of the Act, 2004 as also the certificate dated 23/07/2018 issued by the national Commission for Minority Educational Institutions, directed the petitioner to grant admission to children under the RTE Act for Session 2018-19.

8. The petitioner again vide letter dated 3/08/2018 requested the respondents to delete the name of their school from the portal of RTE admission alongwith the certificate. Thereafter, the respondent no.2 vide letter dated 7/08/2018 has disregarded the NOC granted to the minority educational institution of the petitioner by virtue of Section 10(3) of the Act, 2004 as also the certificate issued by the National Commission for Minority Educational Institutions granting

minority status to the institution of the petitioner by deferring the recognition of its minority status for the current session and applying it for the next Sessions 2019-20. Being aggrieved by this action, the petitioner has filed the present petition.

9. Learned counsel for the petitioner argues that the impugned order dated 1/08/2018 is without jurisdiction as the provisions of RTE are not applicable to the Minority Educational Institute and the status of Minority Educational Institution/ NOC was accorded to the school of the petitioner by virtue of deeming Clause of Section 10(3) of the Act, 2004. He further relied on Article 30 of the Constitution of India, which provides that the petitioner has absolute right to establish a minority educational institute. He further relied on the judgment passed by the Apex Court in the case of *Pramati Educational & Cultural Trust Vs. Union of India,* (2014) 8 SCC 1 in which the Apex Court has categorically excluded minority educational institutes from the purview of the RTE Act. In view of the aforesaid, he submits that the present writ petition deserves to be allowed.

10. The respondents have filed their reply and in the said reply, the respondents have stated that as per provision of Scheme, before establishing any minority institution, the concerned Institutions are required to get NOC from the Competent Authority for establishment of minority institution then they can establish any Minority Institution. Here in the present case, the petitioner has not raised a single word in the petition that they have established any Minority Institution after treating that the concerned Department has issued the NOC as provided under Section 10(3) of the National Commission for Minority Educational Institutions Act, 2004.

11. It has further been stated that the petitioner has not impleaded the Competent Authority as defined under the Act of 2004, who would be the appropriate answering authority for giving reply.

12. Under the RTE Act, it is an Online Process through educational portal once the name of any institution is uploaded then the whole process would be automatically complete and it is worth mentioning here that on the relevant date, the petitioner did not have the relevant certificate, therefore, the authority has rightly imported the name of the School on the educational portal and rightly issued the communication dated 1/08/2018 and 7/08/2018 and for excluding any institution from portal a certificate has to be scanned otherwise it is mandatory for the authority to upload the name of the institution on portal.

13. The respondents have also stated that the petitioner has not filed a single document regarding any communication to the Competent Authority as defined under the Act of 2004 regarding issuance of NOC or deemed to be issued the certificate as defined under Section 10(3) of the Act, therefore, it cannot be said that the petitioner has approached before the High Court with clean hands.

14. The petitioner has filed the rejoinder, wherein the petitioner has stated that the petitioner had applied for grant of NOC on 29/09/2016. By virtue of deeming provision, the NOC is deemed to have been granted in the year 2016 itself and this fact was brought to the knowledge of the respondent no.2 vide letters dated 1/06/2018 and 16/07/2018, despite which respondent has illegally granted admission in the school run by the petitioner.

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

16. In the present case, the petitioner Society has submitted an application on 29/09/2016 for grant of NOC to establish Minority Educational Institution with the office of the Commissioner, Backward Classes and Minority Welfare, Satpura Bhawan, Bhopal in accordance with Section 10 of the Act of 2004.

17. Section 10 of the Act of 2004 provides for right to establish a Minority Educational Institution. Sub-section (3) of Section 10 of the Act of 2004 reads as under :-

> ***(3)*** *Where within a period of ninety days from the receipt of the application under sub-section (1) for the grant of no objection certificate :-*
>
> ***(a)*** *the Competent Authority does not grant such certificate; or*
>
> ***(b)*** *where an application has been rejected and the same has not been communicated to the person who has applied for the grant of such certificate, it shall be deemed that the Competent Authority has granted a no objection certificate to the applicant.*

18. As per the aforesaid Section, the Competent Authority is required to decide the said application within a period of 90 days from the date of receipt of the application. If such an application is not decided or the order of rejection has not been communicated then the permission is deemed to have been granted. In the present case, as already stated, the petitioner has submitted his application on 29/09/2016 and the petitioner has not received any communication regarding acceptance or rejection of the said application and, therefore, as per Sub-section 3 of Section 10 of the Act of 2004, the permission is deemed to have been granted. The petitioner vide its letter dated 1/06/2018 has apprised the respondents no.2 and 3 that by virtue of Section 10 of the Act of 2004, it has been granted NOC/accorded status of minority educational institution and requested the respondents to delete their name from the portal for RTE admission. However, ignoring this the respondent has passed the order dated 1/08/2018 and directed the petitioner to grant admission to children under the RTE Act for the Session

2018-19. In the meanwhile, the National Commission for Minority Educational Institutions vide order dated 11/07/2018 declared Ekayanna School as Minority Educational Institution under Section 2(g) of the Act of 2004.

19. The question whether, the provision of RTE Act are applicable to the minority institution has came forward before the Hon'ble Apex Court in the case of *Pramati Educational & Cultural Trust v. Union of India,* (2014) 8 SCC 1. Relevant extract of *Pramati Educational & Cultural Trust*(Supra) is reproduced here-under :-

> ***"54.*** *Under Article 30(1) of the Constitution, all minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice. Religious and linguistic minorities, therefore, have a special constitutional right to establish and administer educational schools of their choice and this Court has repeatedly held that the State has no power to interfere with the administration of minority institutions and can make only regulatory measures and has no power to force admission of students from amongst non- minority communities, particularly in minority schools, so as to affect the minority character of the institutions. Moreover, in Kesavananda Bharati Sripadagalvaru v. State of Kerala & Anr. (supra) Sikri, CJ., has even gone to the extent of saying that Parliament cannot in exercise of its amending power abrogate the rights of minorities. To quote the observations of Sikri, CJ. in Kesavananda Bharati Sripadagalvaru v. State of Kerala & Anr. (supra): "178. The above brief summary of the work of the Advisory Committee and the Minorities Sub-committee shows that no one ever contemplated that fundamental rights appertaining to the minorities would be liable to be abrogated by an amendment of the Constitution. The same is true about the proceedings in the Constituent Assembly. There is no hint anywhere that abrogation of minorities' rights was ever in the contemplation of the important members of the Constituent Assembly. It seems to me that in the context of the British plan, the setting up of Minorities Sub-committee, the Advisory Committee and the proceedings of these Committees, as well as the proceedings in the Constituent Assembly mentioned above, it is impossible to read the expression "Amendment of the Constitution" as empowering Parliament to*

abrogate the rights of minorities." Thus, the power under Article 21A of the Constitution vesting in the State cannot extend to making any law which will abrogate the right of the minorities to establish and administer schools of their choice.

55. *When we look at the 2009 Act, we find that Section 12(1)(b) read with Section 2(n) (iii) provides that an aided school receiving aid and grants, whole or part, of its expenses from the appropriate Government or the local authority has to provide free and compulsory education to such proportion of children admitted therein as its annual recurring aid or grants so received bears to its annual recurring expenses, subject to a minimum of twenty-five per cent. Thus, a minority aided school is put under a legal obligation to provide free and compulsory elementary education to children who need not be children of members of the minority community which has established the school. We also find that under Section 12(1)(c) read with Section 2(n)(iv), an unaided school has to admit into twenty-five per cent of the strength of class I children belonging to weaker sections and disadvantaged groups in the neighbourhood. Hence, unaided minority schools will have a legal obligation to admit children belonging to weaker sections and disadvantaged groups in the neighbourhood who need not be children of the members of the minority community which has established the school. While discussing the validity of clause (5) of Article 15 of the Constitution, we have held that members of communities other than the minority community which has established the school cannot be forced upon a minority institution because that may destroy the minority character of the school. In our view, if the 2009 Act is made applicable to minority schools, aided or unaided, the right of the minorities under Article 30(1) of the Constitution will be abrogated. Therefore, the 2009 Act insofar it is made applicable to minority schools referred in clause (1) of Article 30 of the Constitution is ultra vires the Constitution. We are thus of the view that the majority judgment of this Court in Society for Unaided Private Schools of Rajasthan v. Union of India & Anr. (supra) insofar as it holds that the 2009 Act is applicable to aided minority schools is not correct.*

> *56. In the result, we hold that the Constitution (Ninety-third Amendment) Act, 2005 inserting clause (5) of Article 15 of the Constitution and the Constitution (Eighty-Sixth Amendment) Act, 2002 inserting Article 21A of the Constitution do not alter the basic structure or framework of the Constitution and are constitutionally valid. We also hold that the 2009 Act is not ultra vires Article 19(1)(g) of the Constitution.* ***We, however, hold that the 2009 Act insofar as it applies to minority schools, aided or unaided, covered under clause (1) of Article 30 of the Constitution is ultra vires the Constitution.*** *Accordingly, Writ Petition (C) No.1081 of 2013 filed on behalf of Muslim Minority Schools Managers' Association is allowed and Writ Petition (C) Nos.416 of 2012, 152 of 2013, 60 of 2014, 95 of 2014, 106 of 2014, 128 of 2014, 144 of 2014, 145 of 2014, 160 of 2014 and 136 of 2014 filed on behalf of non-minority private unaided educational institutions are dismissed. All I.As. stand disposed of. The parties, however, shall bear their own costs.*

20. As per the judgment passed by the Hon'ble Apex Court, the provision of RTE Act are not applicable to the Minority Institutions. The contention of the learned Govt. Advocate that the petitioner has not communicated regarding the fact of obtaining the certificate of NOC from the Competent Authority, therefore, the respondents have deferred the exemption from the RTE Act for Session 2019-20, cannot be accepted.

21. In view of the fact that the application which is filed by the petitioner as Annexue-P/3 shows the receipt seal of the concerned Department which itself shows that the application has been submitted with the Competent Authority and this fact was communicated to the respondents by Annexure-P/5 dated 1/06/2018.

22. Thus, in the light of the aforesaid, the petition deserves to be allowed and is, hereby, ***allowed.*** The impugned Circular dated 1/08/2018 as well as letter dated 7/08/2018 issued by the respondent no.2 are hereby quashed and the respondents are directed to remove/delete the name of Ekayanna School from the portal of RTE and they are further directed to confer all the rights to the petitioner under the Act of 2004.

23. With the aforesaid, the writ petition stands disposed of.

Petition allowed

I.L.R. [2019] M.P. 1663
WRIT PETITION
Before Mr. Justice Prakash Shrivastava
W.P. No. 7434/2006 (s) (Indore) decided on 8 July, 2019

SHAILENDRA …Petitioner

Vs.

STATE OF M.P. & anr. …Respondents

(Alongwith W.P. No. 11196/2010(s))

***A. Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rule 27(2)(iii) – Penalty – Enhancement* – Held – Order of minor penalty could not have been modified after penalty period was over and minor penalty order was fully implemented – Order enhancing the punishment passed after 5 years of passing of original order – Such belated order lacks *bonafide* – Order imposing major penalty is set aside.**
(Paras 7 to 10)

क. सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 27(2)(iii) – शास्ति – वृद्धि – अभिनिर्धारित – लघु शास्ति के आदेश को, शास्ति अवधि बीत जाने के पश्चात् एवं लघु शास्ति के आदेश को पूर्ण रूप से कार्यान्वित किये जाने के पश्चात् उपांतरित नहीं किया जा सकता था – दण्ड को बढ़ाने का आदेश, मूल आदेश पारित किये जाने के 5 वर्ष पश्चात् पारित किया गया– उक्त विलंबित आदेश सद्भावपूर्वक नहीं है – मुख्य शास्ति अधिरोपित करने का आदेश अपास्त किया गया।

***B. Service Law – Suspension Period – Salary* – Held – During the disputed period, petitioner was absent from duty and he has not worked – Petitioner failed to point out any Rule, Regulation or Circular under which he was entitled for full salary for suspension period, though he remained absent from headquarter during suspension – Impugned order does not suffer from any error.** **(Paras 11 to 13)**

ख. सेवा विधि – निलंबन अवधि – वेतन – अभिनिर्धारित – विवादित अवधि के दौरान, याची कर्तव्य से अनुपस्थित था तथा उसने कार्य नहीं किया है – याची किसी नियम, विनियमन या परिपत्र को दर्शाने में विफल रहा जिसके अंतर्गत वह निलंबन के दौरान मुख्यालय से अनुपस्थित रहने के बावजूद, निलंबन अवधि हेतु पूर्ण वेतन का हकदार था – आक्षेपित आदेश किसी त्रुटि से ग्रस्त नहीं है।

***C. Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rule 27, Civil Services (Leave) Rules, M.P. 1977, Rule 24(2) and Fundamental Rules, M.P., Rule 17 A – Unauthorized Leave/Willful Absence – "Dies Non" – Effect* – Held – Treating the period of unauthorized**

absence/leave as "*dies non*" does not result into break in service and thus seniority is maintained – Fundamental Rule 17A is without prejudice to Rule 27 of 1966 – Order, treating the period of absence as "*dies non*" is only an accounting and administrative procedure to avoid break in service in terms of Fundamental Rule-17 A and thus it is partly in favour of petitioner and cannot be treated to be punitive and stigmatic order – Impugned order does not suffer from any error. (Paras 16 to 20 & 22)

ग. सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 27, सिविल सेवा (अवकाश) नियम, म.प्र. 1977, नियम 24(2) एवं आधारभूत नियम, म.प्र., नियम 17 ए – अप्राधिकृत अवकाश/जानबूझकर अनुपस्थिति – ''अकार्य दिन'' – प्रभाव – अभिनिर्धारित – अप्राधिकृत अनुपस्थिति/अवकाश की अवधि को ''अकार्य दिन'' समझे जाने का परिणाम सेवा में व्यवधान नहीं होता और इसलिए वरिष्ठता कायम रखी जाती है – मूलभूत नियम 17 ए, 1966 के नियम 27 पर प्रतिकूल प्रभाव के बिना है – अनुपस्थिति की अवधि को ''अकार्य दिन'' के रूप में समझे जाने का आदेश, मूलभूत नियम 17–ए के निबंधनों में सेवा में व्यवधान से बचने हेतु एक लेखा एवं प्रशासनिक प्रक्रिया है और इसलिए वह अंशतः याची के पक्ष में है तथा उसे दण्डात्मक एवं कलंककारी आदेश नहीं समझा जा सकता – आक्षेपित आदेश किसी से ग्रस्त नहीं है।

***D. Words and Phrases – "Dies Non"* – Held – Words "*dies non*" is a short for *dies non juridicus* which means either a day on which no legal business is done or the day that does not count. (Para 14)**

घ. शब्द एवं वाक्यांश – ''अकार्य दिन'' – अभिनिर्धारित – शब्द ''अकार्य दिन'', न्यायालयीन अकार्य दिन का संक्षिप्त रूप है जिसका अर्थ है या तो वह दिन जिस दिन कोई विधिक कार्य नहीं किया गया अथवा वह दिन जो गण्य नहीं है।

Cases referred :

2005 SCC Online (Bombay) 537: (2005) 4 MAHLJ 939, 2005 (3) MPHT 32, 2007 (3) MPLJ 525, 2008 (8) SCC 469, 2004 (3) MPLJ 627.

Rahul Sethi, for the petitioner.
Rahul Vijaywargiya, for the respondents.

O R D E R

PRAKASH SHRIVASTAVA, J. :- This order will govern disposal of W.P.No. 7434/2006 (s) & W.P. No. 11196/2010(s) as both these writ petitions have been filed by same petitioner and they are in respect of inter-related issues.

2. In WP No. 7434/2006 (s) petitioner has challenged the order dated 26/10/2006 whereby for the period from 23/12/2001 to 30/8/2004 petitioner has been denied the suspension allowance and period from 1/9/2004 to 1/5/2005 has been treated to be a period of unauthorized absence and appropriate action for this period has been proposed. The petitioner has also challenged the order dated

8/1/2007 by which period from 23/12/2001 to 30/8/2004 and 1/9/2004 to 1/5/2005 has been treated to be dies-non.

3. In WP No. 11196/10(s) petitioner has challenged the order dated 8/6/2010 by which major penalty of withholding of two increments with cumulative effect has been imposed.

4. The facts of the case are that petitioner was working as Sub Engineer and was placed under suspension by order dated 22/12/2001. Thereafter charge sheet dated 2/2/2002 was issued to petitioner which was replied by petitioner by denying the charges and after appointing enquiry officer and representing officer the enquiry was conducted and enquiry report dated 20th January 2005 was submitted finding all the ten charges to be proved. The show cause notice alongwith the enquiry report was served upon petitioner which was replied by petitioner and penalty order dated 29/4/2005 was passed by respondent no. 2 inflicting the penalty of withholding of two increments without cumulative effect. Since the minor penalty was imposed therefore, petitioner had filed representations claiming full salary for suspension period and when these representations were not considered he had filed WP No. 3475/06 (s) which was disposed off by directing the competent authority to pass a reasoned order. Thereafter the impugned order dated 26/10/2006 was passed denying the salary for suspension period and proposing the action for unauthorized leave. This order is subject matter of challenge in WP No. 7434/06(s). This petition was earlier disposed off by learned Single Judge on 13/5/2008 holding the petitioner entitled for full salary for suspension period but in Writ appeal no. 804/2008 the Division Bench vide order dated 25/1/2012 had set aside the order of learned Single Judge and remanded the mater (sic : matter) back for fresh consideration. In the meanwhile, the petitioner had challenged the order dated 29/4/2005 by filing the appeal before respondent no. 1 on 13/6/2005. Respondent no. 1 had issued the notice dated 30th June 2009 proposing to enhance the penalty and imposing the penalty of withholding of two increments with cumulative effect. The petitioner had filed the reply and thereafter the impugned order dated 8/6/10 was passed modifying the order of penalty and imposing the major penalty of withholding of two increments with cumulative effect. This order is subject matter of challenge in WP No. 11196/2010(s). The respondents in the meanwhile had passed the order dated 8/1/2007 treating the period of absence as dies-non therefore, petitioner had amended the writ petition no. 7434/06(s) and challenged this order.

5. Learned counsel for petitioner submits that respondents are not justified in imposing the major penalty of withholding of two increments with cumulative effect as the same amounts to double jeopardy. He further submits that petitioner is entitled to full salary for the suspension period if the order of minor penalty is restored and that the period cannot be treated as dies non without conducting full

fledged enquiry and such an order is punitive in nature. He has also submitted that penalty has been enhanced to circumvent the contempt proceedings and after 5 years the order of penalty has been malafidely modified and none of the grounds raised in appeal have been considered by appellate authority.

6. As against this learned counsel for respondents has submitted that under Rule 27(2)(iii) of MPCCA Rules the power exists with the authority to enhance the punishment. He further submits that petitioner is not entitled for restoration of order of minor penalty and order of dies not (sic : dies non) has rightly been passed.

7. Having heard the learned counsel for the parties and on perusal of the record it is noticed that the order of minor penalty withholding two increments was passed on 29/4/2005. Paragraph 6.6 of writ petition no. 11196/2010(s) reveals that said punishment order was implemented and period of punishment came to an end in May 2008. The show cause notice for enhancing the punishment in terms of Rule 27(2) proviso (iii) of MP Civil Services (Classification, Control and appeal) Rules, 1966 was issued on 30th June 2010 which was after punishment period was over. Once the petitioner had suffered punishment, thereafter the issue of enhancing the punishment did not arise.

8. The record further reflects that writ petition no. 3475/06(s) was disposed off by order dated 11/8/2006 with a direction to respondents to decide the representation and the said order was not complied with therefore, the petitioner had initiated the contempt proceedings. The order dated 8/6/2010 enhancing the punishment and imposing the punishment of withholding of two increments with cumulative effect has been passed after five years of passing of original order of minor punishment dated 29/4/2005 and in the meanwhile the increments of petitioner were restored and he was granted increments in May 2008 and 2009. Hence such a belated order of modifying the penalty otherwise lacks bonafide. The order of minor penalty could not have been modified after penalty period was over and the minor penalty order was fully implemented.

9. A perusal of order dated 8/6/2010 reflects that the competent authority has enhanced the punishment by a cryptic order simply by stating that the charges are serious in nature, even without taking note of the charges in departmental enquiry.

10. Having regard to the aforesaid, I am of the opinion that the impugned order dated 8/6/2010 imposing the major penalty of withholding of two increments with cumulative effect cannot be sustained and is hereby set aside.

11. So far as the impugned order dated 26/10/2006 is concerned, the said order reflects that petitioner was not present in the headquarter from 23/12/2001 to 30th August 2004 during suspension period.

12. Counsel for the petitioner has failed to point out any rule, regulation or circular under which the petitioner was entitled to receive full salary for suspension period though he remained absent from headquarter during suspension. Hence I am of the opinion that the order dated 26/10/2006 does not suffer from any error.

13. So far as the order dated 8/1/2007 treating the period from 23/12/01 to 30th August 2004 and 1/9/2004 to 1/5/2005 as dies non is concerned, it is not in dispute that during the aforesaid period petitioner was absent from duty and he has not worked.

14. Dies non is a short for *dies non juridicus* which means either a day on which no legal business is done or the day that does not count. Dies non has been defined in Black's Law Dictionary to mean "A *day not juridical. A day exempt from court proceedings, such as a holiday or a Sunday*." The Oxford Dictionary defines dies non as a day on which no business is done or day that does not count or cannot be used.

15. Bombay High Court in the matter of *India Central Government Health Scheme Employees Association Vs. Union of India* reported in 2005 SCC Online (Bombay) 537; (2005) 4 MAHLJ 939 has duly taken note of this dictionary meaning of dies non by holding that such period is to be treated as without any business and therefore, non existent by both employer and employee and hence the employee is not entitled to any remuneration for such period.

16. The Division Bench of this Court in the mater of *Battilal Vs. Union of India and others* reported in 2005(3) MPHT 32 clarifying this position has held that when the authority directs that the period will be treated dies non, it means the continuity of service is maintained but the period treated as dies non will not count for leave, salary, increment, pension. The Division Bench vide order dated 26.6.2014 in WA No.66/2014 has also held that on account of treating the period dies non, continuity of service is maintained. The single bench of this Court also in the matter of *Mahesh Kumar Shrivastava Vs. State of M.P. and others* reported in 2007(3) MPLJ 525 has reiterated that dies non means continuity of service but the period will not be treated as leave, salary, increment and pension. Hence, it is clear that treating the period of unauthorized absence as dies non does not result into break in service because seniority is maintained.

17. FR-17A provides for treating the period of unauthorized leave as break in service and reads as under:

> "F.R. 17-A Without prejudice to the provisions of Rule 27 of the MP Civil Services (Pension) Rules, 1976, a period of an un-authorized absence-

(i) in the case of an employee working in industrial establishment during a strike which has been declared illega under the provisions of the Industrial Disputes Act, 1947 (No. 14 of 1947) or the MP Industrial Relations Act 1960 (No. 27 of 1960) or any other law for the time being in force;

(ii) in the case of other employees as a result of acting in combination or in concerned manner, such as during a strike, without any authority from, or valid reason to the satisfaction of the competent authority; and

(iii) in the case of an individual employee, remaining absent un-authorisedly or deserting the post,

shall be deemed to cause an interruption or break in service of the employee, unless otherwise decided by the competent authority for the purpose of leave travel concession, quasi-permanency and eligibility for appearing in departmental examinations, for which a minimum period of continuous service is required."

18. The above rule is without prejudice to Rule 27 of the MP Civil Service (Pension) Rules, 1976 which provides for effect of interruption in service.

19. Rule 24(2) of MP Leave Rules, 1977 deals with willful absence and provides as under:

"Willful absence from duty after the expiry of leave renders a Government servant liable to disciplinary action."

20. Hence in case of absence without leave one or more of the following actions can be taken:

i) Period of unauthorized absence can be treated as break in service under FR-17A;

ii) Disciplinary action can be taken against the employee concerned for unauthorized leave and one of the punishment prescribed in the applicable rules can be imposed.

iii) Period of absence can be treated as dies non which has the effect of giving seniority for the period of absence but not counting the period of absence for leave, salary, increment and pension.

21. The Supreme Court in the matter of *State of Punjab Vs. Dr. P.L. Singla.* reported in 2008(8) SCC 469 has held:

"11. Unauthorized absence (or overstaying leave), is an act of indiscipline. Whenever there is an unauthorised absence by an employee, two courses are open to the employer. The first is to condone the unauthorized absence by accepting the explanation and sanctioning

leave for the period of the unauthorized absence in which event the misconduct stood condoned. The second is to treat the unauthorized absence as a misconduct, hold an enquiry and impose a punishment for the misconduct.

12. An employee who remains unauthorisedly absent for some period (or who overstays the period of leave), on reporting back to duty, may apply for condonation of the absence by offering an explanation for such unauthorized absence and seek grant of leave for that period. If the employer is satisfied that there was sufficient cause or justification for the unauthorized absence (or the overstay after expiry of leave), the employer may condone the act of indiscipline and sanction leave post facto. If leave is so sanctioned and the unauthorized absence is condoned, it will not be open to the employer to thereafter initiate disciplinary proceedings in regard to the said misconduct unless it had, while sanctioning leave, reserved the right to take disciplinary action in regard to the act of indiscipline.

13. We may note here that a request for condoning the absence may be favourably considered where the unauthorized absence is of a few days or a few months and the reason for absence is stated to be the sudden, serious illness or unexpected bereavement in the family. But long unauthorized absences are not usually condoned. In fact in Security services where discipline is of utmost importance, even a few of days overstay is viewed very seriously. Be that as it may.

14. Where the employee who is unauthorisedly absent does not report back to duty and offer any satisfactory explanation, or where the explanation offered by the employee is not satisfactory, the employer will take recourse to disciplinary action in regard to the unauthorised absence. Such disciplinary proceedings may lead to imposition of punishment ranging from a major penalty like dismissal or removal from service to a minor penalty like withholding of increments without cumulative effect. The extent of penalty will depend upon the nature of service, the position held by the employee, the period of absence and the cause/explanation for the absence. Where the punishment is either dismissal or removal, it may not be necessary to pass any consequential orders relating to the period of unauthorized absence (unless the rules require otherwise). Where the punishment awarded for the unauthorized absence, does not result in severance of employment and the employee continues in service, it will be necessary to pass some consequential order as to how the period of absence should be accounted for and dealt with in the service record. If the unauthorized absence remains unaccounted, it will result in break in service, thereby affecting the seniority, pension, pay etc., of the employee. Any consequential order directing how the period of absence should be accounted, is an

accounting and administrative procedure, which does not affect or supersede the order imposing punishment. "

22. The Supreme court in the above judgment has made it clear that in the case of unauthorized absence if in a departmental enquiry the punishment does not result in severance of employment meaning thereby any punishment lesser than the punishment of dismissal or removal or compulsory retirement is imposed than (sic : then) a consequential order as to how the period of absence is to be accounted for and dealt with in service record is to be passed since absence of such an order results in break in service effecting seniority, pay etc. and such a consequential order is an accounting and administrative procedure which does not effect or supersede order of punishment. Hence order of treating the period of absence as dies non is only an accounting and administrative procedure to avoid break in service and it can not be treated to be punitive order. It is also worth noting that order of dies non is partly in favour of the employee concerned because it maintains continuity in service and seniority otherwise in terms of FR 17A break in service will take place. Rule 24(2) of the MP Leave Rules is for taking action for the misconduct of willful absence therefore, it is an action independent of action of treating the period as dies non. In view of the binding precedent of the Hon'ble Supreme Court in the matter of *Dr. P.L. Singla* (supra) u/A 141 of the Constitution the plea of counsel for petitioner to treat the order of dies non as stigmatic and punitive order on the basis of judgments of this court in the matter of *Anusuyya Bai and others Vs. State of MP & others* reported in 2004(3) MPLJ 627 and in the matter of *Mahesh Kumar Shrivastava Vs. State of MP and others* reported in 2007(3) MPLJ 525 can not be accepted. Hence the order dated 8/1/2007 treating the period as dies non does not suffer from any error.

23. In view of above analysis WP No. 11196/2010(s) is allowed by setting aside the order of major penalty dated 8/6/2010. WP No. 7434/06(s) is dismissed as the orders dated 26/10/2006 and 8/1/2007 do not suffer from any error. Signed order has been kept in the file of WP No. 11196/10(s) and a copy thereof has been placed in the record of the connected writ petition.

C.C. as per rules.

Order accordingly

I.L.R. [2019] M.P. 1671
WRIT PETITION
Before Mr. Justice Subodh Abhyankar
W.P. No. 5691/2019 (Jabalpur) decided on 12 July, 2019

RATNAKAR CHATURVEDI & ors. …Petitioners

Vs.

STATE OF M.P. & ors. …Respondents

***Constitution – Article 226 & 227 – Practice – Order Attaining Finality – Effect* – Held – Once an order has been passed by Competent Authority, even if it is erroneous in nature, if same has attained finality as no higher Court or authority has overruled the same, it would be binding on parties – Tribunal quashed the notices issued by respondents, they should not have circumvented the Tribunal's order by issuing a separate notice/order of same nature which were already quashed – Impugned order/notice quashed – Petition allowed. (Paras 10, 12 & 14)**

संविधान – अनुच्छेद 226 व 227 – पद्धति – आदेश का अंतिमता प्राप्त करना – प्रभाव – अभिनिर्धारित – एक बार सक्षम प्राधिकारी द्वारा पारित किया गया आदेश, यद्यपि वह त्रुटिपूर्ण स्वरूप में हो, यदि किसी उच्चतर न्यायालय अथवा प्राधिकारी द्वारा उक्त को उलटे न जाने के कारण उक्त ने अंतिमता प्राप्त कर ली है, तो वह पक्षकारों पर बाध्यकारी होगा – अधिकरण ने प्रत्यर्थीगण द्वारा जारी नोटिस अभिखंडित किये, उन्हें समान प्रकृति के एक पृथक नोटिस/आदेश जो पहले ही अभिखंडित किये जा चुके थे, जारी करते हुए अधिकरण के आदेश की परिवंचना नहीं करनी चाहिए थी – आक्षेपित आदेश/नोटिस अभिखंडित – याचिका मंजूर।

Cases referred:

W.P. No. 5033/2019 decided on 26.03.2019, 2011 (1) SCC 197.

R.N. Singh with *Arpan Pawar*, for the petitioner.
Ajay Gupta, Addl. A.G. with *Ravikant Patidar,* G.A. for the respondents-State.
Bhoopesh Tiwari, for the respondent No. 4/Caveator.

O R D E R

SUBODH ABHYANKAR, J.:- The petitioners, who are the Ex. Chairman/Directors of the District Central Cooperative Bank Limited, Satna have filed this writ petition challenging the orders 19.2.2019 (Annexure P-5) passed by the respondent No.4/Chief Executive Officer, District Central Cooperative Bank Limited, Satna, order dated 28.2.2019 (Annexure P-6) passed

by the respondent No.3/Joint Director, Cooperative Societies, Rewa and the order dated 28.2.2019, which is an order again passed by the respondent No.3/Joint Director.

2. The case of the petitioners in brief is that they are the elected members of their respective Cooperative Societies and were elected as Directors of the District Central Cooperative Bank on October, 2015 for a period of five years, which is to end in the month of October, 2020. The case of the petitioners is that earlier vide notice dated 15.3.2017 the respondent No.4 declared the parent societies of the petitioners as defaulters. The aforesaid notice/order was challenged by the petitioners by filing a separate revision petition before the MP State Cooperative Tribunal, Bhopal and on 25.9.2017 all these revisions were allowed by the Tribunal holding that the notice has been issued without following statutory provisions as contained in Section 48-AA and 50-A(2) of the MP Cooperative Societies Act, 1960 (hereinafter referred to as "**Act, 1960**"). According to the petitioners, the aforesaid order 25.9.2017 is under challenge in MP No.594/2017 and the said petition is still pending.

3. It is further the case of the petitioners that despite the fact that the favourable orders have been passed by the Tribunal by quashing the notice dated 15.3.2017 issued by the respondent No.4 under Section 50-A(2) of the Act, 1960, however vide order dated 19.2.2019 the respondent No.4 has again resorted to the same action under the same provisions of law against the petitioners, this is because the order dated 19.2.2019 also refers to the earlier notice dated 15.3.2017 and the respondent No.4 has held that the petitioners' appointment on the post of Director in the District Central Cooperative Bank Limited, Satna is cancelled by the operation of Section 50-A of the Act, 1960 and soon thereafter i.e. on 28.2.2019 the respondent No.3/Joint Director, Cooperative Societies, Rewa Division, Rewa has also passed an order purporting to be u/s Section 50-A of the Act, wherein the Board of Directors have been superseded and an Administrator has been appointed under Section 50-A of the Act, 1960.

4. Shri R.N.Singh, learned senior counsel for the petitioner has assailed the aforesaid order dated 19.2.2019 passed by the respondent No.4 and the order dated 28.2.2019 passed by the respondent No.3 on the ground that the same have been passed in an arbitrary manner and in violation of principles of natural justice as also against the order passed by the MP State Cooperative Tribunal, Bhopal on 25.9.2017. It is further submitted by the learned counsel for the petitioners that once the order has been passed by the MP State Cooperative Tribunal, Bhopal quashing the earlier notice dated 15.3.2017, then there was no occasion for the respondents to again resort to the provisions of Section 50-A of the Act, 1960 and to hold that the petitioners are disqualified from being the Directors of the concerned Bank. Learned counsel for the petitioners has also relied upon the provisions of Section 48-AA of the Act, 1960 to submit that the orders have also

been passed in clear violation of the aforesaid section, which is already held by the Tribunal vide order dated 25.9.2017 when the earlier notice dated 15.3.2017 was under challenge.

5. On the other hand Shri Ajay Gupta, learned Additional Advocate General for the respondents/State has vehemently opposed the petition and has submitted that no case for interference is made out, as the order has been passed by the competent authority under Section 50-A of the Act, 1960, which clearly prescribes disqualification for being candidate or voter for election to Board of Director of representative or delegate of society. It is further submitted that sub-Section (2) of Section 50-A of the Act is a deemed provision which automatically disqualifies of a Director if it is found that the society other than cooperative credit structure commits defaults for any loan or advance or for a period exceeding three months and the Registrar shall declare his seat as vacant. It is further submitted that no sooner the society in which the petitioner was a member is declared as defaulter which has already been admitted by the office bearers of the society, the petitioners herein stand disqualified. It is further submitted that so far as the challenge to the letter dated 19.2.2019 is concerned, the same cannot be challenged as it is only information given to the respective society of the petitioners regarding the default committed by the society and the consequence thereof.

6. So far as the order dated 28.2.2019 is concerned, it is submitted that the aforesaid order is only a consequential in nature and the Board of Directors, Satna has been superseded in exercise of the powers under Section 53(12) of the Act, 1960 and hence an Administrator has been appointed as the quorum was not available.

7. In support of his contention learned counsel for the respondents has heavily relied upon the judgment dated 26.3.2019 of the Indore Bench of this Court in WP No.5033/2019 wherein in the similar circumstances when the Directors of the Society were held to be disqualified owing to provisions of Section 50-A of the Act, 1960, the aforesaid order of the respondents was upheld and subsequently the order passed by the Single Bench has also been affirmed by the Division Bench in WA No.327/2017 and not in WA No.551/2019 and 593/2019.

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

9. From the record this Court finds that so far as the initial notice dated 15.3.2017 (Annexure P-1) issued to the petitioner is concerned, it is actually an intimation, which reads as under:-

''जिला सहकारी केन्द्रीय बैंक मर्या. सतना (म.प्र.)
क./स्थापना/2017/4331 सतना, दिनांक 15.03.2017

प्रति,

श्री रत्नाकर चतुर्वेदी,
संचालक, जिला सहकारी केंद्रीय बैंक मर्यादित, सतना एवं
बैंक प्रतिनिधि, कृषि साख सह. समिति मर्या. भुमकहर

सूचना

विषयः– प्राथमिक कृषि साख सहकारी समिति मर्यादित, भुमकहर पर शासकीय अंशपूंजी उधार 12 माह से अधिक कालातीत हो जाने की सूचना.

संदर्भः– संयुक्त आयुक्त सहकारिता रीवा संभाग रीवा (म.प्र.) का पत्र क/विधानसभा/2017/597 रीवा दिनांक 11.03.2017

महोदय,

एतद् द्वारा कृपया अवगत हो कि म.प्र. सहकारी सोसायटी अधिनियम 1960 की धारा 50 क (2) में प्रावधान है कि ''किसी सोसाइटी के किसी पद पर निर्वाचित किया गया कोई व्यक्ति ऐसे पद धारन करने से प्रविरत हो जावेगा, यदि वह सोसाइटी या किसी अन्य सोसाइटी के प्रति 12 मास से अधिक की कालावधि के लिये उसके द्वारा लिये गये किसी उधार या अग्रिम के लिये व्यतिक्रमी रहता है और रजिस्ट्रार उसके स्थान को रिक्त घोषित करेगा''।

साथ ही म.प्र. सहकारी सोसायटी नियम 1962 के नियम 45(3) में प्रावधान है कि ''सोसाइटी का कोई भी प्रतिनिधि किसी सहकारी बैंक, वित्तीय बैंक, संघीय सोसाइटी या किसी शीर्ष सोसाइटी के संचालक मण्डल के सदस्य के रूप में निर्वाचन के लिये पात्र नहीं होगा और उस रूप में अपना पद धारित नहीं करेगा यदि सोसाइटी ऐसे सहकारी बैंक, वित्तीय बैंक, संघीय सोसाइटी या शीर्ष सोसाइटी से उसके द्वारा लिए गए ऐसे किसी ऋण या ऋणों के संबंध में या राज्य सहकारी संघ एवं जिला सहकारी संघ को देय अभिदाय तथा अंशदान के भुगतान में तथा शासन की देनदारी में बारह मास से अधिक कालावधि के लिये व्यतिक्रम करती है या व्यतिक्रमी हो गई है.''

आपकी प्रतिनिधि संस्था के ऊपर दिनांक 30.09.2016 पर 12 माह से अधिक का कालातीत शासन की अशं पूंजी राशि रू. 30.000.00 बकाया है।

कृपया सूचित हो।

संलग्नः उपायुक्त सहकारिता जिला सतना से
प्राप्त पत्र की प्रमाणित प्रति

मुख्य कार्यपालन अधिकारी/सचिव
जिला सहकारी केन्द्रीय बैंक मर्या. सतना''

Admittedly the aforesaid notices were challenged by the petitioners in separate revisions under Section 77(14) of the Act, 1960, before the Cooperative Tribunal which were decided on 25.9.2017. The Cooperative Tribunal after taking note of Sections 50-A, 45(3) and 48-AA of the Act, 1960 has passed the order in the following manner:-

''10. इसके भी अलावा अधिनियम की धारा 50–क(2) के प्रावधान के अवलोकन से यह प्रकट है कि '' अधिनियम'' का उक्त प्रावधान संस्था के सदस्य द्वारा लिये गये ऋण के 12 मास से अधिक कालावधि के व्यतिक्रम की दशा में उसकी अपात्रता से संबंधित है। आलोच्य प्रकरण में यह अभिकथित नहीं है कि आवेदक स्वयं द्वारा लिये गये ऋण के लिये 12 माह से अधिक कालावधि का व्यतिक्रमी है। अतः उक्त प्रावधान आलोच्य प्रकरण में प्रयोज्य नहीं है।

11. इसी प्रकार ''अधिनियम'' के उक्त प्रावधान के परंतुक से यह स्पष्ट है कि यह परंतुक सहकारी साख संरचना से भिन्न किसी सोसायटी से सहकारी बैंक से किसी पद पर निर्वाचित व्यक्ति के पद धारण करने की निरर्हता से संबंधित है। आवेदक प्राथमिक कृषि साख सहकारी समिति भूमकहर से जिला सहकारी बैंक के लिये निर्वाचित प्रतिनिधि है। यह समिति सहकारी साख सरंचना के अतंर्गत आती है। अतः अधिनियम की धारा 50–क(2) का परंतुक भी आलोच्य प्रकरण में प्रयोज्य नहीं है। अतः उक्त तथ्यों एवं विधिक स्थिति के आलोक में संयुक्त पंजीयक द्वारा अधिनियम की धारा 50–क(2) के प्रावधान के आलोक में कार्यवाही किये जाने के दिये गये निष्कर्ष आवेदक के प्रकरण में प्रभावी नहीं होते है।

12. अतः संयुक्त पंजीयक के पत्र दिनांक 11.03.17 से बैंक के मुख्य कार्यपालन अधिकारी को अधिनियम की धारा 50–क(2) अंतर्गत अपात्र संचालक एवं समिति को विधिवत सूचित किये जाने की कार्यवाही के दिये गये निर्देश तथा इसके परिपालन में बैंक को तत्कालीन मुख्य कार्यपालन अधिकारी द्वारा तत्संबंधी विषय बैंक के संचालक मंडल के समक्ष विचारार्थ/निर्णयार्थ रखे बगैर तथा आवेदक को सुनवाई का समुचित अवसर दिये बगैर उसे अपात्रता धारण करने की सूचना देने हेतु पत्र दिनांक 15.03.17 जारी किये जाने की कार्यवाही विधिसम्मत प्रतीत नहीं होती।

13. अतः आवेदक द्वारा प्रस्तुत पुनरीक्षण याचिका स्वीकार की जाकर अनावेदक क्र.–1 संयुक्त पंजीयक द्वारा दिनांक 11.03.17 से जारी निर्देश एवं इसके परिपालन में तत्कालीन मुख्य कार्यपालन अधिकारी जिला सहकारी बैंक अनावेदक क्र.–2 द्वारा आवेदक को संचालक पद हेतु अपात्रता संबंधी जारी सूचना दिनांक 15.03.17 से की गई कार्यवाही विधिसम्मत नहीं होने से निरस्त की जाती है।

उभय पक्ष अपना वाद व्यय स्वयं वहन करें।

उभय पक्षकारों को आदेश की प्रतिलिपि प्रदान की।''

From the aforesaid order it is apparent that the Cooperative Tribunal in an unambiguous term has held that since the petitioners were not given an opportunity of hearing before issuing such intimation or notice, the aforesaid notice has been quashed.

10. Learned counsel for the petitioner has submitted that the said order of the Tribunal is already under challenge before this Court in WP No.591/2017 and the same is still pending, however on verification by this court it is found that the said writ petition has already been dismissed as withdrawn on 1.5.2017 with liberty to file a properly constituted petition. In view of the same, it is apparent that the aforesaid order passed by the Tribunal on 25.9.2017 has attained finality and is binding on the parties concerned.

11. Now coming to the second inning of this litigation, i.e. the subsequent notice issued by the respondent No.4 on 9.2.2019, the same reads as under:-

''कार्यालय जिला सहकारी केन्द्रीय बैंक मर्यादित, सतना

क्रमांक/स्थापना/18/19/4906 सतना, दिनांक 19.02.2019

प्रति,

प्रशासक/प्रबंधक
प्राथमिक कृषि साख सहकारी संस्था मर्या. भुमकहर
जिला सतना

द्वारा शाखा प्रबंधक शाखा सतना

विषयः– संस्था 12 माह से अधिक की कालावधि के लिये व्यतिक्रमी होने के संबंध में।

संदर्भः– समिति शाखा से प्राप्त जानकारी अनुसार

उपरोक्त विषयान्तर्गत लेख है कि जिला सहकारी केन्द्रीय बैंक मर्यादित, सतना के निर्वाचत संचालक श्री रत्नाकर चतुर्वेदी आपकी प्राथमिक कृषि साख सहकारी संस्था मर्या. भुमकहर से प्रतिनिधि है। संस्था/शाखा से प्राप्त जानकारी के अनुसार संस्था बैंक की दिनांक 30.09.16 को बैंक का 12 माह से अधिक का कालातीत शासन की अंशपूजी राशि रू. 30,000,00 से व्यतिक्रमी हो गई थी। बैंक पत्र क्रमांक / स्थापना/ 17/4331 सतना दिनांक 15.03.17 द्वारा बैंक खाते की प्रमाणित प्रति एवं उपायुक्त सहकारिता जिला सतना से प्राप्त पत्र की प्रमाणित प्रति बैंक प्रतिनिधि/संस्था की ओर प्रेषित की गई थी।

अतः म.प्र. सहकारी सोसाइटी अधिनियम 1960 की धारा 50–ए/क.(2) के प्रावधान अनुसार संस्था बैंक की दिनांक 30.09.16 पर राशि रू. 30,000,00 से 12 माह अधिक की कालावधि के लिये गये उधार या अग्रिम के लिये व्यतिक्रमी होकर निर्हरित हो गई थी। इस प्रकार आपकी संस्था के बैंक प्रतिनिधि श्री रत्नाकर चतुर्वेदी बैंक के संचालक पद से निर्हरित/अपात्र हो गए थे। बैंक संचालक मण्डल की बैठक दिनांक 26.12.18 के विषय क्र.2 में प्रस्तुत बैंक प्रतिनिधि/संचालक सदस्य को अवगत कराया गया है।

मुख्य कार्यपालन अधिकारी
जिला सहकारी केन्द्रीय बैंक मर्या. सतना''

Thereafter the order has been passed by the respondent No.3 on 28.2.2019, appointing an Administrator which reads as under:-

''कार्यालय संयुक्त रजिस्ट्रार सहकारी सोसाइटी
रीवा संभाग रीवा (म.प्र.)

क./विधि/2019/177 रीवा दिनांक 28/02/2019

आदेश

(म.प्र. सहकारी सोसाइटी अधिनियम 1960 की धारा 50–ए/क(2) के अन्तर्गत)

मुख्यकार्यपालन अधिकारी जिला सहकारी केन्द्रीय बैंक मर्या जिला सतना द्वारा पत्र क/स्था./19/4906 सतना दिनांक 19/02/2019 से ऋण खाते की सत्यापति छायाप्रति से अवगत कराया गया कि जिला सहकारी केन्द्रीय बैंक मर्या. जिला सतना के निर्वाचित संचालक श्री रत्नाकर चतुर्वेदी प्राथमिक कृषि साख सहकारी समिति मर्या. भुमकहर जिला

सतना से प्रतिनिधि होकर संस्था बैंक की 31.09.2016 पर शासन अंशपूजी राशि रू. 30000.00 बकाया थी जो 12 माह से अधिक के लिये उसके द्वारा लिये गए उधार/अग्रिम के लिये व्यतिक्रमी हो गई है।

जिला सहकारी केन्द्रीय बैंक मर्या. सतना के उक्त पत्रो के परिपेक्ष्य में शाखा प्रबंधक जिला सहकारी केन्द्रीय बैक मर्या. शाखा सतना एवं समिति प्रबंधक प्राथमिक कृषि साख सहकारी समिति मर्या भुमकहर जिला सतना को कार्यालयीन पत्र क/विधि/2019/152 रीवा दिनांक 20.02.2019 से रिकार्ड एवं दस्तावेज सहित दिनांक 25.02.2019 को कार्यालय में आहूत किया गया। शाखा प्रबंधक एवं समिति प्रबंधक के द्वारा प्रस्तुत रिकार्ड का अवलोकन करने पर पाया गया कि दिनांक 31.09.2016 की स्थिति पर समिति बैंक की 12 मास से अधिक की कालावधि के लिये उसके द्वारा लिये गये उधार/अग्रिम के लिये व्यतिक्रमी हो गई है। शाखा प्रबंधक एवं समिति प्रबंधक द्वारा प्रस्तुत रिकार्ड के आधार पर संस्था बैंक की 12 मास से अधिक की कालावधि के लिये व्यतिक्रमी होना स्वीकार किया गया।

म.प्र.सहकारी सोसाइटी अधिनियम 1960 की धारा 50–ए/क(2) के प्रावधान अनुसार किसी सोसाइटी के किसी पद पर निर्वाचत किया गया कोई व्यक्ति ऐसा पद धारण करने से प्रविरत हो जाएगा यदि वह उस सोसायटी या अन्य किसी सोसायटी के प्रति 12 मास से अधिक की कालावधि के लिये उसके द्वारा लिये गए उधार/अग्रिम के लिये व्यतिक्रमी रहता है और रजिस्ट्रार उसके स्थान को रिक्त घोषित करेगा।

जिला सहकारी केन्द्रीय बैंक मर्या. जिला सतना द्वारा ऋण खाते की प्रेषित जानकारी अनुसार तथा शाखा प्रबंधक एवं समिति प्रबंधक द्वारा नियत दिनांक को प्रस्तुत रिकार्ड के आधार पर में यह पाता हूँ कि संस्था बैंक की 12 मास से अधिक की कालावधि के लिये उसके द्वारा लिये गये उधार/अग्रिम के लिये व्यतिक्रमी होकर प्रतिनिधत्व के लिये अपात्र हो गई हैं ऐसी स्थिति में अधिनियत के प्रावधान अनुसार प्राथमिक कृषि साख सहकारी समिति मर्या. भुमकहर जिला सतना के निर्वाचत बैंक प्रतिनिधि एवं बैंक संचालक के पद को रिक्त घोषित किया जाना उचित होगा।

अतः मैं जगदीश कनोज संयुक्त रजिस्ट्रार सहकारी सोसाइटी रीवा संभाग रीवा मप्र. शासन सहकारिता विभाग भोपाल की अधिसूचना कमां एफ–5–2–2010 पन्द्रह–1 बी भोपाल दिनांक 23.10.2010 एंव 29.05.2013 से म.प्र. सहकारी सोसाइटी अधिनियम 1960 की धारा 50–ए/क(2) में प्रदत्त शाक्तियों का प्रयोग करते हुये प्राथमिक कृषि साख समिति मर्या भुमकहर जिला सतना के निर्वाचित प्रतिनिधि एवं बैंक संचालक श्री रत्नाकर चतुर्वेदी के पद को रिक्त घोषित करता हूँ।

यह आदेश आज दिनांक 28/02/2019 को मेरे हस्ताक्षर एंव कार्यालयीन पद मुद्रा से जारी किया गया।

(जगदीश कनोज)
संयुक्त रजिस्ट्रर
सहकारी सोसाइटी रीवा
संभाग रीवा''

12. A close scrutiny of the earlier notice dated 15.3.2017 and the order passed by the Tribunal in revision on 25.9.2017 and the subsequent notice dated 3.2.2019 and subsequent order dated 28.2.2019 as also the order passed by this Court reveals that the order of the Tribunal dated 25.9.2017 was challenged before

this Court in WP No.594/2017, which came to be dismissed on 1.5.2017 with liberty to file properly constituted petition. Thus the order passed by the Tribunal on 25.9.2017 has attained the finality. In the considered opinion of this Court, when a specific order referring to all the relevant provisions of law has been passed by the competent authority, then the parties are bound by the same. No further order or notice can be issued in violation of the aforesaid order. It is an admitted position that after the aforesaid order was passed by the Tribunal, vide notice dated 19.2.2019 only an intimation was given to the Cooperative Central Bank of the petitioners informing regarding the defaults of the society and subsequently the order has been passed on 28.2.2019 that the petitioners have already become disqualified by the operation of Section 50-A of the Act, 1960 and thus a vacancy has been created. The aforesaid action, in the considered opinion of this Court, in issuing the notice/intimation dated 19.2.2019 passed by the respondent No.4 could not have been issued, as the respondents were bound by the order passed by the Tribunal on 25.9.2017. It is a trite law that once an order has been passed by the competent authority, even if it is an erroneous in nature, if the same has attained the finality as no other higher Court or authority has overruled the same, it would be binding on the parties concerned. The Hon'ble Apex Court in the case of *J. Kodanda Rami Reddy Vs. State of Andhra Pradesh & others*, reported in 2011 (1) SCC 197 has held in para 31 as under:-

> "31. *The order dated 25.3.1991 appointing an arbitrator was also not a nullity, even though it may be erroneous. It is well settled that a decree will be a nullity only if it is passed by a court usurping a jurisdiction it did not have. But a mere wrong exercise of jurisdiction or an erroneous decision by a court having jurisdiction, will not result in a nullity. An order by a competent court, even if erroneous, is binding, unless it is challenged and set aside by a higher forum. Be that as it may."*

Applying the aforesaid dictum on the facts and circumstances of the present case this Court also finds that it is not a case of the respondents that they were not aware of the order passed by the Tribunal and their action according to them is well within the four corners of the provisions of the Act. However, in the notice dated 19.2.2019 as also the order dated 28.2.2019 there is no reference of the order passed by the Tribunal which clearly demonstrates the manner in which the aforesaid notice and the order have been passed. In the considered opinion of this Court, the order passed by the Tribunal is binding on the respondents and they could not have circumvented the same by issuing a separate notice and order of the same nature which were already quashed. Resultantly it is held that both the actions taken by the respondents are bad in law.

13. So far as the judgments relied upon by the learned counsel for the respondents/State are concerned, in the considered opinion of this Court the same

are distinguishable in the facts and circumstances of the present case, hence are of no help to the respondents.

14. As a result, instant petition stands **allowed** and the impugned notices/orders dated 19.2.2019 and 28.2.2019 are hereby quashed. However, liberty is granted to the respondents to proceed against the petitioners in accordance with law.

Petition allowed

I.L.R. [2019] M.P. 1679 (DB)
WRIT PETITION

Before Mr. Justice S.C. Sharma & Mr. Justice Virender Singh

W.P. No. 12474/2019 (Indore) decided on 18 July, 2019

AIR PERFECTION (M/S) …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

A. Tender/NIT – Criteria **– Held – NIT issued based upon recommendations of Expert Committee and are not contrary to public interest, discriminatory or unreasonable – If petitioner does not fulfill the terms and conditions of NIT, question of permitting them to participate in the process does not arise – No interference required – Petition dismissed.**

(Paras 25, 32 & 33)

क. निविदा/निविदा आमंत्रण सूचना – मानदंड – अभिनिर्धारित – जारी की गई निविदा आमंत्रण सूचना **(NIT)**, विशेषज्ञ समिति की अनुशंसाओं पर आधारित है तथा लोकहित के विरोध में, विभेदकारी या अयुक्तियुक्त नहीं है – यदि याची, निविदा आमंत्रण सूचना के निबंधन एवं शर्तों को पूरा नहीं करता है, तब प्रक्रिया में उन्हें सहभागी होने की अनुमति का प्रश्न उत्पन्न नहीं होता – किसी हस्तक्षेप की आवश्यकता नहीं – याचिका खारिज।

B. Constitution – Article 226 – Judicial Review – Scope & Jurisdiction **– Held – Government and their undertakings do have free hand in setting terms of tender and unless the same are arbitrary, discriminatory, *malafide* or actuated by bias, scope of interference by Courts does not arise – Apex Court held that Court shall not interfere in such matter only because it feels that some other terms in tender would have been fairer, wiser or more logical.** **(Para 26)**

ख. संविधान – अनुच्छेद 226 – न्यायिक पुनर्विलोकन – व्याप्ति एवं अधिकारिता – अभिनिर्धारित – सरकार एवं उनके उपक्रमों को निविदा के निबंधन निर्धारित करने की पूर्ण स्वतंत्रता है और जब तक कि वह मनमाने, विभेदकारी,

असद्भावपूर्वक या पक्षपात द्वारा प्रवृत्त न हो, न्यायालयों द्वारा हस्तक्षेप की व्याप्ति उत्पन्न नहीं होती – सर्वोच्च न्यायालय ने अभिनिर्धारित किया कि न्यायालय उक्त मामले में मात्र इसलिए हस्तक्षेप नहीं करेगा कि उसे लगता है कि निविदा में कुछ अन्य निबंधन, अधिक निष्पक्ष, विवेकपूर्ण या अधिक तर्कसम्मत हो सकते थे।

***C. Constitution – Article 14, 19(1)G & 20 – NIT – Terms & Conditions* – Held – Terms/conditions imposed in NIT are reasonable keeping in view the specialized nature of work and to assure procurement of quality lifts to houses, which are being constructed for weaker section of society – Merely because conditions imposed are not suiting to petitioner, it cannot be said that respondents have acted in unfair manner in order to favour someone – No violation of Article 14, 19(1)G & 20 of Constitution.**

(Paras 22 to 24)

ग. संविधान – अनुच्छेद 14, 19(1) जी व 20 – निविदा आमंत्रण सूचना – निबंधन एवं शर्तें – अभिनिर्धारित – कार्य के विशिष्ट स्वरूप को दृष्टिगत रखते हुए निविदा आमंत्रण सूचना में अधिरोपित निबंधन/शर्तें युक्तियुक्त है तथा उन मकानों के लिए क्वालिटी लिफ्ट का उपापन सुनिश्चित करने के लिए हैं, जिन्हें समाज के कमजोर वर्ग हेतु निर्मित किया जा रहा है – मात्र इसलिए कि अधिरोपित शर्तें याची के लिए सुविधाजनक नहीं है, यह नहीं कहा जा सकता कि प्रत्यर्थीगण ने किसी पर अनुग्रह करने के लिए अऋजु ढंग से कार्यवाही की है – संविधान के अनुच्छेद 14, 19(1) जी व 20 का कोई उल्लंघन नहीं।

Cases referred :

1994 (6) SCC 651, 2001 (8) SCC 491, 2009 (6) SCC 171, 1989 AIR 458, 2006 (3) SCC 581, 1989 AIR 157, 2018 (12) SCC 790, 2012 (8) SCC 216, 2016 (16) SCC 818, 2017 (4) SCC 269, 2000 (5) SCC 287, 2003 (3) SCC 186.

Pushyamitra Bhargava, for the petitioner.
S.K. Purohit, G.A. for the respondent No. 1/State.
Manoj Munshi, for the respondent No. 2.

O R D E R

The petitioner before this Court, a partnership firm through its partner Vikas Nema, has filed this present petition being aggrieved by the terms and conditions of the Notice Inviting Tender (hereinafter referred as N.I.T.) i.e. N.I.T. No.03/PMAY/2019-20 for Supply, Installation, Testing, Commissioning & Maintenance of Lifts including Allied Works under PMAY at Bhuritekri, Dudhiya-Devguradiya, Bada, Bangerda, Budhaniya and Badabangerda extension, M.P.

2. The petitioner's contention is that the petitioner / Firm fulfills all the eligibility conditions in the N.I.T. except Clause-2 and 3. Clause-2 provides for

minimum annual turn over of Rs.100.00 crores and Clause-3 provides that a bidder should have installed 1000 lifts in the last three years.

3. During the pendency of the present writ petition, one more condition has been introduced by the respondents, which provides that bidder should have a manufacturing unit. The petitioner's contention is that the Central Vigilance Commission has issued guidelines dated 17.12.2002 in respect of the process of issuing N.I.T., acceptance of N.I.T. and award of contract. It has further been contended that the guidelines issued by the Central Vigilance Commission dated 17.12.2002 are binding upon the respondents.

4. The petitioner has placed heavy reliance upon the aforesaid guidelines and his contention is that as per the guidelines, the annual financial turn over of the last three years should not exceed 30% of the estimated cost of the contract and in those circumstances, the petitioner grievance is that the terms and conditions prescribed in the N.I.T. on account of which, the petitioner is being ousted, are unreasonable and illegal and deserves to be quashed.

5. The petitioner has placed reliance upon several judgments delivered in the cases of *Tata Cellular v/s Union of India* reported in 1994 (6) SCC 651, *Union of India v/s Dinesh Enginnering Corporation* reported in 2001 (8) SCC 491, *Meerut Development Auhtority v/s Assn. of Management Studies* reported in 2009 (6) SCC 171, *Subhash Kumar Lata v/s R.C. Chhiba & Another* reported in 1989 AIR 458, *K.K. Bhalla v/s State of M.P. & Others* reported in 2006 (3) SCC 581 and *Faish Choudhary v/s D.G. Doordarshan* reported in 1989 AIR 157 and has prayed for the following reliefs:-

> (1) Summon the entire relevant record from the possession of the authorities;
>
> (2) Upon holding that the impugned eligibility conditions in Annexure CA Financial 1.II and 1. III of as defined in Pre-qualification Criteria of the NIT as malafide, arbitrary and illegal, issue a Writ of Mandamus or any other appropriate direction, quashing the same.
>
> (3) Issue a Writ of Mandamus directing the respondent authorities to consider the objections raised by the petitioner.
>
> (4) Issue a Writ of Mandamus directing the respondents authorities to permit the petitioner to take part in the NIT proceedings.
>
> (5) Issue a Writ of Mandamus directing the respondent authorities to consider the candidature of the petitioner and its' bid for award of the Tender Contract.
>
> (6) Award cost of the litigation in favour of the petitioner.

6. In the rejoinder, the petitioner has stated that the petitioner is having vast experience in the matter of installation of lifts / elevators. The petitioner has also challenged the corrigendum No.3 issued on 08.07.2019, which provides that the bidder should be an entity having their own manufacturing unit for manufacturing lifts. In the rejoinder, the petitioner has placed reliance upon a judgment delivered by the Division Bench of Gujrat High Court in the case of *Coastal Marine Construction & Engineering Limited v/s Union of India* and has prayed for quashment of the terms and conditions, which are coming in way of the petitioner.

7. A reply has been filed in the matter and the respondents have admitted the issuance of tender by them. The respondents have further stated that they have undertaken the construction of multi storey residential buildings under the Prime Minister Awas Yojna and about 138 lifts are to be installed in the multi storey building.

8. The respondents have further stated that lifts / elevators to be installed are going to cater the need of people belonging to all age group and they want to procure robust and durable lifts so that they have a life span of 25 to 30 years.

9. It has also been stated that the object of procuring lifts directly from the manufacturer is to ensure supply of lifts directly from the manufacturer and avoid intermediaries. It has also been stated that in case, supply is directly availed from the manufacturers, the availability of spare part and components in time is also assured.

10. It has also been stated that because they are procuring lifts directly from the manufacturer, it will reduce the cost and such condition cannot be said to be a tailor-made condition. The respondents have also stated that the pre-qualification eligibility criteria in the documents is reasonable and is for fair competition for all manufacturers of lifts.

11. The respondents have also stated that they have invited tender for supply of 138 lifts within a period of six months, and therefore, annual installation is going to be 276 lifts. Hence, a pre-eligibility criteria for installation of 1000 lifts in three years with an annual average of 333 lifts is fair and reasonable.

12. It has also been stated that in the past, small time businessmen and small firms have participated in various tenders and the respondents are having a bitter experience, when they leave work incomplete. The respondents have stated that the project in question is being directly funded under the Prime Minister Awas Yojna and they are answerable to the Central Government also. They cannot delay the project and they have to provide quality houses with quality lifts to the public at large.

13. It has been argued before this Court that terms and conditions do not violate the Fundamental Right guaranteed to the petitioner and scope of interference by this Court in respect of tender conditions is limited keeping in view the judgment delivered in the case of *Coastal Marine Constitution Limited* (supra).

14. It has also been stated that Central Vigilance Commission memorandum dated 07.05.2004 clarifies that the guidelines dated 17.12.2002, on pre-qualification eligibility criteria, are illustrative and the organization may suitably modify these guidelines for specialized jobs / works, if considered necessary. The respondents have stated that they have issued the tender keeping in view their requirements and no case for interference is made out in the matter.

15. Heard learned counsel for the parties at length and perused the record. The matter is being disposed of at motion hearing stage itself with the consent of the parties.

16. The undisputed facts reveals that a N.I.T. i.e. N.I.T. No.03/ PMA&/2019-20 was issued on 10.06.2019 for Supply, Installation, Testing, Commissioning & Maintenance of Lifts including Allied Works under PMAY at Bhuritekri, Dudhiya-Devguradiya, Bada, Bangerda, Budhaniya and Badabangerda extension, M.P. The petitioner is aggrieved by Clause-1 and 2 of the N.I.T. as well as corrigendum issued by the respondents dated 08.07.2019.

17. The petitioner has placed heavy reliance upon the Central Vigilance Commission Guidelines issued on the subject dated 17.12.2002.

18. The Central Vigilance Commission Guidelines do provide for a criteria for issuance of tender and the factors, which are to be kept in mind while issuing an N.I.T.. The Central Vigilance Commission guidelines have been modified from time to time and the Central Vigilance Commission vide office memorandum dated 07.05.2004 has clarified that the guidelines dated 17.12.2002 can be suitably modified by an organization for specialized jobs / works, if considered necessary.

19. As per the return filed by the respondents, it has been stated that as many as 138 lifts are to be procured within a period of six months, and therefore, the annual installation will be 276 lifts. Hence, pre-qualification eligibility criteria of installation of 1000 lifts in three years with an annual average of 333 lifts is fair and reasonable.

20. The conditions in respect of turnover of Rs. 100.00 crores in three years is fair and reasonable keeping in view the magnitude of supply. The number of lifts and average annual turnover of Rs.100.00 crores, in previous three years, has co-relation with each other and it is just double the average annual estimated cost of

the tender. The estimated cost of the tender is Rs.22.85 crores, and therefore, the annual turnover shall be 45.70 crores and in those circumstances, a clause finds place in respect of annual turn over. It can never be said to be unreasonable. It is not a case where the respondents have tailor-made the terms and conditions of the N.I.T. to favour any individual. The judgment delivered in the case of *Haffkine Bio-Pharmaceutical Corporation Limited v/s Nirlac Chemicals Through its Manager & Others* reported in 2018 (12) SCC 790 does not help the petitioner keeping in view the nature of work and the conditions of the N.I.T. especially keeping in view the qualification issued by the Central Vigilance Commission.

21. This Court has carefully gone through the judgment delivered in the case of *Tata Cellular* (supra) and it is certainly true that Government / Administrative Body functioning in an administrative sphere has to act in a fair and transparent manner not effected by bias or actuated by *malafide.* The petitioner has not been able to establish that bias or *malafide* involved in the process. Merely because the condition is not suiting to the petitioner, it cannot be said that the respondents have acted in an unfair manner in order to favour someone.

22. Similarly, this Court has carefully gone through the judgment delivered in the case of *Union of India v/s Dinesh Engineering Corporation* (supra) and again keeping in view the aforesaid judgment, it can never be said that the respondents have violated the recognized norms, nor it can be said that the terms and conditions of the tender are unreasonable and arbitrary. The judgment again does not help the petitioner, as the conditions imposed in the N.I.T. are reasonable conditions and they have been introduced in the N.I.T. keeping in view the specialized nature of work and to assure procurement of quality lifts to the house, which are being constructed for the weaker section of the society.

23. This Court has also taken into accounts the other judgments referred by the learned counsel for the petitioner in the case of *Meerut Development Authority* (supra), *R.C. Chhiba* (supra), *K.K. Bhalla* (supra) and *Fasih Choudhary* (supra), however, there is no evidence on record to establish that the authorities have abused the power vested with them or there has been *malafide* exercise of power on the part of the authorities. The respondents are the best judge to frame terms and conditions of the N.I.T. and keeping in view the specialized work, they have issued the tender with the conditions, which are under challenge. A similar view has been taken by the Division Bench of Gujrat High Court in the case of *Coastal Marine Engineering Construction Limited* (supra) upholding the action of the respondents therein in respect of tender conditions.

24. In the considered opinion of this Court, keeping in view the fact that tender relates specialized job, large number of lifts are to be procured and also keeping in view the fact that tender document has been prepared after consulting the specialist on the subject, it can never be said that the respondents have violated

the guidelines issued by the Central Vigilance Commission. By no stretch of imagination, it can be said that the action of the respondents is violative of Articles 14, 19(1)G and 20 of the Constitution of India. This Court does not find any reason to hold that the terms and conditions of the N.I.T. are arbitrary and illegal, and therefore, if the petitioner does not fulfill the terms and conditions as per the N.I.T., the question of permitting the petitioner to participate in the process does not arise.

25. The Hon'ble Apex Court in the case of *Michigan Rubber (India) Limited v/s The State of Karnataka & Others* reported in 2012 (8) SCC 216 in paragraphs-25 to 37 has held as under:-

> "25. Respondent No. 1-the State, in their counter affidavit, highlighted that tyre is very critical and a high value item being procured by the KSRTC and it procured 900x20 14 Ply Nylon tyres along with the tubes and flaps in sets and these types of tyres are being used only by the State Transport Units and not in the domestic market extensively. It is highlighted that the quality of the tyre plays a major role in providing safe and comfort transportation facility to the commuters.
>
> 26. It is also pointed out by the Respondent-State that in order to ensure procurement of tyres, tubes and flaps from reliable sources, the manufacturers of the same with an annual average turnover of Rs. 200 crores during the preceding three years, were made eligible to participate in the tenders. In the tender issued for procurement of these sets during October, 2004, the appellant participated and based on the L1 rates, the orders for supply for 16,000 sets of tyres were placed on the firm. It is also pointed out that the appellant supplied 10,240 sets of tyres and remaining quantity was cancelled due to quality problems.
>
> 27. Materials has also been placed to show that the appellant participated in subsequent tenders and orders were released for supply of 900 x 20 14 PR tyres, tubes and flaps from October 2006 to September, 2007. It is also explained that after going into various complaints, in order to achieve good results, new tyre mileage and safety of the public etc., and after noting that vehicle/chassis manufacturers such as M/s Ashok Leyland, M/s Tata Motors etc. have strict quality control system, it was thought fit to incorporate similar criteria as a pre-qualification for procurement of tyres.
>
> 28. It is also highlighted by the State as well as by the KSRTC that the tender conditions were stipulated by way of policy decision after due deliberation by the KSRTC. Both the respondents highlighted that the said conditions were imposed with a view to obtain good quality materials from reliable and experienced suppliers. In other words, according to them, the conditions were aimed at the sole purpose of

obtaining good quality and reliable supply of materials and there was no ulterior motive in stipulating the said conditions.

(a) Managing Director, Bangalore Metropolitan Transport Corporation

(b) Managing Directors of four sister Corporations

(c) Director, Security & Vigilance

(d) Director, Personnel and Environment

(e) Chief Accounts Officer

(f) Chief Engineer (Production)

(g) Chief Engineer(Maintenance)

(h) Chief Accounts Officer(Internal Audit)

(i) Controller of Stores and Purchase

29. Thus it is clear that the said CMG is a widely represented body within the Respondent No. 2-KSRTC.

30. Further materials placed by KSRTC show that the CMG met on 17.05.2007 and deliberated on the question of conditions to be incorporated in the matter of calling of tenders for supply of tyres, tubes and flaps. It is pointed out that in view of the experience gained over the years, it was felt by the said Group that the impugned two conditions should be essential qualifications of any tenderer. The said policy decision was taken in the best interest of the KSRTC and the members of the traveling public to whom it is committed to provide the best possible service. In the course of hearing, learned counsel for the respondents have also brought to our notice the Minutes of Meeting of the CMG held on 17.05.2007. The said recommendation of the CMG was ultimately approved by the Vice Chairman of KSRTC. In the circumstances, the said impugned two conditions were incorporated in the tender notice dated 05.07.2007.

31. It is also brought to our notice that the KSRTC is governed by the provisions of the Karnataka Transparency in Public Procurements Act, 1999 and the Rules made thereunder, viz., Karnataka Transparency in Public Procurements Rules, 2000. Though in Condition No 2(a) in the tender notice dated 05.07.2007, the names of certain vehicle manufacturers were mentioned, after finding that it was inappropriate to mention the names of specific manufacturers in the said condition, it was decided to delete their names. Accordingly, a corrigendum was put up before the CMG and by decision dated 04.08.2007, CMG decided to revise the pre-qualification criteria by deleting the names of those manufacturers. Learned counsel for the respondents have also placed

the Minutes of Meeting of the CMG held on 04.08.2007. It is also brought to our notice that the said corrigendum was also approved by the competent authority.

32. In addition to the same, it was not in dispute that the appellant-Company was well aware of both the original tender notices and the corrigendum issued. It is also brought to our notice that the appellant wrote a letter making certain queries with regard to the corrigendum issued by the KSRTC and the said queries were suitably replied by the letter dated 11.08.2007.

33. It is also seen from the records that pursuant to the tender notice dated 05.07.2007, seven bids were received including that of the appellant- Company. They are:

(i) M/s Apollo Tyres

(ii) M/s Birla Tyres

(iii) M/s Ceat Ltd

(iv) M/s Good Year India

(v) M/s JK Industries

(vi) M/s MRF Ltd

(vii) M/s Michigan Rubber (Former Betul Tyres)

It is brought to our notice that successful bidders were CEAT and JK Tyres. Accordingly, contracts were entered into with the said two companies by the KSRTC and the purchase orders were placed and they have also effected supplies and completed the contract and the KSRTC also made payments to the said suppliers.

34. It is pertinent to point out that the second respondent has also issued 4 (four) more tender notices after the tender notice dated 05.07.2007. The said tender notices were dated 04.03.2008, 22.08.2008, 24.10.2008 and 19.03.2009. Pursuant to the tender notices dated 04.03.2008, 22.08.2008 and 24.10.2008, contracts have been awarded and have been substantially performed. It is also brought to our notice that all the said four subsequent tender notices also contained identical conditions as that of the impugned conditions contained in tender notice dated 05.07.2007.

35. As observed earlier, the Court would not normally interfere with the policy decision and in matters challenging the award of contract by the State or public authorities. In view of the above, the appellant has failed to establish that the same was contrary to public interest and beyond the pale of discrimination or unreasonable. We are satisfied that to have the best of the equipment for the vehicles, which ply on road carrying passengers, the 2nd respondent thought

> it fit that the criteria for applying for tender for procuring tyres should be at a high standard and thought it fit that only those manufacturers who satisfy the eligibility criteria should be permitted to participate in the tender. As noted in various decisions, the Government and their undertakings must have a free hand in setting terms of the tender and only if it is arbitrary, discriminatory, mala fide or actuated by bias, the Courts would interfere. The Courts cannot interfere with 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. In the case on hand, we have already noted that taking into account various aspects including the safety of the passengers and public interest, the CMG consisting of experienced persons, revised the tender conditions. We are satisfied that the said Committee had discussed the subject in detail and for specifying these two conditions regarding pre-qualification criteria and the evaluation criteria. On perusal of all the materials, we are satisfied that the impugned conditions do not, in any way, could be classified as arbitrary, discriminatory or mala fide.
>
> 36. The learned single Judge considered all these aspects in detail and after finding that those two conditions cannot be said to be discriminatory and unreasonable refused to interfere exercising jurisdiction under Article 226 of the Constitution and dismissed the writ petition. The well reasoned judgment of the learned single Judge was affirmed by the Division Bench of the High Court.
>
> 37. In the light of what is stated above, we fully agree with the reasoning of the High Court and do not find any valid ground for interference. Consequently, the appeal fails and the same is dismissed with no order as to costs."

In light of the aforesaid judgment, it can safely be gathered that the Government and their undertakings do have a free hand in setting terms of a tender and unless the terms and conditions are arbitrary, discriminatory, *malafide* or actuated by bias, the scope of interference by Courts does not arise. In the aforesaid judgment it has also been held that the Court would not interfere in a matter because it feels that some other terms in the tender would have been fairer, wiser or more logical.

26. The scope of judicial scrutiny has been considered by the Hon'ble Apex Court time and again. In the case of *Afcons Infrastructure Limited v/s Nagpur Metro Rail Corporation Limited* reported in 2016 (16) SCC 818, the Apex Court has held as under:-

> "We may add the owner or the employer of a project, having authored the tender documents, is the best persons 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 a *malafide* or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner of employer of a project may give an interpretation to the tender documents that is no acceptable to the constitutional Courts but that by itself is not a reason for interfering with the interpretation given".

27. The Apex Court in the case of *Reliance Telecom Limited & Others v/s Union of India & Others* reported in 2017 (4) SCC 269 has again dealt with scope of interference in respect of the tender.

28. In the case of *Tata Cellular v/s Union of India* reported in 1994 (6) SCC 651 again the scope of judicial review has been looked into by the Hon'ble Apex Court. In the aforesaid case, it has been 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 and the Government must be allowed to have a fair play in the joints as it is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere.

29. The Apex Court in the case of *Monarch Infrastructure (P) Limited v/s Ulhasnagar Municipal Corporation & Others* reported in 2000 (5) SCC 287 was again dealing with the N.I.T. and it has been held that it cannot say whether the conditions are better than what were prescribed earlier, for in such matters, the authority calling the tenders is the best judge. The Court declined to restore *status quo ante.*

30. In the case of *Cellular Operator Association of India & Others v/s Union of India & Others* reported in 2003 (3) SCC 186, the Apex Court has held that in respect of the matters affecting policy and those that require technical expertise, the Court should show deference to, and follow the recommendations of the Committee which is more qualified to address the issues.

31. In the present case, N.I.T. has been issued based upon the recommendation of the Expert Committee, and therefore, question of interference by this Court, as terms and conditions are not unreasonable, does not arise.

32. In the considered opinion of this Court, the petitioner has failed to establish that the criteria adopted by the respondents is contrary to public interest, discriminatory or unreasonable. Hence, the question of interference by this Court does not arise.

Accordingly, the present writ petition stands dismissed.

Certified copy as per rules.

Petition dismissed

I.L.R. [2019] M.P. 1690
WRIT PETITION
Before Mr. Justice Atul Sreedharan
W.P. No. 14962/2019 (Jabalpur) decided on 26 July, 2019

VICKY AHUJA …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

***A. Constitution – Article 226 – Habeas Corpus – Maintainability – Locus Standi* – Missing wife, later recovered by police from custody of petitioner (paramour) – Held – *Corpus* voluntarily stated that she wants to live-in with petitioner, thus petitioner had sufficient interest (*locus*) to move this petition – *Corpus* being adult and in good mental and physical health, there can be no hindrance to her right to stay with whomsoever she wishes – *Corpus* set at liberty to go with whomever she wants to – Petition disposed. (Paras 5, 7, 9 & 10)**

क. संविधान – अनुच्छेद 226 – बंदी प्रत्यक्षीकरण – पोषणीयता – सुने जाने का अधिकार – लापता पत्नी, बाद में पुलिस द्वारा याची (जार) की अभिरक्षा से मिली – अभिनिर्धारित – बंदी ने स्वेच्छापूर्वक यह कथन किया कि वह याची के साथ रहना चाहती है, अतः याची के पास यह याचिका प्रस्तुत करने का पर्याप्त हित (अधिकार) था – बंदी के वयस्क होने तथा अच्छे मानसिक एवं शारीरिक स्वास्थ्य होने के कारण, वह जिस किसी के भी साथ चाहे उसके साथ रहने के उसके अधिकार में कोई बाधा नहीं हो सकती – बंदी को, जिस किसी के भी साथ वह जाना चाहे जाने की स्वतंत्रता दी गई – याचिका निराकृत।

***B. Constitution – Article 226 – Habeas Corpus – Claim of Custody of Children – Maintainability* – Held – Such claim cannot be acceded to by this Court in a writ of *habeas corpus* – Wife free to avail remedy available to her under law. (Para 6)**

ख. संविधान – अनुच्छेद 226 – बंदी प्रत्यक्षीकरण – बच्चों की अभिरक्षा का दावा – पोषणीयता – अभिनिर्धारित – उक्त दावा, इस न्यायालय द्वारा बंदी प्रत्यक्षीकरण की एक रिट में स्वीकार नहीं किया जा सकता – पत्नी विधि के अंतर्गत उसे उपलब्ध उपचार लेने हेतु स्वतंत्र है।

Case referred :

AIR 1956 SC 108.

Rahul Diwakar with *Ankit Saxena*, for the petitioner.
Paritosh Gupta, G.A. for the respondents/State.
A.S. Raizada, for the respondent No. 4.

O R D E R

ATUL SREEDHARAN, J.:- The present petition has been filed by the Petitioner Vicky Ahuja, which is writ of habeas Corpus for the production of the Corpus, who is referred herein as 'X'.

2. Corpus X is a married lady having two children. She is the wife of the Respondent No.4. The Corpus X went missing from her matrimonial home and her husband filed a missing report with the police. Subsequently, the Corpus X was recovered from the company of the Petitioner Vicky Ahuja by the police.

3. Learned counsels for the State and for the Respondent No.4 have submitted that the Corpus X and the Petitioner are romantically inclined and that the Corpus X, despite being a married lady having two children, wishes to stay with her paramour i.e. the Petitioner herein. She has been produced before this Court by the State from the custody of her parents at Dindori.

4. Learned counsel for the State has submitted that the missing person report was filed by the Respondent No.4, who has registered a missing person report, bearing number NCR No.49/2019. The police recovered the Corpus X from the company of the Petitioner and thereafter, she is allegedly told the police that she wanted to go with her parents to Dindori. She said she did not want to live with her husband, the Respondent No.4. Learned counsel for the State submits that it was on account of her own statement to the police that she was allowed to go with her parents to Dindori.

5. Today in Court, the Corpus X has stated that she wants to live with the Petitioner. She has also stated that she wants the custody of her two children. As regards her desire to stay with the Petitioner, the Corpus being an adult is entitled to move around wherever she wants and there can be no hindrance to her right to stay with whomsoever she wishes.

6. However, the undisputed facts also disclose that the Respondent No.4 has not kept the Corpus X under illegal detention, as has been alleged in this petition and that, the Corpus X was with her parents after she was removed from the company of the Petitioner.As regards her demand for the custody of her children, the same cannot be acceded to by this Court in a writ of habeas Corpus. She is however free to avail such remedy available to her under the law.

7. Learned counsel for the Respondent No.4 has challenged the *locus standi* of the Petitioner to file the writ petition. In support of his contention, he has placed before this Court the judgment of the the Supreme Court in the case of *Smt. Vidya Verma through next friend R.V.S Mani Vs. Dr. Shiv Narain Verma* reported in AIR 1956 SC108. The facts in that case disclosed that one R.V.S Mani,portraying himself as the next friend of the Corpus was consistently trying to secure the custody of the Corpus Smt. Vidya Verma. Upon being produced before the Court

of Sessions in an application filed under section 491 Cr.P.C (Old Code) by R.V.S Mani, the Corpus in that case Mrs. Vidya Verma informed the Court that she did not want to go with the so called next friend R.V.S Mani. Thereafter, R.V.S Mani approached the Bombay High Court, once again under the Section 491 Code of Criminal Procedure and there also, the Corpus was examined by the High Court on two occasions in which she said that she was not under any restraint either in the house or outside and therefore, the petition was dismissed. It is also relevant to state here that before the High Court the Corpus had stated *"I have no need of any counsel and have nothing to talk with R.V.S Mani"* and thereafter, she was allowed to go with her uncle and finally the same, next friend Mr. R.V.S Mani approached the Supreme Court, where also the petition was dismissed. In that case, the facts clearly disclosed that the Corpus was never interested in going with the alleged next friend. Whereas, the facts in the present case undisputedly disclose that the Corpus X and the Petitioner are in an extra marital relationship, as stated by the Ld. Counsel for the State and not disputed by Corpus X who is present in court, or by the Ld. Counsel for the Petitioner and that, she wants to live with her paramour, the Petitioner, as stated categorically by Corpus X before this Court. Under the circumstances, the paramour is a person with sufficient interest to move the present writ in a situation where the facts suggest that the Corpus X herself was not in a position to file the petition in her individual capacity. Therefore, the argument put forth by the Ld. Counsel for the Respondent No.4 with regard to the lack *locus standi* of the Petitioner to maintain this writ of habeas Corpus is rejected.

8. The institution of marriage only legitimises cohabitation between a man and woman. It generates legally enforceable rights and liabilities between the husband and wife under matrimonial and other cognate laws. Marriage, however does not prohibit either the husband or the wife to transgress its sanctity by entering into anextramarital or a live-in relationship. In such a situation, the law only entitles the aggrieved party to seek divorce from the erring party on the grounds of adultery. In this case, the law cannot prevent Corpus X from living-in with her paramour after she has disclosed her intent to do so. There is no coercion on the part of the Petitioner to compel the Corpus X to live with him and the statement of Corpus X before this Court today reveals that she voluntarily wants to live-in with the Petitioner.

9. Arguments put forth by the Ld. Counsel for the State against restoring custody of the Corpus X to the Petitioner are more emotional and moral rather than legal. In fact even using the phrase "restoring custody of Corpus X" would be improper. Custody is of "Things" "Chattel" or of any individual who is a minor or an adult suffering from a mental debility. In fact, even this Court cannot grant the custody of Corpus X to her paramour, the Petitioner herein, or to her husband the Respondent No.4, or for that matter to anyone, as Corpus X is an adult woman in

good mental and physical health and she can only be set free by this Court to go wherever she wants and restore her liberty to stay with whomsoever she pleases. Aspects of positive morality are nonjusticiable. Therefore, as Corpus X has stated before this court today that she wishes to stay with the Petitioner, there is nothing more to this case. The Respondent No.4, is of course entitled to resort such available remedy under the law as he desires.

10. Under the circumstances, the **petition is finally disposed of** and Corpus X is set at liberty forthwith to go with whomever she wants to and the State or the Respondent No.4 shall not impede her movements in any manner.

Order accordingly

I.L.R. [2019] M.P. 1693
WRIT PETITION
Before Mr. Justice Sanjay Dwivedi
W.P. No. 6633/2019 (Jabalpur) decided on 29 July, 2019

ASHUTOSH RASIK BIHARI PUROHIT …Petitioner

Vs.

THE INDIAN RED CROSS SOCIETY & ors. …Respondents

***A. Indian Red Cross Society Branch Committee Rules, 2017, Schedule III, Clause 2(d) and Constitution – Article 226/227 – Chairman – Suspension of Power – Validity* – Held – Rules of 2017 nowhere provides that Chairman of State Level Society can be placed under suspension and its power can be suspended by respondent Society – Order passed by respondents without competence & jurisdiction – Order is illegal. (Para 12)**

क. भारतीय रेड क्रास सोसाइटी शाखा समिति नियम, 2017, अनुसूची III, खंड 2(डी) एवं संविधान – अनुच्छेद 226/227 – सभापति – शक्ति का निलंबन – विधिमान्यता – अभिनिर्धारित – 2017 के नियम कहीं भी यह उपबंधित नहीं करते कि प्रत्यर्थी सोसाइटी द्वारा राज्य स्तरीय सोसाइटी के सभापति को निलंबित रखा जा सकता है तथा उसकी शक्ति निलंबित की जा सकती है – प्रत्यर्थीगण द्वारा पारित आदेश बिना सक्षमता व अधिकारिता का है – आदेश अवैध है।

***B. Indian Red Cross Society Branch Committee Rules, 2017, Schedule III, Clause 2(d) and Constitution – Article 226/227 – Chairman – Removal – Validity* – Held – In agenda of meeting, no such proposal for removal of Chairman (petitioner) – Decision for removal cannot be taken – Further, before the enquiry report was submitted, petitioner was suspended by majority of votes – No such procedure/mechanism is available under Rules of 2017 – Conduct of respondents is arbitrary and contrary Rules of 2017. (Para 13 & 14)**

ख. भारतीय रेड क्रास सोसाइटी शाखा समिति नियम, 2017, अनुसूची III, खंड 2(डी) एवं संविधान – अनुच्छेद 226/227 – सभापति – हटाया जाना – विधिमान्यता – अभिनिर्धारित – बैठक की कार्यसूची में, सभापति (याची) को हटाये जाने के लिए कोई प्रस्ताव नहीं – हटाये जाने का निर्णय नहीं लिया जा सकता – इसके अतिरिक्त, जांच प्रतिवेदन प्रस्तुत करने के पूर्व, याची को बहुमत द्वारा निलंबित किया गया था – 2017 के नियमों के अंतर्गत ऐसी कोई प्रक्रिया/व्यवस्था उपलब्ध नहीं है – प्रत्यर्थीगण का आचरण मनमाना एवं 2017 के नियमों के प्रतिकूल है।

***C. Indian Red Cross Society Branch Committee Rules, 2017, Schedule III, Clause 2(d) and Constitution – Article 226/227 – Principle of Natural Justice – Opportunity of Hearing* – Held – Regarding date of meeting, no proof of service of notice to petitioner – No opportunity of hearing granted – Order passed without following the principle of *audi alteram partem* – Clear violation of principle of natural justice – Impugned orders set aside – Petition allowed. (Paras 15 & 18 to 20)**

ग. भारतीय रेड क्रास सोसाइटी शाखा समिति नियम, 2017, अनुसूची III, खंड 2(डी) एवं संविधान – अनुच्छेद 226/227 – नैसर्गिक न्याय का सिद्धांत – सुनवाई का अवसर – अभिनिर्धारित – बैठक की तिथि के संबंध में, याची को नोटिस की तामील का कोई सबूत नहीं – सुनवाई का कोई अवसर प्रदान नहीं किया गया – दूसरे पक्ष को भी सुनने के सिद्धांत का पालन किये बगैर आदेश पारित किया गया – नैसर्गिक न्याय के सिद्धांत का स्पष्ट उल्लंघन – आक्षेपित आदेश अपास्त – याचिका मंजूर।

Cases referred :

AIR 1998 AP 205, (1978) 1 SCC 248, (1969) 2 SCC 262, (1978) 1 SCC 405, (2015) 8 SCC 519, (2014) 9 SCC 105, (2014) AIR (SCW) 1611.

Amit Kumar Singh, for the petitioner.
Samdarshi Tiwari, for the respondent Nos. 1 & 2.

O R D E R

SANJAY DWIVEDI, J. :- Considering the last order-sheet as also the issue involved in the case and with the consent of parties, the matter is heard finally.

2. By the instant petition, the petitioner has assailed the legality, validity and propriety of the order dated 08.03.2019 (Annexure-R/4) whereby the petitioner has been removed from the post of Chairman of the respondent-Society i.e. Indian Red Cross Society M.P. State Branch.

3. The challenge is founded mainly on the ground that before passing the order of removal or taking action against the petitioner, he has not been given any opportunity of hearing and therefore, the order suffers from violation of the principle of natural justice.

4. Learned counsel for the petitioner has contended that the charges, on the basis of which, the petitioner has been removed, do not fall under the basic fundamental rules as described in the Rules namely Indian Red Cross Society Branch Committee Rules, 2017 (in short "Rules of 2017"). He further submits that so far as the allegation of misconduct is concerned, that requires determination by an independent agency and for which, an Enquiry Committee has been constituted and that the Committee has yet to submit it's report and take a decision in respect of committing misconduct by the petitioner. But the impugned decision has been taken by the respondents before submitting the report by the said Enquiry Committee. He has also contended that as per the requirement of Rules of 2017, the meeting of Managing Committee needs 21 days prior notice and that requirement has not been fulfilled by the respondents. It is also contended by the petitioner that the quorum required for conducting the meeting of the Managing Committee was not there and thus, the decision taken by the Committee is illegal. He has also raised a ground that in the so-called meeting of the Managing Committee, there was no agenda regarding removal of the petitioner from the post of Chairman of the Society and in absence of any such agenda, if any discussion is made in the meeting, the same cannot be said to be proper and no decision on the said discussion can be taken. He further submits that if the overall conduct of the respondents is seen, it goes without saying that they have acted maliciously and have taken a decision for removal of the petitioner from the post of Chairman. It is also alleged by the petitioner that the respondents have not supplied any document, not even the complaint, on the basis of which, his powers have been suspended.

5. *Per contra,* learned counsel appearing for the respondents opposes the contentions of learned counsel for the petitioner and submits that as per the Rules of 2017, the power is vested with the Managing Committee to take a decision in respect of removal of the Chairman. He submits that the minimum requisite requirements for convening a meeting of Managing Committee has been fulfilled. As per the Rules, 10 days prior notice to the member of the Committee is required and that has been followed. He has also annexed the copy of notice dated 25.02.2019. He submits that the quorum which was required to convene a Managing Committee meeting was also there and that stand has been taken by them in their reply in Paragraphs-17 and 21 of the main return, which was not denied by the petitioner in his rejoinder. Accordingly, the stand taken by the respondents can be considered to be true and admitted. He further submits that since the Rules do not provide any provision for following the principle of natural justice or prior opportunity before taking decision for removal of the Chairman by the Managing Committee, the action taken by the respondents cannot be held to be illegal only because the principle of *audi alteram partem* has not been followed. He submits that it is gathered from the minutes of the meeting held on

08.03.2019 that several issues were discussed and the issue regarding removal of the Chairman has also been discussed and the majority of members present in the meeting, have taken unanimous decision for removal of the Chairman. He has also pointed out towards the minutes of the meeting to substantiate that the nature of the allegations made and supported by the members available in the said meeting, clearly constitute the misconduct on the part of the petitioner and his conduct can be considered to be detrimental to the reputation of the Society. He has contended that it is the power of the President to discuss the issue even though that is not under the agenda prescribed and as such, if in the given agenda, issue regarding removal of Chairman is not there but that has been discussed in the meeting of Managing Committee and decision has been taken thereof, it cannot be said to be illegal. He submits that prior to the meeting of the Managing Committee, an extraordinary Annual General Meeting was conducted on 23.02.2019 headed by the President, in which, several issues were discussed including the issue in respect of irregularities and illegalities committed by the petitioner.

He further submits that the decision taken by the Managing Committee is not dependant upon the decision of report of the Enquiry Committee because the scope of enquiry for which report is yet to come, there were different issues, therefore, if report is not submitted by the Committee, the decision taken by the Managing Committee cannot be held to be illegal. He has relied upon a decision reported in AIR 1998 AP 205 parties being *Samala Jayaramalah v. Government of Andhra Pradesh and Others.*

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

7. It is apposite to venture through the facts for disposal of this case that the instant petition has been filed initially challenging the order dated 23.07.2019 (Annexure-P/1) whereby, in the meeting of the Managing Committee, a decision has been taken for suspending the power and authority of the petitioner as Chairman of the Society till the High Level Committee appointed by the Society concludes its enquiry on the assigned issues. Further, the order dated 08.03.2019 (Annexure-R/4) was also challenged whereby in a meeting of the Managing Committee convened on 08.03.2019, a decision was taken to remove the petitioner from the office of Chairman of the Society. The order dated 08.03.2019 was annexed by the respondent No.1 and 2 in their preliminary reply and then in a rejoinder filed by the petitioner, the said order is also challenged. The Society was formed under the provisions of Indian Red Cross Society Act, 1920 (hereinafter referred to as the 'Act, 1920'). The President of India is the President of the Society. The objective of the Society is to contribute to the improvement of health, the prevention of the disease and maternity and child care in the community.

There is a State Branch of the Society which is governed by the M.P. State Branch Regulations, 1988 (hereinafter referred to as the 'Regulations, 1988'). The Governor of the State is the President of the Society of the State Branch. A notification was issued on 02.09.2019 supplemented the provisions of the Regulations, 1988. The petitioner contested the election as stipulated in the Regulations, 1988 and was declared elected for the said post. As per the certificate issued, the term of the Chairman of the Society was of three years. A list of all elected committee members for the State Branch was also issued vide Annexure-P/6. The meeting of the Society of State Branch was held on 09.01.2019. In the said meeting a resolution has been passed for cancelling the tenders whereby, number of Pharmaceutical Companies were allotted contract for sale/distribution of the medicines through outsourcing as the said decision was taken as there was no Managing Committee in existence. In the said meeting, it is also resolved that the procedure followed for allotting the work of sale and distribution of medicines to be inquired about and the report be placed before the Executive Committee and thereafter, a report to the EOW be also made. The Chairman, Vice Chairman and In-charge General Secretary have been asked to conduct the enquiry and submit a report in the next meeting of the Executive Committee. A complaint was made by respondent No.5 to the respondent No.2 against the petitioner alleging irregularities committed by the petitioner and to take appropriate action against him. It is also requested in the said complaint that the enquiry be conducted to ascertain the correctness of the charges and till the enquiry is completed, the powers of the Chairman be suspended so that he may not interfere in the enquiry. The said complaint is available on record as Annexure-P/8. Thereafter, a letter was issued from the office of respondent No.2 on 25.01.2019 asking explanation regarding alleged irregularities. The petitioner filed a detailed reply on 30.01.2019. From the office of respondent No.1 a notice was issued on 11.02.2019 apprising the petitioner that the Annual General Meeting of the Society of the State Branch had to be convened on 23.02.2019 at about 11.30 am in which, it is mentioned that the President has given his consent, therefore, it was instructed to issue notice to all concerned taking part in the meeting and forward the agenda of the meeting with the list of the members participating in the said meeting be forwarded. In response to the said letter, the petitioner sent a letter on 12.02.2019 apprising to the office of respondent No.1 that as per the requirement of Regulation 2009, notice for convening the Annual General Meeting has to be issued minimum 21 days before the date of meeting. It is also informed that as per the available documents for some of the district level branches the tenure of three years of the Managing Committee is over and the name of new elected representatives are still awaited. Thus, advice was sought that in the said circumstance what should be done. Thereafter, the office of respondent No.1 intimated the petitioner vide letter dated 13.02.2019 that instead of proposed meeting of annual general body an extra ordinary annual general meeting would

be convened on 23.02.2019 in the Governor's house and, therefore, asked to invite the members of the Managing Committee. Again the office of the petitioner issued a letter on 14.02.2019 to the office of respondent No.1 seeking guidance raising some sort of queries therein. The meeting was convened on 23.02.2019 in which a decision has been taken considering the complaint made against the petitioner that a committee be constituted for conducting an enquiry and till the report of the said committee comes, the power and authority of the petitioner as a Chairman be suspended and Mohit Shukla Vice Chairman was assigned the additional charge of the post of the Chairman.

8. Copy of the order i.e. 23.02.2019 was not supplied to the petitioner and since there were no complaints on requisite requirements, therefore, he challenged the said action by filing the writ petition i.e. W.P. No.4053/2019. The said petition was disposed of vide order dated 12.03.2019 directing the respondents to supply the copy of order if any passed within a period of seven days. Thereafter, the petitioner was supplied a copy of the impugned order dated 23.02.2019, however, the minutes of the meeting of 23.02.2019 were not supplied to the petitioner and as per the petitioner, the proceedings held on 23.02.2019 were totally illegal and the resolution passed therein is also liable to be quashed.

9. In response to the petition, a preliminary reply was filed by the respondents as there was a caveat on their behalf in which, they have also annexed the copy of the order dated 08.03.2019 apprising that the meeting of Managing Committee was also held on 08.03.2019 in which, a decision was taken to remove the petitioner from the post of the Chairman of the Society of the State Level Branch. The petitioner thereafter, made amendment in the petition stating that convening the meeting on 08.03.2019 of the Managing Committee is arbitrary, illegal and contrary to the provisions of rules and the decision taken by the respondents is in flagrant violation of principle of natural justice.

10. *Per contra,* the learned counsel for respondent Nos.1 and 2 initially filed the preliminary reply taking the stand therein that in a meeting of Managing Committee convened on 08.03.2019, a decision has already been taken for removal of the petitioner from the post of the Chairman. They have stated that such decision is in accordance with law and the petitioner may challenge the order of his removal. Thereafter, they have filed a detailed reply to the amended petition. The main contention made by the respondents is that the Regulation, 1988 does not exist as the same has been superseded and revised by the Rules of 2017 duly framed by the managing body of the Society with the provisional approval of the President of the Society (the Hon'ble President of India) in exercise of the powers conferred by the sub-clauses (e), (f) and (j) of subsection (1) of Section 5 of the Indian Red Cross Society Act, 1920. As per the respondents, Rule 11 of the Rules of 2017 prescribes the composition powers and tenure of the

members of the Managing Committee in Schedule-II. It is stated that as per Clause-5 the extra ordinary annual general meeting of the Branch to be convened at any time by the President of the State Branch for the purposes connected with and in the interest of the Branch. The Hon'ble Governor being the President of the State Branch does not require any prior notice of specified period. Though the basic procedure to inform all the members through the General Secretary is forwarded. It is also stated that the basic requirement of availability of requisite quorum was also followed. In the reply, it is also stated that as to what irregularities were committed by the petitioner showing total negligence in discharging his functions. It is also stated in the reply that in an extra ordinary annual general meeting held on 23.02.2019 various issues have been discussed on the agenda already formulated and other issues with the permission of the President. It is also stated that looking to the seriousness of the complaints and the issues raised in the meeting, the President thought it appropriate to hold a high level enquiry on all such issues. It is also stated by the respondents that in the order passed by the Court in a petition preferred by the petitioner, there was a direction to supply the copy of the order but not the minutes of the meeting. Proving the illegalities committed by the petitioner, the respondents have taken a shelter of Clause-7 of Schedule-II prescribing quorum of 30% of the eligible members present while holding the Annual General Meeting. As per the respondents in extra ordinary annual general meeting called by the President as per Clause-5 of Schedule-II, 62 out of 164 eligible members were present and voted. The presence of these members as per the respondents is more than the required number. It is also stated that the petitioner was also present in the meeting and had actively participated therein. It is also stated by the respondents that the petitioner was elected as a Chairman in June, 2018 but immediately thereafter, he started undue favouring of the wrong doers and then a letter was issued on 20.02.2019 from the office of respondent No.1 for convening an emergency extra ordinary general meeting. In the reply, the respondents have stated that the meeting of the Managing Committee was done after complying the requirements as per the Rules, 2017 and no irregularities as pointed out by the petitioner, were available. The respondents have also stated that the plea of violation of the principle of natural justice is misconceived. They relied upon Clause-2(d) of Schedule-III authorizing the Managing Committee to remove the Chairman in case of grave misconduct. The grave misconduct has also been defined. As per the respondents, the removal of the Chairman by the Managing Committee by the vote of majority is a democratic process. As per the respondents holding the post by an elected member is not a fundamental right but it is only a statutory right and after elected members have lost the confidence of the house then by way of no confidence motion if the majority of members reach to an opinion to remove the elected person then, there is no necessity to follow the principle of natural justice. As per the respondents since majority was against the petitioner and they voted against

him, therefore, his removal is according to law. As per the respondents, majority decision by voting is not like *quasi judicial* proceeding and, therefore, it is not required to follow the principle of natural justice. As such, they have stated that there is no illegality in the decision taken by the respondents and the petition deserves to be dismissed.

11. Considering the arguments advanced by the learned counsel for the parties and as per their stand taken, the following questions are required to be determined:-

(i) Whether, there is any provision for keeping the petitioner under suspension and as to whether the order of suspension passed against the petitioner is in accordance with law?

(ii) Whether, the respondents have followed the procedure for convening the meeting as prescribed under the Rules of 2017?

(iii) Whether the procedure adopted by the respondents for removing the petitioner from the post of Chairman of State Branch taking a decision unanimously by the majority votes of the Managing Committee is available and if not, then its impact?

(iv) Whether, the action taken by the respondents for removing the petitioner from the post of Chairman of State Branch suffers from violation of the principle of natural justice?

12. **Regarding question No.(i)** - The learned counsel for the petitioner has contended that the respondents in view of the annual general meeting held on 23.02.2019 resolved to conduct an enquiry to ascertain the correctness of the allegations in the complaint made by Neelesh Shukla. In pursuance to the complaint, a decision was taken in the annual general meeting held on 23.02.2019 to conduct high level enquiry and to appoint enquiry committee and until the report of said enquiry committee submitted, the petitioner's power as Chairman has been suspended and in his place Vice Chairman was handed over the charge and directed to perform the work of Chairman. Initially the said order was assailed by the petitioner by filing petition challenging the action of the respondents on diverse grounds but mainly on the ground that the power of suspension is not available and therefore the order is illegal. As per the reply submitted by the respondents in paragraph 5 of the main return, they have admitted that Regulation, 1988 does not exist and has been superseded. It is also stated that the Regulation, 1988 has been replaced by the Rules of 2017 in exercise of power conferred by sub-clause (e), (f) and (j) of Subsection (1) of Section 5 of the Act of 1920. Now, it is clear that the power for suspending the petitioner who is the elected Chairman of the Society, should be available in the provisions of Rules of 2017. Despite specific ground and contention raised by the counsel for the petitioner that the

power of suspension is not available with the respondents, no reply has been given neither during the course of arguments nor in the reply submitted by the respondents. As per their own admission that the provisions of Rules of 2017 are governed with the business of the State Level Society and also govern the other conditions of the office bearers. The provisions of Rule of 2017 are available on record. The petitioner as well as the respondents both have filed the same and after perusal of the same, nowhere it is provided that the Chairman of the State Level Society can be placed under suspension and its power can be suspended by the respondents especially respondent No.1. The original petition challenged the said action of the respondents with a specific ground that the Rules of 2017 do not contain any such provisions and as such the order dated 23.02.2019 is beyond the prescribed rules and regulations and sought quashment of the same. In response to the petition, a preliminary reply on behalf of respondents No.1 and 2 was filed, but the petition was filed on some other grounds, however, nowhere it is stated that as to under which authority, the petitioner has been placed under suspension and his power of Chairman has been withdrawn. Though there were several irregularities alleged and for which enquiry Committee was constituted but that does not mean that the power of the petitioner of Chairman could be withdrawn and he could be placed under suspension and the said power could be assigned to the Vice Chairman. Accordingly, without any specific provision under the Rules of 2017 and without disclosing the source of authority by the respondents to suspend the power of the Chairman and to place him under suspension, such an action cannot be given seal of approval by this Court and accordingly that order is held to be illegal, contrary to the provisions of the law and therefore is not sustainable in the eyes of law.

13. **Regarding question No.(ii)** :- It is clear from the minutes of the meeting that the respondents have supplied the same in which they have also attached the agenda of the meeting dated 08.03.2019, which is Annexure-R/3 filed alongwith the main return. From the said agenda, it is clear that there was no such agenda of the said meeting that the allegations against the petitioner or a proposal for his removal had to be discussed. In absence of any such agenda, the decision for removing the petitioner cannot be taken. The petitioner has pleaded and also the learned counsel for the petitioner has contended during the course of the arguments that in absence of any such agenda, the decision for removal of the petitioner cannot be taken that too when the petitioner was not given an opportunity to participate in the meeting and to be heard before taking such decision. The learned counsel for the respondents submits that it was the prerogative of the President of the Society to take-up any issue which is also not a part of the agenda. But, I am not satisfied with the same because if overall conduct of the respondents is seen, then it is clear that their conduct is arbitrary and such a decision cannot be taken. Accordingly, in my opinion the action of the

respondents taking decision in respect of the removal of the petitioner is contrary to the procedure prescribed under the Rules of 2017.

14. **Regarding question No.(iii)** :- As per the stand taken by the respondents in their main return and admitted in paragraph 4 that the order dated 08.03.2019 has been issued in pursuance to the unanimous majority votes of the Managing Committee following the procedure prescribed for removing the petitioner from the office of Chairman of State Branch as he lost the faith of the majority and further in paragraph 23 of the reply, they have admitted that the petitioner has been removed from the post of Chairman by the votes of majority which is a democratic process. For this purpose, the respondents are also relying upon the decision in the case of *Samala Jayaramalah* (supra) and also stated that if such a decision is taken by the majority of votes then the authority is not required to follow the principle of natural justice. A perusal of the record available and especially the provisions of the Rules of 2017, it is something surprising as to why such procedure can be adopted by the respondents whereas the Rules are totally silent and no such mechanism is available under the Rules for removal of the petitioner from the post of Chairman. The only procedure which is available for removing the elected Chairman of State Level Branch i.e. sub-clause (d) of Clause 2 of Schedule-III, which reads thus:

> "(d) In case of grave misconduct, the Managing Committee shall have the powers to remove the Chairman or Treasurer as the case may be. Grave misconduct for the purpose of removal is defined as the display of character or morality incompatible with the Fundamental Principles or engagement in activities which are detrimental to the reputation or the activities of the National Society."

The above sub-clause provides the power of Managing Committee to remove the petitioner from the post of Chairman but that too under a special circumstance when grave misconduct as per 7 Fundamental Principles as provided under the Rules are proved or engagement in activities which are detrimental to the reputation or the activities of the National Society. In the present case, so far as 7 Fundamental Principles as contained in Rule 3 of the Rules of 2017 are concerned, there is nothing found proved against the petitioner and even otherwise for alleged irregularities when High Level Enquiry Committee was constituted and was making enquiry and before the report was submitted, the petitioner was suspended, then as to how such decision can be taken, finding alleged irregularity proved against the petitioner. It is something surprising as to how such decision can be taken against the petitioner by following the procedure i.e. majority of votes of the members of the Managing Committee whereas no such procedure is available. It is worth noting that in the agenda there was no such proposal to be discussed in the meeting of Managing Committee scheduled on 08.03.2019 and the members were never informed about such discussion,

therefore, the said decision in my opinion is contrary to the law and without any competence and it can be easily inferred that the decision has been taken in a very hurried way. As far as the case law relied upon by the respondents is concerned, the Supreme Court has dealt with Section 245(1) of the Andhra Pradesh Panchayat Raj Act, 1994, which reads thus;-

> "245. Motion of no confidence in Upa-Sarpanch, President or Chairperson: (1) A motion expressing want of confidence in the Upa-Sarpanch or President or Vice-President or Chairperson or Vice-Chairperson may be made by giving a written notice of intention to move the motion in such form and to such authority as may be prescribed, signed by not less than one-half of the total number of members of the Gram Panchayat, Mandal Parishad, or as the case may be the Zila Parishad and further action on such notice shall be taken in accordance with the procedure prescribed:
>
> Provided that no notice of motion under this section shall be made within two years of the date of assumption of office by the person against whom the motion is sought to be moved:
>
> Provided further that no such notice shall be made against the same person more than once during his term of office.
>
> Explanation:- For the removal of doubts, it is hereby declared that for the purpose of this section the expression "total number of members" means, all the members who are entitled to vote in the election to the office concerned inclusive of the Sarpanch, President or Chairperson but irrespective of any vacancy existing in the office of such members at the time of meeting:
>
> Provided that a suspended office-bearer or member shall also be taken into consideration for computing the total number of members and he shall also be entitled to vote in a meeting held under this section: (2) if the motion is carried with the support of two thirds of the total number of members in the case of a Upa-Sarpanch, the Commissioner shall and in the case of the President or Vice-President or Chairperson or Vice-Chairperson, the Government shall by notification remove him from office and the resulting vacancy shall be filled in the same manner as a casual vacancy.
>
> [Explanation: For the purposes of this section, in the determination of two-thirds of the total number of members, any fraction below 0.5 shall be ignored and any fraction of 0.5 or above shall be taken as one.]"

For moving the no confidence motion against the chairperson and that was moved and decision was taken in the meeting of members for removal of chairperson then the Supreme Court has observed that in such situation following the principle of natural justice is not required. As already discussed hereinabove in the present case there is no such procedure available for moving the no confidence motion

against the Chairman and the Rules of 2017 provide the power for removal of the Chairman only under the circumstance when charge of grave misconduct is proved against him or his activities are found detrimental to the reputation of the Society. Accordingly, the procedure adopted by the respondents i.e. majority of votes is in violation to the provisions of Rules of 2017 and also for the members of the Managing Committee. Thus, the same cannot be accepted and in any manner cannot be considered to be valid and accordingly that action of the respondents is also not sustainable.

15. **Regarding question No.(iv):-** Further, it is to be seen whether the conduct of the respondents is in violation of the principles of natural justice or not. The learned counsel for the petitioner has contended that there is gross violation of the principles of natural justice taking action against the petitioner and not only that but it is alleged that the respondents have acted arbitrarily and with *mala fide* intention just to remove the petitioner from the post of Chairman. If the events of this case are seen from very inception, it would reveal that the respondents acted arbitrarily and violated the principles of natural justice. They have placed the petitioner under suspension without any competence and without following any procedure for placing him under suspension and not only that but the order of suspension was also not supplied to the petitioner and that was supplied only after the order passed by the High Court in a petition preferred by the petitioner. In the said petition, the High Court had directed the respondents to supply the copy of order dated 23.02.2019 but even though the petitioner was not supplied with the copy of minutes in which the decision to place the petitioner under suspension was taken. Then again, the order dated 08.03.2019 was not given to the petitioner, but he came to know about the order of his removal only when the preliminary objection to the petition was filed and that order was annexed as Annexure-R/4. The petitioner has alleged that the notices were not issued to the members of the Managing Committee for convening the meeting on 08.03.2019 and no such decision could be taken therein and even though, if the decision was taken as to why the copy of the order dated 08.03.2019 was not communicated to the petitioner. It is something surprising when the decision had already been taken to remove the petitioner from the post of Chairman then Annexure-R/2 an order issued on 15.03.2019 by respondent No.1 was issued without mentioning the fact that the Chairman had already been removed, even the enquiry officer issued notice on 20.03.2019 addressing the petitioner as a Chairman of the Managing Committee State Red Cross Branch. I find substance in the contention raised by the petitioner that everything was done behind his back. There is no proof available on record to show that the notice of meeting dated 08.03.2019 was served to the petitioner although the respondents alongwith their reply have annexed the dispatch register showing that the notices were issued to the members of the Managing Committee and also annexed the paper showing that a notice was

dispatched to the petitioner but that cannot be considered to be a proof of issuance of notice to the petitioner. When the petitioner came with a stand that no notice was issued to him then it was obligatory for the respondents to come with a specific stand that notice of meeting dated 08.03.2019 was issued to the petitioner and despite that he has not attended the meeting. It is something surprising that when every action was being taken against the petitioner why the orders were not supplied to him. It is also apparent that the respondents have adopted the procedure for removing the petitioner from the post of Chairman whereas such procedure is not available under the Rules of 2017. When enquiry committee was constituted to enquire about the allegations and in pursuance to the said enquiry, the petitioner was placed under suspension, then how the charges of misconduct found proved against the petitioner and decision was taken to remove him without giving him any opportunity to explain whether those charges were correct or not. The Supreme Court in series of decisions reported in (1978) 1 SCC 248 *(Mrs. Maneka Gandhi v. Union of India and another);* (1969) 2 SCC 262 *A.K.Kraipak and Others v. Union of India and Others* and (1978) 1 SCC 405 *Mohindhr Singh Gill and another v. Chief Election Commissioner, New Delhi and Others* has clearly laid down that in every action of the authority which carries civil consequences, the principle of natural justice has to be followed unless it is exclusively excluded or by implication under the requisite Rules.

16. In the latest decision, the Supreme Court, in the case of *Dharmpal Satyapal Limited vs. Deputy Commissioner of Central Excise, Gauhati and others* [(2015) 8 SCC 519], has been observed as under :-

> "It, thus, cannot be denied that the principles of natural justice are grounded in procedural fairness which ensures taking of correct decisions and procedural fairness is fundamentally an instrumental good, in the sense that procedure should be designed to ensure accurate or appropriate outcomes. In fact, procedural fairness is valuable in both instrumental and non-instrumental terms. It is on the aforesaid jurisprudential premise that the fundamental principles of natural justice, including audi alteram partem, have developed. It is for this reason that the courts have consistently insisted that such procedural fairness has to be adhered to before a decision is made and infraction thereof has led to the quashing of decisions taken.
>
> In many statutes, provisions are made ensuring that a notice is given to a person against whom an order is likely to be passed before a decision is made, but there may be instances where though an authority is vested with the powers to pass orders which have civil consequences, affecting the liberty or property of an individual but the statute may not contain a provision for prior hearing. But, what is important to be noted is that the applicability of principles of natural

> justice is not dependent upon any statutory provision. The principle has to be mandatorily applied irrespective of the fact as to whether there is any statutory provision or not. The opportunity to provide hearing before making any decision is considered to be a basic requirement in the court proceeding. Later on, this principle has been applied to other quasi-judicial authorities and other tribunals and ultimately it is now clearly laid down that even in the administrative actions, where the decision of the authority may result in civil consequences, a hearing before taking a decision is necessary. If the purpose of rules of natural justice is to prevent miscarriage of justice, one fails to see how these rules should not be made available to administrative inquiries."

17. Further, in the case of *Gorkha Security Services vs. Government (NCT of Delhi) and others* [(2014) 9 SCC 105], the Supreme Court has dealt with the implied applicability of the principle of *Audi Alteram Partem* and has observed as under :-

> "No doubt, rules of natural justice are not embodied rules nor can they be lifted to the position of fundamental rights. However, their aim is to secure justice and to prevent miscarriage of justice. It is now well-established proposition of law that unless a statutory provision either specifically or by necessary implication excludes the application of any rules of natural justice, any exercise of power prejudicially affecting another must be in conformity with the rules of natural justice. When it comes to the action of blacklisting which is termed as "civil death" it would be difficult to accept the proposition that without even putting the notice to such a contemplated action and giving him a chance to show cause as to why such an action be not taken, final order can be passed blacklisting such a person only on the premise that this is one of the actions so stated in the provisions of NIT.
>
> The impugned order passed by the respondents blacklisting the appellant without giving the appellant notice thereto, is contrary to the principles of natural justice as it was not specifically proposed and, therefore, there was no show-cause notice given to this effect before taking action of blacklisting against the appellant. However, it is clarified that it would be open to the respondents to take any action in this behalf after complying with the necessary procedural formalities delineated above."

18. Further in the case of *Nisha Devi vs. State of H.P. and others,* [(2014) AIR (SCW) 1611], the Supreme Court has observed as under :-

> **"5.** Trite though it is, we may yet again reiterate that the principle of audi alteram partem admits of no exception, and demands to be adhered to in all circumstances. In other words,

> before arriving at any decision which has serious implications and consequences to any person, such person must be heard in his defence. We find that the High Court did not notice the violation and infraction of this salutary principle of law. Accordingly, on this short ground, the impugned Judgments and Orders required to be set aside, and are so done. The matter is remanded back to the Divisional Commissioner for taking a fresh decision after giving due notice to the Appellant and affording her an opportunity of being heard. The Divisional Magistrate, Kullu, shall complete the proceedings expeditiously, and not later than six months from the date on which a copy of this Order is served on him."

Here in the present case, it clearly reveals that in every step, the respondents have violated the principle of natural justice and taken action against the petitioner without following the principle of *audi alteram partem.*

19. In view of the above discussion, it is clear that the action of the respondents of not only placing the petitioner under suspension but his removal from the post of Chairman is absolutely without jurisdiction, contrary to law and is clear example of arbitrary exercise on the part of the respondents that too in clear violation to the principle of natural justice.

20. Accordingly, the petition filed by the petitioner is **allowed** and the orders dated 23.02.2019 and 08.03.2019 held illegal, are hereby quashed. The respondents are directed to allow the petitioner to work as a Chairman of M.P. State Branch Red Cross Society and if at all the respondents are still inclined to take action, then they are at liberty to take the same after following the due procedure of law.

Petition allowed

I.L.R. [2019] M.P. 1707
APPELLATE CIVIL
Before Mr. Justice J.P. Gupta
S.A. No. 451/1993 (Jabalpur) decided on 30 July, 2019

RAMAYAN PRASAD (SINCE DECEASED) THROUGH LRs. SMT. SUMITRA & ors. …Appellants
Vs.
SMT. INDRAKALI & ors. …Respondents

***A. Limitation Act (36 of 1963), Article 58 – Suit for Declaration* – Held – For relief of declaration, as per Article 58, suit should be within 3 years when the right to sue first accrues – Bi-party mutation proceedings disposed in favour of appellants/defendants in 1970 by Board of Revenue –**

Suit filed by respondents /plaintiffs in 1977 is time barred – Judgment and decree of Courts below to the extent of declaration of title are set aside.

(Paras 9, 20 & 21)

क. परिसीमा अधिनियम (1963 का 36), अनुच्छेद 58 – घोषणा हेतु वाद – अभिनिर्धारित – घोषणा के अनुतोष के लिए, अनुच्छेद 58 के अनुसार, वाद लाने का अधिकार प्रथम बार प्रोद्भूत होने के 3 वर्षों के भीतर वाद प्रस्तुत किया जाना चाहिए – राजस्व बोर्ड द्वारा द्वि–पक्षीय नामांतरण कार्यवाहियों का निपटान अपीलार्थीगण/ प्रतिवादीगण के पक्ष में 1970 में किया गया – 1977 में प्रत्यर्थीगण/ वादीगण द्वारा प्रस्तुत वाद समय द्वारा वर्जित है – निचले न्यायालयों के निर्णय एवं डिक्री, स्वत्व की घोषणा के विस्तार तक अपास्त।

***B. Limitation Act (36 of 1963), Article 113 – Suit for Injunction – Adverse Possession* – Held – Plaintiffs/respondents are in possession since 1950 and it is pleaded that on 16.07.77, appellants interfered with their possession, thus suit was filed – As per Article 113, suit for perpetual injunction filed on 20.07.77, is within limitation, i.e. within 3 years – Further, plaintiffs completed adverse possession for more than 12 years before filing the suit and thus entitled to get relief of perpetual injunction to protect their possession – Judgment and decree of Courts below to the extent of perpetual injunction are confirmed.** **(Paras 10, 19 & 20)**

ख. परिसीमा अधिनियम (1963 का 36), अनुच्छेद 113 – व्यादेश हेतु वाद – प्रतिकूल कब्जा – अभिनिर्धारित – वादीगण/प्रत्यर्थीगण, सन् 1950 से कब्जे में हैं तथा यह अभिवाक् किया है कि 16.07.77 को, अपीलार्थीगण ने उनके कब्जे में हस्तक्षेप किया, अतः वाद प्रस्तुत किया गया था – अनुच्छेद 113 के अनुसार, शाश्वत व्यादेश के लिए दिनांक 20.07.77 को प्रस्तुत किया गया वाद, परिसीमा के भीतर है, अर्थात् 3 वर्षों के भीतर है – इसके अतिरिक्त, वादीगण ने वाद प्रस्तुत करने से पूर्व 12 वर्षों से अधिक का प्रतिकूल कब्जा पूर्ण कर लिया था एवं इसलिए अपने कब्जे का संरक्षण करने के लिए शाश्वत व्यादेश का अनुतोष पाने के हकदार हैं – निचले न्यायालयों के निर्णय एवं डिक्री, शाश्वत व्यादेश की सीमा तक पुष्ट।

***C. Limitation Act (36 of 1963), Article 100 – Applicability* – Held – Present suit is not for declaration of the order of the Board of Revenue as *null and void*, but for declaration of title and injunction – Article 100 is not attracted.** **(Para 9)**

ग. परिसीमा अधिनियम (1963 का 36), अनुच्छेद 100 – प्रयोज्यता – अभिनिर्धारित – वर्तमान वाद राजस्व बोर्ड के आदेश को अकृत एवं शून्य घोषित करने के लिए नहीं है बल्कि स्वत्व की घोषणा एवं व्यादेश हेतु है – अनुच्छेद 100 आकर्षित नहीं होता।

***D. Limitation Act (36 of 1963), Section 27 – Possession* – Held – It was in the knowledge of appellants that plaintiffs/respondents were in**

possession since 1950 as owner – Right of appellants to get the possession back within 12 years, is ceased by provisions of Section 27 of the Act.

(Para 17)

घ. परिसीमा अधिनियम (1963 का 36), धारा 27 – कब्जा – अभिनिर्धारित – अपीलार्थीगण को यह ज्ञात था कि वादीगण/प्रत्यर्थीगण सन् 1950 से स्वामी के रूप में कब्जे में थे – अपीलार्थीगण का, 12 वर्षों के भीतर कब्जा वापस प्राप्त करने का अधिकार, अधिनियम की धारा 27 के उपबंधों द्वारा समाप्त हो गया है।

***E. Registration Act (16 of 1908), Section 49 – Sale Deed* – Held – In absence of registration of sale deed, transfer of title cannot be effected – On basis of unregistered sale deed, respondents/plaintiffs cannot claim title.**

(Para 13)

ङ. रजिस्ट्रीकरण अधिनियम (1908 का 16), धारा 49 – विक्रय विलेख – अभिनिर्धारित – विक्रय विलेख के रजिस्ट्रीकरण के अभाव में, स्वत्व का अंतरण प्रभावित नहीं किया जा सकता – अरजिस्ट्रीकृत विक्रय विलेख के आधार पर, प्रत्यर्थीगण/वादीगण स्वत्व का दावा नहीं कर सकते।

***F. Civil Practice – Cause of Action – Maintainability of Suit* – Held – It cannot be said that if suit is time barred for declaration of title, then later on, a suit for perpetual injunction based on possession cannot be filed, as both have separate and distinct cause of action. (Para 10)**

च. सिविल पद्धति – वाद हेतुक – वाद की पोषणीयता – अभिनिर्धारित – यह नहीं कहा जा सकता कि यदि स्वत्व की घोषणा के लिए वाद समय द्वारा वर्जित है, तो बाद में, कब्जे पर आधारित शाश्वत व्यादेश के लिए एक वाद प्रस्तुत नहीं किया जा सकता, क्योंकि दोनों में पृथक और भिन्न वाद हेतुक हैं।

***G. Civil Practice – Adverse Possession* – Held – Plaintiff cannot claim declaration of title on basis of adverse possession – Plea of adverse possession can be considered only as shield/defence by defendants to protect their possession. (Para 19)**

छ. सिविल पद्धति – प्रतिकूल कब्जा – अभिनिर्धारित – वादी प्रतिकूल कब्जे के आधार पर स्वत्व की घोषणा का दावा नहीं कर सकता – प्रतिकूल कब्जे के अभिवाक् को प्रतिवादीगण द्वारा उनके कब्जे के संरक्षण हेतु केवल ढाल/बचाव के रूप में विचार में लिया जा सकता है।

Cases referred:

2015 M.P.L.J. 376, (2011) 9 SCC 126, 2014 (3) MPLJ 36 SC, 1987 JLJ 159, MPWN 1986 (1) SN 48.

R.K. Verma with *Ram Murthi Tiwari* and *Anjali Shrivastava*, for the appellants.

J.P. Dhimole, for the LRs. of respondent No. 2, respondent Nos. 3, 6, LRs. A, B, C, D & E of respondent No. 7, respondent Nos. 8 & 9.

J U D G M E N T

J.P. GUPTA, J. :- This second appeal has been preferred under Section 100 of the Code of Civil Procedure against the judgment and decree dated 20.09.1993 passed by First Addl. Sessions Judge, Sidhi in Civil Appeal No.27-A/1984, confirming the judgment and decree dated 17.2.1984 passed by Additional Civil Judge, Class I, Sidhi in Civil Suit No.455-A/1983 whereby respondents/plaintiffs' suit for declaration of title, possession and perpetual injunction for restraining to interfere in the possession of the suit premises has been decreed.

2. Facts giving rise to filing of the present appeal, briefly stated, are that on 20.7.1977, original plaintiff filed a suit for declaration and perpetual injunction before the trial court against the respondents with regard to the suit land bearing Khasra No.71, area 0.36 acres, Khasra No.73 area 0.65 acres, situate at village Gulbaspur, Tahsil Churhat, District Sidhi, stating that grandfather of the appellant Laxmi Narayan was the *Bhoomiswami* of the land and after his death, his son Ramgulam father of the appellants became the *Bhoomiswami* of the land and Ramgulam was missing more than seven years and none heard about him that whether he was alive or not. Deeming him to be dead, the appellants, being the heirs of Ramgulam sold the aforesaid land to the father of plaintiff nos.3 to 5 Mukutdhari for Rs. 216/- on 28.5.1950 and the sale deed was executed and possession was delivered. Mukutdhari purchased the aforesaid land as a property of Joint Hindu Family of plaintiffs, therefore, the plaintiffs are owners of the suit land and have joint possession. There was a dispute between plaintiffs and defendants with regard to mutation in revenue record which was disposed of in favour of the appellants/defendants by the Board of Revenue on 18.12.1970 but it was not in the notice of the plaintiffs. The plaintiffs are in continuous possession of the suit premises since 28.05.1950 as owners, therefore, also on the ground of adverse possession, they accrued title on the land before filing the suit. The appellants/defendants interfered in the possession of the plaintiffs, therefore, instant suit has been filed for declaration of title and possession on the land and perpetual injunction to restrain appellants/defendants to interfere in the possession of the respondents/plaintiffs.

3. Appellants/defendants have filed their written-statement contending that they never executed the sale deed and when their father was alive, they had no title over the property, therefore, question of transferring the suit land by sale deed does not arise and no title and interest occurred by the so called sale deed. The appellants/defendants are in possession of the suit land and the suit is time barred, proceeding for mutation was pending from 1961 and the Board of Revenue decided it finally by its order dated 18.12.1970 which was in the knowledge of the

plaintiffs, therefore, the suit for declaration is time barred and on the suit land, the plaintiffs have no adverse possession, therefore, suit be dismissed.

4. That, after trial, learned trial Court has held that the appellants/defendants executed the unregistered sale deed on 28.5.1950 in favour of Mukutdhari and also delivered possession to him and on the basis of the aforesaid sale deed, plaintiffs became owners of the property and they have legal possession on the suit premises and the suit is not time barred. In the appeal, learned First Appellate Court confirmed the findings of the trial Court with regard to execution of the sale deed by the appellants/defendants and in addition also held that plaintiffs are owners of the property on the ground of adverse possession.

5. Appellants/defendants have challenged the aforesaid findings of both the Courts below on the ground that admittedly the sale deed is an unregistered document of more than Rs.100/-and in absence of registration on the basis of sale deed, it cannot be deemed that title was transferred in favour of Mukutdhar, on behalf of him the plaintiffs are claiming the title. So far as claim of title based on adverse possession is concerned, there is no specific averment and evidence on record and also no issue was framed by the trial Court on this point, therefore, no evince (sic : evidence) has been led by any party. The possession in pursuance of the sale deed was permissive, it cannot be held to be adverse possession. Apart from it, on the basis of adverse possession, plaintiffs cannot claim relief for declaration of title. Only the defendant can take plea of adverse possession to protect their possession. The findings of both the Courts below are also contrary to the law with regard to considering the suit of the plaintiffs within time as it is categorically time barred in view of Articles 58 and 100 of the Limitation Act. Hence, the judgment and decree passed by both the Courts below deserve to be set aside.

6. This Court has admitted this appeal by order dated 8.12.1995 on the following Substantial Questions of Law:-

(i) "Whether under the facts and in the circumstances of the case, the suit of the plaintiff is barred by limitation?"

(ii) Whether, under the facts and in the circumstances of the case, in view of the findings recorded by the learned first appellate Court that execution of Ex.P-1 is not legally proved, could it be held that the plaintiffs are owners of the property?"

Having heard arguments of both the parties, on 8.5.2017, further following additional Substantial Questions of Law have been framed :-

(i) "Whether the Courts below are justified in granting decree in favour of respondents/plaintiffs on the ground of adverse possession for want of

specific pleadings, evidence perfecting adverse possession?"

(ii) "Whether, the Courts below are justified in granting decree on the basis of adverse possession whereas the suit was filed for grant of decree on the ground of sale deed dated 28.5.1950 (Ex.P/1) which has already been discarded by the Courts below?"

7. Learned counsel appearing on behalf of the respondents/plaintiffs has submitted that the findings of both the Courts below are in accordance with law. There is a specific plea with regard to adverse possession and the plaintiffs are in peaceful possession since 28.5.1950 and plaintiffs are entitled to get decree on the basis of adverse possession and concurrent findings of both the Courts below do not require any interference; hence the appeal be dismissed.

8. The appellants/defendants have raised an objection that the suit was time barred and it is contended that in view of Article 100 of the Limitation Act, the suit should be filed within a year after the order of the Board of Revenue dated 18.12.1970 and as per the provisions of Article 58 of the Limitation Act, the suit should have been brought within three years after the order of the Board of Revenue which is 18.12.1970 and the suit was filed on 20.7.1977, therefore, it is time barred and both the Courts below have committed grave legal error in not considering the aforesaid aspect of the case. On behalf of the plaintiffs/ respondents, it is submitted that their counsel did not inform about the order of the Board of Revenue, therefore, they were not aware about the order and the suit has been filed when the appellants/defendants interfere in the possession of the land. It is further submitted that the suit is not merely for declaration of title but it is also for injunction based on the possession on the property and, therefore, it is within three years from the date of the cause of action, i.e. 20.7.1977.

9. Having considered the aforesaid contentions, it is found that in this case, Article 100 of the Limitation Act does not attract as the present suit is not for declaration of the order of the Board of Revenue as *null and void.* In this regard, learned counsel for the appellants has placed reliance on the judgment of this Court passed in the case of *State of M.P. Vs. Najmuddin,* 2015 M.P.L.J. 376 which is based on the applicability of Article 100 of the Limitation Act, therefore, this case is not beneficial to the appellants as the present case comes in the purview of Articles 50 and 113 of Limitation Act. This suit has been filed for declaration and injunction on the basis of title and possession on the suit property. For the relief of declaration, suit should be within three years as per Article 58 of the Limitation Act when the right to sue first accrues. In this case, it is not disputed that the proceeding with regard to mutation was pending from 1961

to 1970 and in the aforesaid proceeding, the appellants/defendants challenged the title of the plaintiffs/respondents and the proceeding was finally disposed of in favour of the appellants/defendants by order dated 18.12.1970 passed by the Board of Revenue. The aforesaid proceeding was bi-party proceeding, therefore, after passing of the order on 18.12.1970, within three years the suit for declaration of title should have been filed, therefore, this suit for the relief of declaration is time barred and learned both the Courts below have committed legal error in not considering the aforesaid aspect.

10. The plaintiffs have also filed this case for perpetual injunction based on possession and it is proved that plaintiffs/respondents are in possession since 28.5.1950 and it is pleaded that on 16.7.1977 the appellants/defendants interfered in their possession, therefore, the suit has been filed, hence this suit for perpetual injunction is within limitation, in other words, within three years of the cause of action as required under Article 113 of the Limitation Act. Hence, it cannot be said that if the suit is time barred for declaration of title, then later on, a suit for perpetual injunction based on possession cannot be filed as both have separate and distinct cause of action.

11. Learned counsel appearing on behalf of appellants has placed reliance on the judgment of the Apex Court in the case of *Khatri Hotels Pvt. Ltd. Vs. Union of India and Others* reported in (2011) *9* SCC 126 in which suit for declaration and permanent injunction for restraining interference on the possession of the immovable property has found time barred in view of Article 58 of the Limitation Act but the facts of the aforesaid case is different. The title was challenged and interference in possession was also made near about it. In the circumstances, suit for both the relief found as time barred, therefore, the suit was declared to be time barred. Here as mentioned earlier, the interference in possession was made in the year 1977, therefore, here the suit for injunction cannot be said to be time barred. Learned counsel appearing on behalf of the appellants has emphasized on the words used "first accrues" in Article 58 and contended that when right to sue first accrues, it will run and the suit based on multiple cause of action, suit has to be filed on the basis of first cause of action accrues and in this regard also, reliance is placed on the judgment of *Khatri Hotel* (supra) but in view of this Court, in the aforesaid judgment, it has not laid down that for other relief based on different cause of action, the suit cannot be brought on the basis of right to sue accrues later on. The aforesaid words used in Article 58 would govern only the suit for the relief of declaration and it will not cover other relief governed by other Articles of the Limitation Act.

12. In view of the aforesaid discussion, plaintiffs/respondents' suit for declaration is time barred but the suit for perpetual injunction is not time barred. Accordingly, substantial question of law no.1 is answered.

13. Having heard learned counsel for the parties and on perusal of the record, it is found that it is not disputed that the sale deed (Ex. P/1) executed by the appellants in favour of Mukutdhari on 28.5.1950 is an unregistered sale deed of the suit land for Rs. 216/-, therefore, the registration of the sale deed is must as per the provisions of the Indian Registration Act. In absence of the registration in view of the provisions of Section 49 of the said Act, the transfer of title cannot be effected, hence, on the basis of the aforesaid unregistered sale deed, the plaintiffs/respondents cannot claim the title and no title can be declared on the basis of such unregistered sale deed.

14. It is also the concurrent finding of both the Courts below that the plaintiffs/respondents are in possession of the suit land since the date of execution of the aforesaid unregistered sale deed Ex. P/1 dated 28.5.1950 and they are claiming the possession as owner on the basis of the sale deed and this fact has remained in the knowledge of the appellants/defendants and the mutation proceedings started in the year 1961. The plaintiffs/respondents are claiming the ownership on the basis of the aforesaid unregistered sale deed Ex. P/1 and their possession completed more than 12 years before filing of the suit and the learned First Appellate Court considering the aforesaid facts decided that the plaintiffs/respondents have acquired title on the suit land on the basis of adverse possession and, therefore, they are entitled to decree of declaration of title.

15. Learned counsel appearing on behalf of the appellants has contended that in absence of specific pleading with regard to adverse possession and without framing any specific issue, without giving opportunity to adduce evidence, on the basis of adverse possession, the suit cannot be decreed. It is further submitted that possession based on an unregistered sale deed cannot be considered to be adverse possession. It was permissive possession, therefore, it will be ever remaining permissive possession till it is not established that it turned in hostile possession from specific date. It is further submitted that plaintiffs/respondents cannot claim declaration of title on the basis of adverse possession. The plea of adverse possession is available only to a defendant as a shield/defence of his possession as held by the Apex Court in the case of *Gurdwara Sahib Vs. Gram Panchayat at Village Sirthala* 2014(3) MPLJ 36 SC.

16. Learned counsel appearing on behalf of the plaintiffs/respondents has submitted that there is a specific plea in the plaint that the plaintiffs are in continuous possession since 28.5.1950 on the basis of the aforesaid unregistered sale deed as owner and their possession are peaceful and on the basis of adverse possession they have acquire title on the suit property and the appellants/ defendants stated that the plaintiffs/respondents were never in possession of the suit property and both the parties after considering the aforesaid pleadings have adduced their evidence deeming that the issue of adverse possession is involved in

the suit, therefore, merely on the ground that trial Court has not framed specific issue, it cannot be said that the issue of adverse possession cannot be dealt with by the Appellate Court and the first Appellate Court has not committed any error considering the plea of adverse possession and relying on the judgment of this Court passed in the case of *Sukhibai and others Vs. Limya and Others* 1987 JLJ 159 in which it is held that long possession for over 12 years as a owner under unregistered document will be deemed to be adverse possession and right accrues in favour of the purchaser.

17. The perusal of the record in the light of the aforesaid contentions in view of this Court, it cannot be said that in this case, there is no pleading with regard to adverse possession. Similarly it cannot be said that parties are not aware about the involvement of issue of adverse possession in this case and parties have also adduced the evidence and it is found that the fact that plaintiffs/respondents are in possession of the suit land since 28.5.1950 as owner, was in the knowledge of the appellants/respondents since beginning and later on since 1961 while the proceedings for mutation were commenced, therefore, the appellants/defendants have a right to get the possession back within 12 years has been ceased as held by this Court in the aforesaid judgment of *Sukhibai* (supra). Apart from it, this Court in another judgment *Abdul Karim Vs. Nanda* MPWN 1986 (1) SN 48 also held that possession given under invalid sale deed and suit for restoration of possession not filed within 12 years, the title of the purchaser perfected by the adverse possession. In view of the aforesaid discussion in this case, there is no hesitation to held that the plaintiffs/respondents' possession on the suit land matured by adverse possession and right of the appellants/defendants ceased by the provisions of Section 27 of the Indian Limitation Act.

18. Now the question is whether the plaintiffs/respondents can claim relief of declaration of title on the basis of the adverse possession. In this regard, concept of law has been changed and Hon'ble the Apex Court in the case of *Gurdwara Sahib* (supra) has held that

> *"the suit for relief of adverse possession is not maintainable even if the plaintiff is found to be in adverse possession it cannot seek a declaration to the effect that such adverse possession as matured into ownership. Only if proceedings are filed against person found in adverse possession he can use his adverse possession as a shield/defence. The Apex Court in this case also made it clear that though the suit of the appellant seeking relief of declaration has been dismissed, in case respondents file suit for possession and/or ejectment of the appellant, it would be open to the appellant to plead in defence that the appellant had become the owner of the property by adverse possession. Needless to mention at this stage, the appellant shall also be at liberty to plead that findings of issue No.1*

to the effect that the appellant is in possession of suit property since 13.4.1952 operates as res judicata. Subject to this clarification, the appeal is dismissed".

(emphasis supplied)

19. In view of aforesaid enunciation of law by the Apex Court, it is clear that the plaintiffs cannot claim the decree for declaration of title on the basis of adverse possession. The plea of adverse possession can be considered only as shield/defence by the defendants to protect the possession, therefore, learned first Appellate Court has committed legal error in granting the decree of title on the basis of the adverse possession and to that extent, the decree deserves to be set aside.

20. In view of the above discussion, it is held that the suit filed by the plaintiffs is time barred for the relief of declaration but for the relief of injunction, it is within time. The plaintiffs/respondents do not get title on the suit premises on the basis of the unregistered sale deed and they are also not entitled to get declaration of title on the basis of adverse possession. However, they have completed adverse possession on the suit land for more than 12 years before filing of the suit, in the light of the law laid down by the Apex Court in the case of *Gurdwara Sahib* (supra) the plaintiffs/respondents are entitled to get relief of perpetual injunction to protect their possession on the suit land against the appellants/defendants.

21. The aforesaid substantial questions of law are answered accordingly and resultantly, the judgment and decree of both the Courts below are set aside to the extent of declaration of title of the plaintiffs/respondents on the suit premises and the judgment and decree is confirmed with regard to perpetual injunction against the appellants/defendants to restrain them from interfering in the possession of respondents/plaintiffs on the suit land without following due process of law.

22. In the facts and circumstances of this case, the parties to appeal will bear their own cost.

Order accordingly

I.L.R. [2019] M.P. 1717
APPELLATE CIVIL
Before Mr. Justice J.P. Gupta

F.A. No. 646/2013 (Jabalpur) decided on 1 August, 2019

ADARSH BALAK MANDIR …Appellant

Vs.

CHAIRMAN, NAGAR PALIKA PARISHAD, HARDA & ors. …Respondents

***A. Easement Act (5 of 1882), Section 52 & 60 – Grant of Land by Government – License* – Held – Suit land was granted for use as a playground without any consideration and fee, thus comes in purview of definition of License as defined u/S 52 of the Act of 1882 and in absence of specific pleading and proof of term of grant, same is revocable u/S 60 of the Act – Licensee has no right to claim relief of injunction against the grantor – Appellant/plaintiff failed to plead the terms of grant and further, no evidence adduced to prove the same – Appeal dismissed. (Paras 19, 21, 24 & 25)**

क. सुखाचार अधिनियम (1882 का 5), धारा 52 व 60 – सरकार द्वारा भूमि का अनुदान – अनुज्ञप्ति – अभिनिर्धारित – वाद भूमि का अनुदान बिना किसी प्रतिफल एवं शुल्क के खेल के मैदान के रूप में उपयोग हेतु किया गया था, अतः 1882 के अधिनियम की धारा 52 के अंतर्गत परिभाषित अनुज्ञप्ति की परिभाषा के भीतर आता है तथा विनिर्दिष्ट अभिकथन एवं अनुदान की शर्त के सबूत के अभाव में, अधिनियम की धारा 60 के अंतर्गत उक्त प्रतिसंहरणीय है – अनुज्ञप्तिधारी को अनुदानकर्ता के विरूद्ध व्यादेश के अनुतोष का दावा करने का कोई अधिकार नहीं है – अपीलार्थी/वादी अनुदान की शर्तों का अभिवाक् करने में विफल रहा तथा इसके अतिरिक्त, उक्त को साबित करने हेतु कोई साक्ष्य पेश नहीं किया गया – अपील खारिज।

***B. Government Grants Act (15 of 1895), Section 2 & 3 and Transfer of Property Act (4 of 1882) – Applicability* – Held – Act of 1882 is not applicable to any grant made under the provisions of Act of 1895 and it is mandatory u/S 3 of the Act that, grant will be governed by its term despite of anything in any other law. (Para 23)**

ख. सरकारी अनुदान अधिनियम (1895 का 15), धारा 2 व 3 एवं सम्पत्ति अन्तरण अधिनियम (1882 का 4) – प्रयोज्यता – अभिनिर्धारित – 1882 के अधिनियम, 1895 के अधिनियम के उपबंधों के अंतर्गत किये गये किसी अनुदान पर लागू नहीं होता तथा अधिनियम की धारा 3 के अंतर्गत यह आज्ञापक है कि अनुदान किसी अन्य विधि में कुछ भी होने के बावजूद अपनी शर्तों द्वारा शासित होगा।

***C. Civil Procedure Code (5 of 1908), Section 80(1) & (2) – Notice – Maintainability of Suit* – Held – Suit was filed after taking permission u/S**

80(2) CPC which was never further challenged and attained finality – No requirement of notice u/S 80(1) CPC – Suit is maintainable. (Para 9 & 10)

ग. सिविल प्रक्रिया संहिता (1908 का 5), धारा 80(1) व (2) – नोटिस – वाद की पोषणीयता – अभिनिर्धारित – सि.प्र.सं. की धारा 80(2) के अंतर्गत अनुमति लेने के पश्चात् वाद प्रस्तुत किया गया था जिसे आगे कभी चुनौती नहीं दी गई थी तथा उसने अंतिमता प्राप्त कर ली – सि.प्र.सं. की धारा 80(1) के अंतर्गत नोटिस की कोई आवश्यकता नहीं – वाद पोषणीय है।

***D. Municipalities Act, M.P. (37 of 1961), Section 319 – Notice – Applicability of Provision* – Held – Suit is for declaration of title and protection of possession – No action under Act of 1961 has been challenged – Provision of Section 319 of the Act of 1961 not attracted, thus no requirement of notice thereunder. (Paras 11, 14 & 15)**

घ. नगरपालिका अधिनियम, म.प्र. (1961 का 37), धारा 319 – नोटिस – उपबंध की प्रयोज्यता – अभिनिर्धारित – वाद, हक की घोषणा तथा कब्जे के संरक्षण हेतु है – 1961 के अधिनियम के अंतर्गत किसी कार्रवाई को चुनौती नहीं दी गई है – 1961 के अधिनियम की धारा 319 का उपबंध आकर्षित नहीं होता, अतः इस आधार पर नोटिस की कोई आवश्यकता नहीं।

***E. Civil Practice – Limitation* – Held – There is no evidence to prove the fact that in 1983, transfer of land by State Government to Trust, which was taken place on paper, was in the knowledge of the Appellant/ plaintiff – Trial Court rightly held that, suit is not barred by time. (Para 16)**

ङ. सिविल पद्धति – परिसीमा – अभिनिर्धारित – इस तथ्य को साबित करने हेतु कोई साक्ष्य नहीं है कि 1983 में, राज्य सरकार द्वारा न्यास को भूमि का अंतरण, जो कि कागज पर किया गया था, अपीलार्थी/वादी के ज्ञान में था – विचारण न्यायालय ने उचित रूप से अभिनिर्धारित किया कि, वाद समय द्वारा वर्जित नहीं है।

***F. Civil Practice – Title* – Held – Suit land was not given on lease or as a gift – As per evidence, permission was given for lying fencing and further exchange of some part of land with another land of the government, do not confer any right of appellant/plaintiff on suit land – No document of title produced by appellant to prove the title – Suit for declaration of title rightly dismissed – Appeal dismissed. (Para 17)**

च. सिविल पद्धति – हक – अभिनिर्धारित – वाद भूमि पट्टे पर अथवा दान स्वरूप नहीं दी गई थी – साक्ष्य अनुसार, अनुमति बाड़ लगाने तथा इसके अतिरिक्त भूमि के कुछ हिस्से का सरकार की अन्य भूमि के साथ आदान–प्रदान करने हेतु दी गई थी, जो कि वाद भूमि पर अपीलार्थी/वादी को कोई अधिकार प्रदत्त नहीं करती – अपीलार्थी द्वारा अपने हक को साबित करने के लिए हक का कोई दस्तावेज प्रस्तुत नहीं किया गया – हक की घोषणा के लिए वाद उचित रूप से खारिज – अपील खारिज।

Cases referred:

2005 (3) MPLJ, 530, 2002 (1) MPLJ 172, 1958 MPLJ 676, C.R. No. 328/1970 decided on 06.10.1972.

R.P. Agrawal, Pranjal Agrawal with *Hemant Namdeo*, for the appellant/plaintiff.

V.S. Shroti with *Ashish Shroti*, for the respondents/defendants.

J U D G M E N T

J.P. GUPTA, J. :- This appeal has been preferred against the judgment and decree dated 3.8.2013 passed in Civil Suit No. 19-A/12 passed by 1st Additional District Judge, Harda whereby the appellant's/plaintiff's suit for declaration of Bhuswami right and the possession over suit land of 1.97 acres land out of Khasra no. 237, area 0.55 acres, Khasra No. 238, area 0.15 acres, Khasra No. 239, area 1.53 acres and to remove the Vardan complex made over it and to delete the name of respondent no. 1 from revenue record and to restrain the respondents/ defendants from making any construction and to sell the shops, was rejected.

2. It is not disputed in this case that the aforesaid suit land was given by erstwhile Provincial Government of CP and Berar by Memo dated 20.9.1943 to the Maharashtra Children Club, Harda for use as play ground. The appellant/ plaintiff is successor of Maharashtra Children Club. On the aforesaid land, respondents/defendants are constructing sport complex as well as shopping complex on the basis of the aid given by the Central Government to provide multifarious facility for sports with the modern equipments of exercise and play activities.

3. On 3.6.2005, the appellant/plaintiff files a suit before the Additional District Judge, Harda stating that after getting the aforesaid land from the provincial government, the appellant/plaintiff is using it for the purpose of play grounds and cultural activities organized by the institute. On 5.9.1988, a part of aforesaid land was exchanged with the respondent no. 2, Municipal Council, Harda and the appellant/plaintiff is owner of the land and without following the due procedure of law, name of the respondent no. 2/Municipal Council, Harda has been recorded in the revenue record and this fact came into the knowledge of the appellant/plaintiff on 25.4.2005 and it was also come into the notice of the appellant/plaintiff that the respondents/defendants are intended to construct the sport complex and shops, therefore, the suit is filed to get aforesaid relief against the respondents/defendants with permission under Section 80 (2) of the CPC.

4. On behalf of the respondent/defendant nos. 1 and 2 and respondent/ defendant nos. 3 to 6 filed written statements separately denied the claim of the plaintiff/appellant and stated that on behalf of the appellant/plaintiff, the lands

were not being used for sports and cultural activities and on account of breach of terms of the allotment, it has been cancelled and advance possession has been given to the respondent/defendant no. 2, Municipal Council, Harda and in the revenue record, necessary correction has been done in accordance with law and the construction of Vardhan complex and other constructions have been done legally. The appellant/plaintiff has no right and title to challenge it. Apart from it the suit is not maintainable because no notices under Section 80 of the CPC have been given, hence the suit be dismissed.

5. After trial, the learned trial Court has held that the suit land is a state government land and the appellant/plaintiff has not adduced any evidence to show its Bhuswami rights and Patta or ownership over it and it appears that the only permission was given for organizing sports activities and the appellant/plaintiff was not using the disputed land for sports and cultural activities, therefore, the appellant/plaintiff is not entitled to get any relief in the suit. Further dismissed the suit on the ground of non-compliance of provision of Section 80 (1) of the CPC and Section 319 of M.P. Municipalities Act, 1961 as the notices required under the aforesaid sections have not been given before filing of the suit.

6. Challenging the aforesaid findings, this appeal has been preferred on the ground that the impugned finding of the learned trial Court is absolutely illegal, erroneous and arbitrary and the learned trial Court has completely failed to appreciate the documentary and oral evidence in right perspective and resulted into the impugned judgment and decree. The suit land was given under The (Government) Grants Act, 1895 by Provincial Government and this grant will govern by the provision of The (Government) Grants Act, 1895 and it will not come under the provision of M.P. Land Revenue Code. The respondent nos. 3 to 6 have failed to produce any evidence, on behalf of the State Government with regard to cancellation of allotment of the suit premises and taking possession of the appellant/plaintiff and the learned trial Court has committed legal error in ignoring the fact that the land was given by the provincial government on the permanent lease, therefore, the dismissal of suit and denying the aforesaid relief is contrary to law and further submitted that learned trial Court has wrongly dismissed the suit on the ground of non-compliance of provision of Section 80 (1) of CPC and 319 of MP Municipalities Act, 1961 as with regard to non-compliance of Section 319 of M.P. Municipalities Act, 1961 no objection has been taken by the respondent nos. 1 and 2 and apart from it, in the present case, no such notices are required as it is the suit for declaration, title and injunction. Similarly, the provision of Section 80 (1) of CPC also not applicable in this case as the suit has been filed after taking permission under Section 80 (2) of the CPC. In such case, requirement of notices is not mandatory. In this regard, learned trial Court has mislead itself. Hence the impugned judgment and decree be set aside and the suit of the appellant/plaintiff be decreed.

7. Learned counsel appearing on behalf of the respondent nos. 1 and 2 has submitted that the suit land was given to the appellant/plaintiff for use as a play ground and the land was not given on lease or as a gift as the land was granted for specific use, therefore, no right of ownership or Bhuswami rights can be claimed under any law and the exchange of land with the respondent nos. 1 and 2 with the permission of the Government does not confer any title of the appellant/plaintiff on the land. In this regard language of Ex. P-37 is clear. Apart from it, the suit is time barred. The advance possession of the suit land was given by the State Government in the year 1983 to the Town Improvement Trust, Harda by order dated 4.10.2005, permission was granted to the appellant/plaintiff for using the land as play ground was cancelled and the learned trial Court rightly dismissed the suit for want of notices under Section 80(1) of the CPC and Section 319 M.P. Municipalities Act, 1961. Therefore, the appeal has no substance. It should be dismissed with cost.

8. Having heard the contention of learned counsel for the parties and perusal of record, in view of this court in this appeal following questions arise for determination :-

> 1. Whether the trial Court committed legal error in rejecting the appellant/plaintiff's suit for want of the notices under Section 80 of CPC and under Section 319 of the M.P. Municipalities Act, 1961?
>
> 2. Whether the learned trial Court has committed legal error in not holding that the suit is time barred?
>
> 3. Whether the learned trial Court had committed legal error holding that the appellant/plaintiff has no right, title and interest in the suit land?

9. **Question No. 1** :- On perusal of the record of trial Court, it is found that vide order dated 4.6.2005, District Judge, Harda gave permission to file this suit under Section 80 (2) of the CPC in absence of notices under Section 80 (1) of the CPC. Neither this order was challenged before the trial Court nor it has been challenged here by way of cross-objection, therefore, the suit cannot be dismissed for want of notices under Section 80 (1) of the CPC, the learned trial Court has wrongly relied on the case of *Municipality, through Chief Municipal Officer, Raghogarh v. Gas Authority of India Ltd and ors,* 2005 (3) MPLJ, 530. As in the aforesaid case, the permission given under Section 80 (2) of the CPC was challenged before the appellate Court and it was found that the permission was given illegal and no notices were given under Section 80 of the CPC. Hence this case law is not applicable in the fact and circumstances of the present case and learned trial Court completely ignored the circumstances that the suit was filed after taking permission under Section 80 (2) of CPC and which attended finality.

10. Learned counsel appearing on behalf of the respondent nos. 1 and 2 has also placed reliance on the judgment of this court passed in *Manoj Kumar*

Shrivastava v. Arvind Kumar Choubey 2002 (1) MPLJ 172, in which the notice given under Section 80 of CPC was considered insufficient as the same did not fulfill the requirement of statutory notice. The fact of the present case is different. Therefore, the judgment passed in *Manoj Kumar Shrivastava* (Supra) is not relevant here. Hence it cannot be held that the suit is not maintainable for want of notice under Section 80(1) of CPC.

11. So far the notices under Section 319 of M.P. Municipalities Act, 1961 are concerned, the present suit is for declaration of title and protection of possession. It is not a suit to challenge the action taken under the Municipal Act, therefore, the aforesaid provision is not attracted in this case.

12. In this regard, the learned counsel for the appellant/plaintiff has rightly placed reliance on the judgment of this court passed in *Kanhaiyalal v. Nagar Palika Dewas and another,* 1958 MPLJ 676 in which Section 17 (1) of Dewas Municipality Act, 1941 was considered and the aforesaid provision was same as under Section 319 of the M.P. Municipalities Act, 1961 in which this court held that the provision of Section 17 of the Dewas Municipalities Act does not attract to the suit for declaration of the title to a land, then it follows that it is also not attracted to suit in so far as it claims, the relief of declaration with regard to the demolition of the wall.

13. Learned counsel for the appellant/plaintiff has also placed reliance on the judgment of this court passed by **Indore Bench in Civil Revision No. 328/1970 dated 6.10.1972.** The relevant para 6 is as under :-

> 6. It is no doubt true that under Section 319 notice is a must before filing of the suit but that must relate to "for anything done or purporting to be done under the Act by the Council or any Councillor, officer or servant thereof or any person acting under the direction of such Council, Councillor, officer or servant". In the present case the applicant Municipal Committee wanted to remove the encroachment of the non-applicant and the non-applicant is merely asserting his title and for the declaration of his title he filed the present suit. A mere notice by the council cannot be termed as an act done. The assertion of title to a property cannot be said to be doing an act or purporting to do an act and as such the suit if filed by the plaintiff cannot be said to be one for any act done or purporting to be done under the Act by the Council or any officer. The relief of declaration that the encroachment cannot be removed as the property belongs to the non-applicant is merely an ancillary relief of the declaration of title. If I hold that clause (1) of Sec. 319 of the Act is not attracted to a suit for declaration of title to a land, then necessarily follows that it is also not attracted to the suit in so far as it claims the relief of declaration with regard to demolition of the encroachment. Mere combining of the two reliefs that is to say reliefs for declaration and injunction in the same suit would not attract the

provisions of clause (1) of Section 319. A suit for injunction could be filed without notice and there is no doubt about it. Sub-Clause (3) of Section 319 of the Act is clear on the point. A suit for declaration of title could also be filed without notice as it does not relate to any act done or purporting to be done under the Act by the Municipality or any of its officers which is a condition precedent when a notice is required to be given in a suit where such an act is being challenged. The object of the provision of clause (1) of Section 319 of the Act is to give an opportunity to reconsider the position with regard to the claim and to make amends or settle the claim if that is necessary looking to the notice of the party. This principle cannot be applied to a suit whose object was to obtain a declaration of title to the property. Since a suit for injunction could be filed without notice under clause (3) of Sec. 319 of the Act and a suit for declaration for title to the property can also be filed without notice, it was not at all necessary in the present case, even though both the reliefs were claimed by the non-applicant in the same suit, to serve a notice on the applicant. The lower Court has correctly held that the present suit is maintainable without service of a notice on the applicant as contemplated under clause (1) of Section 319 of the Act."

14. On the other hand the learned counsel appearing on behalf of the respondent nos. 1 and 2 has placed reliance on the judgment passed in *Municipality, through CMO* (Supra) in which the suit was filed to restrain the municipality to recover the external development fees without giving notices under Section 319 of the Municipalities Act, 1961 therefore, in that case, the requirement of the notices was considered essential but the fact of the present case is different as in the present case, no action under M.P. Municipalities Act has been challenged. Similarly, another judgment relied by the learned counsel for the respondent *Manoj Kumar* (Supra) is concerned the same is also relating to the suit for damages on account of demolition of Hotel by municipal corporation in which it is held that without notice suit was not maintainable, accordingly, the facts of that case is totally different from the present case.

15. In view of the discussions, it is held that in the present case, there is no requirement of notices under Section 80 (1) of the CPC or 319 of the Municipalities Act, 1961 before filing of the suit, therefore, learned trial Court has committed legal error in holding that the suit is not maintainable for want of the aforesaid notices.

16. **Question no. 2 :** It is contended by learned counsel for the respondent nos. 1 and 2 that the suit was barred as the advance possession was given by the State Government in the year 1983 to the Town Improvement Trust but in the case, there is no evidence to prove the fact that the aforesaid so called transfer of possession, which was taken on the paper, was taken place in the knowledge of the appellant/plaintiff in absence of it this cannot be said that the suit of the

appellant/plaintiff is time barred, therefore, learned trial Court has not committed any error holding that the suit is within time.

17. **Question no. 3** :- Now next question is that whether the appellant/plaintiff has established any title, interest over the suit property and learned trial Court has committed error in dismissing the suit? According to the pleading of the appellant/plaintiff, the suit land was given to the appellant/plaintiff for use as a play ground by the order of the grant dated 20.9.1943. As per the pleading of the appellant/plaintiff, the suit land was not given on lease or as a gift. So far permission for lying fencing and to exchange some part of land with another land of the respondent nos. 1 and 2 by Ex. P-37 is concerned, the same do not confer any right of the appellant/plaintiff to the suit land. Apart from it, there is no pleading with regard to grant of accrual of title to the suit land. The evidence laid by the appellant/plaintiff by the statements of Abhay Kakre P.W. 1 and Krishna Bohare P.W. 2 are related to use of the land and getting permission for fencing of the land and exchange of some part of the land from respondent nos. 1 and 2 with the permission of the Government and no document has been filed to prove the fact that the appellant/plaintiff has got any title in the suit land, therefore, learned trial Court has not committed any error in dismissing the suit for declaration of title.

18. Learned counsel appearing on behalf of the appellant/plaintiff has submitted here that the suit land which was given by the CP and Berar Govt. under The (Government) Grants Act, 1895 and on this grant, Provision of Transfer of Property Act is not applicable and this grant can be cancelled only on the terms of the grant and no action has been taken in the terms of the grant to cancel it, therefore, the respondents/defendants cannot deprive the appellant/plaintiff to use the suit land as a play ground and to that extent the appellant's suit should have been decreed.

19. In the present case, on behalf of the respondents/defendants, no iota of evidence or any document has been produced to establish the fact that the grant was given on which terms. Neither the term has been pleaded nor any evidence has been adduced to prove the terms in accordance with Evidence Act.

20. Learned counsel appearing on behalf of respondent nos. 1 and 2 has further contended that in absence of specific pleadings and evidence with regard to terms of grant, the term of the grant cannot be implemented in air and further submitted that the grant came in purview of license and it was only for use of the land for specific purpose without any premium or fee, therefore, it can be revoked at any time by the M.P. State Government who is successor of erstwhile C.P. and Berar Government and licensee has no right to claim injunction or possession except the claim of compensation under Section 64 of the Indian Easement Act, if the license was granted for consideration, at present case, this section is also not

applicable, as no consideration has been paid for the license. Therefore, the appellant/plaintiff has no right to get any relief in this case.

21. In the present case, the appellant/plaintiff has not pleaded the terms of the grant and no evidence has been adduced to prove the term of the grant. In this regard, it is said that the copy of the deed of the grant is available in the record of the revenue court which was called by the learned trial Court during the trial and it is also available in this court. But in view of this court, the document which has not been tendered in evidence cannot be considered as piece of evidence in the case and no reliance can be placed here on such document which has not been tendered in evidence. It is the duty of the appellant/plaintiff to plead and then prove it in accordance with law, therefore, in this case, the appellant/plaintiff has failed to prove the terms of the grant.

22. Undoubtedly, the grant was given under The (Government) Grants Act, 1895 and given by the CP and Berar Government as it is found to be proved by Ex. P-28 which is a permission for fencing of the land given by the Commissioner, Jabalpur. Therefore, it will be governed by the provision of the Act. The relevant provision of The (Government) Grants Act, 1895 are Sections 2 and 3 which are as under :-

> 2. Transfer of Property Act, 1882, not to apply to Government grants.- Nothing in the Transfer of Property Act, 1882 (4 of 1882), contained shall apply or be deemed ever to have applied to any grants or other transfer of land or of any interest therein heretofore made or hereafter to be made [by or on behalf of the [Government]] to, or in favour of, any person whomsoever; but every such grant and transfer shall be construed and take effect as if the said Act had not been passed.
>
> 3. Government grants to take effect according to their tenor.- All provisions, restrictions, conditions and limitations over contained in any such grant or transfer as aforesaid shall be valid and take effect according to their tenor, any rule of law, statute or enactment of the Legislature to the contrary notwithstanding.

23. The aforesaid provision of the Section 2 made it clear that The Transfer of Property Act will be non-applicable, on any grant made under the aforesaid provision and Section 3 made it mandatory that grant will be governed by its term despite of any thing in any other law.

24. As mentioned earlier that in this case no term of grant has been pleaded or proved, therefore, the grant cannot be implemented as per its term, which is not clear, therefore, the appellant's/plaintiffs claim on the basis of the so called terms of grant is concerned the same is not justifiable.

25. The grant given under Government Grant Act, 1895 given for use of suit land as play ground without any consideration and fee, came in preview of definition of license, as defined in Section 52 of the Indian Easement Act, 1882 and in absence of specific pleading and proof of the term of the grant, the aforesaid license is revokable as per provision of Section 60 of Indian Easement Act and the licensee has no right to claim relief of injunction against the granter, hence in view of this court, the appellant/plaintiff is not entitled to get any relief as claimed in the suit or as claimed in the appeal.

26. In view of the aforesaid reasons, the learned trial Court has not committed any legal error to reject the suit of the appellant/plaintiff with regard to the suit land for the prayer as claimed in the plaint. Hence this appeal is dismissed.

27. Consequently, the cost of the suit and this appeal be paid by the appellant/plaintiff to the respondents/defendants and the decree be framed accordingly.

Appeal dismissed

I.L.R. [2019] M.P. 1726
APPELLATE CRIMINAL
Before Mr. Justice Rohit Arya

Cr.A. No. 833/2013 (Indore) decided on 3 January, 2019

ABDUL SATTAR …Appellant

Vs.

STATE OF M.P. …Respondent

A. Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 8/18(b) & 50(1) – Search & Seizure – Mandatory Requirement **– Held – In terms of Section 50(1), suspect was informed regarding existence of his legal right to be searched before nearest gazetted officer or nearest Magistrate – However, accused gave consent in writing to be searched by raiding party and not by gazetted officer or Magistrate – Search and recovery was in accordance with law – Signatures on documents not rebutted by accused – Conviction and sentence maintained – Appeal partly allowed.**
(Para 19 & 20)

क. स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 8/18(बी) व 50(1) – तलाशी एवं जब्ती – आज्ञापक अपेक्षा – अभिनिर्धारित – धारा 50(1) के निबंधनों में, संदिग्ध को निकटतम राजपत्रित अधिकारी या निकटतम मजिस्ट्रेट के समक्ष तलाशी लेने के उसके विधिक अधिकार की विद्यमानता के संबंध में जानकारी दी गई थी – अपितु, अभियुक्त ने छापा दल द्वारा तलाशी हेतु लिखित में सहमति दी और न कि राजपत्रित अधिकारी अथवा मजिस्ट्रेट के समक्ष – तलाशी एवं बरामदगी विधि के अनुसरण

में थी – अभियुक्त द्वारा दस्तावेजों पर हस्ताक्षरों का खंडन नहीं किया गया – दोषसिद्धि एवं दण्डादेश कायम रखा गया – अपील अंशतः मंजूर।

***B. Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Sections 50(1), (2) & (3) – Search & Seizure – Mandatory Requirements* – Discussed and explained. (Para 18)**

ख. स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धाराएँ 50(1), (2) व (3) – तलाशी एवं जब्ती – आज्ञापक अपेक्षाऐं – विवेचित एवं स्पष्ट की गई।

***C. Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 8/18(b) – Sentence & Fine – Quantum* – Held – In default of payment of fine of Rs. 1 lacs, appellant has to undergo 2 years of rigorous imprisonment – In view of the fact that, it is the first offence of appellant, 2 years rigorous imprisonment is reduced to 2 months rigorous imprisonment. (Para 22)**

ग. स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 8/18(बी) – दण्डादेश व अर्थदण्ड – मात्रा – अभिनिर्धारित – रू. 1 लाख के अर्थदण्ड के भुगतान के व्यतिक्रम में, अपीलार्थी को 2 वर्ष कठोर कारावास भुगतना है – इस तथ्य को दृष्टिगत रखते हुए कि अपीलार्थी का यह प्रथम अपराध है, 2 वर्ष कठोर कारावास को घटाकर 2 माह कठोर कारावास किया गया।

Cases referred:

2014 Cr.L.J. 1756, Cr.A. No. 273/2007 decided on 27.04.2018 (Supreme Court), (1999) 6 SCC 172, (2011) 1 SCC 609, (2000) 1 SCC 707, (2004) 2 SCC 56, (2004) 2 SCC 608, (1991) 4 SCC 139, (2000) 5 SCC 488, AIR 1958 SC 918, (1989) 2 SCC 754, (2008) 1 SCC (Cri) 1.

Himanshu Thakur, for the appellant.
Rahul Sethi, P.P. for the respondent/State.

J U D G M E N T

ROHIT ARYA, J. :- This appeal under Section 374 Cr.P.C. is directed against the judgment dated 12.03.2013 passed in Special Sessions Trial No.143/2006 (State of M.P., Vs. Abdul Sattar and another) by the Special Judge, (N.D.P.S.) Mandsaur, District Mandsaur.

The trial Court has convicted the accused for the offence under section 8/18(b) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, the Act, 1985') and sentenced to suffer 10 years rigorous imprisonment with fine of Rs.1,00,000/- with default stipulation.

However, acquitted the co-accused, Sethi Rehman from the aforesaid offence.

The State has not preferred any appeal against aforesaid acquittal, hence the said finding has attained finality.

2. As per prosecution case; on 16.10.2006 a secret information was received by the then Assistant Sub Inspector, Chandrashekhar Upadhya (P.W.7) about 07.30 pm to the effect that appellant Sattar having possession of illegal opium may go from Bajkhedi Phante to Sitamau through unpaved road *(kachhi rasta)* on foot wherefrom by taking any kind of transportation shall go towards Ratlam to deliver the said contraband to someone at Ratlam. On such information, *Roznamcha* (exhibit P/1) was prepared and deputed two independent witnesses alongwith police force by informing the details of information received therefor. Since search has to be conducted immediately, absence of search warrant has been prepared vide *panchnama* exhibit P/2 and to make arrangements for presence of *panch* witnesses.

In compliance of section 42 of the Act, 1985, copies of exhibits P/1 and 2 were forwarded with a covering letter to the office of City Superintendent of Police, Mandsaur.

The police raid party alongwith panch witnesses reached Bajkhedi Phante Sitamau road and after waiting 2-3 hours, a person came from there. The Police stopped him and inquired his name and address under the light of torch, thereafter he has informed his name as; Sattar and carrying a bag. He was informed about the secret information whereupon prepared *panchnama* in presence of the witnesses. The accused was informed about existence of his right under section 50 of the Act,1985 to be searched before a Magistrate or a gazetted officer vide exhibit P/3 and obtained his signature. He has given written consent to be searched in the presence of the *panch* witnesses by the raid party vide exhibit P/4. He has given written consent to be searched by the raid party vide exhibit P/5. After following necessary formalities, the aforesaid bag was opened in which one bag of violet color was kept, thereunder a blue color polythene was found with black thick liquid. Upon weighing, it was found; opium 4 kilograms. Thereafter, the entire quantity was seized The accused was arrested. FIR was registered. The information of arrest of the accused was forwarded to the Special Judge, Mandsaur [exhibits P/5 to P/12].

3. After completion of investigation, charge sheet was filed against the accused persons before the concerned Court.

4. The trial Judge on the basis of the material placed on record framed charge. The accused denied the charge and claimed to be tried.

5. The prosecution has examined as many as 8 witnesses and placed exhibits; P/1 to P/35; the documents on record. The accused in his statement under

section 313 Cr.P.C., has stated that he has been falsely implicated in the offence. The accused has not examined any defence witness.

6. The trial Judge upon critical evaluation of the evidence and documents placed on record, particularly; documents exhibits P/4, P/5, P/6, P/7, P/8, P/9, P/10, P/11 & P/12 wherein in some of them, the accused has appended his signature and also not denied his signature found charge proved against the appellant. As a result, convicted him and passed the sentence referred above.

7. While challenging the legality and sustainability of the impugned judgment, learned counsel for the appellant has asserted that there is non-compliance of Section 50 of the Act, 1985 and referring to Exhibit P/3 *inter alia* contended that while the Seizure Officer informed the appellant of his right to be searched before the nearest Gazetted Officer or the nearest Magistrate in compliance of Section 50(1) of the Act but, as he was not produced either before Magistrate or Gazetted Officer and further the option given to him to be searched by raid party is in excess to the requirement of Section 50(1) of the Act, 1985. Therefore, the alleged searched conducted by the raid party though consequent upon the consent of the appellant vide Ex.P/4 and also Ex.P/5 stands vitiated. Learned counsel relied upon two judgments of the Hon'ble Supreme Court in the case of *State of Rajasthan v. Parmanand & Anr.* 2014 Cr.L.J. 1756 and *Arif Khan @ Agha Khan V. State of Uttarakhand* passed in Criminal Appeal No.273/2007 decided on 27.04.2018 to contend that the search conducted in absence of the Gazetted Officer or the Magistrate is illegal. Under the circumstances, conviction based upon the sole reason of seizure of four kilograms opium from the possession of the appellant cannot be sustained.

Learned counsel further contends that there is mis-appreciation of the evidence on record and grave illegality while the trial Court relied upon the testimony of the evidence led by cited witnesses, Ishqu (P.W.1) & Gudda alias Sayyed (P.W.2); and the documents relied upon by the trial Court. He has submitted that the appellant has been falsely roped in the case and there was no cogent evidence to establish the ingredients of offence alleged against the appellants. Under such circumstances, the trial Court erred in convicting the appellant, hence, this appeal be allowed and the appellant be acquitted from the charge.

8. An alternate submission has also been put-forth by the learned counsel that the appellant is very poor and if this Court comes to the conclusion that the appellant is guilty of the offence, as it is the first offence of the appellant, his conviction and sentence may be maintained but, looking to the fact that there is no other criminal case pending against him, the amount of fine may be reduced suitably.

9. Learned Public Prosecutor supported the impugned judgment and submits that the conviction in question is well merited and considering the bulk quantity of contraband from the appellant, the minimum sentence imposed by the trial Court for the said offence deserve to be maintained and the fine may not be reduced as sought for.

Learned counsel further contends that in this case the requirement of Section 50 of the Act, 1985 has been strictly compiled with vide Exhibit P/3, the appellant was informed of his right to be searched by the Gazetted Officer or the Magistrate. The appellant vide Exhibit P/5 expressed his unwillingness to be searched by the Gazetted Officer or the Magistrate, but has agreed to be searched by the raid party. Learned counsel further submits that merely for the reason the raid party has made the appellant aware at last in Ex.P/3 that he may also be searched by the raid party, this by itself cannot be construed to be non-compliance of section 50 of the Act, 1985. Learned counsel has distinguished the judgments relied upon by learned counsel for the appellant with the contention that in the case of *State of Rajasthan* (supra) that two accused persons namely; Surajmal and Parmanand, respondent No.1 therein were allegedly found in possession of 9 Kg. 600 grams of opium. The raid party had informed only Surajmal of their rights to be searched either by the Gazetted Officer or by the Magistrate and Surajmal had given consent allegedly on behalf of Parmanand as well not to be searched by the Gazetted Officer or the Magistrate but by raid party. Surajmal and Parmanand both were convicted by the trial Court having been found in possession of opium and sentenced for 10 years with fine of Rs.10.00 Lacs. However, the High Court acquitted Parmanand on the premise that his consent was not obtained before effecting search under Section 50, hence there was non-compliance of Section 50. The Hon'ble Supreme Court on an appeal by the *State of Rajasthan* (supra) has confirmed the judgment of the High Court with justification that there were no separate communication of such right to Parmanand but, a common notice was given to Surajmal respondent No.2 thereunder, and since it was only signed by Surajmal. The Hon'ble Supreme Court referred to Constitutional Bench judgment in the case of *State of Punjab v. Baldev Singh* (1999) 6 SCC 172 in the context of strict compliance of Section 50 of the N.D.P.S. Act.

Learned counsel submits that in the instant case, undisputedly, appellant the only person suspect of possession of 4 K.g. opium was informed of his right by Ex.P/3 and upon his consent in writing, he was searched by the raid party. Hence, the aforesaid judgments is of no help.

Learned Counsel before referring to judgment of *Arif Khan* (supra) has read out judgments rendered by two constitutional Benches of Hon'ble Supreme Court *viz. Baldev Sinh vs. State of Punjab* (1999) 6 SCC 172 and *Vijaysinh Chandubha Jadeja V. State of Gujarat* (2011) 1 SCC 609 to lay emphasis on the

authoritative interpretation of Sec.50 by two Benches of the Hon'ble Supreme Court.

10. Learned counsel submits that though the Constitutional Bench in *Baldev Singh's* case (supra) ruled that strict compliance of Section 50 was held to be mandatory, particularly; to apprise the person intended to be searched of his right to be searched before the Gazetted Officer or the Magistrate, however, as there was divergence opinions between two-sets of decisions of the Hon'ble Supreme Court in *Joseph Fernandez Vs. State of Goa* (2000) 1 SCC 707, *Prabha Shankar Dubey Vs. State of M.P,* (2004) 2 SCC 56 on one hand and on the other hand the judgment in the case of *Krishan Kanwar (Smt.) @ Thakuraeen Vs. State of Rajasthan* (2004) 2 SCC 608 with regard to dictum laid down by the Constitution Bench in *Baldev Singh's* case (supra) on the question; "whether before conducting search, the police officer (raid party) is merely required to ask the suspect if he would like to be produced before the Magistrate or the gazetted officer for the purpose of search or is a suspect required to be made aware of existence of his right in that behalf under law." Under such circumstances, again the matter was placed before the Constitution Bench to resolve the controversy. The Constitution Bench in the case of *Vijaysinh Chandubha Jadeja* (supra), has ruled that it is imperative on the part of the empowered officer to "inform" the person intended to be searched of his right under section 50 of the Act, 1985 to be searched before the gazetted officer or a Magistrate though there is no prescribed format or manner in which such communication is to be made, nevertheless, it is mandatory that the suspect is aware of his right to be searched before the gazetted officer or a Magistrate. Therefore, strict compliance of the mandatory provision of section 50 of the Act, 1985 is required, however, thereafter the suspect may or may not chose to exercise the right provided to him under the said provision. The scope of substantial compliance is 'neither borne out from any sub-sections of section 50 of the Act, 1985 nor it is in consonance with the law laid down by the Hon'ble Supreme Court in *Baldev Singh's* case (supra).

(Emphasis supplied)

11. Learned counsel further submits that both the Constitutional Benches of the Hon'ble Supreme Court while extensively examining section 50 of the Act, 1985, particularly; sub-section (1) of section 50, Hon'ble Benches have not laid down the law that even if the accused did not choose or accord his consent to be searched before the gazetted officer or a Magistrate upon being apprised of existence of the right in that behalf for the purpose of search, still the search conducted by the raid party in the absence of the gazetted officer or a Magistrate is illegal and rightly so, because section 50(1) of the Act, 1985 does not contemplate so.

12. While referring to judgment by a Bench of Hon'ble two judges in the case of *Arif Khan @ Agha Khan* (supra), learned counsel with full humility and respect at his command submits that the judgment in the said case neither is in consonance with section 50 of the Act, 1985 nor in line with the judgments of the aforesaid two Constitutional Benches.

13. It is submitted that in the case of *Arif Khan @ Agha Khan* (supra) that though the Hon'ble Bench has taken note of the aforesaid two Constitutional Bench decisions in paragraph 23 of the judgment but, in paragraphs 25, 27 and 28 concluded that though the suspect was apprised of existence of his right for search before the gazetted officer or a Magistrate and the suspect consented to be searched by the police officer (raid party), absence of a Magistrate or gazetted officer during search was not in conformity with the provisions of section 50 of the Act, 1985. Resultantly, held that as the search was illegal, therefore, the trial should vitiate and the appellant was acquitted.

14. Learned counsel submits that the aforesaid judgment in the case of *Arif Khan @ Agha Khan* (supra) though purportedly rested on the dictum of the Constitutional Benches but, is not in consonance thereto and independent of the provisions of section 50 of the Act, 1985. The judgment is *sub silentio inter alia* contending that Chapter V of the Act, 1985 deals with the procedure in the matter of entry, search, seizure and arrest. Sections 41 and 42 defines the powers of a Metropolitan Magistrate or a Magistrate of the first class or any Magistrate of the second class specially empowered by the State Government to issue warrant for the arrest of any person whom he has reason to believe to have committed any offence punishable under this Act for the search. .....

Sections 43 and 44 deals with power of entry, search, seizure and arrest in offences relating to coca plant, opium poppy and cannabis plant with competent authorization by the raid party is legal and proper. Of course, subject to conditions stipulated under section 50 whereunder the person to be searched is given the option of his existing right to be produced before the Magistrate or the nearest gazetted officer for search. But, if he does not consent to be produced before the Magistrate or a nearest gazetted officer and consents to be searched by the police raid party, such search and/or seizure cannot be faulted for the reason that the Magistrate or the gazetted officer is not present at the time of search.

To bolster his submission, he has relied upon the judgments of the Hon'ble Supreme Court in the case of *State of U.P., and another Vs. Synthetics and Chemicals Ltd., and another* (1991) 4 SCC 139 and *Arnit Das Vs. State of Bihar* (2000) 5 SCC 488.

Since, the judgment of the Hon'ble Supreme Court in the case of *Arif Khan @ Agha Khan* (Supra), the provisions of sections 41, 42, 43 and 50 of the Act, 1985 have not been dealt with instead only refers to the Constitution Bench

judgment in *Vijaysinh Chandubha Jadeja* (supra) as indicated in paragraph 27 of the judgment, the reasons reiterated in paragraph 28 thereof are not in conformity with the law laid in the cited judgment; *Vijaysinh Chandubha Jadeja* (supra) wherein the Hon'ble Supreme Court confined its dictum on the scope and meaning of the words "if a person to be searched so requires" and did not lay down the law that search and seizure by the police raid party upon a person shall be illegal if such a person despite having been made aware of existence of his right to be searched before the gazetted officer or a nearest Magistrate for search and seizure has declined to be produced and thereafter consented to be searched by the raid party. As such, the judgment of the Hon'ble Supreme Court in the case of *Arif Khan @ Agha Khan* (Supra) is not preceded by discussion of law and interpretation of the provisions of section 50 of the Act, 1985 and is not in consonance with the dictum of the Constitution Bench in *Vijaysinh Chandubha Jadeja* (supra)'s case.

Learned counsel relied upon the judgment of the Hon'ble Supreme Court referred to and relied upon in the case of *Arnit Das* (Supra) as regards the meaning, scope, law laid down under Article 141 of the Constitution of India wherein the doctrine of *per incurium* and *sub silentio* have been explained; the exception to the rule of precedent in the case of *Synthetics and Chemicals Ltd., and another*(Supra); Paragraph 41 of the judgment reads as under:

> "40. Does this principle extend and apply to a conclusion of law, Which was neither raised nor preceded by any consideration. In other words can such conclusions be considered as declaration of law? Here again the English Courts and jurists have carved out an exception to the rule of precedents. It has been explained as rule of *sub-silentio.* A decision passed *sub-silentio,* in the technical sense that has come to be attached to that phrase, when the particular' point of law involved in the decision is not perceived by the Court or present to its mind' (Salmond on jurisprudence 12th Edition). In Lancaster Motor Company (London) Ltd. V. Bremith Ltd., [1941] IKB 675 the Court did not feel bound by earlier decision as it was rendered 'without any argument, without reference to the crucial words of the rule and without any citation of the authority'. It was approved by this Court in Municipal Corporation of Delhi V. Gurmam Kaur, [1989] 1 SCC 101. The Bench held that, 'precedents *sub-silentio* and without argument are of no moment'. The Courts thus have taken recourse to this principle for relieving from injustice perpetrated by unjust precedents. A decision which is not express and is not founded on reasons nor it proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. Uniformity and consistency

> are core of judicial discipline. But that which escapes in the judgment without any occasion is not *ratio decedendi. In Shama Rao Vs. State of Pondicherry,,* AIR 1967 SC 1480 it was observed, 'it is trite to say that a decision is binding not because of its conclusions but in regard to its ratio and the principles, laid down therein'. Any declaration or conclusion arrived without application of mind or preceded without any reason cannot be deemed to be declaration of law or authority of a general nature binding as a precedent. Restraint in dissenting or overruling is for sake of stability and uniformity but rigidity beyond reasonable limits is inimical to the growth of law."

Learned counsel referred to the doctrine *stare decisis* as explained in Corpus *Juris Secundum,* page 302 as under:

> "Under the *stare decisis* rule, a principle of law which has become settled by a series of decisions generally is binding on the courts and should be followed in similar cases. This rule is based on expediency and and public policy, and, although generally it should be strictly adhered to by the courts it is not universally applicable."

The learned counsel also refers to the doctrine of *stare decisis* reiterated by the Hon'ble Supreme Court in the case of *Maktul Vs. Ms. Manbhari and others,* AIR 1958 SC 918.

The doctrine of judicial precedent has been considered in the realm of judicial system in India by the Hon'ble Supreme Court in the case of *Union of India and another Vs. Raghubir Singh (Dead) by L.Rs., etc.,* (1989) 2 SCC 754 and observed in paragraphs 8, 9 and 15 as under:

> "8. Taking note of the hierarchical character of the judicial system in India, it is of paramount importance that the law declared by this Court should be certain, clear and consistent. It is commonly known that most decisions of the courts are of significance not merely because they constitute an adjudication on the rights of the parties and re- solve the dispute between them, but also because in doing so they embody a declaration of law operating as a binding principle in future cases. In this latter aspect lies their particular value in developing the jurisprudence of the law.
>
> 9. The doctrine of binding precedent has the merit of promoting a certainty and consistency in judicial decisions, and enables an organic development of the law, besides providing assurance to the individual as to the consequence of transaction forming part of his daily affairs. And,

> therefore, the need for a clear and consistent enunciation of legal principle in the decisions of a Court.
>
> 15. The question then is not whether the Supreme Court is bound by its own previous decisions. It is not. The question is under what circumstances and within what limits and in what manner should the highest Court over-turn its own pronouncements.

At this stage, learned counsel relied upon the Constitution Bench judgment of the Hon'ble Supreme Court in *Vijaysinh Chandubha Jadeja* (supra) wherein laid down the law under Article 141 of the Constitution of India and ruled in paragraphs 31 and 32 as under:

> "31. We are of the opinion that the concept of "substantial compliance" with the requirement of Section 50 of the NDPS Act introduced and read into the mandate of the said Section in **Joseph Fernandez (supra)** and **Prabha Shankar Dubey (supra)** is neither borne out from the language of sub-section (1) of Section 50 nor it is in consonance with the dictum laid down in **Baldev Singh's case (supra)**. Needless to add that the question whether or not the procedure prescribed has been followed and the requirement of Section 50 had been met, is a matter of trial. It would neither be possible nor feasible to lay down any absolute formula in that behalf.
>
> 32. We also feel that though Section 50 gives an option to the empowered officer to take such person (suspect) either before the nearest gazetted officer or the Magistrate but in order to impart authenticity, transparency and creditworthiness to the entire proceedings, in the first instance, an endeavour should be to produce the suspect before the nearest Magistrate, who enjoys more confidence of the common man compared to any other officer. It would not only add legitimacy to the search proceedings, it may verily strengthen the prosecution as well."
>
> (Emphasis supplied)

Learned counsel also submits that the aforesaid observations in paragraph 32 of the judgment dated October 29, 2010 are suggestive or directive in nature nevertheless, prospective.

15. Turning to merits of the case, it is submitted that vide exhibit P/3, the accused was apprised of his right to be searched before the nearest gazetted officer or a nearest Magistrate and he had signed the said memo as an acknowledgment of the communication. Thereafter, he had given written consent (exhibit P/5) to be

searched by the raid party. Under such circumstances, there was strict compliance of section 50(1) of the Act, 1985. During trial, nothing is placed on record to belie the existence and veracity of exhibits P/3 and P/5. Applying the *ratio decidendi* of the Constitutional Benches, no fault can be found with the search of the suspect and the consequent recovery from his possession and seizure of the contraband resulting in his conviction as detailed above. Therefore, no interference is warranted in the impugned judgment.

16. Heard.

17. Before adverting to the rival contentions, it is expedient to quote section 50 of the Act, 1985.

> 50. Conditions under which search of persons shall be conducted.—(1) When any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.
>
> (2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).
>
> (3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.
>
> (4) No female shall be searched by anyone excepting a female.
>
> (5) When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section100 of the Code of Criminal Procedure, 1973 (2 of 1974).
>
> (6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior."
>
> (Emphasis supplied)

18. In *Vijaysinh Chandubha Jadeja* (supra), the Constitution Bench while examining the scope and ambit of the expression "if the person to be searched so requires" as figuring in sub-section (1) of the section 50, has after quoting section 50 in paragraph 18 has explained and reiterated the same in paragraphs 19 and 20 quoted below:

> "19. .Sub-section (1) of the said Section provides that when the empowered officer is about to search any suspected person, he shall, *if the person to be searched so requires*, take him to the nearest gazetted officer or the Magistrate for the purpose. Under sub-section (2), it is laid down that if such request is made by the suspected person, the officer who is to take the search, may detain the suspect until he can be brought before such gazetted officer or the Magistrate. It is manifest that if the suspect expresses the desire to be taken to the gazetted officer or the Magistrate, the empowered officer is restrained from effecting the search of the person concerned. He can only detain the suspect for being produced before the gazetted officer or the Magistrate, as the case may be. Sub- section (3) lays down that when the person to be searched is brought before such gazetted officer or the Magistrate and such gazetted officer or the Magistrate finds that there are no reasonable grounds for search, he shall forthwith discharge the person to be searched, otherwise he shall direct the search to be made.
>
> 20. The mandate of Section 50 is precise and clear, viz. if the person intended to be searched expresses to the authorised officer his desire to be taken to the nearest gazetted officer or the Magistrate, he cannot be searched till the gazetted officer or the Magistrate, as the case may be, directs the authorised officer to do so."
>
> (Emphasis supplied)

A bare reading of the provisions of section 50 as quoted above and reiteration of sub-sections (1), (2) & (3) of section 50 of the Act, 1985, the Constitution Bench do not suggest that section 50 contemplates that even if the suspect did not accord consent to be taken before a Magistrate or gazetted officer for the purpose of search upon being apprised of existence of such right to him, still if search is conducted though by duly authorized officer under section 42 of the Act, 1985 in absence of gazetted officer of a Magistrate search so conducted shall be rendered illegal rendering the trial based upon such seizure vitiated by error of law.

In the contest of the object and ambit of sub-sections (5) and (6) added by amending Act No.9 of 2001 with effect from 02-10-2001, the Hon'ble Constitution Bench has held as under:

> "25..As noted above, sub-sections (5) and (6) were inserted in Section 50 by Act 9 of 2001. It is pertinent to note that although by the insertion of the said two sub-sections, the rigour of strict procedural requirement is sought to be diluted under the circumstances mentioned in the sub- sections, viz. when the authorised officer has reason to believe that any delay in search of the person is fraught with the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance etc., or article or document, he may proceed to search the person instead of taking him to the nearest gazetted officer or Magistrate. However, even in such cases a safeguard against any arbitrary use of power has been provided under sub-section (6). Under the said sub-section, the empowered officer is obliged to send a copy of the reasons, so recorded, to his immediate official superior within seventy two hours of the search. In our opinion, the insertion of these two sub-sections does not obliterates the mandate of sub-section (1) of Section 50 to inform the person, to be searched, of his right to be taken before a gazetted officer or a Magistrate."

The Hon'ble Bench further observed that in *Baldev Singh* case (supra), the Constitution Bench did not decide in absolute terms the question whether section 50 of the NDPS Act was directory or mandatory though it was held that provisions of sub-section (1) of section 50 makes it imperative for the empowered officer to "inform" the suspect concerned about the existence of his right that if he so requires, he shall be searched before a gazetted officer or a Magistrate. Failure to "inform" the suspect about the existence of his said right would cause prejudice to him. In case, he opts for, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from the person during a search conducted in violation of the provisions of section 50 of the NDPS Act. But, as in the said case, it was held to be mandatory that the suspect was made aware of existence of his right to be searched before the gazetted officer or a Magistrate, if so required by him.

19. Now turning to the facts of the case, the suspect was informed as regards existence of his legal right to be searched before the nearest gazetted officer or a nearest Magistrate in terms of Section 50(1) of the Act, 1985 vide exhibit P/3. However, he has given consent in writing to be searched by the raiding party and not by the gazetted officer or a Magistrate vide exhibit P/5. Under such circumstances, it has been rightly held by the trial Court that search and recovery

of the contraband from possession of the accused/appellant was in accordance with law. This Court sees no reason to interfere with the same, as the same is held to be in consonance with the dictum laid down by the Hon'ble Supreme Court in the case of *Vijaysinh Chandubha Jadeja* (supra).

20. The trial Court has meticulously analyzed evidence of each and every witness so also the documents placed on record, exhibits P/1 to P/12; particularly; exhibits P/3, P/4, P/5, P/6 to P/13 wherein the signatures have been appended by the accused but, not rebutted and huge quantity of contraband substance seized from his possession, there appears to be no lacunae in observing the provisions of the Act, 1985. Further, P.W.7 Chandrasekhar Upadhaya the then Assistant Sub-Inspector has proved the exhibits, particularly; the procedure followed in search and preparation of *panchnama* as well as discussed in various paragraphs of the judgment. There is no scope to discredit the testimony of P.W.7 and other cited witnesses as sought to be impinged by learned counsel for the appellant. The trial Judge while appreciating the evidence has followed the principles of law laid down in various judgments by the Hon'ble Supreme Court and reached conclusion for convicting the appellant and imposed the minimum sentence of ten years to the appellant. Hence, in the opinion of this Court, the conviction and sentence deserve to be and is hereby maintained.

21. Now considered the alternate prayer.

22. The conviction and sentence of the appellant under section 8/18(b) is hereby maintained. The fine amount of Rs.1,00,000/-(Rupees one lakh only) is also upheld. In the obtaining facts and circumstances of the case coupled with the fact that it is the first offence of the appellant, in default of payment of fine, the appellant has to undergo two years rigorous imprisonment is reduced to rigorous imprisonment for two months *[Shantilal Vs. State of M.P.,* (2008) 1 SCC (Cri) 1].

23. Consequently, the appeals is allowed to that extent only as indicated hereinabove.

24. The Registry is directed to send a copy of this judgment immediately to the Trial Court for necessary compliance.

Appeal partly allowed

I.L.R. [2019] M.P. 1740 (DB)
APPELLATE CRIMINAL

Before Mr. Justice Sujoy Paul & Mr. Justice B.K. Shrivastava

Cr.A. No. 799/1994 (Jabalpur) decided on 4 July, 2019

REVATIBAI & ors. …Appellants

Vs.

STATE OF M.P. …Respondent

A. Penal Code (45 of 1860), Sections 302/34, 304-B/34, 498-A & 201 and Criminal Procedure Code, 1973 (2 of 1974), Section 313 – Appreciation of Evidence – Incriminating Circumstances – Explanation – **Held – Wife died in matrimonial home in abnormal circumstances where several injuries were found on her body – Incriminating circumstances brought to notice of appellants during examination u/S 313 Cr.P.C. but no explanation by them regarding multiple injuries and cause of death – Letters written by deceased to her parents within a week before her death, duly proved, which had a clear mention of cruelty for dowry demands – Cruelty soon before death established – Necessary ingredients of the offences available against appellants – Appellants rightly convicted – Appeal dismissed.**

(Paras 33, 38, 39, 42 & 43)

क. दण्ड संहिता (1860 का 45), धाराएँ 302/34, 304–बी/34, 498–ए व 201 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 313 – साक्ष्य का मूल्यांकन – अपराध में फंसाने वाली परिस्थितियां – स्पष्टीकरण – अभिनिर्धारित – पत्नी की मृत्यु दाम्पत्य निवास में असामान्य परिस्थितियों में हुई, जहां उसके शरीर पर अनेक चोटें पाई गई थी – दं.प्र.सं. की धारा 313 के अंतर्गत परीक्षण के दौरान अपराध में फंसाने वाली परिस्थितियां, अपीलार्थीगण के ध्यान में लाई गई परंतु अनेक चोटों तथा मृत्यु के कारण के संबंध में उनके द्वारा कोई स्पष्टीकरण नहीं – मृतिका द्वारा, उसकी मृत्यु पूर्व एक सप्ताह के भीतर उसके माता–पिता को लिखे गये पत्र, सम्यक् रूप से साबित हुए जिसमें दहेज की मांग के लिए क्रूरता का स्पष्ट उल्लेख था – मृत्यु के तुरंत पहले क्रूरता स्थापित – अपीलार्थीगण के विरूद्ध अपराधों के आवश्यक घटक उपलब्ध – अपीलार्थीगण उचित रूप से दोषसिद्ध – अपील खारिज।

B. Penal Code (45 of 1860), Section 304-B/34 & 498-A and Dowry Prohibition Act (28 of 1961), Section 2 – Definition of "Dowry" – **Held – Appellants failed establish that demand of money was because of husband's unemployment or for starting new business – Such demand of money which has connection with marriage is squarely covered within definition of "Dowry".** **(Para 36)**

ख. दण्ड संहिता (1860 का 45), धारा 304–बी/34 व 498–ए एवं दहेज प्रतिषेध अधिनियम (1961 का 28), धारा 2 – ''दहेज'' की परिभाषा – अभिनिर्धारित –

अपीलार्थीगण यह स्थापित करने में विफल रहे कि पैसे की मांग पति की बेरोजगारी के कारण अथवा नया कारबार आरंभ करने हेतु की गई थी – पैसे की उक्त मांग जिसका विवाह से संबंध है, पूर्णतः ''दहेज'' की परिभाषा के भीतर आती है।

***C. Criminal Procedure Code, 1973 (2 of 1974), Section 164 – Statement of Doctor – Credibility* – Held – Statement of Doctor as witness cannot be discredited on the ground that it is not accordance with opinion expressed in books of medical jurisprudence – Moreso when relevant passage of book was not brought to notice of the doctor during deposition – Conviction on this ground is not legally sustainable. (Para 16)**

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 164 – चिकित्सक का कथन – विश्वसनीयता – अभिनिर्धारित – साक्षी के रूप में चिकित्सक के कथन पर इस आधार पर अविश्वास नहीं किया जा सकता कि यह चिकित्सीय विधिशास्त्र की पुस्तकों में अभिव्यक्त मत अनुसार नहीं है – यहां तक कि जब अभिसाक्ष्य के दौरान पुस्तक का सुसंगत अंश चिकित्सक के ध्यान में नहीं लाया गया था – इस आधार पर दोषसिद्धि विधिक रूप से कायम रखे जाने योग्य नहीं है।

***D. Evidence Act (1 of 1872), Section 106 – Burden of Proof* – Held – Fact which is specially within knowledge of any person, burden of proving that fact is upon him/them – Burden to establish those facts is on the person concerned and if he fails to establish or explain those facts, an adverse inference of fact may arise against him and it becomes an additional link in the chain of circumstances to make it complete. (Para 23)**

घ. साक्ष्य अधिनियम (1872 का 1), धारा 106 – सबूत का भार – अभिनिर्धारित – तथ्य जो कि विशेष रूप से किसी व्यक्ति के ज्ञान में है, उस तथ्य को साबित करने का भार उस/उन व्यक्ति पर होता है – उन तथ्यों को स्थापित करने का भार संबंधित व्यक्ति पर होता है एवं यदि वह उन तथ्यों को स्थापित करने अथवा स्पष्ट करने में विफल रहता है, तो उसके विरूद्ध तथ्य का प्रतिकूल निष्कर्ष उत्पन्न हो सकता है तथा परिस्थितियों की श्रृंखला को पूर्ण करने के लिए यह एक अतिरिक्त कड़ी बन जाती है।

***E. Evidence Act (1 of 1872), Section 113-A & 113-B – Presumption – Burden of Proof* – Held – Apex Court concluded that Section 113-A confers a discretion on a Court to draw presumption in case of suicide whereas Section 113-B mandatorily requires the Court to draw an adverse inference presuming guilt of accused in a case of dowry death – Once initial burden is discharged by prosecution, deemed presumption arises – Burden/onus would then be shifted on accused to rebut that deemed presumption of guilt to prove his innocence. (Para 40)**

ङ. साक्ष्य अधिनियम (1872 का 1), धारा 113–ए व 113–बी – उपधारणा – सबूत का भार – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि धारा 113–ए न्यायालय को आत्महत्या के प्रकरण में उपधारणा करने का विवेकाधिकार प्रदान करती है

जबकि धारा 113–बी आज्ञापक रूप से न्यायालय से दहेज हत्या के एक प्रकरण में अभियुक्त की दोषिता उपधारित करते हुए एक प्रतिकूल निष्कर्ष निकालने की अपेक्षा करती है – अभियोजन द्वारा एक बार प्रारंभिक भार का उन्मोचन हो जाए, समझे जाने की उपधारणा उत्पन्न होती है – अपनी निर्दोषिता को साबित करने के लिए दोषी समझे जाने की उस उपधारणा का खंडन करने का भार तब अभियुक्त पर चला जाएगा।

Cases referred:

AIR 1957 SC 589, AIR 1991 SC 1142, AIR 2006 SC 680, AIR 2007 SC 763, 2015 (5) SCC 201, 2015 (3) SCC 724, AIR 1957 SC 366, 2004 (10) SCC 570, 2013 (3) SCC 684, (1996) 7 SCC 308, 2006 (10) SCC 681, 2007 (12) SCC 288, 2009 (6) SCC 61, 2016 (13) SCC-12, 2018 SCC Online MP-904, 1974 (2) SCC 544, 1992 (3) SCC-106, 1992 (3) SCC-300, (2014) 2 SCC 776, AIR 2001 SC 3020, AIR 2015 SC-1359=(2015) 6 SCC 477, 2013 (4) SCC 177, 1989 CrLJ 2330, AIR 2001 SC 2828.

S.C. Datt with *Siddharth Datt*, for the appellants.
Vrindawan Tiwari, G.A. for the respondent.

J U D G M E N T

The Judgment of the Court was delivered by :
SUJOY PAUL, J. :- This criminal appeal filed under Section 374(2) of the Code of Criminal Procedure**(Cr.P.C.)** is directed against the judgment dated 07.07.1994 passed in Sessions Trial No.145/1993 by learned First Additional Sessions Judge, Shahdol. The particulars of the offences and sentence imposed upon the appellants are as under:

CONVICTION	SENTENCE
U/s 302/34 IPC	Imprisonment for life and fine of Rs.100/-. In default S.I. for one month.
U/s 304-B/34 IPC	RI for 10 years and the fine of Rs.100/-. In default SI for one month.
U/s 498A IPC	RI for 3 years and fine of Rs.100/-. In default SI for one month.
U/s 201 IPC	RI for 3 years and fine of Rs.100/-. In default SI for one month.
Appellant No.2 Ramdayal is also convicted U/s 203 IPC	RI for 2 years and fine of Rs.100/-. In default SI for one month.

The substantive sentences were directed to run concurrently.

2. Draped in brevity, the case of prosecution is that in the year 1990, marriage of deceased Uma Bai was solemnized with accused Shankardayal (appellant No.3). Uma Bai had studied upto Class IV. After marriage, she remained in the house of in-laws for about six months and; thereafter, whenever she came to her parental house, she informed that her mother-in-law does not provide her food and water. They do not permit her to meet her husband Shankardayal and made her to sleep outside the house. The mother-in-law and brother-in-law used to assault her. Ramdayal (appellant No.2) twice visited the parents of Uma Bai and demanded Rs.25,000/- on the pretext that he does not have any source of livelihood. Shankardayal once visited in-laws house and demanded certain materials. Around one and half year before the date of incident, Uma Bai was taken to her parental house by mother-in-law Revatibai because of demand of money was not fulfilled by the parents of Uma Bai. The altercations during this visit were heard by neighbourer Domari Kumhar and Patia Kumhar. They also noticed the burning marks on the face of Uma Bai.

3. Uma Bai informed her parents that all the accused used to beat her for demand of money. They called her insane, made to sit in front of "Lobhan Dhuni". She was not permitted even to meet with the neighbourers. The father-in-law of Uma Bai, died after the marriage. After getting this information of death, brother of Uma Bai, Harkishan had taken Uma Bai to her in-laws' house alongwith one Gendlal. Uma Bai informed Gendlal also about the demand of Rs.25,000/- by accused persons and their act of beating as stated hereinabove. Revatibai demanded Rs.25,000/- in front of Harkishan and stated that if he is not ready with the said amount, he may take back Uma Bai to her parental house. Upon receiving assurance from Harkishan that demanded amount shall be paid before the festival of Rakshabandhan, accused persons permitted Uma Bai to stay with them. Uma Bai died on 20.07.1993. Her body was found hanging with a sari/dhoti. Revatibai called Ramdayal and neighbourers. Accused Shankardayal on the said date went to Garasarai at around 8.00 a.m. Ramdayal informed Police Station, Karanpathar about the incident of hanging of Uma Bai. In turn, *marg* intimation Exhibit P/1 was recorded. Sub Inspector Saleem Tigga (PW/16) visited the spot on the same date and; in the presence of witnesses, the dead body of Uma Bai was removed from hanging position and was taken for medical examination. Upon receiving information, brother of Uma Bai, Govind Prasad Chouksey(PW/5) lodged a written report dated 23.07.1993 to Police Station Incharge Benibari. After recording statements of witnesses under Section 174 on 29.07.1993, Crime No.42/93 was registered alleging offences under Section 302/201 IPC against the accused persons. As per prosecution story, Uma Bai sent two letters from in-laws house to parental house. Accused Ramdayal also wrote a letter to his in-laws. These three letters were seized from Ramkishan by police on 13.08.1993. The accused persons were arrested. The viscera of deceased was sent for chemical

examination. After completion of investigation, charge-sheet was filed in the Court of Judicial Magistrate First Class, Rajendragram and; in turn, it was committed to the Court of Session for trial.

4. The accused persons abjured the guilt. In their statements recorded under Section 313 Cr.P.C., they denied the allegations and story of prosecution and stated that Uma Bai was under *'pretbadha'/* influence of evil spirits. After her treatment, she was sent to her parental house. She remained there for five-six months. After receiving information of death of her father-in-law, she came back to husband's house. On the date of incident, Revatibai was attending a function at neighbour Kunjbihari's house. Since Uma Bai was unwell, she did not go to attend the said function. When Revatibai came back at around 1:00 p.m. from Kunjbihari's house, she found Uma Bai was hanging in one room of the house. She shouted and called the villagers. Appellant Ramdayal was in the house and Shankardayal was in Garasarai.

5. The Court below framed five questions which required determination and answered the same against the appellants. The appellants were held guilty of offences mentioned herein above.

6. Shri S.C. Datt, learned senior counsel for the appellants submits that marriage of Uma Bai had taken place in the year 1990. The date of incident is 20.07.1993. The FIR was registered on 29.07.1993. The first contention of Shri Datt is that the court below has erred in holding that appellants are guilty under Section 302 IPC. By taking this Court to the statement of PW/8 Dr. Premkumar Mahor, it is argued that the expert witness clearly deposed that reason of death of Uma Bai cannot be stated with certainty.

7. The Court below relied upon a book namely; 'Medical Jurisprudence and Toxicology' and on the strength of this book opined that appellants are guilty of offence under Section 302 IPC. The appellants urged that in view of specific medical evidence, passage from the book of Medical Jurisprudence could not have been a reason to convict the appellants. Reliance is placed on AIR 1957 SC 589 *(Bhagwan Das and another vs. State of Rajasthan)*.

8. The argument of appellants is also based on 'Modi's Jurisprudence' (25th Edition) wherein the learned author has mentioned about the symptoms of strangulation other than hanging. The aspect of ligature mark on the neck in cases of hanging. Lyon's Medical Jurisprudence (10th Edition page 358) was relied upon to urge that normally in cases of strangulation, three aspects viz. (i) ligature mark; (ii) fingers or (iii) *bansjoda* (a pair of stick) are found. In the instant case, none of these three were found on the person of deceased Uma Bai. A chart mentioned at page 510 of Modi's Jurisprudence (Supra) is referred wherein the symptoms of hanging and strangulation are mentioned in juxtaposition. In the statement of PW/8, it was mentioned that on the cheek of deceased, saliva was found flowing.

It is urged that it is one of the symptom of hanging. Ancillary argument of learned senior counsel is that relevant passage of medical jurisprudence was not put to the Doctor (PW/8) during cross-examination, nor this was put by the Court by exercising powers under Section 165 of the Evidence Act. Thus, in view of any specific deposition by the doctor, the offence under Section 302 could not be established. The findings of court below are based on conjectures and surmises and not on the evidence on record. Thus, as per the appellants, findings in relation to offence under Section 302 of IPC must be interfered with.

9. The next attack of Shri S.C. Datt, learned senior counsel is on the findings of court below whereby offence under Section 304-B of IPC was found to be proved. By taking this Court to the said provision, it is submitted that unless the death is shown to be an unnatural death, the provision is not attracted. Reliance is placed on AIR 1991 SC 1142 *(Akula Ravinder and others vs. State of Andhra Pradesh).* The charges framed by the Court below were relied upon to submit that said charges could not be established by prosecution beyond reasonable doubt. Coming back to the language employed in Section 304-B IPC, it is submitted that prosecution has miserably failed to establish that soon before the death of Uma Bai, she was subjected to cruelty or harassment by her husband or relatives of her husband. Similarly, the prosecution could not establish any live link between cruelty/harassment and demand of dowry. Learned senior counsel submits that necessary ingredients for attracting Section 304-B are totally missing. No cruelty caused to deceased soon before her death in relation to any demand of dowry could not be established. AIR 2006 SC 680 *(Harjit Singh vs. State of Punjab)* is relied upon for this purpose.

10. Furthermore, it is argued that statement of brother of deceased PW/3 is vague in nature. It could not be established that demand of money falls within the ambit of 'dowry'. The deceased admittedly stayed in her parents' house for about one and half years. The other prosecution witness PW/4's deposition could not establish that alleged demand was made soon before the death of Uma Bai. The delay in recording the statement under Section 161 Cr.P.C. (9 days) is fatal. Statement of PW/5 (Brother of deceased) was relied upon in juxtaposition to the statement recorded under Section 161 Cr.P.C. to bolster the argument that there exists a material contradiction in the statements. This witness has improved a lot while deposing before the court. PW/6 (brother of accused) could not establish whether demand of money will fall within the ambit of 'dowry'. This statement shows that money was demanded for employment/business. Thus, this demand is not covered in the definition of 'dowry' and therefore Section 304-B IPC cannot be pressed into service. AIR 2007 SC 763 *(Appasaheb and another vs. State of Maharashtra)* was referred for this purpose. Learned senior counsel has taken pains to take this Court to the statements of PW/7, PW/11, PW/13 (Constable) and

PW/15 Makhanlal. The argument advanced is that on the basis of these statements, neither offence under Section 302 nor under Section 304B could be established. PW/16 stated that while hanging, the head of Uma Bai was tilted towards left side. This is also one of the symptoms in cases of hanging.

11. The vague and general allegations cannot be reason to hold the appellants as guilty. The alleged demand of Rs.25,000/-, by no stretch of imagination, is covered under Section 304-B. 2015 (5) SCC 201 *(Major Singh and another vs. State of Punjab)* was relied upon to contend that when such amount is demanded for opening shop, it does not attract 304-B IPC. 2015 (3) SCC 724 *(Sher Singh vs. state of Haryana)* was relied upon to show the requirements to attract Section 304-B and Section 113A and B of the Indian Evidence Act, 1972. Shri Datt urged that intimation given to the parents or to police by DW/1 that Uma Bai committed suicide cannot be used as substantive peace of evidence in view of AIR 1957 SC 366 *(Nisar Ali vs. State of U.P.*. Shri Datt in support of his arguments also relied upon 2004 (10) SCC 570 *(State of M.P. vs. Sanjay Rai)* and 2013 (3) SCC 684 *(Vipin Jaiswal vs. State of Andhra Pradesh)*.

12. To sum up, it is urged that the necessary ingredients of 'cruelty', 'demand of dowry', and element of 'soon before death' etc. could not be established beyond reasonable doubt. The demand of dowry must have a clear nexus with the marriage. On the basis of general allegations and without attributing any specific act, the appellants cannot be held guilty.

13. Per contra, Shri Vrindawan Tiwari, learned Government Advocate relied upon Exhibit P/1, the intimation given to parents by brother-in-law of deceased on 20.07.1993. It is submitted that the information itself shows that reason of death was shown to be suicide by Uma Bai which shows that it was an unnatural death. The other defence witnesses also deposed the same before the Court and therefore it was rightly held by the Court below that the death of Uma Bai was otherwise than the normal circumstances and within seven years of her marriage. The letters of deceased Exhibit P/5 and Exhibit P/6 make it clear the demand of dowry and cruelty shown was soon before the death of Uma Bai. Indisputably, Uma Bai died in the house of appellants. In their statements recorded under Section 313 Cr.P.C., the appellants have not chosen to state the reason of death. This is an important circumstance against the appellants. Section 113-B of Evidence Act creates a fiction against the appellants in a matter of this nature. The Court below has passed the judgment after thorough scrutiny and appreciation of evidence. No interference is required on this well reasoned judgment.

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

15. We have heard the learned counsel for the parties at length and perused the record.

16. The first limb of argument of Shri Datt was that the operative reason for holding the appellants as guilty is based on a passage from a book of medical jurisprudence. The opinion expressed in the book cannot become basis for holding the appellants as guilty under section 302 of IPC. Moreso, when relevant passage of the book was not brought to the notice of the Doctor while deposing the statement. We find substance in this argument to the extent that statement of a witness cannot be discredited on the ground that it is not in accordance with opinion expressed in the books. In *Bhagwan Das* (supra), the Apex court took the said view which was followed in *Sanjay Rai* (supra). Thus conviction of appellants on this ground is not legally sustainable.

17. In the instant case, indisputably, Uma Bai was found hanging at the residence of her in-law's/ appellants within 7 years of her marriage. As per statement of Doctor P.W.8, which was corroborated by other evidence, three red wound on the chin, three dark red wounds on calf muscle were found on the person of the deceased. Red fluid was coming out of her nostril. The colour of skin at the neck wherefrom deceased was hanging by a "Sari" was found to be white. On the upper side of right leg three injuries in blue colour were found.

18. The appellant contended that as per the opinion expressed in Modi's Jurisprudence, the symptom of dribbling out of Saliva out of the mouth down on the chin is a symptom of hanging. Thus prosecution failed to establish by leading any cogent evidence that death of deceased was either because of strangulation or because of other injuries found on the body mentioned hereinabove.

19. Dr. Prem kumar Mahor (P.W.8), Assistant Surgeon deposed that the neck of dead body of Uma Bai was covered by a yellow silk Sari. The portion of neck where Sari was tight, became white whereas colour of remaining portion of the body was dark blue. The white circle at the neck which was in white colour was about 2 inch in width. There were blisters on the inner portion of thighs, abdomen and upper portion of the body. Skin of both the buttocks was removed. Three deep blue injury marks were present on the right leg. The red fluid was coming out of the private part. The body started decomposing. It was clearly stated that since body started decomposing, reason of death could not be stated. In Para-7 of his statement, he stated that in cases of hanging, the head of the deceased tilts to one side, tongue comes out and body starts decomposing. In Para-2 of statement, he stated that *tongue came out and red fluid was coming out from her nostril.* The doctor further deposed that presence of ligature marks depends on the duration of hanging, weight of deceased and material by which person is being hanged. He further stated that the white mark on the neck shows that there was no blood circulation in the said place. He, in great detail, stated that if hanging body was touching any surface/wood, it may cause abrasion and will not cause blue injury mark.

20. The statement of Dr. Prem Kumar Mahore (PW/8) shows that there was bleeding from Nostrils. In addition, there was protruding of tongue. The blisters were also found on the body of Uma Bai. The Apex Court considered these symptoms in (1996) 7 SCC 308 *(Mulak Raj & Others vs. State of Haryana)* and opined as under:-

> *"Bleeding from nostrils showed that the death had occurred from asphyxia which was of forceful nature, i.e., the patient must have tried hard to breath. The protruding of the tongue showed that the deceased tried to breath hard or if something was introduced into the mouth or the mouth was closed and the patient might have tried to breath hard to overcome the obstruction and the tongue may have come out. Or if something was introduced into the mouth and if that thing was taken out after death, the tongue will come out. If an alive person is burnt there is bound to be blister formation. But there will be no blister at all if the dead body is burnt, because blister formation is sign of life. Nothing substantial could be brought out in his cross examination. In view of this evidence it becomes clear that deceased Krishna Kumari had died a homicidal death and the burnt injuries found on her dead body were post mortem and not ante mortem."*
>
> *(Emphasis supplied)*

In view of this judgment, symptoms and injuries of this nature shows that the nature of death was homicidal in nature. The death of Uma Bai cannot be treated as a natural death by any process of reasoning or by any stretch of imagination.

21. The death of deceased Uma Bai had taken place in the last room of appellant's house. The appellants have not given any explanation as to how she sustained injuries described above. They answered the relevant incriminating questions put to them by the court under section 313 Cr.P.C in negative. In other words, reason of death, cause of injuries were not described by the appellants. Indeed, they decided to keep mum on this aspect by stating that they are not aware about the injury marks and reason of death.

22. The Apex Court had taken note of frequent flow of cases of killing of bride in complete secracy inside the house and opined that it is very difficult for the prosecution to lead evidence in this regard. In 2006(10) SCC 681 *(Trimukh Maroti Kirkan Vs. State of Maharashtra)* it was held as under : 13,14,21.

> ***"13.** The demand for dowry or money from the parents of the bride has shown a phenomenal increase in the last few years. Cases are frequently coming before the courts, where the husband or inlaws have gone to the extent of killing the bride if the demand is not met. These crimes are generally committed in complete secrecy inside the house and it becomes very*

difficult for the prosecution to lead evidence. No member of the family, even if he is a witness of the crime, would come forward to depose against another family member. The neighbours, whose evidence may be of some assistance, are generally reluctant to depose in court as they want to keep aloof and do not want to antagonise a neighbourhood family. The parents or other family members of the bride being away from the scene of commission of crime are not in a position to give direct evidence which may inculpate the real accused except regarding the demand of money or dowry and harassment caused to the bride. But, it does not mean that a crime committed in secrecy or inside the house should go unpunished.

14. *If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the courts. A judge does not preside over a criminal trial merely to see that no innocent man is punished. A judge also presides to see that a guilty man does not escape. Both are public duties. (See Stirland v. Director of Public Prosecutions [1944 AC 315 : (1944) 2 All ER 13 (HL)] — quoted with approval by Arijit Pasayat, J. in State of Punjab v. Karnail Singh [(2003) 11 SCC 271 : 2004 SCC (Cri) 135] .) The law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led. The duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep in mind Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustration (b) appended to this section throws some light on the content and scope of this provision and it reads:*

*"(b) **A** is charged with travelling on a railway without ticket. The burden of proving that he had a ticket is on him. "*

21. *In a case based on circumstantial evidence where no eyewitness account is available, there is another principle of*

law which must be kept in mind. The principle is that when an incriminating circumstance is put to the accused and the said accused either offers no explanation or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstances to make it complete. This view has been taken in a catena of decisions of this Court. [See State of T.N. v. Rajendran [(1999) 8 SCC 679 : 2000 SCC (Cri) 40] (SCC para 6); State of UP. v. Dr. Ravindra Prakash Mittal [(1992) 3 SCC 300 : 1992 SCC (Cri) 642 : AIR 1992 SC 2045] (SCC para 39 : AIR para 40); State of Maharashtra v. Suresh [(2000) 1 SCC 471 : 2000 SCC (Cri) 263] (SCC para 27); Ganesh Lal v. State of Rajasthan [(2002) 1 SCC 731 : 2002 SCC (Cri) 247] (SCC para 15) and Gulab Chand v. State of M.P. [(1995) 3 SCC 574 : 1995 SCC (Cri) 552] (SCCpara 4).]"

23. The *ratio decidendi* of this judgment was followed by Apex Court in 2007(12) SCC 288 *(Swamy Shraddananda Vs. State of Karnataka),* 2009(6) SCC 61 *(Narendra Vs. State of Karnataka),* 2016(13) SCC-12 *(Jamnadas Vs. State of Madhya Pradesh)* and by Division Bench of this Court in 2018 SCC Online MP-904 *(Smt. Sudama Bai Vs. State of Madhya Pradesh).* As per principle laid down in the case of *Trimukh Maroti* (supra), it is the duty of the court to ensure that no innocent man is punished. Similarly, court is under an obligation to ensure that a guilty man does not escape appropriate punishment. The courts considered the impact of section 106 of the Evidence Act which says that any fact which is specially within the knowledge of any person, the burden of proving that fact is upon him/them. On the principle underlying section 106, the burden to establish those facts is cast on the person concerned and if he fails to establish or explains those facts, an adverse inference of fact may arise against him *(See:* 1974(2) SCC 544 *Collector of Customs Vs. D. Bhoormal)***.** Thus, governing principle is that when an incriminating circumstance is put to the accused and the accused either offers no explanation or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstances to make it complete.

24. Similarly, in cases where allegation against the accused is regarding murder of his wife and prosecution has established the fact that shortly before the commission of crime, they were seen together or the offence has taken place in the dwelling home where husband also normally resided, it has been consistently held that if the accused does not offer any explanation, how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime. *(See: para-22 of judgment of Trimukh Maroti (supra).*

25. In 1992(3)SCC-106 *(Ganeshlal Vs. State of Maharashtra),* the appellant was prosecuted for the murder of his wife which took place inside his house. It was observed that when the death had occurred in his custody, the appellant is under an obligation to give a plausible explanation for the cause of her death in his statement under section 313 Cr.P.C. The mere denial of the prosecution case coupled with absence of any explanation was held to be inconsistent with the innocence of accused persons but consistent with the hypothesis that the appellant is a prime accused in the commission of murder of his wife. In *State of U.P. Vs. Dr. Ravindra Prakash Mittal* (1992(3) SCC-300), the defense (sic : defence) of husband was that the wife had committed suicide and that he was not at home at that time. The letters written by the wife to her relatives showed that the husband ill treated her and their relations were strained coupled with further evidence which showed that both of them were in the same house in the previous night. The chain of circumstances were held to be complete by holding the husband as guilty of murder of his wife and judgment of High Court was reversed whereby husband was acquitted. In the instant case also, the deceased Uma Bai had written letters Ex.P/4 and P/5 mentioning about demand of money and cruelty caused to her by appellants because of inability to pay the said amount. We will deal with this aspect separately at appropriate place in this judgment.

26. The Apex Court in *Jamnadas* (supra) held that (i) Appellants have failed to disclose as to how deceased has died which was specially within their knowledge; (ii) it is nobody's case that any outsider came in the house; (iii) false explanation was given in their statement under section 313 of Cr.P.C.

27. In the light of this legal position, it is clear like noon day that in the present case also it was incumbent upon the appellants to explain about incriminating circumstances put to them by the court under section 313 of Cr.P.C. In absence of any explanation coming forward from appellants in this regard, it is an important circumstance and link of the chain which was missing in the present case. The court below considered the statement of P.W.8 and other statement of witnesses and came to hold the there were several injuries on the person of the deceased. The court below considered the statement of Narendra Pratap (PW/1), Head Constable who deposed that the police report was written by him as per narration of Ramdayal. After reading the report Ex.P/1 he signed on the said report (Ex.P/1). Loknath (P.W.2) stated that the deceased died because of hanging on 20.7.1993. Ramkishan Chouksey (P.W.3), brother of Uma Bai stated that when on the third occasion, Uma Bai came to her parents' house from in-law's house, she stated that her mother-in-law is demanding Rs.25,000/-from her and directed her to bring that money while returning to in-law's house. Uma Bai also stated that Shankar Dayal, Ram Dayal and mother-in-law used to beat her. She was even subjected to torture by putting burn marks on her chin. He said that burn marks were visible on the chin of Uma Bai. This witness, in great detail, narrated that his family could

not arrange the amount of dowry aforesaid demanded by appellants. After great amount of persuation, Ram Dayal took Uma to his house but soon thereafter, Revati Bai (mother-in-law) herself took her to parental house and stated that only when said amount is paid, they will take Uma Bai back. On 20.7.1993, father-in-law of Uma Bai died. The brother of Uma Bai Harkishan took Uma Bai to appellants' house but appellants were not ready to keep her there because of non-fulfilling the demand of money. On getting an assurance from Harikishan that said amount shall be paid before the festival of 'Rakshabandhan', they permitted Uma Bai to stay back in the in-law's house. Fifteen days thereafter, they received information through wireless that Uma Bai committed suicide by hanging. The witness narrated about the condition of body of deceased and injury marks which corroborates the medical evidence. This witness proved the letters of Uma Bai Ex.P/5 and P/6 and identified the hand writing and signature of his sister. Ex.P/7, a letter written by appellant No.2 Ram Dayal was also proved by the witness. In cross-examination, this witness admitted that Shankar Dayal, husband of Uma was unemployed after the marriage. However, it is clearly stated that reason for demand of money was not narrated by the appellants.

28. Gendlal (P.W.4) deposed that Uma was his sister-in-law. Uma Bai told her that appellants used to beat her for the demand of Rs.25000/-. He supported the statement of P.W.3 that even at the time of there visit to appellants house after death of Uma's father-in-law, they demanded money and an assurance was given that amount will be paid before 'Rakshabandhan'. Another brother of Uma Bai P.W.5 and P.W.6 deposed in the same line and their statements are also in conformity with the statement of P.W.3.

29. Patiya Bai (P.W.7) stated that in her presence, mother-in-law of Uma Bai while visiting Uma's parental house stated that Uma Bai may be sent to in-law's house only when Rs.25,000/- is arranged. This witness also stated in specific that burn marks on the chin of Uma Bai were seen by her and Uma Bai informed her that this was caused by the appellants.

30. Ganesh Prasad Pandey (P.W.9) is Headmaster of the school where Uma Bai had studied. He produced the admission register to show that Uma Bai had studied for some time in the said school.

31. Rajaram Sharma (P.W.10), Patwari proved the spot map (Ex.P/15) whereas Girish Kumar Shukla (P.W.11) deposed that one piece of 'Payal' was recovered by him from Shankardayal. Komal Prasad (P.W.12) is the seizure witness of said 'Payal'. Ishwar Das (P.W.13) is a Constable who had taken the dead body of Uma Bai for postmortem. Kishorilal (P.W.14) is a Constable who proved the seizure of packets. Makhanlal (P.W.15) is relative of appellants who did not support the story of prosecution in its entirety. Saleem Tigga (P.W.16), Sub

Inspector was the first police official who reached to the spot where Uma Bai was hanging. He, in the main examination and during cross-examination stated that head of Uma Bai was tiled towards left side and door of the room where Uma Bai was hanging was bolted from outside. He found burn marks on the chin of Uma Bai.

32. A careful reading of these statements coupled with the findings of court below shows that court below has not erred in holding that prosecution has proved it beyond reasonable doubt that appellants consistently demanded money from deceased and her family members and Uma Bai was subjected to cruelty in relation to said demand of money. Uma Bai in her letters Ex.P/5 clearly described the same. A careful reading of first letter Ex.P/5 shows that, she requested her brother on 10.1.1992 to take her back to parental house. It is mentioned that she was subjected to cruelty, beating etc. at her in-laws house. She was even not provided with material of daily use like oil, soap etc. She requested her brother to take her to parental house as early as possible. In the second letter written on 15.7.1993 (Ex.P/6 written by her before five days of the death), She requested the brother Ramkishan and other brothers to immediately take her back to parental house. She clearly narrated that Harikishan left her to in-law's house on 09.07.93 and since then in-laws are harassing and beating her, telling her to ensure that Rs.25,000/- are delivered to them otherwise they will murder and hang her. She expressed her fear that she may not survive till *Rakshabandhan* and she may be murdered any time. She further narrated that perhaps she will not be able to meet her mother again because a day before, her husband, mother-in-law and brother-in-laws have brutally beaten her because of which she is under severe pain. These letters Ex.P/5 and P/6 were duly proved before the court below. The handwriting in these letters were found to be of Uma Bai. There exists a corroboration of Harikishan's statement with the contents of letter Ex.P/6 which shows that after leaving Uma Bai at in-law's house by Harkishan, she was subjected to cruelty in relation to demand of money. Her fear expressed in Ex.P/6 became true within a week and she was found hanging in the house of in-law's.

33. The prosecution established the entire chain of events because of which Uma Bai died. The missing link as projected by the appellants was the reason of death. At the cost of repetition, that missing link or chain of circumstance is also fulfilled because the appellants did not offer any explanation regarding injuries and cause of death of Uma Bai. In *Anjanappa vs. State of Karnataka* (2014) 2 SCC 776, the Apex Court opined as under:-

> *"30. Besides, the conduct of the appellant speaks volumes. He was absconding and could be arrested only on 19-02-1992. Moreover, in his statement recorded under Section 313 of the Code he has not explained how the deceased received burn injuries. He did not set*

up the defence of alibi. It was obligatory on him to explain how the deceased received burn injuries in his house. His silence on this aspect gives rise to an adverse inference against him. It forms a link in the chain of circumstances which point to his guilt."

(Emphasis Supplied)

In the light of aforesaid analysis, the appellants must be held guilty for committing offence under Section 302 r/w Section 34 of IPC.

34. Another limb of argument of learned senior counsel is relating to applicability of Sec.304-B of IPC. Learned Senior counsel urged that since husband of Uma Bai was unemployed and money was demanded for his livelihood, it will not fall within the four corners of definition of 'Dowry'. Certain judgments are relied upon for this purpose. In the case of *Sunil Bajaj Vs. State of M.P.,* AIR 2001 SC 3020, the prosecution could not establish the demand of dowry and the factum of subjecting the deceased to cruelty for or in connection with dowry. No evidence of any relative or neighbour of parties about cruelty caused to deceased could be led. In the letter written by deceased, demand of money by accused persons was not mentioned. No evidence was led that cruelty was in relation to demand of money. This judgment has no application in the factual matrix of the present case where brothers of deceased in no uncertain terms, deposed about demand of dowry and cruelty and harassment caused to Uma Bai for non-payment of the same. Pertinently, Uma Bai herself in the letter Ex.P/5 and P/6 narrated about cruelty and harassment in relation to demand of money. In the case of *Appa Saheb* (supra)**,** the demand of money was for meeting domestic expenses and cruelty caused to the deceased in relation to such demand was not established. In this backdrop, it was held that Section 304-B is not attracted. AIR 2015 SC-1359 = (2015) 6 SCC 477 *(Rajinder Singh Vs. State of Punjab),* a three judge Bench of Supreme Court held that in the said judgments in *Appa Sahib* and *Vpin Jaiswal's* case *(supra)* (followed in *Kulwant Singh and others Vs. State of Punjab,* 2013(4) SCC 177) law has not been correctly laid down.

35. Even otherwise, the case of *Vipin Jaiswal* (supra)*,* the husband demanded money to purchase computer, six months after the marriage. The demand was for starting his own business. The wife committed suicide. In her suicide note she stated that she committed suicide on her free will saying that nobody was responsible for her death and that her parents and family members have harassed her husband and she was taking the extreme step as she was fed-up with her own life. In this peculiar factual backdrop, it was held that said demand of money does not fall within the ambit of dowry demand. This judgment cannot be pressed into service in the present case.

36. The appellants could not establish that demand of Rs.25000/-was because of unemployment of husband of deceased or for starting any business etc by him. The definition of "dowry" as per Dowry Prohibition Act, 1961 is very wide. Any property, valuable security agreed to be given directly or indirectly is covered whether such demand is at or before or any time after the marriage provided it is in connection with the marriage of the parties. In the case in hand, as noticed, the appellants consistently demanded Rs.25,000/- from Uma Bai and her brothers. Uma Bai was left at her parental house by mother-in-law because she did not pay Rs.25,000/-. Left with no option, the brothers of deceased agreed to pay said amount to appellants before the festival of *Rakshabandhan.* Thus, such demand of money which has connection with the marriage is squarely covered in the definition of "Dowry". We find support in our view from the judgment of *Rajinder Singh* (supra) wherein it was held that any money or property or valuable security demanded by any of the persons mentioned in Section 2 of the Dowry Prohibition Act, at or before or at any time after the marriage *which is reasonably connected to the death of a married woman, would necessarily be in connection with or in relation to the marriage unless, the facts of a given case clearly and unequivocally point otherwise.*

37. This is trite that in order to attract section 304-B IPC, the following ingredients are to be satisfied- (i) the death of a woman must have been caused by burns or bodily injury or otherwise then under normal circumstances; (ii) such death must have occurred within seven years of marriage; (iii) soon before her death, the woman must have been subjected to curelty or harassment by her husband or any relative of her husband, and (iv) such cruelty or harassment must be in connection with the demand of dowry.

38. Shri Datt, learned senior counsel placed heavy reliance on the judgment of *Akula Ravinder* (supra) during the course of arguments and argued that in the said case also, the reason of death of deceased could not be established. Hence, there was no evidence establishing that death was an unnatural death. Therefore, Section 304-B IPC is not attracted. A careful reading of this judgment shows that during the examination of accused under Section 313 Cr.P.C., there was not a slightest indication given to him about incriminating circumstances and about the fact that death could be due to poisoning. In this backdrop, it was held that Section 304-B IPC was not met out. At the cost of repetition, in our considered view, in the present case incriminating circumstances were brought to the notice of the appellants by the Court below while examining them under Section 313 Cr.P.C., but no explanation were offered by them regarding the multiple injuries and cause of death of Uma Bai. Thus, aforesaid judgment is of no assistance to the appellants in the present case.

39. For the foregoing analysis, we are unable to persuade ourself with the argument of the appellants that death of Uma Bai can be said to be under normal circumstances. Similarly, in the case of *Major Singh* (supra), the prosecution could not lead evidence as to demand of dowry or cruelty, nor could establish that deceased was subjected to dowry harassment soon before her death. In this case, the letter of Uma Bai (Ex.P/6) was written within a week before the date of her death and the death was certainly otherwise than under normal circumstance. Soon before that, the demand of Rs.25,000/- was made by appellants from Uma Bai and her brothers. They caused cruelty on her in relation to demand of dowry soon before the death. Since amount could not be arranged by them, Uma Bai was again subjected to cruelty. Hence, this judgment is also of no help to the appellants.

40. In *Harjeet Singh* (supra), no evidence of cruelty and harassment in connection with demand of dowry could be established. In this backdrop, it was held that no case under Section 304-B of IPC was made out. As held by us, a live connection between cruelty and demand of dowry is duly established in this case. Such demand of money is covered in the definition of 'dowry'. No doubt, in *Sher Singh* (supra), the Supreme Court poignantly held that Section 304-B needs interpretation in context of purpose of enactment. The words "shown" and "deemed" employed in Section 304-B should be read as "proved" and "presumed" respectively. It was held that difference between Sections 113-A and 113-B were marked and it was held that Section 113-A confers a discretion on a Court to draw presumption in case of suicide, Section 113-B mandatorily requires the Court to draw an adverse inference presuming guilt of accused in a case of dowry death. It was further held that once initial burden is discharged by prosecution, initial presumption of innocence of accused would be replaced by deemed presumption of guilt of accused. Burden/onus would then be shifted on accused to rebut that deemed presumption of guilt by proving beyond reasonable doubt his innocence. In this case, prosecution has clearly established before the Court below that death of Uma Bai is in abnormal circumstances and, therefore, burden was shifted on the appellants to prove their innocence. Moreso, when on the body of deceased, several injuries were found, cause of which were required to be explained by the appellants.

41. It is worth noting that a Division Bench of A.P. High Court in *Public Prosecution High Court of A.P.Hyd.*-1989 CrLJ 2330 held that cases of suicide are also covered under Section 304-B of IPC because same is otherwise than under normal circumstances. The Apex Court also took the same view in *Satvir Singh and others Vs. State of Punjab*-AIR 2001 SC2828 and *Sher Singh* (supra).

42. Looking from any angle, it is clear that necessary ingredients for holding appellants as guilty under Sections 302 read with Section 34, 304-B, 498-A and

201 IPC were available against the appellants. In addition, appellant No.2 was rightly held guilty under Section 203 IPC. It be noted that no amount of arguments were advanced by appellants attacking the findings of Court below in relation to Section 201 and 203 IPC.

43. In view of foregoing analysis, we are unable to hold that appellants are innocent and Court below has committed any error in passing the impugned judgment dated 07.07.1994 in ST No.145/1993. In our considered opinion, the Court below has rightly held that prosecution has satisfactorily and beyond reasonable doubt established their case before the Court below. Considering the aforesaid, we find no reason to interfere in the impugned judgment. The appellants shall undergo the remaining jail sentence. Resultantly, the appeal fails and is hereby dismissed.

Appeal dismissed

I.L.R. [2019] M.P. 1757
APPELLATE CRIMINAL
Before Smt. Justice Anjuli Palo

Cr.A. No. 1785/1999 (Jabalpur) decided on 1 August, 2019

KISHORI …Appellant

Vs.

STATE OF M.P. …Respondent

A. Penal Code (45 of 1860), Section 307 and Arms Act (54 of 1959), Section 25(1) & 27 – Appreciation of Evidence **– Held – Testimony of complainant/victim duly corroborated by medical evidence – No material omission and contradiction in testimonies of prosecution witnesses – Armourer report also corroborated the prosecution case – Appellant rightly convicted u/S 307 IPC – Appeal dismissed. (Paras 6 to 8, 10 & 15 to 17)**

क. दण्ड संहिता (1860 का 45), धारा 307 एवं आयुध अधिनियम (1959 का 54), धारा 25(1) व 27 – साक्ष्य का मूल्यांकन – अभिनिर्धारित – परिवादी/पीड़ित का परिसाक्ष्य चिकित्सीय साक्ष्य द्वारा सम्यक् रूप से संपुष्ट – अभियोजन साक्षीगण के परिसाक्ष्य में कोई तात्विक लोप एवं विरोधाभास नहीं – आयुधिक/आर्मरर प्रतिवेदन ने भी अभियोजन प्रकरण की पुष्टि की है – अपीलार्थी, भारतीय दंड संहिता की धारा 307 के अंतर्गत उचित रूप से दोषसिद्ध – अपील खारिज।

B. Penal Code (45 of 1860), Section 307 – Nature of Injury – Intention **– Held – Apex Court concluded that Court has to see whether the act, irrespective of its result, was done with intention and knowledge, and such act under ordinary circumstances could cause death of person assaulted – Further, it does not require that hurt should be grievous or of any**

particular degree – For conviction u/S 307 IPC, intention of accused is to be considered and not the nature of injury. (Para 13 & 14)

ख. दण्ड संहिता (1860 का 45), धारा 307 – चोट का स्वरूप – आशय – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि न्यायालय को देखना चाहिए कि क्या वह कृत्य, उसके परिणाम का विचार किये बिना, आशय और ज्ञान के साथ किया गया था एवं उक्त कृत्य साधारण परिस्थितियों में उस व्यक्ति की जिस पर हमला किया गया था, मृत्यु कारित कर सकता था – इसके अतिरिक्त, यह अपेक्षित नहीं है कि उपहति गंभीर अथवा किसी विशिष्ट कोटि की होनी चाहिए – भा.दं.सं. की धारा 307 के अंतर्गत दोषसिद्धि के लिए, अभियुक्त के आशय को विचार में लिया जाएगा तथा न कि चोट के स्वरूप को।

***C. Criminal Practice – FIR* – Held – Prompt FIR prevents possibilities of any concocted stories which could be cooked up by the complainant party to falsely implicate the accused persons. (Para 8)**

ग. दाण्डिक पद्धति – प्रथम सूचना प्रतिवेदन – अभिनिर्धारित – तत्परता से दर्ज किया गया प्रथम सूचना प्रतिवेदन किसी भी मनगढ़ंत कहानियों की संभावनाओं को रोकता है जो कि परिवादी पक्षकार द्वारा अभियुक्तगण को मिथ्या आलिप्त करने के लिए गढ़ी जा सके।

Cases referred:

(2018) 5 SCC 549, (2017) 3 SCC 152, (2019) 3 SCC 605, (2015) 11 SCC 366.

Durgesh Gupta, *Amicus Curiae* for the appellant.
Jubin Prasad, P.L. for the respondent-State.

J U D G M E N T

ANJULI PALO, J. : - This appeal has been preferred by the accused, being aggrieved by the judgment dated 07.06.1999 passed by Additional Sessions Judge, Lakhnadon, District Seoni in Sessions Trial No.13/1999, whereby he has been convicted under Section 307 of I.P.C. and Sections 25 (1) and 27 of Indian Arms Act and sentenced to undergo RI for seven years (for each offence) along with fine of Rs.5,000/-, Rs.1000-1000/- , respectively with default stipulations.

2. In brief, the prosecution story is that, on 02.10.1998 at about 03:00 pm complainant- Premlal was sitting in the house of Chandan Kotwar. He used to stop the persons, who were cutting the wood from the forest trees. Therefore, the appellant abused complainant- Premlal, when he objected to the same, appellant went away from the spot. On the same day, at about 04:00 pm, appellant again came with gun and stood in front of the house of Premlal and asked Premlal to come out from his house. He threatened to kill Premlal. When Premlal came out, the appellant targeted him. Thereafter, Premlal caught his gun with his right hand. In the meanwhile the appellant triggered the gun. Due to heat of barrel of the gun,

right palm of Premlal got burnt. He had not received any gun shot injury, because of misfire. He lodged a report against the appellant at Police Station- Dhuma, District- Seoni.

3. After investigating of the case, charge-sheet was filed before the concerned Court. After conduct of trial, learned trial Court found the apellant guilty of committing offences punishable under Section 307 of I.P.C. and Sections 25 (1) and 27 of Indian Arms Act and sentenced him, as mentioned hereinabove.

4. The appellant has challenged the aforesaid findings of the trial Court in the present appeal and prayed to set aside the impugned judgment and for his acquittal from the charges levelled against him.

5. Learned Panel Lawyer for the respondent-State strongly opposed the contentions of the appellant and supported the findings of trial Court. Heard learned counsel for the parties at length and perused the record.

6. The prosecution case is duly supported by complainant- Premlal (PW-1). As per the statements of Premlal (PW-1) and Jagat Bahadur Singh (PW-8), an FIR was lodged by Premlal on 02.10.1998. The facts narrated by Premlal in FIR have duly been corroborated by him in his testimony. A perusal of the statement of Jagat Bahadur Singh (PW-8) and FIR do establish that on the same date of incident, Premlal lodged named FIR within four hours against the appellant.

7. Motilal (PW-3) (son of Premlal) and Chandan Kotwar (PW-2) have also duly corroborated the testimony of Premlal. At that time, Motilal was present in his house. He heard when the appellant was abusing his father. He also came out from his house along with his father. This Court neither finds any reason to disbelieve their testimony nor any material contradiction and omission in their testimony.

8. Prompt FIR prevents the possibilities of any concocted story has been cooked up by the complainant party to falsely implicate the accused persons. Thereafter, on the next day, Dr. Deepak Pandey (PW-5) examined the complainant and found burnt injury on his right palm, which was black in colour and its outer area was reddish. He also corroborated the testimony of the complainant and opined that the aforesaid injury may be caused due to heated object within 24 hours from the examination and it may be cured within 7 days. In cross-examination, he admitted that the aforesaid injury was not found on any vital part of the body. Hence, the Court found that the testimony of Premlal is duly corroborated by the medical evidence.

9. Manharan Singh Chandel (PW-7) (Investigating Officer) stated that when he reached on the spot, and made search for the appellant and found the he was absconding. On 11.11.1998, he arrested the appellant and recorded his

memorandum (Ex.P/3). Accordingly, on the production of gun by the appellant, he recovered the same and prepared seizure memo (Ex.p/4). According to him the appellant had no license for the said gun. Chandan Kotwar (PW-2) in his statement has corroborated his testimony.

10. Devi Singh (PW-4) (Constable) examined the said gun and submitted his report (Ex.P/6). In Ex.P/6 he opined found that explosive particles were present in the gun and smell was coming from the barrel which indicated that the gun was fired. Armorer report also corroborated the prosecution case. Gopal Namdeo (PW-6) (Arms Clerk) proved the sanction for prosecution of the appellant which was granted by then Collector vide Ex.P/8.

11. After considering the entire evidence and findings recorded by the trial Court, this Court finds that there is material substance present against the appellant to convict him under Section 307 of IPC and Sections 25 and 27 of Arms Act.

12. In case of *Ganapathi and another Vs. State of Tamil Nadu* (2018) 5 SCC 549 and *Baleshwar Mahto and another Vs. State of Bihar and another* (2017) 3 SCC 152 the Hon'ble Supreme Court held that if the evidence available on record establishes the guilt of accused beyond reasonable doubt and corroborates the medical evidence and Motive of crime is very clear, the High Court finds no error in appreciation of evidence and there is no inconsistency in ocular and medical evidence, hence, the conviction of the appellant is proper.

13. Learned counsel for the appellant urged that the injury caused to Premlal is simple in nature and is not sufficient to cause his death. Hence, appellant may be convicted for committing offence punishable either under Section 324 or Section 325 of the IPC. But, recently the Supreme Court has interpreted Section 307 of IPC and discussed the issue in case of *State of Madhya Pradesh Vs. Kanha @ Omprakash* (2019) 3 SCC 605 in paragraphs No.10 to 12 and held as under:-

"10. Several judgments of this Court have interpreted Section 307A of the Penal Code. In State of Maharashtra v Balram Bama Patil 1, this Court held that it is not necessary that a bodily injury sufficient under normal circumstances to cause death should have been inflicted:

> "9...To justify a conviction under this section it is not essential that bodily injury capable of causing death should have been inflicted. Although the nature of injury actually caused may often give considerable assistance in coming to a finding as to the intention of the accused, such intention may also be deduced from other circumstances, and may even, in some cases, be ascertained without any reference at all to actual wounds. The section makes a distinction between an act of the accused and its result, if any. Such an act may not be attended by any result so far as the person assaulted is concerned, but still there may be cases in which the culprit would be liable

under this section. It is not necessary that the injury actually caused to the victim of the assault should be sufficient under ordinary circumstances to cause the death of the person assaulted. What the Court has to see is whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in this section. An attempt in order to be criminal need not be the penultimate act. It is sufficient in law, if there is present an intent coupled with some overt act in execution thereof." (Emphasis supplied)

This position in law was followed by subsequent Benches of this Court.

14. Thus, Supreme Court confirmed the conviction of the appellant under Section 307 of the IPC is proper. Supreme Court further discussed, in paragraph No.18 of the aforesaid judgment, as under:-

"18. The lack of forensic evidence to prove grievous or a life-threatening injury cannot be a basis to hold that Section 307 is inapplicable. This proposition of law has been elucidated by a two-judge bench of this Court in Pasupuleti Siva Ramakrishna Rao v State of Andhra Pradesh:

"18. There is no merit in the contention that the statement of medical officer that there is no danger to life unless there is dislocation or rupture of the thyroid bone due to strangulation means that the accused did not intend, or have the knowledge, that their act would cause death. The circumstances of this case clearly attract the second part of this section since the act resulted in Injury 5 which is a ligature mark of 34 cm x 0.5 cm. It must be noted that Section 307 IPC provides for imprisonment for life if the act causes "hurt". It does not require that the hurt should be grievous or of any particular degree. The intention to cause death is clearly attributable to the accused since the victim was strangulated after throwing a telephone wire around his neck and telling him that he should die. We also do not find any merit in the contention on behalf of the accused that there was no intention to cause death because the victim admitted that the accused were not armed with weapons. Very few persons would normally describe the Thums up bottle and a telephone wire used, as weapons. That the victim honestly admitted that the accused did not have any weapons cannot be held against him and in favour of the accused." (Emphasis supplied)

In case of *Jage Ram v. State of Haryana* [(2015) 11 SCC 366] Hon'ble Court held that:

"12. For the purpose of conviction under Section 307 IPC, prosecution has to establish (i) the intention to commit murder and (ii) the act done by the accused. The burden is on the prosecution that accused had attempted to commit the murder of the prosecution witness. Whether the accused person intended to commit murder of another person would depend upon the facts and circumstances of each case. To justify a conviction

> under Section 307 IPC, it is not essential that fatal injury capable of causing death should have been caused. Although the nature of injury actually caused may be of assistance in coming to a finding as to the intention of the accused, such intention may also be adduced from other circumstances. The intention of the accused is to be gathered from the circumstances like the nature of the weapon used, words used by the accused at the time of the incident, motive of the accused, parts of the body where the injury was caused and the nature of injury and severity of the blows given etc."
>
> (emphasis supplied)
>
> This Court in the recent decision of State of M.P. v. Kanha @ Omprakash held that: "The above judgements of this Court lead us to the conclusion that proof of grievous or lifethreatening hurt is not a sine qua non for the offence under Section 307 of the Penal Code. The intention of the accused can be ascertained from the actual injury, if any, as well as from surrounding circumstances. Among other things, the nature of the weapon used and the severity of the blows inflicted can be considered to infer intent."
>
> (emphasis supplied)
>
> {See also: *State of M.P. v. Harjeet Singh* 2018 (3) JLJ 11 and *State of M.P. v Saleem* (1983) 2 SCC 28 (2005) 5 SCC 554}

15. In light of the principles laid down by the Supreme Court and the facts and circumstances discussed above, this Court does not find any perversity or illegality in the appreciation of material on record by the learned trial Court.

16. Hence, this Court finds that cogent and reliable evidence has been brought by the prosecution on record. After discussion of the entire evidence in right perspective, learned trial Court has rightly held the appellant guilty for committing offence under Section 307 of IPC.

17. In that view of the matter, the findings of conviction recorded by the trial Court and the sentence, as directed against the appellant, do not warrant any interference in facts of the case.

18. In view of the foregoing discussions, the judgment of the trial Court is hereby upheld. Accordingly, the appeal filed by the appellant is hereby **dismissed.** Appellant is on bail. His bail bond stands cancelled and he be taken into custody to serve the remaining part of sentence.

19. At the end, it is the duty of this Court to record words of appreciation in favour of Smt. Durgesh Gupta, *Amicus Curiae*, who assisted this Court in disposal

of this appeal, which was pending since 1999. Her assistance is hereby acknowledged.

20. Let a copy of this judgment be sent to the trial Court as well as to the jail authorities to take appropriate steps to take the appellant back into custody to serve the remaining part of the sentence.

Appeal dismissed

I.L.R. [2019] M.P. 1763
ARBITRATION CASE
Before Mr. Justice Subodh Abhyankar

Arb. Case No. 57/2018 (Jabalpur) order passed on 1 July, 2019

SHAKTI TRADERS (M/S) …Applicant

Vs.

M.P. STATE MINING CORPORATION …Non-applicant

***A. Arbitration and Conciliation Act (26 of 1996), Section 11 and Contract Act (9 of 1872), Section 28 – Appointment of Arbitrator – Arbitral Dispute – Limitation to invoke the Clause of Arbitration* – Held – Apex Court concluded that the contract which limits the right of parties to approach the Court, would be void – In view of Section 28 of the Act of 1872, such a stipulation in contractual obligation would not be valid and binding – Arbitrator appointed. (Paras 10 to 12)**

क. माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 11 एवं संविदा अधिनियम (1872 का 9), धारा 28 – मध्यस्थ की नियुक्ति – माध्यस्थम् विवाद – माध्यस्थम् खंड का अवलंब लेने के लिए परिसीमा – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि ऐसी संविदा जो कि न्यायालय के समक्ष जाने के पक्षकारों के अधिकार को सीमित करती है, शून्य होगी – 1872 के अधिनियम की धारा 28 को दृष्टिगत रखते हुए, संविदात्मक बाध्यता में इस तरह का एक अनुबंध विधिमान्य एवं बाध्यकारी नहीं होगा – मध्यस्थ नियुक्त।

B. General Clauses Act (10 of 1897), Section 27 – Service of Notice – Held – Record reveals that notice for appointment of arbitrator was sent by applicant on correct address of respondent and same was properly served – Section 27 of the Act of 1897 would be applicable in full force. (Para 10)

ख. साधारण खण्ड अधिनियम (1897 का 10), धारा 27 – नोटिस की तामील – अभिनिर्धारित – अभिलेख यह प्रकट करता है कि आवेदक द्वारा मध्यस्थ की नियुक्ति हेतु नोटिस प्रत्यर्थी के सही पते पर भेजा गया था तथा उक्त को उचित रूप से तामील किया गया था – 1897 के अधिनियम की धारा 27 पूर्ण प्रभाव से लागू होगी।

Cases referred:

(2018) 14 SCC 265, A.C. No. 39/2016 order passed on 30.06.2016.

Siddharth Gupta and *Amit Garg*, for the applicant.
Aditya Khandekar, for the non-applicant.

J U D G M E N T

SUBODH ABHYANKAR, J. :- This application has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (in short "the Act") for appointment of an Arbitrator between the parties for settlement of their dispute.

2. The case of the applicant is that the applicant is in the business of sand quarrying and for this purpose they have entered into an agreement with the respondent - M.P. State Mining Corporation on 24.07.2013 (Annexure P-1) in relation to excavation and trading of sand quarries of Tehsil Palera, District Tikamgarh. Apparently, a dispute has arisen between the parties relating to the said agreement, which also provides for the resolution of the same through an Arbitrator as per Clause 8 of the agreement provided that such dispute is referred to the Managing Director of the Corporation within seven days from the date of cause of action.

3. Learned counsel for the applicant has submitted that the Clause 8 of the agreement dated 24.07.2013 (Annexure P-1) provides that the dispute has to be referred to the Managing Director of the respondent -Corporation within seven days of its cause of action. He submits that the first cause of action arose in the month of February, 2015 and subsequently, the contract was also terminated on 20th March, 2017, however, letter for appointment of the Arbitrator was issued only on 13.02.2017 and subsequently, on 05.07.2017, which are filed as Annexure P-8 and P-12 respectively. Thus, the dispute was raised almost after three months from the date of termination of the contract and since no reply to the same was sent by the respondent, this application has been filed.

4. Learned counsel for the applicant has relied upon a three Judge Bench judgment passed by the Apex Court in the case of *Grasim Industries Limited v. State of Kerala* (2018) 14 SCC 265 to submit that the contract which limits the rights of the parties to approach to the Court, would be void.

5. On the other hand, learned counsel for the respondent has opposed the prayer and has submitted that in the present case, even the notices which are alleged to have been issued by the applicant, were not served on the respondent, as even from the delivery reports submitted by the applicant which are annexed to the application at page 41 and 49, it is clear that the same were served on Shiksha Mandal and not on the respondent - M.P. State Mining Corporation and thus, the same would not be treated to be the compliance of Clause 8 of the agreement and

since there is no invocation of arbitration clause by the applicant, there is no question of appointment of Arbitrator. Learned counsel has relied upon a judgment rendered by the coordinate Bench of this Court in the case of *Star Mineral Resources Pvt. Ltd. v. M.P. State Mining Corporation Ltd.* passed on 30.06.2016 in A.C. No.39/2016 in which also the same issue was involved that the arbitration clause was not invoked by the applicant within the time limit provided in the agreement and while scrutinizing the issue, it has been held that if the applicant has failed to follow the agreed procedure as mentioned in Clause 8 of the agreement then in such circumstances, the application for appointment of an Arbitrator cannot be entertained.

6. To rebut the aforesaid contention, learned counsel for the applicant has submitted that the notices were sent by the applicant on two occasions viz. on 13.02.2017 (Annexure P-8) and on 05.07.2017 (Annexure P-12), the delivery reports of the same are also filed on record at page nos. 41 and 49, which clearly demonstrate that these notices were served on 15.02.2017 and 10.07.2017 respectively, hence, it cannot be said that the notices were not served on the respondent. Learned counsel has further submitted that it is not the case of the respondent that the notices were sent on the wrong address and hence, even if the Postal Department in its delivery report has mentioned about service of the notice on Shiksha Mandal, it cannot be said that it was not delivered on the respondent. It is further submitted that even otherwise in the delivery report it is mentioned that it was delivered on Shiksha Mandal S.O. i.e. the Sub-Office of the Postal Department. Thus, it has to be presumed that the same was delivered on the respondent through the Shiksha Mandal Sub-Office of the Postal Department which is nearer to the office of the respondent. Learned counsel has also placed reliance upon Section 27 of the General Clauses Act 1897, which refers to the "meaning of service by post" and postulates that the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post. Thus, it is submitted that when the notices were properly addressed and were sent on the correct address through speed post, it cannot be said that they were not sent by the applicant.

7. So far as the judgment relied upon by the learned counsel for the respondent rendered in the case of *Star Mineral Resources* (supra) is concerned, learned counsel for the applicant has submitted that identical issue has already been decided by the Apex Court in the case of *Grasim Industries* (supra). He has submitted that since the aforesaid judgment is rendered by the Apex Court subsequent to the order passed by a coordinate Bench of this Court in A.C. No.39/2016 (supra), the decision passed in A.C. No.39/2016 (supra) would not be

binding on this Court and the law governing the field at present would be as has been declared by the Apex Court in *Grasim Industries* (supra).

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

9. From the record, this Court finds that the arbitration clause in the agreement dated 24.07.2013 (Annexure P-1) reads as under:-

> "8. विवाद और उनका निपटारा
>
> निगम एवं ठेकेदार के मध्य निष्पादित अनुबंध से संबंधित किसी विवाद के निराकरण हेतु विवाद उत्पन्न होने के सात दिवसों के भीतर ठेकेदार द्वारा निगम के प्रबंध संचालक को औपचारिक रूप से लिखित में विवाद का सारभूत अधिसूचित किया जावेगा। अधिसूचित करने के तीस दिवस के भीतर निगम के प्रबंध संचालक संबंधित पक्षों की सुनवाई कर इसका निराकरण कर सकेंगे। यदि निगम के प्रबंध संचालक 30 दिवस में उन्हें संदर्भित किये गये विवाद का समाधान करनें में असमर्थ रहते हैं तब ऐसी स्थिति में विवाद का निपटारा निगम के प्रबंध संचालक द्वारा नामांकित व्यक्ति के समक्ष आरबीट्रेशन एण्ड कन्सीलिएशन एक्ट 1996 के अंतर्गत संबंधित पक्षों द्वारा विवाद पंच निर्णय हेतु प्रस्तुत किया जावेगा एवं पंच द्वारा विधि सम्मत निर्णय दोनो पक्षों को मान्य होगा। किसी भी विवाद की स्थिति में किसी भी पक्ष द्वारा पंच के समक्ष रेफरेंस करने के पूर्व विवाद न्यायालय में दायर नहीं किया जा सकेगा जो कि उपरोक्त वर्णित आरबीट्रेशन एण्ड कन्सीलिएशन एक्ट 1996 के अंतर्गत नही आता। इसमें यदि न्यायालयीन वाद प्रस्तुत हुआ तो उस वाद के लिए केवल व्यवहार न्यायालय, भोपाल को ही श्रवणाधिकार होगा तथा अन्यत्र किसी स्थान में न्यायालयीन वाद प्रस्तुत नहीं किया जा सकेगा।"
>
> (emphasis supplied)

10. It is the admitted fact that a dispute has arisen between the parties relating to excavation of sand and the payment to be paid to the applicant, however, the preliminary dispute before this Court is that the notices regarding reference of the dispute to the Arbitrator were not issued by the applicant within seven days time as prescribed in the aforesaid clause. This Court finds that the notice was issued by the applicant on 13.02.2017 itself for the first time, which was served on the respondent on 15.02.2017 although in the service report it is mentioned that the place of delivery of notice is "Shiksha Mandal S.O. (Sub Office), however, this Court has no reason to disbelieve the contention raised by the learned counsel for the applicant that from the Shiksha Mandal S.O., the same were served on the respondent, as the address on the notices mentioned is M.P. State Mining Corporation Ltd. through General Manager, Paryavas Bhawan, Block No.1, Second Floor, Arera Hills, Bhopal. Otherwise also, Section 27 of the General Clauses Act would be applicable in the present case with full force. Thus, this Court has no hesitation to hold that notice for appointment of Arbitrator was served by the applicant on the correct address of the respondent and the same was properly served on the respondent.

11. Now coming to the contention regarding the invocation of arbitration clause after the prescribed period of limitation is concerned, this Court finds that so far as the judgment of the coordinate Bench of this Court in *Star Mineral Resources* (supra) is concerned, in which the same Clause 8 of the agreement has been considered by this Court and it is held that the applicant who has invoked the arbitration clause subsequent to the time limit provided in the aforesaid arbitration clause has no right to get the Arbitrator appointed, the same is distinguishable in the light of the decision rendered by the Apex Court in the case of *Grasim Industries* (supra). In *Grasim Industries* (supra), the Apex Court has also referred to Section 28 of the Contract Act and has held as under:-

> **"9.** Having perused Clause 9 of the supplementary agreement dated 27.10.1988, we are of the view that the interpretation placed by the High Court on Clause 16, was wholly misconceived. The aforesaid clause, did not postulate the period within which a claim could have been raised by the parties to the contractual agreements. Even otherwise, we are of the view that in terms of Section 28 of theContract Act. 1872, such a stipulation in a contractual obligation would not be valid and binding.
>
> **10.** Section 28 of the Act is reproduced below:
>
> **"28 Agreements in restraint of legal proceedings, void.**
> — Every agreement,—
>
> (a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, or
>
> (b) which extinguishes the rights of any party thereto, or discharges any party thereto, from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to that extent.
>
> *Exception 1* — ***Saving of contract to refer to arbitration dispute that may arise.*** — This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.
>
> *Exception 2.* - ***Saving of contract to refer questions that have already arisen.*** — Nor shall this section

render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.

Exception 3. - ***Saving of a guarantee agreement of a bank or a financial institution*** - This section shall not render illegal a contract in writing by which any bank or financial institution stipulate a term in a guarantee or any agreement making a provision for guarantee for extinguishment of the rights or discharge of any party thereto from any liability under or in respect of such guarantee or agreement on the expiry of a specified period which is not less than one year from the date of occurring or non-occurring of a specified event for extinguishment or discharge of such party from the said liability."

11. Section 28(b) unequivocally provides that an agreement which extinguishes the right of a party on the expiry of a specified period, would be void. Therefore, even if a restricted period for raising an arbitral dispute had actually been provided for (as was determined in the impugned order), the same would have to be treated as void.

12. In view of the legal position expressed hereinabove, the limitation with reference to the claim raised by the appellant, would have to be determined only under Article 137 of the Limitation Act. Insofar as the instant aspect of the matter is concerned, the High Court found that the claim raised by the appellant was even beyond the period postulated under Article 137 of the Limitation Act. In this behalf, the High Court recorded the following observations (*Grasim Industries Ltd. v. State of Kerala, 2003 SCC OnLine Ker 630 para 12):*

"12. ..... It is not actually a decision on the claim made under Annexure-X, but it is a decision of the arbitration clause in the Agreement. Apart from that, the claim put forward by the applicant in respect of the shortage of supply of raw materials from 1988-1989 onwards also is barred by limitation under Article 137 of the Limitation Act. The Supreme Court in *Steel Authority of India Limited v. J.C Budharaja [(1999) 8 SCC 122]* held that the provisions of Art.137 of the Limitation Act would apply and any action should be brought within three years from the date when the cause of action to recover the amount rose. Thus, the request for appointment of arbitrator will have only to be rejected."

13. It is not possible for us to accept the aforesaid determination rendered by the High Court for the simple reason that in the claim raised by the appellant in the notice, dated 1.2.2002, it was inter alia asserted as under:

> "While the matter was so pending before the Industrial Tribunal at the instance of the Labour Department of Government of Kerala, through the Labour Commissioner and the Additional Labour Commissioner, a settlement was eventually entered into with the Unions in the presence of the Hon'ble Minister for Labour on 7.7.2001, agreeing to the closure of the undertakings with effect from 1.7.2001. The fact that the Government was not in a position to supply raw material in required quantity and in the proportion agreed to on account of its not having taken enough steps to ensure continued availability of eucalyptus by planting the same is also clear from the orders of the Secretary to the Government, Labour department, in the applications for closure of the company's units at Mavoor. This has also been admitted by your department. The total amount that was paid to the employees inclusive of fixed overheads and idle wages during the period referred to above i.e June, 1999 to June 2001 came to Rs. 5999.43 lakhs is enclosed, marked as Annexure -2 and the compensation paid to the employees as a result of the settlement came to Rs. 5559.72 lakhs is enclosed, marked as Annexure- 3."
>
> It is, therefore, apparent that the appellant raised a grievance with reference to issues, that emerged even upto June, 2001. Under Article 137 of the Limitation Act, the postulated period of limitation is 3 years. In the instant case, the period of limitation would be three years prior to the date of invocation of arbitration. After the appellant issued the notice dated 1.2.2002, it invoked the arbitral clause on 8.5.2002, and therefore, the period of limitation in terms of Article 137, would bar all claims prior to 9.5.1999."
>
> (emphasis supplied)

12. Thus, this Court, with due respect, is of the considered opinion that the judgment rendered by this Court in the case of *Star Mineral Resources* (supra) has already been superseded by the judgment of the Apex Court in *Grasim Industries* (supra) and hence, is not binding on this Court and the judgment rendered by the Apex Court in *Grasim Industries* (supra) would prevail.

13. Resultantly, the contentions raised by the respondent are hereby rejected and the application stands **allowed.**

14. As agreed between the parties, I deem it proper to provisionally appoint **Shri K.K. Trivedi, Former Judge, R/o Block No.3, Vasundhara Vihar, Near St. Thomas School, South Civil Lines, Jabalpur (M.P.)** as an Arbitrator to resolve the dispute between the parties. The Registry of this Court shall obtain consent/declaration from the said Arbitrator as per Sub-section (8) of Section 11 of the Act and place this matter before the Court on the next date of hearing.

List **after two weeks.**

Order accordingly

I.L.R. [2019] M.P. 1770
CIVIL REVISION
Before Mr. Justice G.S. Ahluwalia
C.R. No. 174/2012 (Gwalior) decided on 30 January, 2019

MAHESH KUMAR AGARWAL …Applicant

Vs.

STATE OF M.P. & ors. …Non-applicants

***A. Municipalities Act, M.P. (37 of 1961), Section 318 – Indemnity for Acts Done in Good Faith – Demolition of Encroachment* – Notice of encroachment refused by plaintiff which was later served by affixture – Plaintiff did not remove the encroachments thus same was demolished by Municipal authorities – Held – Suit for damages is not maintainable even in a situation where Municipal Committee or its officers had intended to perform any act under the Act, Rule or Bye-Laws – Case covered under the phrase "intended to be done under this Act" – Concerned Officer is entitled for protection u/S 318 of the Act – Suit is not maintainable and is barred – Revision allowed. (Paras 14, 16 & 23)**

क. नगरपालिका अधिनियम, म.प्र. (1961 का 37), धारा 318 – सद्भावपूर्वक किये गये कार्यों हेतु क्षतिपूर्ति – अधिक्रमण को तोड़ना – वादी द्वारा अधिक्रमण का नोटिस अस्वीकार किया गया जिसे बाद में चस्पा कर तामील की गई थी – वादी ने अधिक्रमणों को नहीं हटाया, अतः नगरपालिक प्राधिकारीगण द्वारा उक्त को तोड़ा गया था – अभिनिर्धारित – क्षति के लिए वाद ऐसी स्थिति में पोषणीय नहीं है जहां नगरपालिक समिति या उसके अधिकारी अधिनियम, नियम अथवा उप–विधि के अंतर्गत किसी कार्य को करने हेतु आशयित थे – प्रकरण ''इस अधिनियम के अंतर्गत किया जाना आशयित,'' इस वाक्यांश के अंतर्गत आता है – वाद पोषणीय नहीं है तथा वर्जित है – पुनरीक्षण मंजूर।

***B. Municipalities Act, M.P. (37 of 1961), Section 318 & 319 – Scope* – Held – Protection given u/S 318 is not dependent on provisions of Section**

319 of the Act of 1961 – Both Sections are independent to each other dealing with different situations. (Para 14)

ख. नगरपालिका अधिनियम, म.प्र. (1961 का 37), धारा 318 व 319 – विस्तार – अभिनिर्धारित – धारा 318 के अंतर्गत दिया गया संरक्षण 1961 के अधिनियम की धारा 319 पर अवलंबित नहीं है – दोनों धाराएँ भिन्न परिस्थितियों से संबंध रखते हुए एक–दूसरे से स्वतंत्र हैं।

***C. Service Law – Transfer – Functionary Powers* – Held – Although Officer was transferred but there is nothing on record to show that he was relieved – It cannot be said that merely because applicant was transferred, he had lost all his statutory duties – If a person is transferred but so long he is not relieved from original place of posting, he is not denuded from his powers. (Para 22)**

ग. सेवा विधि – स्थानांतरण – कृत्यकारी शक्तियां – अभिनिर्धारित – यद्यपि अधिकारी का स्थानांतरण हुआ था परंतु अभिलेख पर ऐसा कुछ भी नहीं है जो यह दर्शाता हो कि उसे भारमुक्त कर दिया गया था – यह नहीं कहा जा सकता कि मात्र चूंकि आवेदक को स्थानांतरित कर दिया गया था, उसने अपने सभी कानूनी कर्तव्य खो दिये थे – यदि किसी व्यक्ति को स्थानांतरित किया जाता है परंतु जब तक उसे पदस्थापना के मूल स्थान से भारमुक्त न कर दिया जाए, उसे उसकी शक्तियों से वंचित नहीं किया जाता है।

Cases referred:

(2007) 10 SCC 414, AIR 1996 SCC 892, (2003) 10 SCC 38, (2014) 6 SCC 394, AIR 2005 SC 1794.

HK Shukla with *DK Agrawal*, for the applicant.

BM Patel, G.A. for the non-applicant No. 1/State.

N.K. Gupta with *Pawan Vijaywargiya* and *S.D. Singh,* for the non-applicant No. 5.

Arman Ali, for the non-applicant No. 6.

(Supplied: Paragraph numbers)

J U D G M E N T

G. S. AHLUWALIA, J. :- This Civil Revision under Section 115 of CPC has been filed against the order dated 07/11/2012 passed by Additional Judge to the Court of First Additional District Judge, Sheopur in Civil Suit No.12-B of 2011 (Original Civil Suit No.4-B of 1997), by which the preliminary issues framed by the trial Court have been decided against the applicant.

2. The necessary facts for the disposal of the present revision in short are that the respondents No.5 to 8/plaintiffs have filed a suit for recovery of damages to

the tune of Rs.12, 64, 300/- against the applicant and other defendants on the ground that the plaintiffs are the owners and in possession of three-stored (sic : storied) building situated in Ward No.13, Near Gandhi Park Golmbar, Sheopurkala. It is also known as "Soma Lodge". The back portion of said building is used for residential purpose, whereas the remaining portion is used for lodge, shops and offices. The construction of the building was over in the year 1984 and the plaintiffs is running the said lodge from the said year. The office of respondent No.5 who is an Advocate by profession, is also situated in the said building. The land situated between the front portion of the house and the culvert is used for visiting the building. It was further pleaded that when the construction was going on, then the Officers of the Municipal Council, Revenue Officers and other officers of the Department were also noticing the construction, but it was never objected by them. In the year 1985, a notice was given by the Municipal Council on the ground of raising construction without obtaining permission and, thereafter, the matter was compounded by order dated 25/08/1986. In the month of January, 1997, the applicant was posted on the post of Additional Collector but he was already transferred, whereas other defendants no.2 and 3 were also posted in Sheopur in their official capacity. On 27th January, 1997, at about 06:00 pm, the applicant as well as the respondents along with police force started demolishing a portion of the building and since the demolition was not stopped, as a result of which the remaining part of building also got damaged. It was also pleaded that when a notice was given to the Municipal Council, then a false reply was given pleading that a notice was issued to the plaintiffs which was refused by the plaintiff No.1, as a result of which the notice of demolition was affixed on the building. It was also mentioned in the plaint that no such notice was either served or affixed on the building.

3. The defendants filed their written statements and on the basis of written statements, four preliminary issues were framed as under:-

> "(1) Whether the suit is maintainable in the light of provisions of Sections 188 and 318 of MP Municipalities Act, 1961 and whether the plaintiffs are entitled for any compensation ?
>
> (2) Whether the applicant was working on the post of Executive Magistrate and whether he is entitled for protection under the Judicial Officers' Protection Act ?
>
> (3) Whether the action was taken under Section 223 of MP Municipalities Act, 1961 and whether the suit is maintainable in the light of alternative remedy of filing an appeal ?
>
> (4) Whether the suit is maintainable in absence of notice under Section 319 of the MP Municipalities Act, 1961 and Section 80 of the CPC ?

4. All these preliminary issues have been decided against the applicant by the Trial Court by order dated 07/11/2012 passed in Civil Suit No.12-B of 2011. Hence, this present revision.

5. Challenging the order passed by the Court below, it is submitted by the counsel for the applicant that undisputedly, the applicant was working on the post of Additional Collector, Sheopur. An anti-encroachment drive was undertaken by the Municipal Council and being an Executive Magistrate, the applicant was allegedly present on the spot. No specific allegations have been made against the applicant. The suit is not maintainable in the light of Section 318 of MP Municipalities Act, 1961 and the Trial Court has wrongly decided the preliminary issues against the applicant.

6. *Per contra*, it is submitted by the counsel for the respondents No.5 & 6/plaintiffs that the petitioner was already transferred. He is not entitled for any protection under Section 318 of MP Municipalities Act, 1961 and until and unless it is proved by the applicant that he had acted under the provisions of MP Municipalities Act, 1961, it cannot be said that the suit is not maintainable.

7. Heard the learned counsel for the parties.

8. Before considering the other preliminary issues which have been framed by the Trial Court, this Court feels it appropriate consider the provisions of Section 318 of the MP Municipalities Act, 1961 which reads as under:-

> **"318. Indemnity for acts done in good faith.** No suit shall be maintainable against the Council or any of its committees, or any Municipal officer or servant, or any person acting under or in accordance with the direction of the Council or any of its committees or any Municipal officer or servant, or of a Magistrate, in respect of anything in good faith done or intended to be done under this Act or under any rule or bye-law made there-under.'

The use of words **"intended to be done under this Act"** are of much importance.

9. So far as the applicant is concerned, admittedly, he is not an employee of Municipal Council but Section 318 of MP Municipalities Act, 1961 also grants indemnity to any person acting under or in accordance with the direction of the Municipal Council or any of its committees or any Municipal Officer or servant, or of a Magistrate. Thus, when the Municipal Council was carrying on the demolition work and even if it is presumed that the applicant was present on the spot, being Executive Magistrate of the area, it is clear that he is covered under Section 318 of MP Municipalities Act, 1961.

10. The Supreme Court in the case of *Joseph and another vs. State of Kerala and Another*, reported in (2007) 10 SCC 414 has held as under:-

> **"18**. Several questions arose for consideration before the High Court. The High Court indisputably had a limited role to play. We, as at present advised, are not inclined to accept the submission of Mr Iyer that sub-sections (2) and (3) of Section 3 of the 1971 Act would operate in the same field. In our opinion, both operate in different fields. However, on a plain reading of the impugned order passed by the High Court, we are of the opinion that the High Court was not correct in its view in regard to its construction of Section 3(3) of the 1971 Act. The Tribunal, while exercising its power under Section 8 of the 1971 Act, had taken into consideration the question which arose before it viz. as to whether the appellants herein had intention to cultivate the land on the appointed day. Appointed day having been defined in the 1971 Act, the relevant aspect was the situation as it existed on that day i.e. on 10-5-1971. For the purpose of attracting sub-section (3) of Section 3 of the 1971 Act, it was not necessary that the entire area should have been cultivated for arriving at a decision as to whether the owner of the land had the intention to cultivate or not. Also, it was required to be considered having regard to the activities carried on by the owner from the day of purchase till the appointed day. For the said purpose, subsequent conduct of the owner of the land was also relevant. Development of the land by plantation of rubber plants is not in dispute. The Explanation appended to Section 3(2) of the 1971 Act clearly suggests that cultivation would include cultivation of trees or plants of any species. Intention to cultivate by the owner of the land, we think, has to be gathered not only in regard to the fact situation obtaining at a particular time but also with regard to the subsequent conduct of the parties. If the activity in regard to cultivation of land or development thereof is systematic and not sporadic, the same also may give an idea as to whether the owner intended to cultivate the land. The words "intend to cultivate" clearly signify that on the date of vesting the land in question had not actually been cultivated in its entirety but the purchaser had the intention of doing so. Such intention on the part of the purchaser can be gathered from his conduct in regard to the development of land for making it fit for cultivation preceding to and subsequent to the date of vesting.
>
> 19. The High Court, in our opinion, was not correct in opining that for applying Section 3(3) of the 1971 Act, the cultivation of the property subsequent to the vesting cannot be taken into account. The High Court also was not correct in arriving at a finding that there had been no evidence whatsoever that the owners intended to cultivate the land prior to 10-5-1971. As the provision contained in sub-section (3) of Section 3 of the 1971 Act clearly provides for exclusion of the operation of sub-section (1) thereof, the same has to be construed liberally. So construed,

> the conduct of the parties was a relevant fact. The High Court, in our opinion, therefore was not correct in ignoring the findings of the Tribunal. Also, the High Court should bestow its attention to the findings arrived at by the Tribunal having regard to the limited nature of the scope and ambit of appeal in terms of Section 8-A of the 1971 Act and, particularly, in view of the fact that the order dated 21-2-1979 had not been appealed against."

11. While interpreting the words "intended to cultivate" as provided in sub-section (3) of Section 3 of Kerala Private Forests (Vesting and Assignment) Act,1971, it has been held by the Supreme Court that the words "intended to cultivate" clearly signify that on the date of vesting the land in question was not actually being cultivated in its entirety, but the intention of the purchaser, to cultivate the same can be gathered from his conduct. Therefore, whether the act complained by the plaintiffs would be covered by the phrase **"intended to be done under this Act"** or not, it is necessary to gather the intention of the parties.

12. In the present case, it is the pleadings of the plaintiffs that when the notices were given to the Municipal Council, then it was replied by them that before starting anti-encroachment drive, a notice under MP Municipalities Act, 1961 was issued to the plaintiffs on 25/01/1997 and actual anti-encroachment drive was started on 27/01/1997. Whether the notice was actually served upon the plaintiffs or not and whether it was affixed on the building of the plaintiffs or not, is a disputed question of fact. However, undisputedly, a specific stand was taken by the Municipal Council, that an anti-encroachment drive was started only after given a notice to the plaintiffs, thus, it is clear that the Municipal Council had pleaded from day one that they had acted under the provisions of M.P. Municipalities Act.

13. It is submitted by the counsel for the respondents No.5 and 6 that whether any act was done in good faith or not, is a disputed question of fact and until and unless it is proved that the defendants had done anything in good faith, the applicant cannot claim the protection of Section 318 of MP Municipalities Act, 1961. It is further submitted that even if filing of suit is held to be barred against Municipal Council or its officer or any officer working under this Act or in accordance with the direction of the Municipal Council, then Section 319 of MP Municipalities Act, 1961 would become redundant. There is no bar of suit and the only rider is that the suit shall not be maintainable in absence of notice. When MP Municipalities Act, 1961 itself provides for filing of suit against the activities of Municipal Council, then if it is interpreted that no suit can be filed if the work has been intended to be done under this Act, then Section 319 of MP Municipalities Act, 1961 would become redundant.

14. Considered the submissions made by the Counsel for the Plaintiffs. The use of words **" intended to be done under this Act"** is of paramount importance.

If a person has intention of performing any duty under the Act, then he would be covered under the phrase **"intended to be done under this Act".** The intention can be gathered from the surrounding circumstances. Even otherwise, for undertaking anti-encroachment drive, if the officers of Municipal Council are required to face civil litigations, then it would frustrate the very purpose of indemnity granted under Section 318 of MP Municipalities Act, 1961 and in order to handle such a situation, so that the officers of Municipal Council may perform their duties fearlessly under this Act, provision of Section 318 of the MP Municipalities Act, 1961 has been made. The protection given under Section 318 of MP Municipalities Act, 1961 is not dependent on the provisions of Section 319 of MP Municipalities Act, 1961. Both these Section are independent to each other dealing with the different situations. There may be certain circumstances where the suit may lie against the Municipal Council like for enforcement of any contract, etc. The basic purpose of provision of Section 319 of MP Municipalities Act, 1961 is to give an opportunity and prior notice to the Municipal Council so that the grievance of the person can be resolved without approaching the Court. In the present case, even according to the plaintiffs when a notice was given to the Municipal Council, then it was specifically replied that, a notice was given to the plaintiffs for removal of encroachment. Only when the plaintiffs did not remove the encroachment, then anti-encroachment drive was undertaken. Thus, an opportunity was given to the Municipal Council to resolve the dispute, and accordingly, it was specifically pointed out that an action has been taken by the Municipal Council under the provisions of MP Municipalities Act, 1961. For considering the intention, the conduct of the parties would be material. The Municipal Council had taken a clear stand that the action has been taken under the Act, thus, even in absence of any formal proof, the intention of the Municipal Council and its officer "to act under the Act", can be gathered, and thus, the applicant is entitled for protection under Section 318 of MP Municipalities Act, 1961.

15. It is submitted by the counsel for the applicant that as the Municipal Council had acted under the provisions of MP Municipalities Act, 1961 and it is its statutory due (sic : duty) to remove the unauthorized constructions and when the plaintiffs did not remove their encroachment even after issuance of notice for demolition, therefore, the Municipal Council was well within its rights to remove the encroachment and the encroacher is not entitled for damages. To buttress his contention, the counsel for the applicant has relied upon the judgment passed by the Supreme Court in the case of *Municipal Committee, Karnal vs. Nirmala Devi*, reported in AIR 1996 SCC 892.

16. Although the judgment in the case of *Nirmala Devi* (supra) has been passed after conclusion of trial but if the law laid down by the Supreme Court in the case of *Nirmala Devi* (supra) is considered in the light of the provisions of

Section 318 of the MP Municipalities Act, 1961, then it is clear that the suit for damages is not maintainable even in a situation where the Municipal Committee or its officer had intended to perform any act under the Act or Rule or bye-law.

17. It is next contended by the counsel for the applicant that as the respondents No 5 to 8 had an efficacious remedy of filing an appeal against the notice issued by the Municipal Council and until and unless it is held that the act of Municipal Council in demolishing the building of the applicant was contrary to the provisions of MP Municipalities Act 1961, the civil suit in its present form for grant of compensation because of demolition undertaken by Municipal Council is not maintainable. To buttress his contention, the counsel for the applicant has relied upon the judgment passed by the Supreme Court in the case of *NDMC vs. Satish Chand* (Deceased) by LR. Ram Chand, reported in (2003) 10 SCC 38.

18. The Supreme Court in the case of *Satish Chand* (supra) has held as under:-

> **"5.** The opening words of the section give a very wide jurisdiction to the civil courts to try all suits of a civil nature however, this wide power is qualified by providing an exception i.e. "excepting suits of which their cognizance is either expressly or impliedly barred." Dhulabhai etc. vs. State of Madhya Pradesh & Others [AIR 1969 SC 78] is a celebrated judgment on the point which still holds the field. It lays down the following principles: (AIR pp. 89-90, para 32)
>
> "(1) Where the Statute gives a finality to the orders of the special tribunals the Civil Courts' jurisdiction must be held to be excluded if there is adequate remedy to do what the civil court would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.
>
> (2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court. Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not.
>
> (3) Challenge to the provisions of the particular Act as ultra vires cannot be brought before Tribunals constituted under that Act.

Even the High Court cannot go into that question on a revision or reference from the decision of the Tribunals.

(4) When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory remedy to replace a suit.

(5) Where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or illegally collected, a suit lies.

(6) Questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case the scheme of the particular Act must be examined because it is a relevant enquiry.

(7) An exclusion of the jurisdiction of the Civil Court is not readily to be inferred unless the conditions above set down apply."

6. It will be noticed from the provisions contained in Section 9 of the Code of Civil Procedure that a bar to file a civil suit may be express or implied. An express bar is where a Statute itself contains a provision that the jurisdiction of a civil court is barred e.g., the bar contained in Section 293 of the Income Tax Act, 1961. An implied bar may arise when a Statute provide a special remedy to an aggrieved party like a right of appeal as contained in the Punjab Municipal Act which is the subject matter of the present case. Section 86 of the Act restrains a party from challenging assessment and levy of tax in any manner other than as provided under the Act. A provision like this is the implied bar envisaged in Section 9 C.P.C. against filing a civil suit. In Raja Ram Kumar Bhargava (dead) by LRs vs. Union of India [AIR 1988 SC 752] this Court observed:(SCC p.689, para 9)

"Generally speaking, the broad guiding considerations are that wherever a right, not pre- existing, in common-law, is created by a statute and that statute itself provided a machinery for the enforcement of the right, both the right and the remedy having been created uno flatu and a finality is intended to the result of the statutory proceedings, then, even in the absence of an exclusionary provision the Civil Courts' jurisdiction is impliedly barred. If, however, a right pre-existing in common law is recognised by the Statute and a new statutory remedy for its enforcement provided, without expressly excluding the Civil Court's jurisdiction, then both the common-law and the statutory remedies might become concurrent remedies leaving upon an element of election to the persons of inherence. To what extent, and on what areas and under what circumstances and conditions, the Civil Courts' jurisdiction is

preserved even where there is an express clause excluding their jurisdiction, are considered in Dhulabhai's case. AIR 1969 SC 78".

7. Munshi Ram and Others vs. Municipal Committee, Chheharta [1979 (3) SCR 463] was a case under the Punjab Municipal Act itself. The Court was considering the question of bar created under Sections 84 and 86 of the Act regarding hearing and determination of objections to levy of provisional tax under the Act. In this connection it was observed: (SCC pp. 88-89, paras 22-23)

"22. From a conjoint reading of sections 84 and 86, it is plain that the Municipal Act, gives a special and particular remedy for the person aggrieved by an assessment of tax under the Act, irrespective of whether the grievance relates to the rate or quantum of tax or the principle of assessment. The Act further provides a particular forum and a specific mode of having this remedy which analogous to that provided in Section 66 (2) of the Indian Income-tax Act, 1922. Section 86 forbids in clear terms the person aggrieved by an assessment from seeking his remedy in any other forum or in any other manner than that provided in the Municipal Act.

23. It is well recognized that where a Revenue Statute provides for a person aggrieved by an assessment there-under, a particular remedy to be sought in a particular forum, in a particular way, it must be sought in that forum and in that manner, and all other forums and modes of seeking it are excluded. Construed in the light of this principle, it is clear that sections 84 and 86 of the Municipal Act bar, by inevitable implication, the jurisdiction of the Civil Court where the grievance of the party relates to an assessment or the principle of assessment under this Act."

The Court upheld the objection regarding maintainability of the civil suit.

8. A Division Bench of the Delhi High Court in Sobha Singh & sons (P) Ltd. vs. New Delhi Municipal Committee [34 (1988) Delhi Law Times 91] had an occasion to consider the question of maintainability of a civil suit challenging the assessment and levy of property tax by the NDMC. Sections 84 and 86 of the Act came in for consideration. It was held that the provision of appeal contained in Section 84(1) of the Act provided a complete remedy to a party aggrieved against the assessment and levy of tax. Section 86 provides that the remedy of appeal is the only remedy to a party to challenge assessment for purposes of property tax. No other remedy was available to a party in such circumstances. It follows that the remedy of civil suit is barred."

19. The Supreme Court in the case of *Nagar Palika Parishad , Mihona and Another vs. Ramnath* and Another reported in (2014) 6 SCC 394 has held as under:-

> "6. Section 319 of the 1961 Act bars suits in absence of notice and reads as follows:
>
> **" Section 319-Bar of suit in absence of notice**.-(1) No suit shall be instituted against any Council or any Councilor, officer or servant thereof or any person acting under the direction of any such Council, Councilor, officer or servant for anything done or purporting to be done under this Act, until the expiration of two months next after a notice, in writing, stating the cause of action, the name and place of abode of the intending plaintiff and the relief which he claims, has been, in the case of a Council delivered or left at its office, and, in the case of any such member, officer, servant or person as aforesaid, delivered to him or left at his office or usual place of abode; and the plaint shall contain a statement that such notice has been delivered or left.
>
> (2)Every suit shall be dismissed unless it is instituted within eight months from the date of the accrual of the alleged cause of action.
>
> (3)Nothing in this section shall be deemed to apply to any suit instituted under Section 54 of the Specific Relief Act, 1877 (I of 1877).
>
> 7. Respondent No.1-plaintiff filed the suit for declaration of title and permanent injunction. In view of bar of suit for declaration of title in absence of notice under Section 319 the suit was not maintainable. The Courts below wrongly held that the suit was perpetual injunction though the respondent No.1-plaintiff filed the suit for declaration of title and for permanent injunction.
>
> **8** Respondent No.1-plaintiff cannot derive advantage of sub Section (3) of Section 319 which stipulates non-application of the Section 319 when the suit was instituted under Section 54 of the Specific Relief Act, 1877 (old provision) equivalent to Section 38 of the Specific Relief Act, 1963 and reads as follows:
>
> **"38.Perpetual injunction when granted**.-(1)Subject to the other provisions contained in or referred to by this Chapter, a perpetual injunction may be granted to the plaintiff to prevent the breach of an obligation existing in his favour, whether expressly or by implication.
>
> (2) When any such obligation arises from contract, the Court shall be guided by the rules and provisions contained in Chapter- II.
>
> (3)When the defendant invades or threatens to invade the plaintiff right to, or enjoyment of, property, the Court may grant a perpetual injunction in the following cases, namely:

(a)where the defendant is trustee of the property for the plaintiff;

(b)where there exists no standard for ascertaining the actual damage caused, or likely to be causes, by the invasion;

(c)where the invasion in such , that compensation in money would not afford adequate relief;

(d)where the injunction is necessary to prevent a multiplicity of judicial proceedings.

The benefit aforesaid cannot derive by Respondent No.1-plaintiff as the suit was filed for declaration of title coupled with permanent injunction. Respondent No.1 having claimed title, the suit cannot be termed to be suit for perpetual injunction alone.

9. Along with the trial court and the appellate court, the High Court also failed to appreciate the aforesaid fact and also overlooked the valuable interest and right of public at large, to use the suit land which is a part of public street. Further, in absence of challenge to the notice of eviction issued by the appellant, it was not open to the trial court to decide the title merely because permanent injunction coupled with declaration of title was also sought for."

20. It is submitted by the counsel for the applicant that so far as the contention of the plaintiffs that the Municipal Council had regularized the construction by compounding is concerned, the Supreme Court in the case of *Mahendra Baburao Mahadik and Others vs. Subhash Krishna Kanitkar and Others* AIR 2005 SC 1794 has deprecated the said practice.

21. It is next contended by the counsel for the respondents No. 5 and 6 that since the applicant was already transferred from Sheopur, therefore, even his present on the spot was unwarranted and as the plaintiffs are the active supporters of BJP and out of political vendetta, the applicant took personal interest in the matter and without any authority he came on the spot.

22. So far as the above-mentioned submission is concerned, it is fairly conceded by the counsel for the respondents No. 5 and 6 that although the applicant was already transferred from Sheopur but there is nothing on record to show that he was also actually relieved. If a person has been transferred but so long he is not relieved from the original place of posting, then it cannot be said that merely because of transfer order, the concerned officer would be denuded from his powers. As there is nothing on record to show that the applicant was also relieved from Sheopur, this Court is of the considered opinion that it cannot be said that merely because the applicant was transferred from Sheopur, he had lost all his statutory duties and accordingly, the submission made by the counsel for the applicant is rejected.

23. Thus, from the plain reading of the averments made in the paragraph 28 of the plaint, it is clear that the plaintiffs themselves have made reference to the reply given by the Municipal Council which was to the effect that a notice was given to the plaintiffs on 25/01/1997 which was refused by them and accordingly the notice was served by affixture and as the plaintiffs did not remove the encroachment on their own, therefore, anti-encroachment drive was undertaken on 27/01/1997. Thus, it is clear that the case of the respondents is squarely covered under the phrase **"intended to be done under this Act"**.Therefore, in the considered opinion of this Court, the suit against the applicant is barred under Section 318 of MP Municipalities Act, 1961 and the trial Court has wrongly decided the preliminary issue against the applicant. As the aforesaid preliminary issues is being decided by this Court in favour of the applicant and it has been held that the suit filed against the applicant is not maintainable, therefore, this Court is of the considered view that it is not necessary to consider the order passed by the Trial Court with regard to remaining preliminary issues.

24. Accordingly, the order dated 07/11/2012 passed by Additional Judge to the Court of First Additional District Judge, Sheopur in Civil Suit No. 12-B of 2011 (Original Civil Suit No. 4-B of 1997) is hereby set aside and it is held that the suit filed against the applicant is not maintainable and it is accordingly dismissed qua the applicant.

25. The record of the trial Court was received and further proceeding before the Trial Court were stayed by this Court by order dated 30/12/2012, therefore, the Registry is directed to return the record back to the Trial Court.

With the aforesaid observation, this Civil Revision succeeds and is hereby **allowed**.

Revision allowed.

I.L.R. [2019] M.P. 1782
CRIMINAL REVISION
Before Mr. Justice Rajendra Kumar Srivastava
Cr.R. No. 833/2018 (Jabalpur) decided on 23 July, 2019

AFAQUE KHAN …Applicant

Vs.

HINA KAUSAR MIRZA …Non-applicant

A. Criminal Procedure Code, 1973 (2 of 1974), Section 125 – Divorced Muslim Woman – Iddat Period – Entitlement* – Held – Divorced muslim woman is entitled for maintenance u/S 125 Cr.P.C. beyond the *iddat

***period* till her remarriage or according to conditions enumerated u/S 125 Cr.P.C. (Paras 11, 12 & 19)**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125 – तलाकशुदा मुस्लिम महिला – इद्दत अवधि – हकदारी – अभिनिर्धारित – तलाकशुदा मुस्लिम महिला दं.प्र.सं. की धारा 125 के अंतर्गत इद्दत अवधि के परे उसका पुनर्विवाह होने तक अथवा दं.प्र.सं. की धारा 125 के अंतर्गत प्रगणित शर्तों के अनुसार भरणपोषण हेतु हकदार है।

***B. Criminal Procedure Code, 1973 (2 of 1974), Section 125 and Contract Act (9 of 1872), Sections 2(e), 23 & 28 – Agreement – Effect* – Held – Even if wife has relinquished her rights to maintenance by executing an agreement with husband, her statutory right to seek maintenance u/S 125 Cr.P.C. cannot be bartered – Further, agreement which restrain her right to file legal proceeding is against public policy and same does not create any hurdle for wife for filing proceeding u/S 125 Cr.P.C. (Paras 14, 22 & 31)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125 एवं संविदा अधिनियम (1872 का 9), धाराएँ 2(ई), 23 व 28 – करार – प्रभाव – अभिनिर्धारित – भले ही पत्नी ने पति के साथ एक करार करके भरणपोषण के अपने अधिकारों को त्याग दिया हो, दं.प्र.सं. की धारा 125 के अंतर्गत भरणपोषण चाहने के उसके कानूनी अधिकार का प्रतिदान नहीं किया जा सकता – इसके अतिरिक्त, करार जो कि विधिक कार्यवाही फाईल करना अवरूद्ध करता है लोकनीति के विरूद्ध है तथा उक्त दं.प्र.सं. की धारा 125 के अंतर्गत कार्यवाही फाईल करने हेतु पत्नी के लिए कोई बाधा उत्पन्न नहीं करता।

***C. Criminal Procedure Code, 1973 (2 of 1974), Section 125 – Sufficient Cause to Live Separately* – Held – Respondent is a divorced wife where Section 125 (4) does not apply – Wife not required to explain any reasonable cause to live separately from husband. (Para 23 & 26)**

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125 – पृथक रहने हेतु पर्याप्त कारण – अभिनिर्धारित – प्रत्यर्थी एक तलाकशुदा पत्नी है जिस पर धारा 125(4) लागू नहीं होता – पत्नी द्वारा पति से पृथक रहने के लिए कोई युक्तियुक्त कारण स्पष्ट किया जाना अपेक्षित नहीं।

***D. Criminal Procedure Code, 1973 (2 of 1974), Section 125 – Quantum – Income of Husband – Consideration & Grounds* – Held – Wife entitled to live with same standard of her husband – Wife is educated, practicing as an Advocate – Quantum of maintenance be decided after consideration of her income also – Petitioner having responsibility of his unmarried sisters – Wife has also received some maintenance amount at the time of divorce – Maintenance amount reduced from Rs. 15000 pm to Rs. 10,000 pm. (Paras 30 to 32**

घ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125 – मात्रा – पति की आय – विचार किया जाना व आधार – अभिनिर्धारित – पत्नी अपने पति के समान स्तर से

रहने की हकदार है – पत्नी शिक्षित है, अधिवक्ता के रूप में व्यवसाय कर रही है – भरणपोषण की मात्रा का विनिश्चय उसकी आय को भी विचार में लेने के पश्चात् किया जाए – याची पर उसकी अविवाहित बहनों का उत्तरदायित्व है – पत्नी को तलाक के समय भी कुछ भरणपोषण की राशि प्राप्त हुई है – भरणपोषण राशि को 15000 रू. प्रतिमाह से घटकार 10,000 रू. प्रतिमाह किया गया।

Cases referred:

(2010) 1 SCC 666, 2019 (1) Crimes 515 (Bom.), 1985 MHLJ 853, 2013 CR.L.J. 3153, (2006) 1 MPLJ 272, 1995 (2) MPWN S.N. 162, 2006 (4) M.P.H.T. 381.

Mohd. Wajid Hyder, for the applicant.
Qasim Ali, for the non-applicant.

O R D E R

RAJENDRA KUMAR SRIVASTAVA, J. :- This revision petition under Section 397/401 of Cr.P.C has been filed by the petitioner, being aggrieved by order dated 06.11.2017, passed by learned 2nd Additional Principal Judge, Family Court, Bhopal, in M.J.C No. 764/2015, whereby the learned Judge has allowed the application under Section 125 of Cr.P.C. filed by the respondent/ applicant and directed the petitioner/non-applicant to give the maintenance amount of Rs. 15,000/- per month to the respondent.

2. According to case, respondent has filed an application under 125 of Cr.P.C., before Family Court, Bhopal, contending that her marriage was solemnized with the petitioner on 23.12.2001, according to Muslim rites. After some time, behavior of petitioner and his family members became bad towards her. They demanded dowry and maltreated her. Thereafter, respondent gave birth to a dead child, since they started to torture her constantly. They had compelled her to bring Rs.50,000/- from her parents and due to non fulfillment of the same, they were torturing her. On 8.10.2002, they also quarreled with her family members and its report was lodged by her family members in Police Station-Jahangeerabad. Petitioner did not live with her for long period. She further contended that she had filed some criminal cases against the petitioner but due to compromise, she did not proceed further with those cases. She submits that her parents have retired from service and due to old age ailment they are not able to take care of her. She has no source of income for her survival. She prayed before court to give maintenance amount of Rs. 25,000/- from the petitioner.

3. In reply, petitioner/non applicant has denied all the allegations made against him by the respondent/applicant. He contended that a compromise was arrived between them and in this regard an agreement was also executed by the parties. Respondent had received Rs. 32,000/- of Mehar amount through cheque.

She had also taken two cheques of Rs. 75,000/- for making compromise in proceedings filed under Muslim Women Protection Act 1986. They had agreed by executing an agreement that in future they will not file any legal proceedings against each other and she had also received the consolidated maintenance amount under Muslim Law.

4. Learned counsel for the petitioner submits that the order passed by the Family Court is bad in law, as Court has failed to consider the provisions of Section 125(4) of Cr.P.C in proper manner. He further submits that the learned Family Court ought to have been seen that the respondent not only deserted the petitioner but also after divorce she is living separately under mutual consent. The learned judge did not consider the defence of petitioner under section 125(4) of Cr.P.C, thus, impugned order deserves to be set-aside. Apart from that respondent/applicant is an advocate and earning sufficient income for her survival whereas petitioner is having responsibility of his parents and unmarried sisters.

5. On the other hand, learned counsel for the respondent submits that the petitioner maltreated the respondent, due to which she was compelled to live separately in her parental house. She does not have sufficient means to survive herself, as now her parents have retired from their service. The respondent /applicant has demanded Rs. 25,000/- per month, as maintenance from petitioner but learned Family Court has given only Rs. 15,000/- per month. Therefore, looking to this fact that the court has already given the maintenance amount in lesser side, no interference is warranted in the present case. So far as arguments of petitioner's counsel regarding non- applicability of getting maintenance from respondent due to compromise are concerned, there is no legal bar for filing an application under Section 125 of Cr.P.C. Therefore, this petition deserves to be dismissed. In support of his contention he has relied on the judgment of the Hon'ble Apex Court in the case of *Sabana Bano Vs. Imran Khan* reported in (2010) 1 SCC 666, and *Reema Salkan Vs. Sumer Singh Salkan* passed in Cr.A. No. 1220/2018.

6. Heard both the parties and perused the record.

7. On perusal of record, it appears that the petitioner and respondent have entered into marriage on 23.12.2001 according to Muslim rites. Due to maltreatment, respondent started living separately from the petitioner and she has filed an application under Section 125 of Cr.P.C. for seeking maintenance on 02.12.2015. It is also admitted fact that prior to this proceeding, respondent/wife has filed another proceeding under Section 3 of Muslim Women Protection Act, 1986. She has also filed a criminal proceeding of Section 498-A of IPC against the petitioner. It is reflected from the record that due to compromise, respondent/wife took back these cases and has closed the proceedings against the petitioner. The

respondent has given reason to file this proceeding of Section 125 of Cr.P.C. that she is unable to maintain herself and after making compromise, she is living with her parents, who are suffering from old age ailment. The parents of respondent/wife have retired from their service and now respondent is facing difficulties in her survival. The respondent has raised the argument before the learned Family Court that he has already given the consolidated maintenance amount under Muslim law and he has also returned "Mehar amount' to respondent. He has also pointed out in compromise agreement that parties have assured each other for not initiating any proceeding in future.

8. After hearing the contentions raised by both the counsels, the question arises before this court is whether if the wife has received any amount from his husband under Muslim Law then would she be entitled to get the maintenance amount under Section 125 of Cr.P.C. or not ?

9. From reading of the case *Shabana Bano* (Supra), it appears that the Hon'ble Apex Court has held that the divorced Muslim woman would be entitled to claim maintenance from her husband, as long as she does not marry. The Hon'ble Apex Court has held as under:-

> "10. The basic and foremost question that arises for consideration is whether a Muslim divorced wife would be entitled to receive the amount of maintenance from her divorced husband under Section 125 of the Cr.P.C. and, if yes, then through which forum.
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> 11. Section 4 of Muslim Act reads as under:-
>
> "4. Order for payment of maintenance:-
>
> (1) Notwithstanding anything contained in the foregoing provisions of this Act or in any other law for the time being in force, where a Magistrate is satisfied that a divorced woman has not re-married and is not able to maintain herself after the iddat period, he may make an order directing such of her relatives as would be entitled to inherit her property on her death according to Muslim law to pay such reasonable and fair maintenance to her as he may determine fit and proper, having regard to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of such relatives and such maintenance shall be payable by such relatives in the proportions in which they would inherit her property and at such periods as he may specify in his order:
>
> Provided that where such divorced woman has children, the Magistrate shall order only such children to pay maintenance to her, and in the event of any such children being unable to pay

such maintenance, the Magistrate shall order the parents of such divorced woman to pay maintenance to her:

Provided further that if any of the parents is unable to pay his or her share of the maintenance ordered by the Magistrate on the ground of his or her not having the means to pay the same, the Magistrate may, on proof of such inability being furnished to him, order that the share of such relatives in the maintenance ordered by him be paid by such of the other relatives as may appear to the Magistrate to have the means of paying the same in such proportions as the Magistrate may think fit to order.

(2) Where a divorced woman is unable to maintain herself and she has no relatives as mentioned in sub-section (1) or such relatives or any one of them have not enough means to pay the maintenance ordered by the Magistrate or the other relatives have not the means to pay the shares of those relatives whose shares have been ordered by the Magistrate to be paid by such other relatives under the second proviso to sub-section (1), the Magistrate may, by order, direct the State Wakf Board established under Section 9 of the Wakf Act, 1954 (29 of 1954), or under any other law for the time being in force in a State, functioning in the area in which the woman resides, to pay such maintenance as determined by him under sub-section (1) or, as the case may be, to pay the shares of such of the relatives who are unable to pay, at such periods as he may specify in his order."

12. Section 5 thereof deals with the option to be governed by the provisions of Section 125 to 128 of the Cr.P.C. It appears that parties had not given any joint or separate application for being considered by the Court. Section 7 thereof deals with transitional provisions.

13. Family Act, was enacted w.e.f. 14th September, 1984 with a view to promote conciliation in, and secure speedy settlement of, disputes relating to marriage and family affairs and for matters connected therewith. The purpose of enactment was essentially to set up family courts for the settlement of family disputes, emphasizing on conciliation and achieving socially desirable results and adherence to rigid rules of procedure and evidence should be eliminated. In other words, the purpose was for early settlement of family disputes. The Act, inter alia, seeks to exclusively provide within jurisdiction of the family courts the matters relating to maintenance, including proceedings under Chapter IX of the Cr.P.C.

14. Section 7 appearing in Chapter III of the Family Act deals with Jurisdiction. Relevant provisions thereof read as under:

"7. Jurisdiction-(1) Subject to the other provisions of this Act, a Family Court shall -

(a) have and exercise all the jurisdiction exercisable by any district Court or any subordinate civil Court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the Explanation; and

(b) be deemed, for the purposes of exercising such jurisdiction under such law, to be a district Court or, as the case may be, such subordinate civil Court for the area to which the jurisdiction of the Family Court extends.

Explanation.- The suits and proceedings referred to in this sub-section are suits and proceedings of the following nature, namely:-

(a) ... ...

(b) ... ...

(c) ... ...

(d) ... ...

(e) ... ...

(f) a suit or proceeding for maintenance;

(g) ... ..."

15. Section 20 of the Family Act appearing in Chapter VI deals with overriding effect of the provisions of the Act. The said section reads as under:

"20. Act to have overriding effect - The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act."

21. Bare perusal of Section 20 of the Family Act makes it crystal clear that the provisions of this Act shall have overriding effect on all other enactments in force dealing with this issue. "

10. Further, in paras 23 and 24 the Hon'ble Apex court has given its findings, same is quoted as under:-

"23. Cumulative reading of the relevant portions of judgments of this Court in Danial Latifi and Iqbal Bano would make it crystal clear that even a divorced Muslim woman would be entitled to claim maintenance from her divorced husband, as long as she does not marry. This being a beneficial piece of

> legislation, the benefit thereof must accrue to the divorced Muslim women.
>
> 24. In the light of the aforesaid discussion, the impugned orders are hereby set aside and quashed. It is held that even if a Muslim woman has been divorced, she would be entitled to claim maintenance from her husband under Section 125 of the Cr.P.C. after the expiry of period of iddat also, as long as she does not remarry "

11. It is clear that the divorced Muslim woman is entitled to get maintenance under Section 125 of Cr.P.C. beyond the Iddat period. She can get the maintenance till her remarriage or according to the conditions, as enumerated under Section 125 of Cr.P.C.

12. Therefore, in this case, this Court has no hesitation to say that the respondent/wife is entitled to get the maintenance amount under Section 125 of Cr.P.C. also beyond her Iddat period.

13. Now another question arises before this court is whether if an agreement was executed between the parties with regard to their divorce, maintenance and for non-filing of any legal proceedings against each other then the legal question is whether the said agreement would have any effect in the eyes of law or not ?

14. The definition of agreement is provided under Section 2(e) of Indian Contract Act, 1872 and according to it, "every compromise and set of promises, forming the consideration for each other, is an agreement." Further, Section 23 provides the provision to determine the consideration or object of an agreement is lawful or not, which is quoted, as under:-

> "23. What consideration and objects are lawful, and what not.-The consideration or object of an agreement is lawful, unless-
>
> it is forbidden by law; or
>
> is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or
>
> involves or implies, injury to the person or property of another; or
>
> the Court regards it as immoral, or opposed to public policy.
>
> In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void. "

15. Further, Section 28 speaks about the agreements, which restrained the legal proceedings and same is quoted as under :

28. Agreements in restrain of legal proceedings, void:- Every agreement,-

"(a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or

(b) which extinguishes the rights of any party thereto, or discharges any party thereto, from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights,

is void to that extent. "

16. In this regard in the case of *Ramchandra Laxman Kamble vs Shobha Ramchandra Kamble And Anr* reported in 2019 (1) Crimes 515 (Bom.), the High Court of Bombay has held as under:-

"19. R. Rambilas vs. Ms. Anita and Another 7, a learned Single Judge of the Andhra Pradesh High Court has held that a wife's claim for maintenance cannot be defeated by any agreement not to claim any maintenance. Even divorced wife is entitled to maintenance so long as she remains unmarried and unable to maintain herself. Mere divorce does not end right to maintenance. A clause in an agreement that wife shall not be entitled to claim maintenance from husband cannot be used in proceedings under Section 125 of Cr.P.C., since, such clause is opposed to public policy and, therefore, void under Section 23 of the Contract Act.

20. Division Bench of the Punjab and Haryana High Court in the 7 2009 All MR (Cri) Journal 232 sg wp3439-16.doc case of Ranjit Kaur vs. Pavittar Singh 8, has held that maintenance is a statutory right, which the legislature has framed irrespective of nationality, cast or creed of the parties. The statutory liability under Section 125 is, therefore, distinct from the liability under any other law. Therefore, the statutory right of a wife of a maintenance cannot be bartered, done away with or negatived by the husband by setting up an agreement to the contrary. Such an agreement in addition to it being against public policy would also be against the clear intendment of this provision. Therefore, giving effect to an agreement, which overrides this provision of law, that is, Section 125 of Cr.P.C. would tantamount to not only giving recognition to something, which is opposed to public policy, but would also amount to negation of it. The law makes a clear distinction between a void and illegal agreement and void but legal agreement. In the former case, the legislature penalizes it or prohibits it. In the latter case,

> it merely refuses to give effect to it. This is what exactly Section 23 of the Contract Act provides for. Thus, the agreement, whereby this statutory right of wife to maintenance was relinquished, may not per se be illegal, but it cannot be given effect to being a negation of the statutory right as provided for in this section and being opposed to public policy. However, Clauses (b) and (c) of Section 127(3) do not annihilate or defeat the right of the wife's future maintenance. (underling added)

17. In another case *Shahnaz Bano Vs. Babbu Khan and another* reported in 1985 MHLJ 853, the Bombay High Court has held that even in a case where the wife has surrendered her rights voluntary, and if after waiving her rights to maintenance, she becomes vagrant and destitute and is unable to maintain herself, then irrespective of her personal law, she would be entitled to avail statutory remedy for maintenance under Section 125 of Cr.P.C.

18. In the case of *Rameshwar S/o Sand Kachhkure Vs. State of Maharastra and another* reported in (2018) 4 MHLJ (Cri.) Passed in Criminal Writ Petition No. 295/17 the High Court of Bombay has also held that an agreement, by which the wife relinquishes her rights to receive maintenance in future, is contrary to public policy and unenforceable.

19. In another case *Rajesh R. Nair Vs. Meera Babu* reported in 2013 CR.L.J. 3153, the High Court of Kerala has held that an agreement, by which the wife waived her rights to claim maintenance would be avoid maintenance against public policy, the claim for maintenance can not be rejected only basis of such type of agreement.

20. In the case of *Nizumal Haq Vs. Phool Begum and others* reported in (2006) 1 MPLJ 272, the High Court of M.P. has laid down the same principle with regard to maintenance to children under Section 125 of Cr.P.C. It has been held by the Court that statutory rights of children to get the maintenance from his father can not be bartered by setting up an agreement to the contrary

21. In the present case, the agreement was executed on 21.11.2006. From reading of the same, it appears that the parties have arrived into compromise by inserting a condition that they are giving divorce to each other and in this regard, they would not initiate any proceedings in any court in future. They have also noted that they are free to re-marry to another person. It is also noted that the respondent/wife has received the maintenance amount under fair and reasonable scheme of Muslim Law.

22. As it is already considered by this court in above paras, the Court is of the view that the agreement is restraining the legal proceedings, thus, it is against the public policy and same does not have any effect in the proceedings of Section 125 of Cr.P.C.

23. Learned Counsel for the petitioner has also raised the arguments by relying the provision of section 125(4) of Cr.PC and stated that under mutual constant (sic : consent), respondent is living separately, therefore, she is not entitled to get any maintenance from him. From reading of the statements of respondent/wife, it appears that she has admitted that the agreement was executed between the parties, but she has denied the fact that the petitioner has given permanent maintenance amount to her. She has also stated that in the year 2004 her husband had thrown her out from his house since then she had made several efforts to return back to his home, but the petitioner did not turn-up to do so. She has also accepted that the proceeding of Muslim Women Protection Act was withdrawn by her due to aforesaid compromise. The proceedings of Section 498-A was also rejected by the trial Court, as she did not appear in the case. Therefore, it is found that by way of compromise they had given divorce to each other, thus, it is natural to see that after divorce respondent/wife would live separately from petitioner. In this regard, in the case of *Vanamala (Smt.) Vs. Shri H.M. Ranganatha Bhatta* reported in 1995 (2) MPWN S.N. 162, the Hon'ble Apex Court has held as under:-

> "On a plain reading of this Section it seems fairly clear that the expression 'wife' in the said sub-section does not have the extended meaning of including a woman who has been divorced. This is for the obvious reason that unless there is a relationship of husband and wife there can be no question of a divorcee woman living in adultery or without sufficient reason refusing to live with her husband. After divorce where is the occasion for the women to live with her husband? Similarly there would be no question of the husband and wife living separately by mutual consent because after divorce there is no need for consent to live separately. In the context, therefore, sub-section (4) of Section 125 does not apply to the case of a woman who has been divorced or who has obtained a decree for divorce. In our view, therefore, this contention is not well founded. "

24. In another case of *Shahnaz Bano* (Supra), the High Court of Bombay has held as under:-

> "11. The other question is that the wife has not proved 'neglect' on the part of the husband. Now, admittedly, the wife has been divorced by the husband and she is residing at the house of her father. She had issued notice (Ex. 12) to the husband that she needs maintenance for her livelihood as she is unable to maintain herself. The husband has not cared to provide any maintenance to her after divorce. It is his contention that by Khullanama divorce, she has waived her right to maintenance. In Bai Tahira v. Ali Hussain Fissalli Chothia and another, the

Supreme Court has observed as follows :

> S. 125 requires, as a sine qua non for its application, neglect by husband or father. The magistrate's order proceeds on neglect to maintain; the sessions judge has spoken nothing to the contrary; and The High Court has not spoken at all. Moreover, the husband has not examined himself to prove that he has been giving allowances to the divorced wife. His case, on the contrary, is that she has forfeited her claim because of divorce and the consent decree. Obviously, he has no case of non-neglect. His plea is his right to ignore. So the basic condition of neglect to maintain is satisfied. In this generous jurisdiction, a broader perception and appreciation of the facts and their bearing must govern the verdict not chopping little logic or tinkering with burden of proof.

The Supreme Court has further observed in para 9 as follows :

> The next submission is that the absence of mutual consent to live separately must be made out if the hurdle of s. 125(4) is to be over come. We see hardly any force in this plea. The compulsive conclusion from a divorce by a husband and his provision of a separate residence as evidenced by the consent decree fills the bill. Do divorcees have to 1) prove mutual consent to live apart? Divorce painfully implies that the husband orders her out of the conjugal home. If law has nexus with life this argument is still-born.
>
> 12. This view of the Supreme Court has been further reaffirmed in the case of Fuzlunbi v. K. Khader Vali and another, (1980) 4 SCC 125.
>
> 13. Finally, in the latest ruling of the Supreme Court in the matter of Mohd. Ahmed Khan v. Shah Bano Begum and others, it has been observed in no uncertain terms that the statutory right available to her under that section (125 of the code) is unaffected by the provisions of the personal law applicable to her... "(underlining added)

25. Further, in para 16 the High Court of Bombay while giving its findings observed as under:-

> "16. In the present case, admittedly, even if we presume that Khulanama was executed, she has not received any quittance from her husband, in fact she had surrendered her rights to maintenance. But that is as far as her personal law is concerned. In my opinion, under section 125 of the Code of Criminal Procedure in a given set of circumstances, even a wife divorced

> under Khulanama, if is unable to maintain herself, can take resort to proceedings under section 125. In fact, the Court must discharge its function in the administration of justice by granting her the maintenance irrespective of her personal law. ..... "

26. Since the law has been settled by the Hon'ble Supreme Court that the divorce wife is entitled to get the maintenance under Section 125 Cr.P.C. till her remarriage and in the context, Section 125(4) does not apply, therefore, this court is of the opinion that there is no need to respondent/wife to explain any reasonable cause to live separately from petitioner.

27. Therefore, this court does not find any reason to consider the argument raised by the petitioner's counsel with regard to Section 125(4) Cr.P.C.

28. So far as quantum of maintenance amount is concerned, from perusal of record, it is an admitted fact that the petitioner is working in Central Railway on the post of Guard and he is earning Rs. 50,000/- per month, as salary. In his cross-examination, petitioner had accepted his salary as Rs. 80,000/- to Rs. 90,000/- per month. Petitioner has also submitted that he is responsible person for his parents and unmarried sisters but it appears from the record that his father is a pensioner. Thus, the learned trial Court did not make any error in holding that the petitioner has no burden to give financial support to his parents but at the same time it can be said that the petitioner is having responsibility of his three unmarried sisters and this aspect should also be considered while granting maintenance to the respondent/wife. It also appears from the record, the respondent is an advocate and she was also doing some private work. As she is an educated lady doing practice as an advocate it may be presume that she is earning and her income may be assessed at Rs. 5000/- to 7000/. In the case of *Smt. Ratna Vs. Durga Prasad* reported in 2006 (4) M.P.H.T. 381 this Hon'ble Court has held as under :-

> "11. On due consideration of the facts and circumstances of the case and the material on record I am of the opinion that the impugned order directing reduction of the maintenance allowance from Rs.2,000/- per month to Rs.500/- per month deserves to be modified. Since the amount for maintenance should be awarded keeping in mind the status of the family and the needs of the wife, it must be a proper amount. The status of wife is to be judged from the status of her husband and not from her maternal relations. The rate of allowance cannot be fixed on the hypothetical basis i.e., capacity to earn money. Capacity to earn money may be taken into consideration in coming to a conclusion with regard to the means of the husband. In the present case, it is on record that the petitioner is living in her own house and owns agricultural land also. In such

> circumstances, though the amount of maintenance allowances deserves to be enhanced, but not too much. In my opinion, the rate of allowances deserves to be enhanced to Rs.900/-per month".

29. The learned counsel for the respondent/wife has relied on the judgment of Hon'ble Apex Court in the case of *Reema Salkan* (Supra) and argued that the Hon'ble Apex Court has held that maintenance must had to the similar living standard of the husband and his family and same can not be reduced as no change of circumstances in the case.

30. It is true, in view of the principle laid down by the Hon'ble Apex Court that the wife is also entitled to live with same standard of his husband, the maintenance amount should be given to the respondent/wife according to income of the petitioner/husband but at the same time if it is found that the respondent/wife is capable to earn herself then the maintenance amount should be given to her after considering her income also. Therefore, in view of the above the maintenance amount of Rs. 15,000/- per month is looking excessive.

31. In sum up of its conclusion, this Court is observing that even a wife relinquished her rights to maintenance by executing an agreement with the husband, her statutory rites (sic : rights) to seek maintenance under Section 125 of Cr.P.C. can not be bartered. An agreement which restrain her right to file the legal proceeding of Section 125 of Cr.P.C. is against the public policy and same does not create any hurdle on the way of the respondent/wife for filing the proceeding of Section 125 of Cr.P.C. So far as quantum of maintenance amount is concerned, looking to the fact that petitioner is having some responsibility of his sisters and the respondent/wife is an advocate and was doing some private job. She has also received some maintenance amount at the time of taking divorce from the petitioner, thus, the awarded maintenance amount to her should be reduced.

32. With the above said discussion, this Court is of the view that the respondent/wife is entitled to get the maintenance of Rs. 10,000/- per month instead to Rs. 15,000/- per month from the petitioner.

33. Accordingly, this petition is hereby **disposed of**.

Order accordingly.

I.L.R. [2019] M.P. 1796
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice Rajeev Kumar Shrivastava
M.Cr.C. No. 23809/2019 (Gwalior) decided on 25 June, 2019

NEERAJ @ VIKKY SHARMA ...Applicant

Vs.

STATE OF M.P. …Non-applicant

***A. Criminal Procedure Code, 1973 (2 of 1974), Section 438 and Penal Code (45 of 1860), Section 304-B/34 & 498-A – Anticipatory Bail – Ground of Parity* – Held – Parity cannot be the sole ground for granting bail even at stage of second or third or subsequent bail applications – Court is not bound to grant bail on ground of parity where the order granting bail to co-accused has been passed in flagrant violation of well settled principles of granting bail or if it is not supported by reasons – Applicant is husband and the main accused – Considering the gravity of offence and allegations and material available on record, anticipatory bail cannot be granted – Application dismissed. (Para 7 & 8)**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 438 एवं दण्ड संहिता (1860 का 45), धारा 304–बी/34 व 498–ए – अग्रिम जमानत – समानता का आधार – अभिनिर्धारित – समानता, द्वितीय अथवा तृतीय अथवा पश्चात्वर्ती जमानत आवेदनों के प्रक्रम पर भी जमानत प्रदान करने के लिए एकमात्र आधार नहीं हो सकता – न्यायालय समानता के आधार पर जमानत प्रदान करने के लिए आबद्ध नहीं है जहां सह–अभियुक्त को जमानत प्रदान किये जाने वाला आदेश जमानत प्रदान करने के सुस्थापित सिद्धांतों के स्पष्ट उल्लंघन में पारित किया गया है अथवा यदि वह कारणों द्वारा समर्थित नहीं है – आवेदक पति तथा मुख्य अभियुक्त है – अपराध की गंभीरता तथा अभिलेख पर उपलब्ध अभिकथनों एवं सामग्री को विचार में लेते हुए, अग्रिम जमानत प्रदान नहीं की जा सकती – आवेदन खारिज।

***B. Criminal Practice – Bail – Ground of Parity* – Factors relevant for consideration, discussed and enumerated. (Para 6 & 7)**

ख. दाण्डिक पद्धति – जमानत – समानता का आधार – विचार किये जाने के लिए सुसंगत कारक, विवेचित एवं प्रगणित।

Case referred:

1993 Cr.L.J. 938.

R.K. Sharma with *V.K. Agarwal*, for the applicant.
Kshitiz Sharma, P.P. for the non-applicant/State.
Ashutosh Pandey, for the complainant.

O R D E R

RAJEEV KUMAR SHRIVASTAVA, J. :- This first bail application for grant of anticipatory bail under Section 438 of the Cr.P.C has been filed on behalf of applicant in relation to Crime No.90/2019 registered at Police Station Janakganj, District Gwalior for the offences punishable under Sections 304(B), 34 and 498(A) of IPC.

2. As per prosecution story, marriage of deceased Preeti Sharma with the present applicant was solemnized on 9.5.2015 and after marriage, in-laws of Preeti Sharma used to demand four wheeler and on 28.1.2019, Preeti Sharma committed suicide by hanging.

3. It is submitted by counsel for the applicant that the applicant is husband of the deceased. It is further submitted that the applicant is having a daughter aged two and a half years, who is living with him. It is also contended that omnibus and vague allegations have been levelled against the applicant. Co-accused Ku. Boby @ Sheetal and Ramesh Sharma @ Ramsingh Sharma have been granted anticipatory bail by High Court vide order dated 5.3.2019 and 26.4.2019 respectively, while other two co-accused persons viz., Bittu @ Nokhil sharma and Smt. Chandni have been enlarged on bail by the trial Court itself vide order dated 26.3.2019 and 2.5.2019 respectively and the case of the applicant is identical to the case of above mentioned co-accused persons. It is also submitted by counsel for the applicant that on behalf of complainant, affidavit has been filed by father, mother and sister-in-law of the deceased, wherein it is specifically mentioned that the deceased was under depression hence she committed suicide. Under these circumstances, prays for grant of benefit of anticipatory bail.

4. Learned Public Prosecutor for the State as well as counsel for the complainant opposed the application and prayed for its rejection by contending that consideration of affidavit at the time of considering bail is not appropriate, it entirely reflects that some inducement has been made with the prosecution witnesses.

5. Learned counsel for the rival parties are heard and perused the case diary.

6. In *Nanha vs. State of UP* [1993 Cri.L.J. 938], the issue with regard to grant of bail on the basis of parity has been elaborately discussed, wherein it is observed as under:

> "Parity cannot be the sole ground for granting bail even at the stage of second or third or subsequent bail applications when the bail applications of the co-accused whose bail application had been earlier rejected are allowed and co-accused is released on bail.

> The Court has to satisfy itself that, on consideration of more materials placed, further developments in the investigation or otherwise and other different considerations, there are sufficient grounds for releasing the applicant on bail."

7. In the light of the above annunciation of law, it is clear that while deciding bail application on the ground of parity, following factors are relevant for consideration:

> (i) Parity cannot be the sole ground for granting bail even at the stage of second or third or subsequent bail applications.
>
> (ii) More materials placed before the Court with regard to the case, further developments in the investigation and other reasoned considerations may be considered as sufficient grounds for consideration.
>
> (iii) The Court is not bound to grant bail to an accused on the ground of parity even where the order granting bail to an identically placed co- accused contains reason, if the same has been passed in flagrant violation of well settled principles and ignoring the relevant facts essential for grant of bail.
>
> (iv) Failure of justice may be occasioned if bail is granted to an accused on the basis of parity with another co-accused whose bail order does not contain any reason.
>
> (v) If an order granting bail to co-accused is not supported by reasons, the same cannot form the basis of granting bail to an accused on the ground of parity.

8. Thus, in view of the aforesaid discussion, looking to the facts and circumstances of the present case, considering the gravity of offence and on the basis of allegations and material available on record, as the applicant is husband and main accused of this case, without commenting on the merits of the case, in the considered opinion of this Court, it would not be appropriate at this stage to grant the benefit of anticipatory bail to the applicant.

9. Consequently, the application is dismissed.

A copy of this order be sent to the Court concerned for information and a copy of the order be given to the learned Public Prosecutor with a direction to keep the same in the concerned case diary.

Application dismissed.

I.L.R. [2019] M.P. 1799
MISCELLANEOUS CRIMINAL CASE
Before Smt. Justice Anjuli Palo

M.Cr.C. No. 39605/2018 (Jabalpur) decided on 2 August, 2019

DURGA PRASAD & anr. ...Applicants

Vs.

STATE OF M.P. …Non-applicant

***A. Criminal Procedure Code, 1973 (2 of 1974), Section 362 & 482 – Recall/Review of Judgment – Scope* – Application u/S 482 for recall/review of judgment on ground that when case was listed, it was overlooked by the Counsel in the cause list – Held – No provision in Cr.P.C. to recall/review the judgment – Court cannot re-consider its own judgment on merits again by re-appreciating/re-evaluating the findings – It can only be done when there is apparent mistake or error on face of the record – Application dismissed. (Para 4 & 5)**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 362 व 482 – निर्णय को वापस लिया जाना/पुनर्विलोकन – व्याप्ति – निर्णय को वापस लेने/पुनर्विलोकन हेतु धारा 482 के अंतर्गत इस आधार पर आवेदन कि जब प्रकरण को सूचीबद्ध किया गया था, अधिवक्ता द्वारा वाद सूची में अनदेखी हुई थी – अभिनिर्धारित – दं.प्र.सं. में निर्णय को वापस लेने/पुनर्विलोकन के लिए कोई उपबंध नहीं – न्यायालय, गुणदोषों पर दिये गये स्वयं के निर्णय पर, पुनः विवेचन/पुनः मूल्यांकन द्वारा पुनः विचार नहीं कर सकता – यह केवल तब किया जा सकता है जब अभिलेख पर कोई प्रकट भूल या त्रुटि हुई है – आवेदन खारिज।

***B. Criminal Procedure Code, 1973 (2 of 1974), Section 362 – Judgment – Alteration – Scope* – Held – Re-opening or entertaining an application except in exceptional circumstances is totally barred – Once High Court signed the judgment, it becomes functus officio, neither the Judge who signed the judgment nor any other Judges of High Court has any power to review, reconsider or alter it, except for correcting a clerical or arithmetical error. (Para 6)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 362 – निर्णय – परिवर्तन – व्याप्ति – अभिनिर्धारित – एक आवेदन को फिर से खोलना या ग्रहण करना, आपवादिक परिस्थितियों को छोड़कर, पूर्णतः वर्जित है – एक बार निर्णय पर उच्च न्यायालय के हस्ताक्षर हो जाने पर वह पदकार्य–निवृत हो जाता है, न तो उस न्यायाधीश को, जिसने निर्णय पर हस्ताक्षर किये, न ही उच्च न्यायालय के किसी अन्य न्यायाधीश को, किसी लिपिकीय या गणितीय त्रुटि के सुधार हेतु छोड़कर, उसमें पुनर्विलोकन, पुनः विचार या परिवर्तन करने की कोई शक्ति है।

Cases referred:

(2011) 14 SCC 770, AIR 1962 SC 1208, AIR 2018 SC 3220, AIR 2017 SC 1751.

K.K. Pandey, for the applicants.
Jubin Prasad, P.L. for the non-applicant/State.

J U D G M E N T

ANJULI PALO, J. :- Heard.

This petition has been filed under Section 482 of the Code of Criminal Procedure by the accused persons for recalling/review of the judgment dated 14.09.2018 passed by this Court in Criminal Appeal No.1587/1996.

2. The petitioners pray for modification of their conviction under Section 498-A of the Indian Penal Code, which was maintained by this Court vide the order under review. He submitted that the petitioners' counsel could not argue the matter on the date when the case was listed for hearing because the case was overlooked in the cause list. He placed reliance on the decision in the case of *State of Punjab v. Davinder Pal Sing*, (2011) 14 SCC 770.

3. Heard learned counsel for the petitioners and perused the record. On perusal of the record, it is apparently clear that after getting facility of bail, original counsel engaged by the appellants did not appear before the Court. The case was pending for about 22 years. Therefore, amicus curiae was appointed to assist the Court and after thoroughly examining the evidence on record, the impugned judgment was passed by this Court.

4. There is no provision in the Code of Criminal Procedure to recall or review of the judgment either under Section 482 or 362 of the Code of Criminal Procedure. Findings of this Court may be correct or incorrect but this Court cannot reconsider its own judgment on merits again.

5. It is trite law, to review or recall any decision, it is essential to be established that there is apparent mistake or error on the face of the record. Otherwise also, the power under Section 482 of the Code of Criminal Procedure has to be exercised very sparingly in rare cases, to prevent abuse of process of law. It cannot be exercised for reappreciating or re-evaluating the findings on merits. The High Court has no right to pass any order against statutory procedure. Inherent powers cannot be exercised to do what the Code specifically prohibits the Court from doing. [See: *Shankatha Singh v. State of UP*, AIR 1962 SC 1208]

6. Further that under Section 362 of the Code of Criminal Procedure, reopening or entertaining an application except in exceptional circumstances is totally barred. Once, the High Court has signed its judgment, it becomes functus

officio, and neither the judge who signed the judgment nor any other judges of the High Court has any power to review, reconsider or alter it, except for correcting a clerical or arithmetical error.

7. Learned counsel for the petitioners has placed reliance on the decision in the case of *Mukesh v. State of NCT of Delhi*, AIR 2018 SC 3220. In the aforesaid case, Hon'ble the Supreme Court in paragraph 6 has held as under:

> "6. An application to review a judgment is not to be lightly entertained and this Court could exercise its review jurisdiction only when grounds are made out as provided in Order XLVII Rule 1 of the Supreme Court Rules, 2013 framed under Article 145 of the Constitution of India. This Court in Sow Chandra Kante and another v. Sheikh Habib (1975) 1 SCC 674 speaking through Justice V.R. Krishna Iyer on review has stated the following in paragraph 10:
>
> "10. A review of a judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. A mere repetition, through different counsel, of old and overruled arguments a second trip over ineffectually covered ground or minor mistakes of inconsequential import are obviously insufficient.
>
> 7. As per rule, review in a criminal proceeding is permissible only on the ground of error apparent on the face of the record. This Court in P.N. Eswara Iyer and otehrs v. Registrar, Supreme Court of India, (1980) 4 SCC 680 while examining the review jurisdiction of this Court vis-a-vis criminal and civil proceedings had made the following observations in para 34 and 35:
>
> 34. The rule, on its face, affords a wider set of grounds for review for oders in civil proceedings, but limits the ground vis-a-vis criminal proceedings to "errors apparent on the face of the record". If at all, the concern of the law to avoid judicial error should be heightened when life or liberty is in peril since civil penalties are often less traumatic. So, it is reasonable to assume that the framers of the ruls could not have intended a restrictive review over criminal orders or judgments. It is likely to be the other way about. Supposing an accused is sentenced to death by the Suprme Court and

> the "deceased" shows up in Court and the Court discovers the tragic treachery of the recorded testimony ....."

Thus, in the light of aforesaid observation impugned judgment cannot be reviewed or recalled.

8. Learned counsel for the petitioners has also placed reliance on the decision in the case of *Sushila Kumari v. Col. Satish Chander*, AIR 2017 SC 1751. The facts of the present case is entirely different than that of *Sushila Kumari's* case (supra). In the aforesaid case, Hon'ble the Supreme Court was dealing with a case of grant of maintenance and there was no agreement recorded for withdrawal of cases in maintenance proceedings. In that context, Hon'ble Supreme Court has held that the order passed by the High Court was factually incorrect. In the case at hand, there is no factual error in the judgment passed by this Court. Hence, the ratio laid down by Hon'ble the Supreme Court in *Sushila Kumari's* case (supra) has no application to the case at hand.

9. In view of the above analysis, it is clear that scope, ambit and parameters of review jurisdiction are well defined. A review application cannot be entertained except on the ground of error apparent on the face of the record. By review application, an applicant cannot be allowed to reargue the appeal.

10. In view of the preceding analysis, this petition for review being sans merit, stands dismissed.

Application dismissed