VOL. 1

INDIAN LAW REPORT (M.P.) COMMITTEE

JANUARY 2019

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दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125 – पुत्री का भरणपोषण – मात्रा – अभिनिर्धारित – विचारण न्यायालय ने पुत्री को रू. 15000/– प्रतिमाह की दर से भरणपोषण प्रदान किया – अभिनिर्धारित – पुत्री 2013 से, माता के साथ पृथक रूप से रह रही है – पुत्री के भरणपोषण हेतु आवेदक/पिता, जो कि एक प्रथम श्रेणी अधिकारी है जिसका शुद्ध वेतन रू. 72,084/– प्रतिमाह है, ने एक पैसे का भुगतान नहीं किया – केवल इसलिए कि पुत्री उसकी माता के साथ रह रही है जो रू. 36,076/– प्रतिमाह अर्जित कर रही है, आवेदक पिता के लिए उसकी स्वयं की पुत्री की जिम्मेदारी से बचने का आधार नहीं होगा – अवार्ड की गई राशि न्यायोचित है – पुनरीक्षण खारिज। (लॉरेन्स रॉबर्टसन वि. श्रीमती वाणी जोगी) …*6

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stations, then each police station has jurisdiction to investigate the offence – Application dismissed. [Manoj Shrivastava Vs. State of M.P.] …207

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दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 311 व 482 – साक्षी को पुनः बुलाया जाना – विचारण का प्रक्रम – आधार – एक प्रकरण में जो कि 5 वर्ष पुराना था, अंतिम तर्कों के प्रक्रम पर, आवेदन प्रस्तुत किया गया – अभिनिर्धारित – अभियुक्त को अंतिम तर्क के लिए एक दर्जन से अधिक बार प्रकरण में स्थगन मिला – दं.प्र.सं. की धारा 311 के अंतर्गत प्रस्तुत आवेदन पर विचार करते समय, न्यायालय द्वारा समस्त अभियुक्तगण के साथ–साथ पीड़ितों/साक्षीगण तथा अभियोजन के हितों पर विचार किया जाना अपेक्षित है – निष्पक्ष विचारण तथा न्याय हित के सिद्धांत को विचार में लेते हुए, दो विषम हितों के मध्य संतुलन बनाना पड़ता है अधिकतर जब आवेदन अतिविलम्बित प्रक्रम पर प्रस्तुत किया गया हो – न्याय के हित में अनुचित स्थगन देने से विरत रहना भी अंतर्ग्रस्त है, जो एक बार दं.प्र.सं. की धारा 311 के अंतर्गत आवेदन मंजूर हो जाने के बाद आवश्यक परिणाम बन सकता है – आक्षेपित आदेश में कोई त्रुटि नहीं – आवेदन खारिज। (बाबूलाल वि. म.प्र. राज्य) …*4

***Criminal Procedure Code, 1973 (2 of 1974), Section 437 & 439 – Bail Applications – Delay in Trial* – Held – In present cases, till date not a single witness has been examined – Accused persons are in jail since a long period –**

(ii). *Separate Entity* – Held – In a calculated manner, lease deed was executed in favour of petitioner which is a separate entity for namesake – Beneficiaries behind curtains are the same persons.

(iii). *Premium Amount/Cost of Land* – Held – License to construct and payment of premium cannot be treated as payment of "cost of land" – Amount of premium sought to be equated with cost of land is not only misconceived but also amounts to misrepresentation – Inadvertent use of words "cost of land" in some annexures will not alter the meaning of word "premium".

(iv). *Fraud* – Held – Petitioner, despite knowing the fact, that he has limited right for construction and to receive sale consideration as one time measure, he applied for execution of sale deed which was not at all envisaged in tender or agreement to which he was the signatory – Conduct of petitioner not free from blemish – Respondents established the plea of fraud/malice in law with sufficient material.

(v). *Terminology of Instrument/Document* – Held – A loose terminology used in instrument at some place is not determinative – To find out real intention of parties, complete document needs to be read in light of relevant statutory provisions to understand what is decipherable from it. [Samdariya Builders Pvt. Ltd. (M/s.) Vs. State of M.P.] (DB)…16

निर्वचन – *(i) निर्णय व पूर्व न्याय* – अभिनिर्धारित – उच्चतम न्यायालय ने निष्कर्षित किया है कि एक पूर्व न्याय वह है जो वास्तव में उच्चतम न्यायालय द्वारा विनिश्चित किया जाता है न कि वह जो किसी निर्णय से तार्किक रूप से बाहर आता है – पूर्व न्याय, प्रतिपादित सिद्धांत अथवा प्रकरण के विनिश्चय किये जाने के आधार से संबंधित होता है जिसमें प्रकरण का कोई तथ्यात्मक मैट्रिक्स शामिल नहीं है – एक निर्णय का अर्थान्वयन कानून के रूप में नहीं किया जाना चाहिए – तथ्य एवं परिस्थितियों पर विचार किये बिना निर्णय पर आंख बंद कर भरोसा करना उचित नहीं है – इसके अतिरिक्त, पश्चात्वर्ती प्रकरण में एक अकेला भिन्न तथ्य निर्णय के न्यायिक मूल्य को परिवर्तित कर सकता है।

(ii) *पृथक अस्तित्व* – अभिनिर्धारित – एक परिकल्पित ढंग से, पट्टा विलेख का निष्पादन याची के पक्ष में किया गया था जो नाम मात्र के लिए एक पृथक अस्तित्व रखता है – परदे के पीछे के हिताधिकारी भी वही व्यक्ति हैं।

(iii) *प्रीमियम राशि/भूमि का मूल्य* – अभिनिर्धारित – निर्माण करने की अनुज्ञप्ति तथा प्रीमियम के भुगतान को ''भूमि के मूल्य'' के भुगतान के रूप में नहीं माना जा सकता – प्रीमियम की राशि को भूमि के मूल्य के बराबर चाहे जाने, को न केवल गलत समझा गया है बल्कि दुर्व्यपदेशन की कोटि में भी आता है – कुछ अनुलग्नकों में ''भूमि का मूल्य'' शब्द का अनवधानता से प्रयोग ''प्रीमियम'' शब्द का अर्थ परिवर्तित नहीं करेगा।

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नगर तथा ग्राम निवेश विकसित भूमियों, गृहों, भवनों तथा अन्य संरचनाओं का व्ययन नियम, म.प्र., 1975, नियम 3 व 5, नगर सुधार न्यास अधिनियम, 1960 (1961 का 14), धारा 52 व 87(सी)(iii), नगर तथा ग्राम निवेश अधिनियम, म.प्र. (1973 का 23), धारा 2(जे) एवं राजस्व पुस्तिका परिपत्र – नजूल भूमि/प्राधिकरण भूमि – राज्य सरकार की मंजूरी – अभिनिर्धारित – नजूल भूमि, जब तक कि अधिसूचित नहीं की जाती है, अपने आप से किसी भी प्राधिकरण अथवा न्यास में निहित नहीं होती है – राज्य सरकार के पूर्व अनुमोदन के बिना नजूल/प्राधिकरण भूमि का कोई हस्तांतरण अथवा व्ययन अनुज्ञेय नहीं है जैसा कि 1975 के नियमों के नियम 3/5 में आज्ञापक है – याची ऐसी कोई अधिसूचना दर्शाने में विफल रहा जिससे भूमि का स्वरूप नजूल/सरकारी भूमि से प्राधिकरण भूमि में परिवर्तित किया गया हो – 1975 के नियमों के अनुसार, संप्रवर्तक करार के माध्यम से कोई हस्तांतरण अनुज्ञेय नहीं है – राज्य एवं जेडीए कानूनी नियमों के अनुसार कार्रवाई करने हेतु बाध्य थे – जेडीए ने नियम 1975 एवं प्रकोष्ठ अधिनियम के उपबंधों का उल्लंघन किया है – यह ''विधि अंतर्गत विद्वेष'' की कोटि में आता है। (समदड़िया बिल्डर्स प्रा. लि. (मे.) वि. म.प्र. राज्य) **(DB)…16**

Nagar Tatha Gram Nivesh Vikasit Bhumiyon, Griho, Bhavano Tatha Anya Sanrachnao Ka Vyayan Niyam, M.P., 1975, Rule 5-A – Tenant/ Sub Lessees – Public Interest **– Held – Petitioner admittedly given shops/ offices/showroom on rent but possession was not given to tenants by joint signatures of JDA and promoter which was contrary to promoter agreement read with scheme of Prakoshta Adhiniyam – For every transfer of apartment, JDA was entitled to receive 3% of Collector guideline rate of property – JDA was deprived of its benefits and also the amount of rent by putting sub-lessees and licensees – Action is not only against JDA but also against public interest – Impugned orders rightly passed. [Samdariya Builders Pvt. Ltd. (M/s.) Vs. State of M.P.] (DB)…16**

नगर तथा ग्राम निवेश विकसित भूमियों, गृहों, भवनों तथा अन्य संरचनाओं का व्ययन नियम, म.प्र., 1975, नियम 5–ए – किराएदार/उप–पट्टेदार – लोकहित – अभिनिर्धारित – याची ने स्वीकृत रूप से दुकानें/कार्यालय/शोरूम भाड़े पर दिये परंतु किराएदारों को कब्जा जेडीए एवं संप्रवर्तक के संयुक्त हस्ताक्षरों द्वारा नहीं दिया गया था जो कि संप्रवर्तक करार सहपठित प्रकोष्ठ अधिनियम की स्कीम के विपरीत था – प्रकोष्ठ के प्रत्येक हस्तांतरण के लिए, जेडीए संपत्ति की कलेक्टर द्वारा मार्गदर्शक दर का 3% प्राप्त

निष्पक्ष एवं पक्षपातरहित अन्वेषण पर संदेह का कारण सृजित करता है – सर्वोच्च न्यायालय के आदेश को वर्तमान प्रकरण में लागू करते हुए, अतिउत्साही अन्वेषण अधिकारी की कार्रवाई द्वारा अपीलार्थी के अधिकारों का उल्लंघन हुआ है, जिसने प्रथम सूचना प्रतिवेदन दर्ज करना और संपूर्ण अन्वेषण पूरा करना भी अपने ऊपर लिया है, जिसे कायम नहीं रखा जा सकता – दोषसिद्धि अपास्त – अपील मंजूर। (मोतीलाल डहेरिया वि. म.प्र. राज्य) **...*8**

Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 8/21 & 37 and Criminal Procedure Code, 1973 (2 of 1974), Section 439 – Bail – Grounds – Quantity of Psychotropic Substance – Calculation of **– Held – Government of India vide notification dated 18.11.2009 made it clear that for purpose of determining quantity, gross weight of the drug recovered and not the pure content of psychotropic substance shall be taken into consideration – In present case, even if net quantity is considered, total quantity of seized "Codeine" is 1.993 Kg which is commercial quantity which was kept in possession without any document to show that it was meant for therapeutic use – Restrictions u/S 37 of the Act of 1985 is applicable – Petitioners not entitled for bail – Applications dismissed. [Ranjan Vs. State of M.P.] ...230**

स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 8/21 व 37 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 439 – जमानत – आधार – मनःप्रभावी पदार्थ की मात्रा – की गणना – अभिनिर्धारित – भारत सरकार ने अधिसूचना दिनांक 18.11.2009 द्वारा यह स्पष्ट किया है कि मात्रा की अवधारणा के प्रयोजन हेतु, बरामद औषधि का सकल माप और न कि मनःप्रभावी पदार्थ का शुद्ध तत्व विचार में लिया जाएगा – वर्तमान प्रकरण में, यदि शुद्ध मात्रा विचार में ली जाए तब भी जब्तशुदा ''कोडीन'' की कुल मात्रा 1.993 कि.ग्रा. है जो कि वाणिज्यिक मात्रा है जिसे बिना किसी ऐसे दस्तावेज के कब्जे में रखा गया था जो दर्शाता हो कि वह रोगोपचारक उपयोग हेतु अर्थान्वित थी – 1985 के अधिनियम की धारा 37 के अंतर्गत निर्बंधन लागू होते हैं – याचीगण, जमानत हेतु हकदार नहीं – आवेदन खारिज किये गये। (रंजन वि. म.प्र. राज्य) **...230**

Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 40 – Removal of Sarpanch – Enquiry **– On a complaint against petitioner, SDO directed CEO to investigate the matter and submit enquiry report – As per report, irregularities found against petitioner – Show cause notice issued whereby petitioner filed reply, which was not found satisfactory resulting in his removal – Held – Before passing order u/S 40, enquiry is necessary – Such enquiry does not mean issuance of show cause notice, but requires a detail enquiry where office bearer must be given opportunity to examine and cross examine the witnesses – No such enquiry conducted by SDO – Impugned order of removal quashed – Petition allowed. [Vikram Singh Vs. State of M.P.] ...*13**

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basic allegation made against accused persons including present applicant, Court should have allowed the application u/S 5 of the Act of 1963 on this ground – Delay condoned – Matter remanded back for consideration on merits. [Aatamdas Vs. State of M.P.] …*1

दण्ड संहिता (1860 का 45), धारा 327/34 व 323/34 एवं परिसीमा अधिनियम (1963 का 36), धारा 5 – अपील – विलंब के लिए माफी – अभिनिर्धारित – दोषसिद्धि के विरूद्ध अपील प्रस्तुत करने में 5 वर्ष और 5 माह का विलंब – उक्त व्यतिक्रम हेतु पर्याप्त कारण की अनुपस्थिति में, विनिर्दिष्ट रूप से जब आवेदक जेल में नहीं था, विचारण न्यायालय ने विलंब के लिए माफी हेतु आवेदन को उचित रूप से खारिज किया – किंतु, चूंकि अपीली न्यायालय द्वारा अभियुक्तगण, जिसमें वर्तमान आवेदक शामिल है, के विरूद्ध किये गये मूल अभिकथन पर ही संदेह उठाते हुए सह–अभियुक्त को दोषमुक्त किया गया है, न्यायालय को इस आधार पर, 1963 के अधिनियम की धारा 5 के अंतर्गत आवेदन मंजूर करना चाहिए था – विलंब माफ किया गया – गुणदोषों पर विचार किये जाने हेतु मामला प्रतिप्रेषित। (आतमदास वि म.प्र. राज्य) …*1

Penal Code (45 of 1860), Section 354-A – See – Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, Section 3(1)(w)(i) **[Atendra Singh Rawat Vs. State of M.P.] …168**

दण्ड संहिता (1860 का 45), धारा 354–ए – देखें – अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम, 1989, धारा 3(1)(डब्ल्यू)(i) (अतेन्द्र सिंह रावत वि. म.प्र. राज्य) …168

Penal Code (45 of 1860), Sections 363, 366, 376 & 506(2) – Rape – Medical Evidence – Appreciation of Evidence **– Held – As per medical evidence, no injury on private parts and no definite opinion regarding rape – Prosecutrix was earlier engaged with appellant No. 1 – Previous enmity between appellant No. 1 and father of prosecutrix – It can be inferred by Ossification test report that prosecutrix was more than 16 yrs. of age – Prosecutrix never disclosed the incident to her relatives – It is very much probable that prosecutrix was a consenting party – No cogent evidence against appellant No. 2 for abduction – False implication is probable – No offence of rape and abduction made out – Conviction and sentence set aside – Appeal allowed. [Bhagwan Vs. State of M.P.] (DB)…184**

दण्ड संहिता (1860 का 45), धाराएँ 363, 366, 376 व 506(2) – बलात्संग – चिकित्सीय साक्ष्य – साक्ष्य का मूल्यांकन – अभिनिर्धारित – चिकित्सीय साक्ष्य के अनुसार गुप्तांगों पर कोई चोट नहीं तथा बलात्संग संबंधी कोई निश्चित राय नहीं – अभियोक्त्री की पूर्व में अपीलार्थी क्र. 1 से सगाई हुई थी – अपीलार्थी क्र. 1 एवं अभियोक्त्री के पिता के बीच पूर्वतर वैमनस्यता – अस्थि विकास परीक्षण प्रतिवेदन से निष्कर्षित किया जा सकता है कि अभियोक्त्री 16 वर्ष से अधिक आयु की थी – अभियोक्त्री ने कभी भी उसके रिश्तेदारों को घटना प्रकट नहीं की – यह अधिक संभाव्य है कि अभियोक्त्री सम्मत पक्षकार थी –

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THE INDIAN LAW REPORTS M.P. SERIES, 2019

(VOL-1)

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

AMENDMENTS IN THE HIGH COURT OF MADHYA PRADESH RULES, 2008

[Published in Madhya Pradesh Gazette, Part 4 (Ga), dated 18th January, 2019, page No. 63 to 66]

High Court of Madhya Pradesh, Jabalpur

No. B-6 Jabalpur, the 2nd January, 2019

In exercise of the powers conferred by Articles 225 of the Constitution of India, section 54 of the States Reorganisation Act, 1956, clauses 27 and 28 of the letters patent, section 3 of the Madhya Pradesh Uchcha Nyayalaya (Khandpeeth ko Appeal) Adhiniyam, 2005, the High Court of Madhya Pradesh, hereby, makes the following amendments in the High Court of Madhya Pradesh Rules, 2008, Namely

AMENDMENTS

In the said rules,-

1. In chapter X,-

(1) in rule 24, published in the Madhya Pradesh Gazette, (extraordinary) dated 07-06-2012 at page No. 532 (9), S.No. 10 (b) and 10 (c) are withdrawn which runs as under.

(b) after words “the name” & “address and” word “office” is inserted.

(c) after words “address name” & “of the advocate” words “phone numbers” are inserted.

After withdrawal of S.No. 10 (b) and 10 (c), the following amendment are inserted in chapter X, rule 24 :-

(b) between words “High Court” & “the name”, the symbol “,” is inserted.

(c) between words “the name” & “address of”, the symbol & words “, office” is inserted.

(d) between words "address" & "of the advocate", the words ", phone number(s) and e-mail address (if any)" are inserted.

(e) between words "the advocate," & "for the Principal Seat", the words "if any," are deleted.

After Amendments, Rule 24 of the Chapter X, shall be read as under :-

24. The Registrar shall require the Central Government and all local or other authorities under the control of the State or Central Government operating within the territory of the State of Madhya Pradesh to inform the High Court, the name, office address, phone number(s) and e-mail address (if any) of the advocate, for the Principal Seat of the High Court at Jabalpur and Benches at Indore and Gwalior, who is authorized to accept service on their behalf. Such information shall be maintained in the form of a Register and shall be made available to the Bar. Whenever such advocate is changed, intimation of such change shall be given to the Registrar, who shall notify it to the Bar.

Provided that it shall not be incumbent upon any such local or other Authority to authorize an advocate for accepting service on its behalf.

2. In Chapter-XIII, after Rule 3, the following rule shall be added, namely:- "3A. In application for restoration/review/recall/modification/ clarification of order or judgment passed in a main case, the Court may, at any time, direct the office to attach the record of main case.".

3. In chapter XVIII, in rule 18, in the end, before full stop, the following words, figure and letters shall be inserted, namely:–

"printed on both sides on a recycled, 60 GSM paper"

4. In chapter XIX

(1) In rule 15, the para shall be renumbered as sub-rule (1) thereafter following sub-rules shall be added namely:-

"(2) A Judgment or an Order shall be typed/printed on both side of a ledger paper of foolscap size, leaving a margin of not less than 5 centimeters on the top and left and 2.5 centimeters on right and bottom.

(3) It shall be printed using double space, font size of 14 and font face Times New Roman.";

(2) In rule 23,-

(a) Sub-rule (8) shall be renumbered as sub-rule (10);

(b) After sub-rule (7), the following sub-rules shall be added namely:

"(8) Such papers, in case of historical, sociological and scientific value, as in the opinion of the Court, should be permanently preserved.

(9) Any original document relating to title whether it has been admitted or not."

(3) In rule 24, in the second line between the words "a period of" and the words "and shall", the figure & word "12 years" shall be substituted by the figure & word "4 years"

(4) In rule 26,-

(a) sub-rule (1), in proviso the words "shall not be destroyed" shall be substituted by the words " preserved permanently"

(b) In Sub-rule (2), in clause (c), after the words "risk of the party", the words "and destroyed after 12 years from the date of judgment" shall be deleted.

(5) After sub-rule (6) of rule 28 of chapter XIX, the following sub-rule shall be added namely:

"(7) Such papers, in case of historical, sociological and scientific value, as in the opinion of the Court, should be preserved.

(8) Any original document relating to title whether it has been admitted or not.".

5. In chapter XXI,

(1) amendment published in the Madhya Pradesh Gazette, (extraordinary) dated 30-07-2010 at page No. 802 (3), S.No. 9 providing that: "In chapter XXI, sub-rule (1) of rule 3 shall be deleted", is withdrawn.

(2) In rule 6, sub-rule (1) shall be deleted.

6. For form No. 4 (Chapter X, sub-rule (1) of rule 3), the following Form shall be substituted, namely:

"Form No. 4
(Chapter X, rule 3(1))
IN THE HIGH COURT OF MADHYA PRADESH
PRINCIPAL SEAT AT JABALPUR / BENCH AT INDORE/
BENCH AT GWALIOR

Class of Case …….. No. …….. of 20……

Appellant :
Applicant : ……
Petitioner :

Versus

Respondent :
Non-applicant : ……

Part A – Index

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Part B – Chronology of Events

Date	**Event**
……	……
……	……
……	……

Place: ……

Date: ……

(Signature)
Advocate for ……..."

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REGISTRAR GENERAL
High Court of Madhya Pradesh

HIGH COURT OF MADHYA PRADESH DIGITIZATION OF RECORDS RULES, 2018

[Published in Madhya Pradesh Gazette, Part 4 (Ga), dated 18th January, 2019, page No. 67 to 71]

There is an urgent need to cope with the need for creation of user-friendly database with features for text, context, keyword based searching and for purpose of safe custody and creation of space for records. The digitization solution will be an integrated web technology based solution capable of running seamlessly over Intranet, Virtual Private Network (VPN) as well as on the Internet that allows the High Court of Madhya Pradesh to scan and integrate all types of records, Judgments/Orders and enable the end users to search quickly and comprehensively across different media from the vast database available at the High Court of Madhya Pradesh;

Therefore, in exercise of the powers conferred by Article 225 of the Constitution of India, Section 54 of the States Reorganisation Act, 1956, clauses 27 & 28 of the Letters Patent, the High Court of Madhya Pradesh, hereby, makes following rules for digitization of records of the High Court, namely:-

CHAPTER-1

1. Short Title.- These Rules may be called the "High Court of Madhya Pradesh Digitization of Records Rules, 2018".

2. Commencement.- These rules shall come into force with immediate effect from the date of their publication in the official Gazette.

3. Definitions:-

(1) **"Application software"** means a program or group of programs designed for end users. The application software includes database programs, word processors, spreadsheets, etc.

(2) **"Digitization"** means the process of converting analog signals or information in any form into a digital and un-editable format that can be understood by computer systems or electronic devices.

(3) **"Digitization of the High Court records"** means conversion of all physical files including Judicial records of disposed of, pending and freshly filed cases, administrative records, ILR publications, gazette notifications/publications, old books, all registers etc. into digital form capable of being understand by computer systems or an electronic device.

(4) **"Digitized/electronic records"** shall bear the same meaning as assigned under the Information Technology Act, 2000.

(5) **"Local Area Network"** means a computer network that interconnects computers in a limited area such as a home, school, computer laboratory or office building using network media.

(6) **"Microfilming"** means a film bearing a photographic record on a reduced scale of printed or other graphic matter.

(7) **"Official"** means the officer and employees of the High Court of Madhya Pradesh.

(8) **"Physical Records"** means and include records on paper of

(a) cases-pending or disposed of,

(b) administrative records,

(c) gazette notifications /circulars / publications,

(d) journals,

(e) books and

(f) registers etc.

(9) **"Repository"** means a central place where data is stored and maintained and this data comprises of collection of electronic records.

(10) The words and phrases not mentioned herein shall bear the same meaning as assigned under the High Court of Madhya Pradesh, Rules 2008.

CHAPTER-II

PRESENTATION OF MATTERS AT THE FILING COUNTER

4. Notwithstanding anything to the contrary contained in Rule 1, Chapter 11 of High Court of Madhya Pradesh Rules, 2008.

(1) Any main case, interlocutory application or any other document in a main case may be presented at the presentation centre of the High Court during working hours in soft copy (pdf format) by any party or his recognized agent or counsel in person.

(2) On such presentation, the advocate/party shall be given the facility of listing of his/her case on next working day after removal of default.

(3) In case the advocates/parties are submitting the hard copy of paper book the same will be scanned at scanning center by the scanning team of the High Court or by the vendor appointed by the High Court for the said purpose.

(4) The scanned files and the soft copy shall be uploaded on the Server added in the repository.

(5) All subsequent orders, memo's, reminders, rejoinders shall be appended/added in the scanned digital file either through scanning process or digitally attaching the documents with the relevant file/case.

(6) Any additional amendment submitted later by the parties/ advocates at filing center either in the hard copy or soft copy shall be tagged with the relevant file/case in sequential order.

CHAPTER-III

Preservation and Elimination of Records

5. (1) All the original documents after digitization shall be returned to the parties after giving them three months notice to receive the documents and in case the parties do not collect the documents within a period of three months, those documents shall be destroyed in accordance with the provisions of Chapter XIX of the Rules, 2008 under the general superintendence of the Registrar (IT), by the Supervising Officer(s) as may be appointed by the Chief Justice for that purpose. Record to be digitized and preserved permanently in the un-editable digitized format.

(2) Notwithstanding anything contained in Rule 23 to 31, Chapter XIX of High Court of Madhya Pradesh Rules, 2008, Part A of every case shall be digitized and preserved permanently in an uneditable format under the general superintendence of the Registrar (IT) and the Supervising Officer(s) nominated by the Chief Justice.

(3) The official digitizing the record of the High Court shall certify that the entire judicial record as per sub-rule (2) of Rule 5 of the given case has been digitized. The Supervising Officer shall then as soon as possible give a certificate under his physical and digital signatures, that the required entire judicial record of the given case is available in the un-editable digitized format.

(4) The scanned images of the judicial records after digital signature of Supervising Officer(s) shall be kept in such format and in such medium as may, from time to time, be specified by the Chief Justice.

(5) The judicial records of the given case which has been digitized for the period specified in Rules 23 to 31 of chapter XIX (records) of the High Court of Madhya Pradesh, Rules 2008 in the physical form.

6. After digitization of the disposed of cases, all the judicial records in the physical form except the judicial record as mentioned in rules of the chapter XIX of High Court of Madhya Pradesh Rules, 2008 shall be destroyed and destruction shall be carried out from time to time as may be necessary in accordance with the provisions of rules of chapter XIX of High Court of Madhya Pradesh Rules, 2008 under the general superintendence of the Registrar (IT) by the Supervising Officer(s) as may be appointed by the Chief Justice for that purpose.

7. Notwithstanding anything contained in these Rules, all documents, other than those required to be preserved in perpetuity in accordance with the High Court of Madhya Pradesh Rules, 2008, may be eliminated after being retained and secured in electronic form and after certification as required by sub-section (4) of section 65-B of the Indian Evidence Act, 1872.

CHAPTER-IV

Digitization of Registers, Administrative Records, Others papers and Publications :

8. Digitization of Registers & Administrative Records:-

(1) All the administrative records/files and Registers are to be digitized and preserved permanently in the digitized form by the Supervising Officer(s) as may be appointed by the Chief Justice for that purpose and under the general superintendence of the Registrar (IT). For the digitization of Registers related to judicial branch, the digitization will be done by the Supervising Officer(s) as may be appointed by the Chief Justice for that purpose and under the general superintendence of the Registrar (IT).

(2) The official of the IT section digitizing the register shall certify that the entire Administrative Records/Files and Registers have been digitized. The Supervising Officer shall then as soon as possible give a certificate under his physical and digital signatures

that the entire Administrative Records/Files and Registers are available in the digitized form.

(3) The registers mentioned in part II of chapter XIX of High Court of Madhya Pradesh Rules, 2008, which have been duly digitized and certified by the Supervising Officer, shall be eliminated. The destruction shall be progressively carried out from time to time in accordance with the provisions of rule 42 (3) of chapter XIX of High Court of Madhya Pradesh Rules, 2008 under the general superintendence of the Registrar (Admin) and Registrar (IT). The digitization of Registers related to judicial branch be done by the Supervising Officer(s) as may be appointed by the Chief Justice for that purpose.

(4) The administrative records/files which have been duly digitized and certified by the Supervising Officer, shall be destroyed. The destruction process shall be carried out as per the directions of the Chief Justice. It shall be done under the general superintendence of Registrar (Admin), by the Supervising Officer(s) as may be appointed by the Chief Justice for that purpose.

(5) Notwithstanding anything contained in these Rules, all documents, other than those required to be preserved in perpetuity in accordance with the High Court of Madhya Pradesh Rules, 2008, may be eliminated after being retained and secured in electronic form and after certification as required by sub-section (4) of section 65-B of the Indian Evidence Act, 1872.

9. Digitization of all other papers:-

(1) All the other papers as per directions of the Chief Justice shall be digitized and preserved permanently in the digitized form under the general superintendence of the Registrar (IT) by the Supervising Officer(s) as may be appointed by the Chief Justice for that purpose.

(2) The official of the IT department digitizing the papers shall certify that the entire papers have been digitized. The Supervising Officer shall then as soon as possible give a certificate under his physical and digital signatures that the said papers are available in the digitized form.

(3) All the papers which have been duly digitized and certified by the Supervising Officer, shall be destroyed except the papers of the current year which shall be preserved in physical form. The

destruction shall be progressively carried out from time to time in accordance with orders of the Chief Justice. It shall be done under the general superintendence of Deputy Registrar (Judicial), by the Supervising Officer(s) as may be appointed by the Chief Justice for that purpose.

10. The Chief Justice may, from time to time, issue directions for effective implementation of these Rules and Chapter XIX of "The High Court of Madhya Pradesh Rules, 2008".

11. **Repeal and Saving:-** High Court of Madhya Pradesh Digitization of Records Rules, 2014, in force immediately before the commencement of these Rules, are hereby repealed, in respect of matters covered by these rules;

Provided that any order made or action taken under the Rules so repealed shall be deemed to have been made or taken under the corresponding provisions of these Rules.

A.K. SHUKLA, Registrar General
High Court of Madhya Pradesh

NOTES OF CASES SECTION

Short Note
****(1)***
Before Mr. Justice G.S. Ahluwalia
Cr.R. No. 652/2018 (Gwalior) decided on 25 September, 2018

AATAMDAS …Applicant

Vs.

STATE OF M.P. …Non-applicant

A. Penal Code (45 of 1860), Section 327/34 & 323/34 and Limitation Act (36 of 1963), Section 5 – Appeal – Condonation of Delay **– Held – Delay of 5 yrs. and five months in filing appeal against conviction – In absence of sufficient cause for such default, specifically when applicant was not in jail, Trial Court rightly dismissed the application for condonation of delay – But, as co-accused has been acquitted by Appellate Court by raising doubt on the very basic allegation made against accused persons including present applicant, Court should have allowed the application u/S 5 of the Act of 1963 on this ground – Delay condoned – Matter remanded back for consideration on merits.**

क. दण्ड संहिता (1860 का 45), धारा 327/34 व 323/34 एवं परिसीमा अधिनियम (1963 का 36), धारा 5 – अपील – विलंब के लिए माफी – अभिनिर्धारित – दोषसिद्धि के विरूद्ध अपील प्रस्तुत करने में 5 वर्ष और 5 माह का विलंब – उक्त व्यतिक्रम हेतु पर्याप्त कारण की अनुपस्थिति में, विनिर्दिष्ट रूप से जब आवेदक जेल में नहीं था, विचारण न्यायालय ने विलंब के लिए माफी हेतु आवेदन को उचित रूप से खारिज किया – किंतु, चूंकि अपीली न्यायालय द्वारा अभियुक्तगण, जिसमें वर्तमान आवेदक शामिल है, के विरूद्ध किये गये मूल अभिकथन पर ही संदेह उठाते हुए सह–अभियुक्त को दोषमुक्त किया गया है, न्यायालय को इस आधार पर, 1963 के अधिनियम की धारा 5 के अंतर्गत आवेदन मंजूर करना चाहिए था – विलंब माफ किया गया – गुणदोषों पर विचार किये जाने हेतु मामला प्रतिप्रेषित।

B. Criminal Practice – Benefit of Acquittal to Non Appealing Accused **– Held – Apex Court concluded that where the Court disbelieves the entire incident/case, then the benefit of the same should be extended to the non-appealing accused – It is well established principle of law that non-appealing accused should not suffer only because of the fact that he could not file the appeal.**

ख. दाण्डिक पद्धति – अपील न करने वाले अभियुक्त को दोषमुक्ति का लाभ – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि जहां न्यायालय संपूर्ण घटना/प्रकरण पर अविश्वास करता है, तब उक्त का लाभ अपील न करने वाले अभियुक्त को भी दिया जाना चाहिए – यह विधि का सुस्थापित सिद्धांत है कि अपील न करने वाले अभियुक्त को मात्र इस तथ्य के कारण कि वह अपील प्रस्तुत नहीं कर सका, भुगतना नहीं पड़ना चाहिए।

Cases referred :

AIR 2003 SC 2987, (1994) 2 SCC 568, AIR 2005 SC 268, AIR 2012 SC 2435, AIR 2003 SC 1439.

Anil Jha, for the applicant.
G.S. Chauhan, P.P. for the non-applicant/State.

Short Note
****(2)***
Before Mr. Justice J.K. Maheshwari
W.P. No. 6953/2018 (Jabalpur) decided on 3 December, 2018

ARIF AQUIL …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

***Backward Classes and Minority Welfare Department (Gazetted) Service Recruitment Rules, M.P., 2013, Rule 6(1)(b) & (c) – Recruitment* – Secretary – Held – Post of Secretary, Minority Commission which is Class I gazetted post, is to be filled up 100% by way of promotion from post of feeder cadre and if such candidate is not available then by way of transfer of persons who hold in substantive capacity such posts in such services – Respondent No. 4, an Assistant Veterinary Surgeon, Class II appointed as Secretary – It is not a case of promotion – Minority Commission is a public office created by Statute on which a person possessing eligibility as prescribed in Rules can be appointed and posted – In present case, neither respondent No. 4 possess the eligibility nor the procedure followed is just – Appointment set aside – Petition allowed.**

पिछड़ा वर्ग तथा अल्पसंख्यक कल्याण विभाग (राजपत्रित) सेवा भर्ती नियम, म.प्र., 2013, नियम 6(1)(बी) व (सी) – भर्ती – सचिव – अभिनिर्धारित – सचिव, अल्पसंख्यक आयोग का पद, जो कि श्रेणी–I राजपत्रित पद है, को फीडर काडर के पद से 100% पदोन्नति के जरिए भरा जाएगा तथा यदि ऐसा अभ्यर्थी उपलब्ध नहीं है तब ऐसे व्यक्तियों के स्थानांतरण के जरिए जो उक्त सेवाओं में ऐसे पदों को मौलिक क्षमता में धारण करते हैं – प्रत्यर्थी क्र. 4, एक सहायक पशु शल्य–चिकित्सक, श्रेणी–II को सचिव के रूप में नियुक्त किया गया – यह पदोन्नति का प्रकरण नहीं है – अल्पसंख्यक आयोग, कानून द्वारा सृजित एक लोक कार्यालय है जिस पर नियमों में यथाविहित पात्रता धारक व्यक्ति को नियुक्त एवं पदस्थ किया जा सकता है – वर्तमान प्रकरण में, न तो प्रत्यर्थी क्र. 4 पात्रता रखता है न ही पालन की गई प्रक्रिया न्यायसंगत है – नियुक्ति अपास्त – याचिका मंजूर।

Mukesh Kumar Agrawal, for the petitioner.
Girish Kekre, G.A. for the respondent Nos. 1 to 3.
Amit Khatri, for the respondent No. 4.
B.P. Yadav, for the respondent No. 5.

NOTES OF CASES SECTION

Short Note
****(3)(DB)***
Before Mr. Justice Sanjay Yadav & Mr. Justice Vivek Agarwal
W.A. No. 296/2016 (Gwalior) decided on 3 October, 2018

ASHA KUSHWAH (SMT.) …Appellant

Vs.

STATE OF M.P. & ors. …Respondents

A. Appointment – Panchayat Karmi – Eligibility & Suitability – Held – **Gram Panchayat was entitled to adjudge not only eligibility but also the suitability of candidate – Eligibility is to be seen on the cut off date whereas suitability can be adjudged even on date of consideration of appointment – There was a criminal case pending against respondent No. 4 on date of adjudging suitability and hence has become ineligible – Appointing authority was entitled to adjudge suitability of candidate on touchstone of criminal antecedents – Impugned order set aside – Appeal allowed.**

क. नियुक्ति – पंचायत कर्मी – पात्रता व उपयुक्तता – अभिनिर्धारित – ग्राम पंचायत, न केवल अभ्यर्थी की पात्रता बल्कि उपयुक्तता भी न्यायनिर्णित करने के लिए हकदार थी – पात्रता को अंतिम तिथि पर देखा जाना चाहिए जबकि उपयुक्तता को नियुक्ति का विचार किये जाने की तिथि को भी न्यायनिर्णित किया जा सकता है – उपयुक्तता न्यायनिर्णित करने की तिथि को प्रत्यर्थी क्र. 4 के विरूद्ध एक दाण्डिक प्रकरण लंबित था और इसलिए अपात्र हो गया है – नियुक्ति प्राधिकारी, आपराधिक पूर्ववृत्त की कसौटी पर अभ्यर्थी की उपयुक्तता न्यायनिर्णित कर सकता है – आक्षेपित आदेश अपास्त – अपील मंजूर।

B. Constitution – Article 226/227 – Appointment – Judicial Review – Scope & Grounds – **Held – An order of appointment is subject to judicial review on ground of illegality, non application of mind and *malafide* – If suitability of candidate has not been found to be proper by assessing authority and reasons have been assigned for the same, that cannot be a ground for judicial review.**

ख. संविधान – अनुच्छेद 226/227 – नियुक्ति – न्यायिक पुनर्विलोकन – व्याप्ति व आधार – अभिनिर्धारित – नियुक्ति का आदेश, अवैधता, मस्तिष्क का प्रयोग न किये जाने एवं असद्भावपूर्णता के आधार पर न्यायिक पुनर्विलोकन के अधीन है – यदि अभ्यर्थी की उपयुक्तता को निर्धारण प्राधिकारी द्वारा उचित नहीं पाया गया है और उसके लिए कारण दिये गये है, तब यह न्यायिक पुनर्विलोकन हेतु आधार नहीं हो सकता।

The judgment of the Court was delivered by : **VIVEK AGARWAL, J.**

NOTES OF CASES SECTION

Cases referred :

AIR 1967 SC 1353, (1993) 2 SCC 429, (2016) 8 SCC 471, AIR 1964 Kerala 238, AIR 1972 Patna 93 (FB), AIR 1969 Allahabad 370 (DB), AIR 1975 SC 446, 2018 (2) MPLJ 419.

Ankur Mody, for the appellant.
Praveen Newaskar, G.A. for the respondents/State.
Pratip Bisoria, for the respondent No. 4.

Short Note
****(4)***
Before Mr. Justice Shailendra Shukla
M.Cr.C. No. 430/2019 (Indore) decided on 4 January, 2019

BABULAL & ors. …Applicants

Vs.

STATE OF M.P. …Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 311 & 482 – Recall of Witness – Stage of Trial – Grounds – **Application filed at the stage of final arguments in a case which was 5 yrs. old – Held – Accused got the case adjourned for final arguments for more than a dozen times – While considering application filed u/S 311 Cr.P.C., Courts required to consider interests of victims/witnesses and prosecution alongwith all accused – Considering the concept of fair trial and interest of justice, a balance has to be struck between the two contrasting interests moreso when application filed at a very belated stage – Interest of justice also involves refraining from giving undue adjournments which may become a necessary corollary, once application u/S 311 Cr.P.C. is allowed – No error in impugned order – Application dismissed.**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 311 व 482 – साक्षी को पुनः बुलाया जाना – विचारण का प्रक्रम – आधार – एक प्रकरण में जो कि 5 वर्ष पुराना था, अंतिम तर्कों के प्रक्रम पर, आवेदन प्रस्तुत किया गया – अभिनिर्धारित – अभियुक्त को अंतिम तर्क के लिए एक दर्जन से अधिक बार प्रकरण में स्थगन मिला – दं.प्र.सं. की धारा 311 के अंतर्गत प्रस्तुत आवेदन पर विचार करते समय, न्यायालय द्वारा समस्त अभियुक्तगण के साथ–साथ पीड़ितों/साक्षीगण तथा अभियोजन के हितों पर विचार किया जाना अपेक्षित है – निष्पक्ष विचारण तथा न्याय हित के सिद्धांत को विचार में लेते हुए, दो विषम हितों के मध्य संतुलन बनाना पड़ता है अधिकतर जब आवेदन अतिविलम्बित प्रक्रम पर प्रस्तुत किया गया हो – न्याय के हित में अनुचित स्थगन देने से विरत रहना भी अंतर्ग्रस्त है, जो एक बार दं.प्र.सं. की धारा 311 के अंतर्गत आवेदन मंजूर हो जाने के बाद आवश्यक परिणाम बन सकता है – आक्षेपित आदेश में कोई त्रुटि नहीं – आवेदन खारिज।

Cases referred:

LAWS (ALL)-2001-8-30, LAWS (P&H)-2001-8-30, LAWS (ALL) 2005-11-115, AIR 2016 SC 3942, AIR 2009 SC 1535, AIR 2005 SC 2119, AIR 2015 SC 3501, AIR 2015 SC 1206.

Amar Singh Rathore, for the applicants.
Rajesh Mali, P.P. for the non-applicant/State.

Short Note
****(5)***
Before Mr. Justice Prakash Shrivastava
W.P. No. 2840/2017 (Indore) decided on 6 September, 2018

JEHANGIR D. MEHTA …Petitioner

Vs.

THE REAL NAYAK SAKH SAHKARI MARYADIT & anr. …Respondents

***Sawayatta Sahakarita Adhiniyam, M.P., 1999 (2 of 2000), Section 56 & 57 and Civil Procedure Code (5 of 1908), Section 2(2) – Award by Arbitration Council – Execution – Stamp Duty* – Held – A decree is passed by Civil Court in a suit on adjudication but Arbitration Council is neither a Court nor its proceedings falls within the meaning of suit – Order/award passed by Arbitration Council is not a decree as defined in Section 2(2) CPC – Section 56(4) of the Act treats the order of Council as decree only for purpose of its execution by Civil Court – Stamp Duty is payable on execution of the said award as per clause 11 of Schedule 1A of the Indian Stamp Act, 1899 (MP amendment) – Impugned order set aside – Petition allowed.**

स्वायत्त सहकारिता अधिनियम, म.प्र., 1999 (2000 का 2), धारा 56 व 57 एवं सिविल प्रक्रिया संहिता (1908 का 5), धारा 2(2) – माध्यस्थम् परिषद् द्वारा अवार्ड – निष्पादन – स्टाम्प शुल्क – अभिनिर्धारित – एक वाद में न्यायनिर्णयन पर सिविल न्यायालय द्वारा एक डिक्री पारित की जाती है परंतु माध्यस्थम् परिषद न तो एक न्यायालय है, न ही उसकी कार्यवाहियां वाद के अर्थान्तर्गत आती है – माध्यस्थम् परिषद द्वारा पारित आदेश/अवार्ड एक डिक्री नहीं है जैसा कि धारा 2(2) सि.प्र.सं. में परिभाषित है – अधिनियम की धारा 56(4), परिषद् के आदेश को डिक्री के रूप में केवल सिविल न्यायालय द्वारा उसके निष्पादन के प्रयोजन हेतु मानती है – भारतीय स्टाम्प अधिनियम, 1899 (म.प्र. संशोधन) की अनुसूची 1ए के खंड 11 के अनुसार, उक्त अवार्ड के निष्पादन पर स्टाम्प शुल्क देय है – आक्षेपित आदेश अपास्त – याचिका मंजूर।

Cases referred:

AIR 2007 SC 168, AIR 2002 Bombay 494.

R.T. Thanewala, for the petitioner.
None, for the respondent No. 1, though served.

Short Note

****(6)***

Before Smt. Justice Anjuli Palo

Cr.R. No. 3625/2018 (Jabalpur) decided on 3 December, 2018

LAWRENCE ROBERTSON …Applicant

Vs.

SMT. VANI JOGI & anr. …Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Section 125 – Maintenance of Daughter – Quantum **– Held – Trial Court granted maintenance to daughter @ Rs. 15000 p.m. – Held – Daughter living separately with mother since 2013 – For maintenance of daughter, not a single penny paid by applicant/father, who is Class I Officer with net salary of Rs. 72,084 p.m. – Just because daughter is living with her mother who is earning Rs. 36,076 p.m. would not provide a ground for applicant father to shirk from responsibility of his own daughter – Amount awarded is justified – Revision dismissed.**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125 – पुत्री का भरणपोषण – मात्रा – अभिनिर्धारित – विचारण न्यायालय ने पुत्री को रू. 15000/– प्रतिमाह की दर से भरणपोषण प्रदान किया – अभिनिर्धारित – पुत्री 2013 से, माता के साथ पृथक रूप से रह रही है – पुत्री के भरणपोषण हेतु आवेदक/पिता, जो कि एक प्रथम श्रेणी अधिकारी है जिसका शुद्ध वेतन रू. 72,084/– प्रतिमाह है, ने एक पैसे का भुगतान नहीं किया – केवल इसलिए कि पुत्री उसकी माता के साथ रह रही है जो रू. 36,076/– प्रतिमाह अर्जित कर रही है, आवेदक पिता के लिए उसकी स्वयं की पुत्री की जिम्मेदारी से बचने का आधार नहीं होगा – अवार्ड की गई राशि न्यायोचित है – पुनरीक्षण खारिज।

Cases referred :

(2015) 6 SCC 353, (1978) 4 SCC 70, (1997) 7 SCC 7, (2015) 2 SCC 385.

Ankit Saxena, for the applicant.

C.Veda Rao, for the non-applicants.

Short Note

****(7)***

Before Smt. Justice Anjuli Palo

Cr.R. No. 2201/2018 (Jabalpur) decided on 18 December, 2018

MOHD. SHAFIQ ANSARI & anr. …Applicants

Vs.

MOHD. RASOOL ANSARI …Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 125 – Maintenance – Entitlement of Father or Mother – Liability of Major Daughter **– Trial Court awarded Rs. 750 p.m. as maintenance jointly against major son and**

daughter – Held – Father is entitled to claim maintenance from his children – Apex court concluded that both son and daughter are liable to maintain their father or mother who is unable to maintain himself or herself – Looking to daily needs for an old person of 70 yrs. of age including health etc, maintenance amount is not on higher side – Revision dismissed.

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125 – भरणपोषण – पिता या माता की हकदारी – वयस्क पुत्री का दायित्व – विचारण न्यायालय ने वयस्क पुत्र एवं पुत्री के विरूद्ध संयुक्त रूप से भरणपोषण के रूप में 750/– प्रतिमाह भरणपोषण प्रदान किया – अभिनिर्धारित – पिता अपने बच्चों से भरणपोषण का दावा करने के लिए हकदार है – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि दोनों, पुत्र व पुत्री, अपने ऐसे पिता या माता जो स्वयं का भरणपोषण करने में अक्षम है, का भरणपोषण करने के लिए दायी हैं – 70 वर्ष आयु के वृद्ध व्यक्ति की दैनिक जरूरतों, जिसमें स्वास्थ्य इत्यादि शामिल हैं को देखते हुए, भरणपोषण की राशि अधिक नहीं है – पुनरीक्षण खारिज।

Cases referred :

[1978] Cr.L.J. 600, [1983] Cr.L.J. 412, (1987) 2 SCC 278.

B.K. Shukla, for the applicants.
R.K. Tiwari, for the non-applicant.

Short Note

****(8)***

Before Mr. Justice Subodh Abhyankar

Cr.A. No. 9/2017 (Jabalpur) decided on 24 October, 2018

MOTILAL DAHERIYA …Appellant

Vs.

STATE OF M.P. …Respondent

Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 8(C) & 20(b)(ii)(B) – Investigation – Procedure **– Held – Sub-Inspector not only lodged the FIR but had also carried out entire investigation including all procedural formalities – Apex Court concluded that such practice creates occasion to suspect fair and impartial investigation – Applying dictum of Apex Court in present case, rights of appellant has violated by action of the over zealous Investigating Officer who has taken upon himself to lodge the FIR and to carry out the entire investigation as well, which cannot be sustained – Conviction set aside – Appeal allowed.**

स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 8(सी) व 20(बी)(ii)(बी) – अन्वेषण – प्रक्रिया – अभिनिर्धारित – उप–निरीक्षक ने न केवल प्रथम सूचना प्रतिवेदन दर्ज किया बल्कि संपूर्ण अन्वेषण भी पूरा किया जिसमें सभी प्रक्रियात्मक औपचारिकताऐं शामिल हैं – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि उक्त पद्धति, निष्पक्ष एवं पक्षपातरहित अन्वेषण पर संदेह का कारण सृजित करता है – सर्वोच्च न्यायालय के आदेश को वर्तमान प्रकरण में लागू करते हुए, अतिउत्साही अन्वेषण अधिकारी की

कार्रवाई द्वारा अपीलार्थी के अधिकारों का उल्लंघन हुआ है, जिसने प्रथम सूचना प्रतिवेदन दर्ज करना और संपूर्ण अन्वेषण पूरा करना भी अपने ऊपर लिया है, जिसे कायम नहीं रखा जा सकता – दोषसिद्धि अपास्त – अपील मंजूर।

Cases referred:

2018 SCC OnLine SC 974, (1996) 11 SCC 709.

Manish Datt with *Chetan Jaggi,* for the appellant.
D.K. Paroha, G.A. for the State.

Short Note
****(9)***
Before Mr. Justice G.S. Ahluwalia

M.Cr.C. No. 26746/2018 (Gwalior) decided on 6 September, 2018

PREMNARAYAN YADAV …Applicant

Vs.

STATE OF M.P. & anr. …Non-applicants

***Criminal Procedure Code, 1973 (2 of 1974), Section 439(2) – Cancellation of Bail* – Held – After the release of respondent No. 2 on bail, at least three more criminal cases have been registered against him by police – He misused the liberty granted – Bail earlier granted liable to be and is cancelled – Respondent directed to surrender immediately before trial Court – Application allowed.**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 439(2) – जमानत का रद्दकरण – अभिनिर्धारित – प्रत्यर्थी क्र. 2 को जमानत पर मुक्त करने के पश्चात्, पुलिस द्वारा उसके विरूद्ध कम से कम तीन और दाण्डिक प्रकरण पंजीबद्ध किये गये हैं – उसने प्रदान की गई स्वतंत्रता का दुरूपयोग किया – पूर्व में प्रदान की गई जमानत रद्द किये जाने योग्य है और रद्द की गई – प्रत्यर्थी को तत्काल रूप से विचारण न्यायालय के समक्ष समर्पण करने के लिए निदेशित किया गया – आवेदन मंजूर।

N.S. Tomar, for the applicant.
RVS Ghuraiya, P.P. for the non-applicant No. 1/State.

Short Note
****(10)***
Before Mr. Justice Sheel Nagu

W.P. No. 23805/2018 (Gwalior) decided on 30 October, 2018

RANJANA KUSHWAHA (DR.) …Petitioner

Vs.

STATE OF M.P. …Respondent

***Constitution – Article 16(2) – Public Employment – Equality of Opportunity* – Held – After written examination, department exempted the**

requirement of holding viva-voce/interview as prescribed in statutory rules/ advertisement – State has ample power to relax the recruitment rules – Action of State Government cannot be said to prejudice any candidate as the change/relaxation in norms/rules does not adversely affect the right to be considered in public employment – It is not a case where participation in interview is waived for few and not for others thus no ground of discrimination established – No interference called for – Petition dismissed.

संविधान – अनुच्छेद 16(2) – लोक नियोजन – समानता का अवसर – अभिनिर्धारित – लिखित परीक्षा के पश्चात्, विभाग ने मौखिक परीक्षा/साक्षात्कार आयोजित करने की, आवश्यकता जैसा कि कानूनी नियमों/विज्ञापन में विहित है, से छूट प्रदान की – राज्य को भर्ती नियमों को शिथिल करने की पर्याप्त शक्ति है – राज्य सरकार द्वारा की गई कार्रवाई से किसी अभ्यर्थी को प्रतिकूल प्रभाव कारित होना नहीं कहा जा सकता क्योंकि सन्नियमों/नियमों में बदलाव/शिथिलीकरण से लोक नियोजन में विचार में लिए जाने का अधिकार प्रतिकूल रूप से प्रभावित नहीं होता – यह ऐसा प्रकरण नहीं जहां कुछ के लिए साक्षात्कार का अधित्यजन किया गया और अन्य के लिए नहीं अतः विभेद का कोई आधार स्थापित नहीं – हस्तक्षेप की कोई आवश्यकता नहीं – याचिका खारिज।

J.S. Rathore, for the petitioner.
A.K. Nirankari, G.A. for the respondent/State.

Short Note
****(11)(DB)***
Before Mr. Justice S.C. Sharma & Mr. Justice Virender Singh
W.P. No. 15286/2018 (Indore) decided on 12 October, 2018

SAJNI BAJAJ (SMT.)(DR.) …Petitioner

Vs.

INDORE DEVELOPMENT AUTHORITY & ors. …Respondents

(Alongwith W.P. Nos. 14970/2018, 14971/2018, 15293/2018 & Conc. No. 2021/2018)

A. Lok Parisar (Bedakhali) Adhiniyam, M.P. (46 of 1974), Sections 3, 4, 5, 7 & 17 – Allotment of land & Lease Deed – Cancellation of – Competent Authority **– As per State Government notifications, all Rent Controlling Authorities in township of Indore have also been delegated with powers to function as competent authority under Adhiniyam of 1974 over the area in which they are exercising jurisdiction – Impugned order passed by competent authority – Further, competent authority not empowered to decide the correctness of lease cancellation order acting like a Civil Court – Order of eviction rightly passed under Adhiniyam of 1974 – Petition dismissed.**

क. लोक परिसर (बेदखली) अधिनियम, म.प्र. (1974 का 46), धाराएँ 3, 4, 5, 7 व 17 – भूमि का आबंटन व पट्टा विलेख – का रद्दकरण – सक्षम प्राधिकारी – राज्य सरकार की अधिसूचनाओं के अनुसार, इंदौर नगरी में सभी भाड़ा नियंत्रक प्राधिकारीगण को उस क्षेत्र में जिसमें वे अधिकारिता का प्रयोग कर रहे हैं, 1974 के अधिनियम के अंतर्गत सक्षम प्राधिकारी के रूप में भी कार्य करने के लिए शक्तियाँ प्रत्यायोजित की गई हैं – आक्षेपित आदेश सक्षम प्राधिकारी द्वारा पारित किया गया – इसके अतिरिक्त, सक्षम प्राधिकारी सिविल न्यायालय के रूप में कार्य करते हुए पट्टे के रद्दकरण के आदेश की सत्यता विनिश्चित करने हेतु सशक्त नहीं है – 1974 के अधिनियम के अंतर्गत, बेदखली का आदेश उचित रूप से पारित किया गया – याचिका खारिज।

***B. Lok Parisar (Bedakhali) Adhiniyam, M.P. (46 of 1974), Sections 3, 4, 5, 7 & 17 – Allotment of land & Lease Deed – Cancellation of – Grounds* – Plot which was earmarked for hospital, allotted to petitioner through NIT – Petitioner instead of constructing a hospital, started shopping/ commercial complex – Flagrant breach of mandatory conditions of lease deed resulting into cancellation of allotment order and lease deed – Petitioner has not challenged the lease cancellation order before appropriate forum as per liberty granted by this Court earlier – No case in favour of petitioner – Respondent entitled to take possession of premises – Petitions dismissed.**

ख. लोक परिसर (बेदखली) अधिनियम, म.प्र. (1974 का 46), धाराएँ 3, 4, 5, 7 व 17 – भूमि का आबंटन व पट्टा विलेख – का रद्दकरण – आधार – भूखंड जो चिकित्सालय हेतु चिन्हित किया गया था, एन आई टी के माध्यम से याची को आबंटित किया गया – याची ने चिकित्सालय का निर्माण करने के बजाय, शॉपिंग/वाणिज्यिक कॉम्प्लेक्स आरंभ किया – पट्टा विलेख की आज्ञापक शर्तों के स्पष्ट भंग के परिणामस्वरूप आबंटन आदेश एवं पट्टा विलेख का रद्दकरण – याची ने पूर्व में इस न्यायालय द्वारा प्रदान की गई स्वतंत्रता के अनुसार समुचित फोरम के समक्ष पट्टा रद्दकरण के आदेश को चुनौती नहीं दी है – याची के पक्ष में कोई प्रकरण नहीं – प्रत्यर्थी परिसर का कब्जा लेने का हकदार है – याचिकाएँ खारिज।

The order of the Court was passed by : **S.C. SHARMA, J.**

Cases referred :

2012 (2) SCC 232, 2012 (1) MPLJ 53, W.P. No. 531/2005 decided on 20.11.2007, W.P. No. 8792/2010 decided on 23.07.2010,W.P. No. 11362/2010 decided on 03.09.2010, W.P. No. 14078/2010 decided on 08.11.2011 (DB), 2008 (4) MPLJ 338, W.P. No. 3962/2018 decided on 08.03.2018 (DB).

A.K. Sethi with *Sumeet Samvatsar* and *G.M. Agrawal*, for the petitioner(s).

Purushaindra Kaurav, A.G. and *Sunil Jain* with *Ambar Pare,* for the respondents.

Mini Ravindran, for the respondent Nos. 1 & 2 in Conc. No. 2021/2018.

NOTES OF CASES SECTION

Short Note
****(12)***
Before Mr. Justice Vijay Kumar Shukla
Cr.A. No. 3334/2013 (Jabalpur) decided on 15 December, 2018

SHIVA SALAME …Appellant

Vs.

STATE OF M.P. …Respondent

***A. Penal Code (45 of 1860), Sections 363, 366 & 376(2)(i) and Protection of Children from Sexual Offences Act, (32 of 2012), Section 3/4 – Medical & Chemical Examination – FSL Report* – Held – As per medical report, Doctor has found no injury either on the person of prosecutrix or on her private parts and there was no sign of any intercourse – Doctor opined that no definite opinion of rape can be given – Vaginal swab and undergarment sent for chemical examination but prosecution failed to produce FSL Report – No corroboration with medical evidence – Further, Lady doctor who examined prosecutrix was not examined before Court – Adverse inference has to be drawn – Conviction set aside – Appeal allowed.**

क. दण्ड संहिता (1860 का 45), धाराएँ 363, 366 व 376(2)(i) एवं लैंगिक अपराधों से बालकों का संरक्षण अधिनियम, (2012 का 32), धारा 3/4 – चिकित्सीय व रासायनिक परीक्षण – एफ.एस.एल. प्रतिवेदन – अभिनिर्धारित – चिकित्सीय प्रतिवेदन के अनुसार, चिकित्सक को अभियोक्त्री के शरीर अथवा उसके गुप्तांगों पर कोई चोट नहीं मिली तथा किसी संभोग की कोई निशानी नहीं थी – चिकित्सक का मत था कि बलात्संग की कोई निश्चित राय नहीं दी जा सकती – वैजाइनल स्वैब तथा अंतर्वस्त्र रासायनिक परीक्षण हेतु भेजे गये परंतु अभियोजन एफ.एस.एल. प्रतिवेदन प्रस्तुत करने में विफल रहा – चिकित्सीय साक्ष्य से कोई संपुष्टि नहीं – इसके अतिरिक्त, महिला चिकित्सक जिसने अभियोक्त्री का परीक्षण किया, का न्यायालय के समक्ष परीक्षण नहीं किया गया था – प्रतिकूल निष्कर्ष निकालना होगा – दोषसिद्धि अपास्त – अपील मंजूर।

***B. Penal Code (45 of 1860), Sections 363, 366 & 376(2)(i) and Protection of Children from Sexual Offences Act, (32 of 2012), Section 3/4 – Medical & Chemical Examination – Delayed FIR – Explanation* – Held – After the incident prosecutrix remained in the night with her mother and father but did not disclose the incident – FIR lodged after more than 36 hours and delay was not properly explained by prosecution.**

ख. दण्ड संहिता (1860 का 45), धाराएँ 363, 366 व 376(2)(i) एवं लैंगिक अपराधों से बालकों का संरक्षण अधिनियम, (2012 का 32), धारा 3/4 – चिकित्सीय व रासायनिक परीक्षण – विलंबित प्रथम सूचना प्रतिवेदन – स्पष्टीकरण – अभिनिर्धारित – घटना के पश्चात् अभियोक्त्री रात्रि में अपनी माता तथा पिता के साथ रही परंतु घटना प्रकट नहीं की – प्रथम सूचना प्रतिवेदन, 36 घंटे से अधिक समय पश्चात् दर्ज किया गया तथा अभियोजन द्वारा विलंब को उचित रूप से स्पष्ट नहीं किया गया था।

Cases referred :

2004 (2) MPHT 153, 1987 JLJ 681 (DB).

B.R. Vijaywar, for the appellant.
Aditya Jain, Dy. G.A. for the respondent/State.

Short Note
****(13)***
Before Ms. Justice Vandana Kasrekar
W.P. No. 22978/2018 (Indore) decided on 20 December, 2018

VIKRAM SINGH …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

***Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 40 – Removal of Sarpanch – Enquiry* – On a complaint against petitioner, SDO directed CEO to investigate the matter and submit enquiry report – As per report, irregularities found against petitioner – Show cause notice issued whereby petitioner filed reply, which was not found satisfactory resulting in his removal – Held – Before passing order u/S 40, enquiry is necessary – Such enquiry does not mean issuance of show cause notice, but requires a detail enquiry where office bearer must be given opportunity to examine and cross examine the witnesses – No such enquiry conducted by SDO – Impugned order of removal quashed – Petition allowed.**

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 40 – सरपंच को हटाया जाना – जांच – याची के विरूद्ध शिकायत पर एस डी ओ ने सी.ई.ओ. को मामले का अन्वेषण करने तथा जांच प्रतिवेदन प्रस्तुत करने के लिए निदेशित किया – प्रतिवेदन के अनुसार, याची के विरूद्ध अनियमितताऐं पायी गई – कारण बताओ नोटिस जारी किया गया जिसमें याची ने उत्तर प्रस्तुत किया जिसे संतोषजनक नहीं पाये जाने के परिणामस्वरूप उसे हटाया गया – अभिनिर्धारित – धारा 40 के अंतर्गत आदेश पारित करने के पूर्व जांच आवश्यक है – उक्त जांच का अर्थ कारण बताओ नोटिस जारी करना नहीं बल्कि विस्तृत जांच अपेक्षित है जहां पदाधिकारी को साक्षियों के परीक्षण एवं प्रतिपरीक्षण का अवसर अवश्य दिया जाना चाहिए – एस डी ओ द्वारा ऐसी कोई जांच संचालित नहीं की गई – हटाये जाने का आक्षेपित आदेश अभिखंडित – याचिका मंजूर।

Cases referred:

I.L.R. [2009] M.P. 3067, 2003 (2) M.P.L.J. 112, 2001 (4) M.P.L.J. 364, 2015 (3) M.P.L.J. 104, 2015 (3) M.P.L.J. 405.

Vivek Sharan, for the petitioner.
Pushyamitra Bhargava, Dy. A.G. for the respondent/State.
Amit Raj, for the intervener.

I.L.R. [2019] M.P. 1 (SC)
SUPREME COURT OF INDIA

Before Mr. Justice Abhay Manohar Sapre & Mr. Justice Navin Sinha

C.A. No. 7240/2018 decided on 26 July, 2018

CENTRAL BOARD OF TRUSTEES …Appellant

Vs.

M/S INDORE COMPOSITE PVT. LTD. …Respondent

Practice – Order/Judgment of Court – Principle of Reasoning **– Held – Division Bench of High Court dismissed the writ petition cursorily without dealing with any of the issues arising in the case as also the arguments urged by parties – The only expression used by Court while disposing the case was *"on due consideration"* and it is not clear as to what was that due consideration – Courts need to pass reasoned order – It causes prejudice to parties and deprive them to know the reasons as to why one party has won and other has lost – Matter remanded back to High Court for decision afresh – Appeal allowed. (Paras 13 to 15)**

पद्धति – न्यायालय का आदेश/निर्णय – तर्कपूर्णता का सिद्धांत – अभिनिर्धारित – उच्च न्यायालय की खंड न्यायपीठ ने प्रकरण में उत्पन्न हुए किसी विवाद्य का एवं पक्षकारों द्वारा बताये गये तर्कों का भी निपटारा किये बिना सरसरी रूप से रिट याचिका खारिज की – प्रकरण निराकृत करते समय न्यायालय द्वारा केवल ''सम्यक् विचारोपरांत'' अभिव्यक्ति का प्रयोग किया गया और यह स्पष्ट नहीं कि वह सम्यक् विचार में लिया जाना क्या था – न्यायालयों को सकारण आदेश पारित करना आवश्यक है – यह पक्षकारों को प्रतिकूल प्रभाव कारित करता है तथा उन्हें उन कारणों के ज्ञान से वंचित करता है कि क्यों एक पक्षकार जीता है दूसरा हारा है – उच्च न्यायालय को नये सिरे से विनिश्चय करने हेतु मामला प्रतिप्रेषित – अपील मंजूर।

J U D G M E N T

The Judgment of the Court was delivered by:

ABHAY MANOHAR SAPRE, J. :- Leave granted.

2. This appeal is filed against the final judgment and order dated 01.08.2017 passed by the High Court of Madhya Pradesh, Bench at Indore in Writ Petition No.1046 of 2017 whereby the Division Bench of the High Court dismissed the writ petition filed by the appellant herein and affirmed the order dated 06.09.2016 passed by the Employees Provident Fund Appellate Tribunal, New Delhi in ATA No.214(8) of 2015.

3. The facts of the case lie in a narrow compass and it would be clear from the facts stated hereinbelow.

4. On 19.05.2008, the appellantCentral Board of Trustees issued summons under Section 7A of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (hereinafter referred to as "the Act") to the respondent-M/s Indore Composite Pvt. Ltd. for non-payment of the Provident Fund contribution in the year 2005-2006 on the wages lesser than the minimum wages prescribed for the employees under the category of semi-skilled. The representative of the respondent attended the enquiry and submitted that the Department has not considered non-working days of the employees already furnished in Form 3A for the year 2005-2006 and there are some employees under the category of unskilled whereas the Department has treated all of them as semi-skilled. The appellant, after considering the aforesaid, by order dated 15.04.2010, directed the respondent to deposit Rs.87,204/- within 15 days from the receipt of that order. It was also stated that the above order under Section 7A is without prejudice to any action under Sections 7C, 7Q and 14B of the Act.

5. On 21.01.2015, the appellant, in exercise of the power under Section 14B of the Act, ordered the respondent to pay damages and allied dues of Rs.91,585/- for the delayed payments from 01/2007 to 02/2006 to 05/2013.

6. Challenging the said order, the respondent filed an appeal being ATA No.214 (8) of 2015 before the Employees Provident Fund Appellate Tribunal, New Delhi. Vide order dated 06.09.2016, the Tribunal allowed the appeal and set aside the order dated 21.01.2015 passed by the appellant.

7. Felt aggrieved, the appellant filed writ petition being Writ Petition No.1046 of 2017 before the High Court. The High Court, by the impugned order, dismissed the petition.

8. The appellant felt aggrieved and filed the present appeal by way of special leave before this Court.

9. The short question, which arises for consideration in this appeal, is whether the Division Bench of the High Court was justified in dismissing the appellant's writ petition.

10. Heard learned counsel for the parties.

11. Having heard the learned counsel for the parties and on perusal of the record of the case, we are constrained to allow the appeal, set aside the impugned order and remand the case to the Division Bench of the High Court for deciding the writ petition afresh on merits in accordance with law.

12. After setting out the facts, the Division Bench proceeded to disposed of the writ petition with the following observations in its concluding paras which read as under:

> **"On due consideration of the aforesaid on the basis of the fresh documents and affidavit for taking additional documents on record, we cannot direct the establishment to pay damages for the period from March 2006-April 2010 when all these objections were not taken before the learned Tribunal.**
>
> **Considering the aforesaid, we are of the view that the order passed by the learned Tribunal is just and proper and no case for interference with the impugned order is warranted.**
>
> **The writ petition filed by the petitioner has no merit and is accordingly dismissed."**
>
> **(emphasis supplied)**

13. In our opinion, the need to remand the case to the High Court has occasioned for the reason that the Division Bench dismissed the writ petition filed by the appellant (petitioner) cursorily without dealing with any of the issues arising in the case as also the arguments urged by the parties in support of their case.

14. Indeed, in the absence of any application of judicial mind to the factual and legal controversy involved in the appeal and without there being any discussion, appreciation, reasoning and categorical findings on the issues and why the findings impugned in the writ petition deserve to be upheld or reversed, while dealing with the arguments of the parties in the light of legal principles applicable to the case, it is difficult for this Court to sustain such order of the Division Bench. The only expression used by the Division Bench in disposing of the appeal is "on due consideration". It is not clear to us as to what was that due consideration which persuaded the Division Bench to dispose of the writ petition because we find that in the earlier paras only facts are set out.

15. Time and again, this Court has emphasized on the Courts the need to pass reasoned order in every case which must contain the narration of the bare facts of the case of the parties to the lis, the issues arising in the case, the submissions urged by the parties, the legal principles applicable to the issues involved and the reasons in support of the findings on all the issues arising in the case and urged by the learned counsel for the parties in support of its conclusion. It is really unfortunate that the Division Bench failed to keep in mind these principles while disposing of the writ petition. Such order, in our view, has undoubtedly caused prejudice to the parties because it deprived them to know the reasons as to why one party has won and other has lost. We can never countenance the manner in

which such order was passed by the High Court which has compelled us to remand the matter to the High Court for deciding the writ petition afresh on merits.

16. In the light of the foregoing discussion, we allow the appeal, set aside the impugned order and remand the case to the Division Bench of the High Court for deciding the writ petition afresh on merits in accordance with law keeping in view our observations made supra.

17. We, however, make it clear that we have refrained from making any observation on merits of the controversy having formed an opinion to remand the case to the High Court for the reasons mentioned above. The High Court would, therefore, decide the writ petition, uninfluenced by any of our observations, strictly in accordance with law.

18. With the aforesaid directions, the appeal is accordingly allowed and the impugned order is set aside.

Appeal allowed

I.L.R. [2019] M.P. 4 (SC)
SUPREME COURT OF INDIA

Before Mr. Justice Abhay Manohar Sapre & Mr. Justice S. Abdul Nazeer

Cr.A. No. 2393/2009 decided on 27 July, 2018

STATE OF M.P. …Appellant

Vs.

GANGABISHAN @ VISHNU & ors. …Respondents

Penal Code (45 of 1860), Section 302 & 304 (Part I) – Injury – Intention **– Held – Deceased suffered single gun shot injury and entry wound was back of his left thigh which shows that shot was fired from his back side – No blackening, charring on exit wound but was present on entry wound which shows that shot was fired within range of 6-8 feet – It can be inferred that there was no intention of murder, if it had been so, injury could have been caused on upper limb, above waist of deceased – High Court rightly converted the conviction from Section 302 to one u/S 304 (Part I) IPC – Appeal dismissed. (Para 9)**

दण्ड संहिता (1860 का 45), धारा 302 व 304 (भाग I) – चोट – आशय – अभिनिर्धारित – मृतक ने बंदूक की गोली की एकल चोट सहन की और प्रवेषण घाव उसकी बांयी जांघ के पीछे की ओर था जो दर्शाता है कि गोली उसके पीछे की ओर से चलायी गई थी – निर्गमन घाव पर कालापन, झुलसन नहीं परंतु प्रवेषण घाव पर उपस्थित थी जो दर्शाती है कि गोली, 6–8 फीट की दूरी से चलायी गई थी – यह निष्कर्षित किया जा सकता है कि हत्या का आशय नहीं था, यदि ऐसा होता, चोट, मृतक की कमर के ऊपर,

ऊपरी अवयव पर कारित की जा सकती थी – उच्च न्यायालय ने धारा 302 भा.दं.सं. के अंतर्गत दोषसिद्धि को उचित रूप से परिवर्तित कर धारा 304 (भाग I) भा.दं.सं. के अंतर्गत किया – अपील खारिज।

J U D G M E N T

The Judgment of the Court was delivered by :

S. ABDUL NAZEER, J. :- This appeal by special leave is preferred against the judgment dated 06.12.2006 passed by the High Court of Madhya Pradesh at Indore in Criminal Appeal No. 1370 of 2001 arising out of SessionsTrial No. 197 of 2000 passed by the Additional Sessions Judge, Shajapur, Madhya Pradesh, dated 4th December, 2001, wherein the High Court has set aside the judgment and order of conviction of the respondents under Sections 302/149 and 325/129 IPC against all the respondents except respondent No.1. The respondent No.1 has been held guilty under Section 304 (Part-I) IPC and sentenced to undergo ten years R.I. and fine of Rs.25,000/- and in default to undergo three years further R.I.

2. Briefly stated the prosecution case is that Dinesh (PW-1) and his brother Rajesh (deceased) were in their field situated in the forest, for the purpose of watching the crops. At that juncture, the accused persons reached over there having lathis and swords in their possession except accused No.1 Gangabishan alias Vishnu, who was having 12 bore gun and started assaulting Rajesh with their respective weapons. Accused No.1 caused gunshot injury on the left thigh of the deceased by 12 bore gun because of which he fell down on the ground. Dinesh raised cry. However, no one came to their rescue. Somehow he managed to run away from the scene of occurrence and disclosed about the incident to Sidhnath,Ramsingh, Gopal Khati and Laxminarayan Khati. They all brought the deceased Rajesh on a cot from the field and thereafter took him in a mini truck. The deceased Rajesh became unconscious. The accused persons were also causing damage to the standing crops of PW-1 by grazing their cattle and the incident occurred because of the objection being raised by PW-1 in the morning of the same day.

3. The police after registration of the crime and recording of the FIR (Ex. P/1) prepared the inquest. Post mortem examination of the deceased was conducted by Dr. Kapil Sahay (PW-7). The post mortem report is Ex. P/10. Dr. Vijaysingh, PW-8 initially examined the deceased Rajesh, the same day and also PW-1. Their MLC reports are Exhibits P/11 and P/12 respectively. Dying declaration (Ex. P/4) of the deceased was also recorded by Tehsildar Shri Purshottam Sharma (PW-2). After investigation, accused were charge sheeted for the commission of offences under Sections 302/149, 325/149, 147, 148 and 440 of the IPC. Accused No.1 was also charge sheeted under Section 30 of the Arms Act.

4. The trial court after undertaking a full-fledged trial found the accused guilty under Sections 302/149 of IPC and sentenced them to undergo life imprisonment and Rs.20,000/- fine and on default additional three years of R.I., two years of imprisonment under Section 325/149 of IPC and fine of Rs.2000/- and on default one year additional R.I, three years of R.I under Section 440 of IPC and fine of Rs.5000/- and on default six months additional R.I and except accused No.1, rest of the accused were sentenced to one year of R.I under Section 147 IPC and fine of Rs.500/- and on default two months of additional R.I. Accused No. 1 was further convicted under Section 148 IPC and Section 30 of the Arms Act and was sentenced to suffer two years of R.I and fine of Rs.1000/- and on default four months of additional R.I. and four months of R.I and a fine of Rs.1000/- and on default four months of additional R.I respectively.

5. Feeling aggrieved, the accused approached the High Court by filing an appeal. By the impugned judgment herein, the High Court set aside the judgment and order of conviction of accused Nos.2 to 9 (respondent Nos.2 to 9). However, respondent No.1 has been held guilty under Section 304 (Part I) IPC and sentenced to undergo ten years R.I and fine of Rs.20,000/- and in default to undergo three years R.I in addition.

6. We have heard learned counsel for the parties. Learned counsel for the appellant submits that the High Court has failed to appreciate the findings of the trial court that the respondents who were nine in number and were armed with sharp edged weapons, lathis and one of them had a 12 bore gun had come to the spot of the incident with premeditation and common intention to assault and kill the complainant and his brother and in this transaction of violence the brother of complainant succumbed to gunshot injury inflicted by accused No.1. Therefore, the court below was not justified in setting aside the sentence and conviction of respondent Nos. 2 to 9. It is further submitted that the High Court was also not justified in setting aside the conviction and sentence of the respondent No.1 under Section 302 IPC and imposing lesser punishment of ten years of R.I under Section 304 (Part I) IPC. On the other hand, learned advocate appearing for the respondents has sought to justify the impugned judgment of the High Court.

7. We have carefully considered the submissions of the learned counsel appearing for the appellant-State and the learned advocate appearing for the respondents. It is clear from the evidence on record that the deceased Rajesh suffered only one injury on interior aspect of thigh, which was an exit wound. Injury No. 2 was a gunshot entry wound on the back side of left thigh. There was haematoma and fracture of thigh bone. Dr. Vijaysingh (PW-8) examined the deceased and issued MLC report (Ex. P/11). He also examined PW-1 Dinesh, brother of the deceased and found three contusions and one lacerated wound. In the opinion of the doctor all the injuries were simple in nature except injury No.1 on the left forearm. PW-1, Dinesh is an eye-witness. PW-2 recorded the dying

declaration of the deceased Rajesh (Ex. P/4). It is evident from the statement of PW-1, that he has given a general and omnibus statement about the assault upon the deceased and himself by the accused. Accused No.1 was having a twelve bore gun and the other accused were armed with lathis. However, the doctor's report shows that deceased had sustained only one injury on the left thigh caused by accused No.1. Neither the deceased nor PW-1 had any injury caused by sharp edged weapon. PW-1 suffered fracture of left ulna bone and three simple injuries caused by hard and blunt object but he has not pointed out as to which accused did cause injuries to him. His general statement regarding participation of all the accused with different weapons and causing injury to the deceased as well as to himself is not duly corroborated by medical evidence of PW-8 and autopsy surgeon PW-7, Dr. Kapil Sahay. The version of PW-1 is belied by medical evidence. In the dying declaration the deceased has deposed that except Vishnu Prasad (accused No.1) he was not knowing as to who had assaulted him but in the same breath he has stated that he was assaulted by lathi by Chaturbhuj (accused No.3) and Laxmichand (accused No.2). However, his version is not corroborated by medical evidence as he did not suffer even a single scratch on his body except fire arm injury.

8. It is necessary to notice here that the dispute between the parties arose on account of entrance of cattle and causing damage to the crops, as well as use of way in which deceased and PW-1 sustained injuries. Taking overall view of the matter, the High Court has acquitted accused Nos.2 to 9. Insofar as accused No.1 is concerned, his overt act is fully corroborated by the medical evidence, as well as the dying declaration (Ex.P/4). Though, PW-1 sustained injuries caused by hard and blunt object but according to his version, he was assaulted by all the appellants, whereas he sustained only four injuries and no injury was sustained by him by fire arm or sharp edged weapon. Therefore, it would be difficult to fix the liability for causing injuries to this witness by the respondents.

9. Insofar as the deceased Rajesh is concerned, he suffered gunshot injury and entry wound was on back of his left thigh. This shows that the shot was fired from his back side. There was no blackening, charring on exit wound. Blackening and charring were present on entry wound which shows that the gunshot was fired within the range of 6 to 8 feet. In view of the medical evidence, it would be easy to infer that if accused No.1 was having intention to commit murder of the deceased and used fire arm for that purpose, the injury could have been caused on upper limb, above waist of the deceased but the part chosen for causing injury was the back portion of left thigh. Thus, though the accused No.1 was not having intention to commit murder of the deceased but the act was to cause bodily injury which was likely to cause death. Therefore, the High Court found that he would be responsible for commission of culpable homicide not amounting to murder

punishable under Section 304 (Part I) of IPC. The High Court after scanning the entire evidence also held that the respondents were not having an intention to commit murder of the deceased Rajesh. We do not find any infirmity in the judgment of the High Court.

10. Accordingly, the appeal is dismissed.

Appeal dismissed

I.L.R. [2019] M.P. 8
WRIT PETITION
Before Mr. Justice Prakash Shrivastava
W.P. No. 4500/2017 (Indore) decided on 6 September, 2018

PAWAN …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

***A. Service Law – Appointment – Criminal Antecedent – Effect – Appointment in Police Service* – Held – Petitioner was convicted u/S 325 IPC and in appeal he was acquitted on basis of compromise – As per dictum of Apex Court, such acquittal did not fall under clean or honourable acquittal – While considering the case of candidate for appointment in police force, his criminal antecedents are required to be meticulously examined – Petitioner not fit for appointment – Petition dismissed. (Para 7 & 12)**

क. सेवा विधि – नियुक्ति – आपराधिक पूर्ववृत्त – प्रभाव – पुलिस सेवा में नियुक्ति – अभिनिर्धारित – याची को धारा 325 भा.दं.सं. के अंतर्गत दोषसिद्ध किया गया था तथा अपील में उसे समझौते के आधार पर दोषमुक्त किया गया था – सर्वोच्च न्यायालय के आदेशानुसार उक्त दोषमुक्ति, साफ–सुथरी या सम्मानपूर्ण दोषमुक्ति के अंतर्गत नहीं आती – पुलिस बल में नियुक्ति हेतु अभ्यर्थी के प्रकरण का विचार करते समय उसके आपराधिक पूर्ववृत्त का बारीकी से परीक्षण किया जाना अपेक्षित होता है – याची, नियुक्ति के लिए उपयुक्त नहीं – याचिका खारिज।

***B. Constitution – Article 226 – Scope & Jurisdiction* – Held – If the screening committee constituted for such purpose finds the petitioner unfit for appointment due to prosecution in criminal case, then this Court in writ jurisdiction cannot act as an appellate authority and interfere in such a decision, unless same is found to be palpably erroneous or *de hors* the rules, regulations or settled law. (Para 12)**

ख. संविधान – अनुच्छेद 226 – व्याप्ति एवं अधिकारिता – अभिनिर्धारित – यदि उक्त प्रयोजन हेतु गठित छानबीन समिति याची को दाण्डिक प्रकरण में अभियोजन के कारण अयोग्य पाती है तब यह न्यायालय, रिट अधिकारिता में एक अपीली प्राधिकारी के रूप में कार्य नहीं कर सकता एवं उक्त निर्णय में हस्तक्षेप नहीं कर सकता जब तक कि वह

त्रुटिपूर्ण या सुस्पष्ट रूप से नियमों, विनियमों या स्थापित विधि से असंबद्ध नहीं पाया जाता।

Cases referred :

(2016) 8 SCC 471, C.A. No. 4842/2013 decided on 02.07.2013 (Supreme Court), C.A. No. 10613/2014 decided on 01.12.2014 (Supreme Court), W.A. No. 163/2009 order passed on 11.08.2017 (DB).

L.C. Patne, for the petitioner.
Pushyamitra Bhargav, for the respondents.

O R D E R

PRAKASH SHRIVASTAVA, J. :- By this writ petition the petitioner has challenged the order dated 6th June 2017, whereby petitioner has been declared ineligible for appointment in the police services on account of prosecution in criminal case.

2. The petitioner case is that he had participated in the selection for appointment to the post of Constable and had qualified the written test and the interview call letter was also issued and petitioner had downloaded information showing that his posting unit is SP Narsinghpur but thereafter the impugned communication was received by petitioner holding him ineligible for appointment.

3. Learned counsel for petitioner submits that petitioner has already been acquitted on the basis of compromise therefore, the petitioner cannot be denied appointment on the ground of criminal prosecution.

4. As against this learned counsel for State has submitted that acquittal of petitioner is not an honourable acquittal and case has already been examined by the screening committee in terms of the judgment of the Supreme court, hence no ground for interference is made out.

5. Having heard the learned counsel for the parties and on perusal of the record it is noticed that crime No. 271/12 was registered against petitioner for offence under Sections 323, 504 and 325 of IPC, trial of which had resulted into conviction of petitioner for offence under section 325 of IPC and sentencing him 6 months imprisonment with fine of Rs. 1,500/-. Against the order of conviction petitioner had preferred an appeal in which he has been acquitted on the basis of compromise.

6. Supreme court in the matter of *Avtar Singh Vs. Union of India and others* reported in (2016)8 SCC 471 has laid down the test and the criteria on the basis of which the cases relating to appointment of candidates who have been prosecuted in the criminal cases or who had suppressed the information of involvement in

criminal case is to be considered as follows:

> 38. We have noticed various decisions and tried to explain and reconcile them as far as possible. In view of aforesaid discussion, we summarize our conclusion thus:
>
> 38.1. Information given to the employer by a candidate as to conviction, acquittal or arrest, or pendency of a criminal case, whether before or after entering into service must be true and there should be no suppression or false mention of required information.
>
> 38.2 While passing order of termination of services or cancellation of candidature for giving false information, the employer may take notice of special circumstances of the case, if any, while giving such information.
>
> 38.3 The employer shall take into consideration the Government orders/instructions/rules, applicable to the employee, at the time of taking the decision.
>
> 38.4 In case there is suppression or false information of involvement in a criminal case where conviction or acquittal had already been recorded before filling of the application/verification form and such fact later comes to knowledge of employer, any of the following recourses appropriate to the case may be adopted : -
>
> 38.4.1 In a case trivial in nature in which conviction had been recorded, such as shouting slogans at young age or for a petty offence which if disclosed would not have rendered an incumbent unfit for post in question, the employer may, in its discretion, ignore such suppression of fact or false information by condoning the lapse.
>
> 38.4.2 Where conviction has been recorded in case which is not trivial in nature, employer may cancel candidature or terminate services of the employee.
>
> 38.4.3 If acquittal had already been recorded in a case involving moral turpitude or offence of heinous/serious nature, on technical ground and it is not a case of clean acquittal, or benefit of reasonable doubt has been given, the employer may consider all relevant facts available as to antecedents, and may take appropriate decision as to the

continuance of the employee.

38.5 In a case where the employee has made declaration truthfully of a concluded criminal case, the employer still has the right to consider antecedents, and cannot be compelled to appoint the candidate.

38.6 In case when fact has been truthfully declared in character verification form regarding pendency of a criminal case of trivial nature, employer, in facts and circumstances of the case, in its discretion may appoint the candidate subject to decision of such case.

38.7 In a case of deliberate suppression of fact with respect to multiple pending cases such false information by itself will assume significance and an employer may pass appropriate order cancelling candidature or terminating services as appointment of a person against whom multiple criminal cases were pending may not be proper.

38.8 If criminal case was pending but not known to the candidate at the time of filling the form, still it may have adverse impact and the appointing authority would take decision after considering the seriousness of the crime.

38.9 In case the employee is confirmed in service, holding Departmental enquiry would be necessary before passing order of termination/removal or dismissal on the ground of suppression or submitting false information in verification form.

38.10 For determining suppression or false information attestation/verification form has to be specific, not vague. Only such information which was required to be specifically mentioned has to be disclosed. If information not asked for but is relevant comes to knowledge of the employer the same can be considered in an objective manner while addressing the question of fitness. However, in such cases action cannot be taken on basis of suppression or submitting false information as to a fact which was not even asked for.

38.11 Before a person is held guilty of suppressio veri or suggestio falsi, knowledge of the fact must be attributable to him.

7. The record reflects that respondents in pursuance to the directions of the Supreme court in the aforesaid judgment and also direction in the case of *Commissioner of Police, New Delhi and another Vs. Mehar Singh* in Civil Appeal No. 4842/13 by judgment dated **2nd July 2013** have constituted the screening committee for examining such cases and in terms of the directions issued by the Supreme court in the aforesaid judgment, case of petitioner has been examined by screening committee which vide report contained in Annex. R-7 has found that acquittal of petitioner did not fall under clean or Honourable acquittal and petitioner was not fit for appointment in the police services.

8. The record further reflects that circular dated 5th June 2003 Annexure R-5 has been issued by Home Department specifying the cases which fall under category of the moral turpitude and the offence under section 325 in terms of said circular is an offence relating to moral turpitude.

9. That apart Supreme court in the matter of *State of MP and others Vs. Parvez Khan* in civil appeal No. 10613/14 vide judgment dated **1st December 2014** in similar case relating to denial of appointment in a case of acquittal in criminal case while rejecting the claim has held:

> 13. From the above observations of this Court, it is clear that a candidate to be recruited to the police service must be worthy of confidence and must be a person of utmost rectitude and must have impeccable character and integrity. A person having criminal antecedents will not fit in this category. Even if he is acquitted or discharged, it cannot be presumed that he was completely exonerated. Persons who are likely to erode the credibility of the police ought not to enter the police force. No doubt the Screening Committee has not been constituted in the case considered by this Court, as rightly pointed out by learned counsel for the Respondent, in the present case, the Superintendent of Police has gone into the matter. The Superintendent of Police is the appointing authority. There is no allegation of *mala fides* against the person taking the said decision nor the decision is shown to be perverse or irrational. There is no material to show that the appellant was falsely implicated. Basis of impugned judgment is acquittal for want of evidence or discharge based on compounding.
>
> 14. The plea of parity with two other persons who were recruited can also not help the respondent. This aspect of the matter was also gone into by this Court in ***Mehar Singh (supra)*** and it was held :

> **"36.** *The Screening Committee's proceedings have been assailed as being arbitrary, unguided and unfettered. But, in the present cases, we see no evidence of this. However, certain instances have been pointed out where allegedly persons involved in serious offences have been recommended for appointment by the Screening Committee. It is well settled that to such cases the doctrine of equality enshrined in Article 14 of the Constitution of India is not attracted. This doctrine does not envisage negative equality (Fuljit Kaur (2010 (11) SCC 455). It is not meant to perpetuate illegality or fraud because it embodies a positive concept. If the Screening Committee which is constituted to carry out the object of the comprehensive policy to ensure that people with doubtful background do not enter the police force, deviates from the policy, makes exception and allows entry of undesirable persons, it is undoubtedly guilty of committing an act of grave disservice to the police force but we cannot allow that illegality to be perpetuated by allowing the respondents to rely on such cases. It is for the Commissioner of Police, Delhi to examine whether the Screening Committee has compromised the interest of the police force in any case and to take remedial action if he finds that it has done so. Public interest demands an in-depth examination of this allegation at the highest level. Perhaps, such deviations from the policy are responsible for the spurt in police excesses. We expect the Commissioner of Police, Delhi to look into the matter and if there is substance in the allegations to take necessary steps forthwith so that policy incorporated in the Standing Order is strictly implemented."*

> 15. Having given our thoughtful consideration, we are of the view that the Division Bench of the High Court was not justified in interfering with the order rejecting the claim of the respondent for recruitment to the police service by way of giving him compassionate appointment.

10. The Division Bench of this court in the matter of *Roop Narayan Sahu Vs. State of MP and others* vide order dated 11/8/2017 passed in **WA No. 163/09** while holding a candidate unfit for appointment for the post of constable, though he was

acquitted in the criminal case, has held that:

> 13. In the present case, the employer has examined the case of the appellant in the light of the Circular dated 5-6-2003 issued by the Department. It was found that the appellant was involved in a case of theft of crown (MUKUT) from a temple, the value of the aforesaid stolen property was more than 40 lacs and the appellant was prosecuted in respect of the offence punishable under sections 452 and 380 of the IPC. The courts found that even though the stolen property was recovered from the possession of the appellant, but there was some discrepancy in the seizure-memo, Ex.P/4; statement of the Investigating Officer (PW-6) and seizure witnesses and, therefore, the appellant was extended the benefit of doubt and he was acquitted. The competent authority evaluated the entire matter in proper perspective after going through the judgments of the trial Court as well as the appellate Court and ascribed the finding that the appellant has been granted benefit of doubt to the discrepancies in the statements of witnesses. However, considering the nature of the case and implication of the appellant and taking note of the fact that he is not acquitted on a clear finding of non-existing of guilt but has acquitted him by extending the benefit of doubt and, therefore, he was not found fit to be considered for appointment in the Police Department in accordance to the requirements of the Circular (Annexure-R/1).
>
> **14.**Thus, the decision taken by the Department was not mechanical, but it was a conscious decision after taking into consideration the facts and circumstances of the case in proper perspective. Further, if a candidate is to be recruited to the Police service, he must be worthy confidence of an utmost rectitude and must have impeccable character and integrity. The persons having criminal antecedents, would not fall within the ambit of the said category. Even if he is acquitted or discharged, it cannot be presumed that he can be completely exonerated. [See: *State of Madhya Pradesh and others vs. Parvez Khan,* (2015) 2 SCC 591]
>
> **15.**In the conspectus of the above discussion, we are of the considered opinion, that there is no illegality or impropriety in the decision taken by the respondents,

> denying appointment to the appellant-petitioner, the same is in accordance with law expounded in *Avtar Singh (supra)* and the findings ascribed by the learned Single Judge are impeccable and deserve stamp of approval of this Court.
>
> **16.**In view of the aforesaid analysis, the inevitable conclusion is that the appeal is devoid of any substance and deserves to be dismissed and accordingly, we so direct. However, in the facts and circumstances of the case, there shall be no order as to costs.

11. Having regard to the aforesaid factual and legal position, I am of the opinion that the respondents have not committed any error in passing the impugned order dated 6th June 2017 holding the petitioner ineligible for appointment in the police services.

12. While considering the case of a candidate seeking appointment in police force his criminal antecedents are required to be meticulously examined. If the screening committee constituted for this purpose on the basis of applicable criteria finds him to be unfit for appointment due to prosecution in criminal case, then this court while exercising writ jurisdiction cannot act as an appellate authority and interfere in such a decision unless the same is found to be palpably erroneous or dehorse the rule, regulation or settled law.

13. The impugned order has been passed after due examination of the case by the screening committee and by following the directions issued by Hon'ble Supreme court in cases of *Mehar Singh and Avtar Singh* (supra) which indicates that a conscious decision by due application of mind has been taken by the respondents which does not require any interference by this court.

14. Hence the writ petition is found to be devoid of any merit which is accordingly dismissed.

C.C. As per rules.

Petition dismissed

I.L.R. [2019] M.P. 16 (DB)
WRIT PETITION

Before Mr. Justice J.K. Maheshwari & Mr. Justice Sujoy Paul

W.P. No. 9733/2017 (Jabalpur) decided on 1 October, 2018

SAMDARIYA BUILDERS PVT. LTD. (M/S.) …Petitioner

Vs.

STATE OF M.P. & anr. …Respondents

(Alongwith W.P. Nos. 2119/2016, 3665/2004, 10158/2017, 10406/2017 & 12898/2017

A. Constitution – Article 226 and Prakostha Swamitva Adhiniyam, M.P., 2000 (15 of 2001), Sections 2, 3(b), 3(i) & 4(2) – Cancellation of Lease – Validity and Legality of Lease **– Held – Tender document, promoter agreement and provisions of Adhiniyam of 2000 shows that license was given to promoter/ petitioner to construct building and give first allotment to persons of his choice and receive sale consideration for first time out of it – Ownership of shops/ showrooms/chambers was to remain with JDA (lessor) – Promotor had limited rights to nominate a party for execution of lease deed, who will later become lessee of JDA who is entitled to receive transfer fee – No right to execute lease deed of land accrued in favour of petitioner and was clearly impermissible – Such unauthorized transfer of land in favour of promoter *dehors* the tender document, agreement and Prakoshta Adhiniyam and is *void ab initio* – Petition dismissed. (Paras 99, 107, 108 & 203)**

क. संविधान – अनुच्छेद 226 तथा प्रकोष्ठ स्वामित्व अधिनियम, म.प्र., 2000 (2001 का 15), धाराएँ 2, 3(बी), 3(i) व 4(2) – पट्टे का रद्दकरण – पट्टे की विधिमान्यता तथा वैधता – अभिनिर्धारित – निविदा दस्तावेज, संप्रवर्तक करार एवं 2000 के अधिनियम के उपबंध यह दर्शाते हैं कि संप्रवर्तक/याची को, भवन निर्माण के लिए तथा अपनी पसंद के व्यक्तियों को पहला आबंटन देने और उससे प्रथम बार बिक्री प्रतिफल प्राप्त करने हेतु, अनुज्ञप्ति प्रदान की गई थी – दुकानों/शोरूम/कक्षों का स्वामित्व जेडीए (पट्टाकर्ता) के पास ही रहना था – संप्रवर्तक के पास पट्टा विलेख के निष्पादन हेतु किसी पक्षकार को नामित करने के लिए सीमित अधिकार हैं, जो बाद में जेडीए का पट्टेदार बन जायेगा जो कि हस्तांतरण शुल्क प्राप्त करने का हकदार है – याची के पक्ष में भूमि के पट्टा विलेख को निष्पादित करने का कोई अधिकार प्रोद्भूत नहीं होता है तथा स्पष्ट रूप से अननुज्ञेय था – संप्रवर्तक के पक्ष में भूमि का ऐसा अप्राधिकृत हस्तांतरण, निविदा दस्तावेज, करार एवं प्रकोष्ठ अधिनियम से बाहर है तथा आरंभ से ही शून्य है – याचिका खारिज।

B. Prakostha Swamitva Adhiniyam, M.P., 2000 (15 of 2001), Sections 2, 3(b), 3(i) & 4(2) – Term "Land", "Building" & "Apartment" **– Held – "Apartment" is a part of "building" and not the building itself – Section 2 of**

Adhiniyam is applicable to "every apartment" in any "building" constructed by promoter and not the land or building itself – Adhiniyam of 2000 intends to recognize the right of ownership on an apartment and not on any land or building – In present case, individual lease for apartment/s was permissible, lease of entire land or building is not at all envisaged. (Paras 106, 107 & 108)

ख. प्रकोष्ठ स्वामित्व अधिनियम, म.प्र., 2000 (2001 का 15), धाराएँ 2, 3(बी), 3(i) व 4(2) – शब्द ''भूमि'', ''भवन'' व ''प्रकोष्ठ'' – अभिनिर्धारित – ''प्रकोष्ठ'', ''भवन'' का एक भाग है, न कि स्वयं भवन – अधिनियम की धारा 2 संप्रवर्तक द्वारा निर्मित किसी भी ''भवन'' में ''हर प्रकोष्ठ'' के लिए प्रयोज्य है तथा न कि स्वयं भूमि अथवा भवन हेतु – सन् 2000 का अधिनियम एक प्रकोष्ठ पर स्वामित्व के अधिकार को मान्यता प्रदान करने का आशय रखता है तथा किसी भूमि अथवा भवन पर नहीं – वर्तमान प्रकरण में, प्रकोष्ठ/प्रकोष्ठों के लिए व्यक्तिगत पट्टा अनुज्ञेय था, संपूर्ण भूमि अथवा भवन का पट्टा बिल्कुल भी परिकल्पित नहीं है।

***C. Nagar Tatha Gram Nivesh Vikasit Bhumiyon, Griho, Bhavano Tatha Anya Sanrachnao Ka Vyayan Niyam, M.P., 1975, Rule 3 & 5, Town Improvement Trust Act, 1960 (14 of 1961), Section 52 & 87(c)(iii), Nagar Tatha Gram Nivesh Adhiniyam, M.P. (23 of 1973), Section 2(j) and Revenue Book Circulars – Nazul Land/Authority Land – Sanction of State Government* – Held – Nazul Land, unless notified, does not automatically gets vested in any Authority or Trust – No transfer or disposal of Nazul/Authority land is permissible without prior approval of State Government as mandated in Rule 3/5 of Rules of 1975 – Petitioner failed to show any such notification whereby character of land has been changed from Nazul/Government land to Authority land – As per 1975 Niyam, no transfer through promoter agreement is permissible – State and JDA were bound to act according to statutory rules – JDA violated provisions of 1975 Niyam and Prakoshta Adhiniyam–It amount to "malice in law". (Paras 117 to 120 & 123)**

ग. नगर तथा ग्राम निवेश विकसित भूमियों, गृहों, भवनों तथा अन्य संरचनाओं का व्ययन नियम, म.प्र., 1975, नियम 3 व 5, नगर सुधार न्यास अधिनियम, 1960 (1961 का 14), धारा 52 व 87(सी)(iii), नगर तथा ग्राम निवेश अधिनियम, म.प्र. (1973 का 23), धारा 2(जे) एवं राजस्व पुस्तिका परिपत्र – नजूल भूमि/प्राधिकरण भूमि – राज्य सरकार की मंजूरी – अभिनिर्धारित – नजूल भूमि, जब तक कि अधिसूचित नहीं की जाती है, अपने आप से किसी भी प्राधिकरण अथवा न्यास में निहित नहीं होती है – राज्य सरकार के पूर्व अनुमोदन के बिना नजूल/प्राधिकरण भूमि का कोई हस्तांतरण अथवा व्ययन अनुज्ञेय नहीं है जैसा कि 1975 के नियमों के नियम 3/5 में आज्ञापक है – याची ऐसी कोई अधिसूचना दर्शाने में विफल रहा जिससे भूमि का स्वरूप नजूल/सरकारी भूमि से प्राधिकरण भूमि में परिवर्तित किया गया हो – 1975 के नियमों के अनुसार, संप्रवर्तक करार के माध्यम से कोई हस्तांतरण अनुज्ञेय नहीं है – राज्य एवं जेडीए कानूनी नियमों के अनुसार कार्रवाई करने हेतु बाध्य थे – जेडीए ने नियम 1975 एवं प्रकोष्ठ अधिनियम के

उपबंधों का उल्लंघन किया है – यह ''विधि अंतर्गत विद्वेष'' की कोटि में आता है।

D. ***Nagar Tatha Gram Nivesh Vikasit Bhumiyon, Griho, Bhavano Tatha Anya Sanrachnao Ka Vyayan Niyam, M.P., 1975, Rule 5-A – Tenant/ Sub Lessees – Public Interest*** **– Held – Petitioner admittedly given shops/ offices/showroom on rent but possession was not given to tenants by joint signatures of JDA and promoter which was contrary to promoter agreement read with scheme of Prakoshta Adhiniyam – For every transfer of apartment, JDA was entitled to receive 3% of Collector guideline rate of property – JDA was deprived of its benefits and also the amount of rent by putting sub-lessees and licensees – Action is not only against JDA but also against public interest – Impugned orders rightly passed. (Paras 160 to 168)**

घ. नगर तथा ग्राम निवेश विकसित भूमियों, गृहों, भवनों तथा अन्य संरचनाओं का व्ययन नियम, म.प्र., 1975, नियम 5–ए – किराएदार/उप–पट्टेदार – लोकहित – अभिनिर्धारित – याची ने स्वीकृत रूप से दुकानें/कार्यालय/शोरूम भाड़े पर दिये परंतु किराएदारों को कब्जा जेडीए एवं संप्रवर्तक के संयुक्त हस्ताक्षरों द्वारा नहीं दिया गया था जो कि संप्रवर्तक करार सहपठित प्रकोष्ठ अधिनियम की स्कीम के विपरीत था – प्रकोष्ठ के प्रत्येक हस्तांतरण के लिए, जेडीए संपत्ति की कलेक्टर द्वारा मार्गदर्शक दर का 3% प्राप्त करने का हकदार था – उप–पट्टेदारों तथा अनुज्ञप्तिधारियों को रखकर, जेडीए को इसके लाभों तथा भाड़े की राशि से भी वंचित रखा गया था – कार्रवाई न केवल जेडीए के विरूद्ध है बल्कि लोकहित के भी विरूद्ध है – आक्षेपित आदेश उचित रूप से पारित।

E. ***Nagar Tatha Gram Nivesh Vikasit Bhumiyon, Griho, Bhavano Tatha Anya Sanrachnao Ka Vyayan Niyam, M.P., 1975, Rule 27(b) – Allotment of Additional Land*** **– Held – Precondition of applicability of clause (b) was that largest plot is already held by a person who is claiming the adjoining plot – On the date (19.05.2008), High Rise Committee meeting had taken place, petitioner was not holding any such largest plot of land, thus there was no occasion for Committee to recommend grant of additional land – Since the grant of largest plot to petitioner vide lease deed dated 30.05.2008 stood cancelled, very foundation of allotment of additional land became non-existent automatically. (Paras 170, 174 & 175)**

ङ. नगर तथा ग्राम निवेश विकसित भूमियों, गृहों, भवनों तथा अन्य संरचनाओं का व्ययन नियम, म.प्र., 1975, नियम 27(बी) – अतिरिक्त भूमि का आबंटन – अभिनिर्धारित – खंड (बी) की प्रयोज्यता की पूर्व शर्त यह थी कि सबसे बड़ा भूखंड पहले से ही उस व्यक्ति के पास हो जो लगे हुए भूखंड का दावा कर रहा है – दिनांक (19.05.2008) को, उच्च स्तरीय समिति की बैठक हुई थी, याची, भूमि का कोई ऐसा सबसे बड़ा भूखंड धारित नहीं करता था, इसलिए अतिरिक्त भूमि प्रदान किये जाने की अनुशंसा करने हेतु समिति के पास कोई अवसर नहीं था – चूंकि विक्रय विलेख दिनांक 30.05.2008 के माध्यम से याची को सबसे बड़ा भूखंड प्रदान किया जाना रद्द कर दिया गया, अतिरिक्त भूमि के आबंटन का मूल आधार स्वतः ही अस्तित्वहीन हो गया।

***F. Administrative Law – Principle of Estoppel* – Held – Principle of estoppel is not applicable where huge public interest is involved – Petitioner authorities acted in flagrant breach of agreement and Rules causing harm to public interest and loss to public exchequer – No estoppels operates against statutory provisions – Entire exercise initiated on application of promoter, he cannot be held blameless. (Paras 148 & 158)**

च. प्रशासनिक विधि – विबंध का सिद्धांत – अभिनिर्धारित – विबंध का सिद्धांत वहां लागू नहीं होता जहां वृहद लोकहित शामिल हो – याची प्राधिकारियों ने करार तथा नियमों को प्रत्यक्ष रूप से भंग करते हुए कार्रवाई की जिससे लोकहित को नुकसान तथा राजकोष को हानि पहुंची है – कानूनी उपबंधों के विरूद्ध कोई विबंध प्रवर्तित नहीं होते – संपूर्ण कार्रवाई संप्रवर्तक के आवेदन पर आरंभ हुई, उसे निर्दोष अभिनिर्धारित नहीं किया जा सकता।

***G. Constitution – Article 14 – Equality* – Petitioner claimed that JDA/State has taken no coercive action against other parties who has been allotted land similarly – Held – It is settled law that Article 14 provides for positive equality and does not permit negative parity and not meant to perpetuate illegality – Further, petitioner failed to show that other parties got lease deed executed in respect of "Nazul Land". (Para 159)**

छ. संविधान – अनुच्छेद 14 – समता – याची ने दावा किया कि जेडीए/राज्य ने अन्य पक्षकारों के विरूद्ध कोई प्रपीड़क कार्रवाई नहीं की है, जिन्हें समान रूप से भूमि आबंटित की गई है – अभिनिर्धारित – यह सुस्थापित विधि है कि अनुच्छेद 14 सकारात्मक समता उपबंधित करता है एवं नकारात्मक समानता को अनुमति नहीं देता है तथा अवैधता कायम रखने हेतु नहीं है – इसके अतिरिक्त, याची यह दर्शाने में विफल रहा कि अन्य पक्षकारों ने ''नजूल भूमि'' के संबंध में पट्टा विलेख का निष्पादन करा लिया।

***H. Contract Act (9 of 1872), Section 128 – Bank Loan – Principle of Promissory Estoppel* – Held – Execution of lease deed of land which was the reason/foundation for grant of loan to SBPL, itself was contrary to law and against public interest – Cancellation of such lease deed of land got stamp of approval from this Court – Principle of promissory estoppels or Section 128 cannot be pressed into service in the case of this nature – No fault of JDA withdrawing the consent/ undertaking given for loan – Decision of JDA is taken in public interest and as per public trust doctrine – Petition by Bank dismissed. (Para 189)**

ज. संविदा अधिनियम (1872 का 9), धारा 128 – बैंक ऋण – वचन विबंध का सिद्धांत – अभिनिर्धारित – भूमि के पट्टा विलेख का निष्पादन जो कि एस.बी.पी.एल. को ऋण प्रदान करने का कारण/आधार था, स्वयं विधि के विपरीत तथा लोकहित के विरूद्ध था – भूमि के उक्त पट्टा विलेख के रद्दकरण को इस न्यायालय से अनुमोदन का स्टाम्प मिल गया – वचन विबंधों के सिद्धांत अथवा धारा 128 को इस स्वरूप के प्रकरण में प्रयोग में नहीं लाया जा सकता – ऋण के लिए दी गई सहमति/वचनबंध वापस लेने में जेडीए का

कोई दोष नहीं – जेडीए का विनिश्चय लोकहित में लिया गया तथा लोक न्यास सिद्धांत के अनुसार है – बैंक द्वारा प्रस्तुत याचिका खारिज।

***I. Interpretation – (i). Judgment & Precedent* – Held – Supreme Court concluded that a precedent is what is actually decided by Supreme Court and not what is logically flowing from a judgment – Precedent relates to the principles laid down or *ratio decidendi* of a case which does not include any factual matrix of case – A judgment should not be construed as Statute – Blind reliance on a judgment without considering fact and situation is not proper – Further, a singular different fact in subsequent case may change the precedential value of judgment. (Para 116 & 177)**

***(ii). Separate Entity* – Held – In a calculated manner, lease deed was executed in favour of petitioner which is a separate entity for namesake – Beneficiaries behind curtains are the same persons. (Para 154)**

***(iii). Premium Amount/Cost of Land* – Held – License to construct and payment of premium cannot be treated as payment of "cost of land" – Amount of premium sought to be equated with cost of land is not only misconceived but also amounts to misrepresentation – Inadvertent use of words "cost of land" in some annexures will not alter the meaning of word "premium". (Para 137)**

***(iv). Fraud* – Held – Petitioner, despite knowing the fact, that he has limited right for construction and to receive sale consideration as one time measure, he applied for execution of sale deed which was not at all envisaged in tender or agreement to which he was the signatory – Conduct of petitioner not free from blemish – Respondents established the plea of fraud/malice in law with sufficient material. (Paras 121 to 123 & 126)**

***(v). Terminology of Instrument/Document* – Held – A loose terminology used in instrument at some place is not determinative – To find out real intention of parties, complete document needs to be read in light of relevant statutory provisions to understand what is decipherable from it. (Para 99 & 105)**

झ. निर्वचन – (i) निर्णय व पूर्व न्याय – अभिनिर्धारित – उच्चतम न्यायालय ने निष्कर्षित किया है कि एक पूर्व न्याय वह है जो वास्तव में उच्चतम न्यायालय द्वारा विनिश्चित किया जाता है न कि वह जो किसी निर्णय से तार्किक रूप से बाहर आता है – पूर्व न्याय, प्रतिपादित सिद्धांत अथवा प्रकरण के विनिश्चय किये जाने के आधार से संबंधित होता है जिसमें प्रकरण का कोई तथ्यात्मक मैट्रिक्स शामिल नहीं है – एक निर्णय का अर्थान्वयन कानून के रूप में नहीं किया जाना चाहिए – तथ्य एवं परिस्थितियों पर विचार किये बिना निर्णय पर आंख बंद कर भरोसा करना उचित नहीं है – इसके अतिरिक्त, पश्चात्वर्ती प्रकरण में एक अकेला भिन्न तथ्य निर्णय के न्यायिक मूल्य को परिवर्तित कर सकता है।

(ii) *पृथक अस्तित्व* – अभिनिर्धारित – एक परिकल्पित ढंग से, पट्टा विलेख का निष्पादन याची के पक्ष में किया गया था जो नाम मात्र के लिए एक पृथक अस्तित्व रखता है – परदे के पीछे के हिताधिकारी भी वही व्यक्ति हैं।

(iii) *प्रीमियम राशि/भूमि का मूल्य* – अभिनिर्धारित – निर्माण करने की अनुज्ञप्ति तथा प्रीमियम के भुगतान को ''भूमि के मूल्य'' के भुगतान के रूप में नहीं माना जा सकता – प्रीमियम की राशि को भूमि के मूल्य के बराबर चाहे जाने, को न केवल गलत समझा गया है बल्कि दुर्व्यपदेशन की कोटि में भी आता है – कुछ अनुलग्नकों में ''भूमि का मूल्य'' शब्द का अनवधानता से प्रयोग ''प्रीमियम'' शब्द का अर्थ परिवर्तित नहीं करेगा।

(iv) *कपट* – अभिनिर्धारित – याची ने, यह तथ्य जानने के बावजूद कि उसके पास एक बार के उपचार के रूप में निर्माण करने तथा विक्रय प्रतिफल प्राप्त करने हेतु सीमित अधिकार हैं, विक्रय विलेख के निष्पादन हेतु आवेदन किया जो कि निविदा अथवा करार जिसमें वह हस्ताक्षरकर्ता था में बिल्कुल भी परिकल्पित नहीं था – याची का आचरण बेदाग नहीं – प्रत्यर्थीगण ने कपट/विधि में विद्वेष का अभिवाक् पर्याप्त सामग्री के साथ स्थापित किया।

(v) *लिखत/दस्तावेज की शब्दावली* – अभिनिर्धारित – लिखत में कुछ स्थान पर प्रयुक्त अस्पष्ट शब्दावली अवधारक नहीं है – पक्षकारों के वास्तविक आशय का पता लगाने के लिए पूर्ण दस्तावेज को सुसंगत कानूनी उपबंधों के आलोक में पढ़ने की आवश्यकता है ताकि उससे जो स्पष्ट हो रहा है, उसे समझा जा सके।

Cases referred :

2013(15) SCC 193, ILR 1889 (11) ILR All (FB), 1991 (3) SCC 91, 2003 (4) SCC 695, 1988 (3) SCC 433, 2014 SCC OnLine Cal 3497, 1992 (1) SCC 534, 2008 (15) SCC 166, 2015 (2) SCC 424, 2012 SCC Online (Cal) 1440, AIR 41 PV 94, AIR 1952 Bom 425, AIR 1951 SC 280, 1976 (1) SCC 311, 1959 (Suppl.) SCR 787, 1988 (4) SCC 709, 1993 MPLJ 1005, 1999 (6) SCC 464, 2003 (8) SCC 567, 2013 UK SC 5, 2016 (12) SCC 632, 2006 (11) SCC 548, 2011 (7) SCC 493, 2012 (1) SCC 718, 2014 (8) SCC 804, AIR 1963 SC 1417, 2011 (11) SCC 34, 1975 (1) SCC 199, 2004 (3) SCC 694, 2009 (5) SCC 313, 2006 (3) SCC 581, 1992 (4) SCC 683, 2011 (10) SCC 420, 2013 (5) SCC 450, 2012 (4) MPLJ 194, 2000 (3) MPLJ 43, AIR 2004 MP 82, 2012 (4) SCC 441, 2011 (5) SCC 29, 2012 (11) SCC 434, 2016 (4) SCC 469, 2004 (2) SCC 65, 1987 (1) SCC 13, 1996 (7) SCC 665, 1992 (2) SCC 411, 1994 (2) SCC 481, 2015 (15) SCC 588, AIR 2004 SC 1469, 2005 (8) SCC 283, 2005 (6) SCC 304, 1995 (3) SCC 693, 2007 (11) SCC 641, 2007 (11) SCC 172, 2012 (3) MPLJ 678, AIR 1969 SC 297, AIR 1970 SC 1972, AIR 1992 SC 1740, AIR 1968 SC 718, 2002 (2) SCC 188, AIR 1970 SC 150, 2015 (10) SCC 400, 2012 (13) SCC 14, 2000 (7) SCC 529, 2002 (4) SCC 503, 2000 (6) SCC 359, 1991 (1) SCC 761, 2010 (3) SCC 274, 1986 (3) SCC 156, 1987 (1) SCC 424, AIR 1977 SC 965, AIR 1976 SC 1766, 2003 (2) SCC 111, 2007 (5) SCC 371, 2003 (11) SCC 584, 2007 (11) SCC 92, 2011 (5) SCC 708, 2015 (10) SCC 161, 2016 (3)

SCC 762, 1999 (3) SCC 494, 2000 (9) SCC 94, 2005 (8) SCC 394, (2005) 8 SCC 394, 1983 (1) All ER-765, 1991 (1) SCC 556, AIR 1966 Supreme Court 1017, 1981 (4) SCC 716, 1989 (1) SCC 89, 1978 (4) SCC 104, (1995) 5 SCC 48, 1995 Supp (4) SCC 139, (1994) 2 SCC 204, 2010 (7) SCC 1, 2011 (6) SCC 508, 2012 (3) SCC 1, 2014 (9) SCC 1, 2013 (4) SCC 642, 2011 (7) SCC 493, AIR 1965 SC 470, 1996 (5) SCC 740, (1975) 1 SCC 737, (1897) AC 22, 1996 (4) SCC 622, (2000) 3 SCC 312, 1996 (6) SCC 634, AIR 1959 SC 93, 2001 (4) SCC 9, 2002 (1) SCC 633, 2011 (2) MPLJ 690, 1990 (1) SCC 400, (1974) 2 SCC 151, (1995) 3 SCC 693:AIR 1995 SC 1205, 1973 (2) SCC 650, 2013 (2) MPLJ 573.

Nidhesh Gupta with *Sanjay Agrawal*, for the Samdariya Builders.
N.S. Ruprah, for the petitioner in W.P. No. 2119/2016 (PIL).
Sankalp Kochar, for the Tenants in W.P. No. 12898/2017.
V.S. Shroti with *Vikram Johri,* for the Bank of Baroda.
Samdarshi Tiwari, Addl. A.G. for the State.
Ravish Chandra Agrawal with *Anshuman Singh,* for the JDA.
None, for the petitioner in W.P. No. 3665/2004.

O R D E R
(01.10.2018)

The Order of the Court was passed by :
SUJOY PAUL, J.:-These matters have a chequered history. The parties have fought a long drawn battle in the corridors of the Court and the statutory authorities.

2. M/S. Samdariya Builders Pvt. Ltd (SBPL) is aggrieved by the decision of Jabalpur Development Authority *(hereinafter referred to as **"JDA"**)* and Government in cancelling the lease deed dated 30.05.2008 and issuing certain consequential directions and orders whereas Bank of Baroda is aggrieved by impugned orders because of which Jabalpur Development Authority (JDA) has cancelled the permission to mortgage the property as a surety to the Bank against the loan taken by SBPL. The tenants installed by SBPL are aggrieved because before taking an adverse action/decision, they have not been heard. The petitioner of Public Interest Litigation (PIL) is also partially dissatisfied by impugned orders to the extent certain reliefs claimed by him were not granted.

WP-9733-2017.

(3) In this petition, the petitioner M/s Samdariya Builders Pvt. Limited (SBPL) has called in question the legality, validity and propriety of the order dated 27.6.2016 passed by respondent No.2, Jabalpur Development Authority (JDA), the order of the State Government dated 19.6.2017 (Annexure-P/15) and the consequential orders passed by the JDA dated 30.6.2017 (Annexure-P/36), 22.6.2017 (Annexure-P/36B & P/36C) and 11.7.2017 (Annexure-P/36D).

4. Draped in brevity, the admitted facts between the parties are that pursuant to an advertisement/Notice Inviting Tender (NIT) dated 16.7.2004 published in "Dainik Bhaskar" and other newspapers, M/s Samadariya Builders (HUF) Ltd. (Promoter) and other eligible parties submitted their tenders. The said NIT was published in relation to a "Promoter Scheme" regarding Khasra No.13, 14/1 and 3/4, settlement No.773, P.C. No.25/31, Plot No.A1, area 41179 sq. ft. situated in Civic Center, Jabalpur. The reserve price mentioned in the NIT was Rs.1500/-per sq. ft. The promoter submitted its tender quoting Rs.1,799/- per sq. ft. which was the highest rate quoted and hence accepted. The Tender Advisory Committee on 13.10.2004 (Annexure-P/3) recommended for acceptance of tender of M/s Samadariya Builders. On the same date i.e., 13.10.2004 (Annexure-P/4), the allotment committee made similar recommendation. The Board of JDA on 29.12.2004 (Annexure-P/5) accepted tender of the promoter. JDA informed the said promoter about acceptance of tender on 01.05.2006 (Annexure-P/6) with further direction to deposit 30% of premium amount of Rs.7,40,81,921/- within a week which comes to Rs.2,22,24,306/-. The said promoter on 1.5.2006, deposited the said amount and accordingly an agreement dated 1.5.2006 (**promotor agreement**) (Annexure-P/7) was executed between JDA and the promoter.

5. As per promoter agreement dated 01.05.2006 (Annexure-P/7), the promoter was required to deposit remaining installments of premium. The stand of JDA is that by communication dated 18.12.2006 (Annexure-R/2/17), the said promoter was directed to deposit the first installment of premium Rs.1,48,16,204/- (due on 31.10.2016). It is followed by reminder dated 10.4.2007 (Annexure-R/2/18). On 01.05.2007, second installment of premium became due against the promoter. On 26.10.2007 (Annexure-R/2/19), the promoter deposited first installment of Rs.1,48,16,204/-. On 31.10.2007, third installment of premium became due. Due to delay in depositing the installments of premium, by communication dated 30.3.2008 (Annexure R-2/21), the promoter requested for waiver of interest on delayed deposit of premium on the basis of note-sheet dated 01.04.2008 (Annexure R-2/22) which empowers the Chairman to waive the interest. The promoter deposited second and third installments on 08.04.2008 (Annexure R-2/20).

6. The promoter by letter dated 09.01.2008 requested the JDA for providing 6240 sq. ft. additional land on the ground that the adjacent bigger piece of land has already been allotted in his favour by the JDA pursuant to the "promoter agreement".

7. The promoter preferred an application dated 23.5.2008 (Annexure R-2/13) and requested for execution of lease deed in favour of Sarva Shri Ajeet Samdariya and Kishore Samdariya, Directors of SBPL. The promoter preferred two more applications on 23.5.2008 claiming that Rs.5,00,000/ - earnest money

be adjusted towards last installments and Rs.25,00,000/- be released. In furtherance of promoter's request dated 23.5.2008 for execution of a lease deed, a note-sheet dated 24.5.2008 (Annexure-P/17) was prepared. On 30.05.2008, Superintendent Engineer of JDA recommended for execution of lease deed with certain modifications. On 30.05.2008, Chief Executive Officer (CEO) of JDA directed for preparation of lease deed of land in the name of SBPL which was executed on the same date. Later on, on the request of the petitioner, by document dated 27.6.2008 (Annexure P/33), additional land of 6240 sq. ft. was allotted in favour of the petitioner.

8. W.P. No.7549/2015 (PIL) was filed by Shri Sushil Mishra before this court seeking certain directions including direction to conduct an inquiry and take appropriate action in relation to execution of lease deed and other issues, which was disposed of by the Division Bench on 17.06.2015 by directing the appropriate authority to conduct an inquiry into such allegations after hearing the stakeholders and by recording reasons. Aggrieved by the said order, the petitioner filed RP-703-15 on various grounds including the ground that before passing the order dated 17.06.2015 in the said PIL, the review petitioner was not heard. However, review petition was dismissed by order dated 15.10.2015 (Annexure P/9).

9. In turn, the CEO of JDA prepared the report dated 20.1.2016 (Annexure P/16). This report was challenged by petitioner in WP No.2506/2016 on the ground that it was prepared without affording opportunity of hearing to the petitioner. The Division Bench by order dated 18.2.2016 directed that CEO of JDA is free to proceed on the basis of report dated 20.1.2016. However, before taking any decision on the said report of CEO, JDA shall comply with the principles of natural justice by giving opportunity to all the stakeholders including the petitioner. The order can be passed after undertaking the aforesaid exercise. On 18.7.2016 (Annexure P/11), JDA submitted its report in a sealed cover before the Division Bench of this Court with a request that in view Section 74 of the MP Nagar Tatha Gram Nivesh Adhiniyam, 1973 (for short "1973 Adhiniyam") the report needs to be forwarded to the State Government for its decision. The High Court permitted the JDA to submit its report dated 27.6.2012 (Annexure-P/12) before the State Government. The State Government after hearing the petitioner, passed the order dated 19.6.2017 (Annexure-P/15) and gave findings on certain issues and consequently directed action to be taken against the petitioner. In obedience of this order of State Government, the JDA passed the impugned orders dated 30.6.2017 (Annexure-P/36), 24.6.2018 (Annexure-P/36A), 22.6.2017 (Annexure-P/36B), 11.07.2017 (Annexure-P/36D) and 07.07.2017 (Annexure-P/36C). The lease deed dated 30.5.2008 and consent letter given to the Bank were cancelled.

Contention of petitioner/SBPL:

10. The first contention of learned counsel for the petitioner is relating to legality and validity of lease deed dated 30.05.2008. The learned counsel for the petitioner submits that after having paid the "cost of land", the petitioner got absolute right of allotment and such right is not circumscribed by any restriction. The lease deed executed in favour of M/s Dainik Bhaskar Annexure P/51 is pointed out and it is urged that Dainik Bhaskar had offered the price of another piece of land of the same scheme at the rate of Rs.1,930/- sq. ft. in the year 2008. If this rate is compared with the rate offered by the builder/petitioner, it will be clear that promoter had given a better offer. It is submitted that petitioner cannot be treated as a mere "licensee" because entire cost of the land as a premium was paid. The promoter was not merely asked to develop the property and then entrust the property as a licensee. The promoter had absolute right of allotment and to make the allotment to persons of his choice and receive consideration therefrom. In exercise of this right, the promoter had every right to allot the shop/building etc. to himself or to any sister concern as per tender conditions envisaged in Clause 9, 11, 26 and 28 of tender document (Annexure P/5) and promoter agreement. The allotment of entire property by promoter in favour of present petitioner is supported on the strength of said clauses and it is urged that present petitioner became the first allottee. It is further canvassed that right of allotment includes right to allot to a singular party or to more than one parties. This is permissible because "singular" includes "plural". Section 5 of M.P. General Clauses Act and judgment of Supreme Court reported in 2013 (15) SCC 193, *(Govind Bala Patil vs. Ganpati Ramchandra)* is referred to in this regard. Shri Gupta by placing reliance on the judgment of Full Bench of Allahabad High Court in ILR 1889 (11) ILR All (FB), *(Muhammad Sulaiman Khan vs. Muhammad Yaar Khan);* 1991 (3) SCC 91, *(G.B. Mahajan vs. Jabalpur Municipal Corporation)* & 2003 (4) SCC 695, *(Union of India vs. Shivdayal)* urged that what is not prohibited, is permitted.

11. It is further urged that lease of the land is envisaged which can be gathered from the format of lease-deed (Annexure-P/5) appended to tender conditions. The format of the sample multi-storied apartment clearly provides for execution of such lease deed. The agreement dated 1.5.2006 reiterates that the lease would be executed in favour of the allottee. The sample sale-deed refers to The Madhya Pradesh Prakoshtha Swamitva Adhiniyam, 2000 (*hereinafter referred to as* ***"Prakoshtha Adhiniyam"***). As per Section 2, 3(i) and 4(2) of this Adhiniyam, it is argued that the lease deed dated 30.5.2008 is in consonance with the mandate of Prakoshtha Adhiniyam.

12. The impugned orders are criticized by contending that the term "land" includes "building" which is evident from bare reading of Section 3(n) of Prakoshtha Adhiniyam and Section 2(k) of the M.P. Land Revenue Code and

Section 2(j) of M.P.Gram tatha Nagar Nivesh Adhiniyam of 1973. To support this argument, judgments reported in 1988 (3) SCC 433, *(P. Rami Reddy and others vs. State of Andhra Pradesh)* & 2014 SCC OnLine Cal 3497, *(Ashok Kumar Jaiswal vs. Ashim Kumar Kar)* are relied upon. The submission of petitioner is that at the time of execution of lease deed dated 30.5.2008, the shopping complex was constructed upto five floors. The report of Lokayukt (Annexure-P/64) is referred to for this purpose. The findings given in high rise committee report dated 19.05.2008 (Annexure-P/25) was attacked wherein as per spot inspection made on 31.10.2007, a finding is given that construction upto ground floor had taken place. The finding is said to be incorrect because report of Lokayukt (Annexure-P/64) refers to the letter of Superintendent Engineer of JDA who opined that construction of five floors were completed on 19.5.2008. Since construction upto five floors was completed, lease deed was not only in respect of land but it included the building constructed over such land. By placing reliance on para 7 and 11 of Additional Return of JDA, it is urged that JDA had admitted this fact.

13. The attention of this court is drawn on lease deed dated 30.5.2008 to submit that it was executed in favour of present petitioner and not in favour of two individuals namely; Sarva Shri Ajeet and Kishore Samdariya. The main application dated 23.5.2008 shows that lease was sought to be executed in favour of SBPL and said two persons signed every page of lease deed in the capacity of Directors of the Company/SBPL. The entire correspondence after execution of said lease deed was also made by petitioner with the JDA. Few communications are filed by respondents themselves with IA No.13223/2017 (Annexure-R/8). Section 49 of Companies Act has no application, argued learned counsel for the petitioner. The aspect of allotment is duly reflected in the accounts of the SBPL. The argument of other side that property vests in the name of individuals and not in the name of company is termed as "ridiculous".

14. Shri Nidesh Gupta, learned counsel for SBPL submitted that the stand of official respondents is that there was a "fraud" committed in the matter of execution of lease deed dated 30.05.2008 and on other aspects but this stand is devoid of any basis. He relied on Section 17 of Contract Act, 1872 wherein 'Fraud' is defined. He submits that the necessary ingredients to constitute fraud are totally missing in the present case. The exception to Section 19 of said Act is also relevant. Fraud cannot be urged where party could have discover such fraud with due diligence. Reference is made to Order VI Rule 4 of CPC which requires a pleading in this regard. It is pointed out that plea of fraud has been raised for the first time in the pleadings of instant case and interior thereto, such plea has never been raised. Since Shri J.P. Trivedi was signatory to lease deed (Annexure-P/16), he cannot raise the plea of fraud being an OIC who filed his affidavit in support of pleadings of JDA.

15. To explain in detail, petitioner argued that fraud either in private of public law, needs to be established in a particular manner. In absence of any misrepresentation, suppression or concealment of any fact by the petitioner at any point of time, plea of fraud is not available to the other side. The judgment reported in 1992 (1) SCC 534, *(Smt. Shrisht Dhawan vs. Ms. M/s. Shaw Brothers)* is relied upon wherein it is held that fraud is essentially a question of fact, the burden to prove which is upon him who alleges it. He who alleges fraud, must establish it promptly. The fraud in public law arises only from a deception committed by a disclosure of incorrect fact knowingly and deliberately. The fraud in public/ administrative law can arise only when there is a disclosure of incorrect facts in the said manner. A non disclosure of fact which is not required by law to be disclosed, does not amount to misrepresentation. Silence or non disclosure of facts not required by law to be disclosed, does not amount to misrepresentation. The judgment reported in 2008 (15) SCC 166, *(Elizabeth Jecob vs. District Collector, Idukki & others)* is referred to submit that a suspicion that there might have been collusion and fraud is not proof of collusion and fraud. The onus is clearly on the state to establish fraud or collusion. Bald plea of fraud is not enough. The party who sets up a plea, must *prima facie* establish the same by placing material before the Court, is the ancillary submission of Shri Gupta based on 2015 (2) SCC 424, *(New India Assurance Co. Ltd. vs. Genus Power Infrastructure Ltd.)* Furthermore, 2012 SCC Online (Cal) 1440, *(Mihir Kumar Maity vs. State of W.B.)* is cited wherein it is held that the party alleging fraud must specifically mention as to who committed such fraud, upon whom such fraud was committed, when such fraud was committed and where such fraud was committed. The particulars of fraud are also required to be proved by producing evidence by the party alleging such fraud in order to succeed their plea. AIR 41 PV 94, *(A.L. Narayan vs. Official Assignee of the High Court, Rangoon)* is referred to submit that fraud like any other charge of criminal offence, whether made in civil or criminal proceedings, must be established beyond reasonable doubt. Bald assertions of JDA without supplying particulars do not constitute fraud. A Division Bench judgment of Bombay High Court in *[Narsinghdas vs. Chandrakant]* reported in AIR 1952 Bom 425 and judgment of Supreme Court in AIR 1951 SC 280, *(Bishnudeo Narain and another vs. Seogeni Rai and Jagernath)* are referred wherein it is held that mere averment of fraud is not sufficient. Fraud must be established as per requirement of Section 17 (3) of the Contract Act. Breach of contract alone does not lead to the conclusion that fraud had been committed thereby. This contention is based on 1976 (1) SCC 311, *(Shri Krishnan Vs. Kurukshetra University)*.

16. The next contention of petitioner's is relating to concept of fraud committed on a public authority *vis a viz* concept of fraud in a contract with public authority. Argument advanced is that both cannot be assessed on the same parameters of judicial review. In the case of the former, an order in excess of

jurisdiction or contrary to the statute may give rise to malice in law and could also give rise to issue of *corum non judice*. Conversely, it is argued when a public authority enters into a contract, unless there is a violation of the statute and/ or loss caused to the public exchequer, the notions of fraud as in the former cannot be incorporated. 1959 (Suppl.) SCR 787, *(C.K. Achutan vs. State of Kerala)* is relied upon in support wherein it is held that a contract which is held from government, stands on no different footing from a contract held from a private party. The judgments reported in 1988 (4) SCC 709, *(Subhash Kumar Lata vs. R.C. Chhiba)* & 1993 MPLJ 1005, *(Narayan Das vs. Bhagwan Das)* cited by respondents are mentioned and it is argued that Subhash Kumar was a case of suppression of material fact by a tenant before rent controller and had nothing to do with a contract by a public authority whereas Narayan Das was a case of false representation before the Civil Court which is equally inapplicable.

17. The judgment of *M.I. Builders Pvt. Ltd. vs. Radheshyam Sahu,* 1999 (6) SCC 464 is tried to be distinguished by submitting that in the said case, contract was given without tender for construction of an underground market whereas in the present case contract was entered into after following the procedure. Secondly, issue was about an unauthorized construction in the case of *M.I. Builders* (supra). Shri Gupta and Shri Sanjay Agrawal further argued that judgment of *Vijay Shankar Shukla vs. Municipal Corporation Jabalpur* (MP. No.2861/89) cited by respondents is irrelevant as in that case, the agreement was sought to be challenged on the ground that the same was opposed to various provisions of law. In the instant case promoter i.e. M/s. Samdariya Builders (HUF) had made an allotment of the property in accordance with the terms and conditions of tender document as also the agreement dated 01-05-2006. There is no illegality in the lease deed dated 30-05-2008. After execution of said lease deed, the initial promoter aforesaid is not in picture at all. Hence, the said judgment has no application in the present case. Lastly, it is urged that an expeditious decision does not lead to presumption of fraud. 2003 (8) SCC 567, *(Chairman & MD, BPL Ltd. vs. S.P. Gururaja and others)* is relied upon and argued that when consultation/discussion takes place at different levels and between different authorities, performing different functions under the statute, the purpose of consultation stands satisfied. In the present case, Several (sic : several) persons and authorities have processed the case of petitioner and merely because it was done expeditiously, it does not indicate any malicious action. Para 34 and 35 of said judgment were highlighted wherein it is held that "undue haste" by itself would not have been a ground for exercise of the power of judicial review unless it is held to be *malafide*. In such matter, the amount of time taken is not important. The concern is not the merit of the decision but the decision making process.

18. The prayer of other side for invoking principle of lifting of corporate veil is attacked in the teeth of conditions of promoter agreement which gives right to the promoter to allot the land/building to himself. The promoter and present petitioner are not one and the same legal entity. Reliance is placed on judgment of UK Supreme Court in 2013 UK SC 5, *[VTB Capital PLC vs. Internation Corp & others]*.

19. In addition, it is urged that the promoter or petitioner have not violated any material term of tender conditions or the promoter agreement. Reference is made to Clause 45 (Annexure P/7), Clause 11 (Annexure P/5) to contend that these are not essential terms of the contract. Since no material condition of contract is violated, impugned orders could not have been passed. Argument is based on 2016 (12) SCC 632, *(Om Prakash Sharma vs. Ramesh Chand Prashar and others)*; 2006 (11) SCC 548, *(B.S.N. Joshi & Sons Ltd. vs. Nair Coal Services Ltd. and others)* & 2011 (7) SCC 493, *(ITCLtd. vs. State of U.P. and others)*. The test laid down by Supreme Court in ***ITC Ltd.*** (supra) is referred to, in support of argument that no public interest has suffered in the matter of execution of lease deed in question. The transferee acted bonafide and alleged violation of terms and conditions does not have any ever lasting adverse impact on public interest. Similar principles laid down in 2012 (1) SCC 718, *(Union of India vs. Colonel L.S.N. Murthy and another);* 2014 (8) SCC 804 *(Jal Mahal Resorts Pvt. Ltd. Vs. K.P. Sharma and others)* & AIR 1963 SC 1417, *(Banarsi Devi vs. Cane Commissioner, U.P. and another)* are also relied upon. In alleged violation of clause 45 of agreement, JDA has not been prejudiced in any manner. The JDA received 2% of premium amount annually. Thus, there was no adverse financial implication on the JDA.

20. The stand of respondents in interpreting the terms of contract is criticized by petitioner on the strength of 2011 (11) SCC 34, *(A.P. TRANSCO vs. Sai Renewable Power Pvt. Ltd. And others)* & 1975 (1) SCC 199 *(Godhra Electricity Co. Ltd. And another vs. State of Gujarat and another)*. The interpretation advanced by respondents is termed as incorrect and contrary to law laid down by Supreme Court. The conduct of JDA shows that agreement was entered upon with free will, the lease deed dated 23.5.2008 was duly allotted on the request of promoter to a different legal entity i.e. petitioner. All the drawings and designs in respect of G+7 floors have been duly approved by the JDA and Municipal Corporation, Jabalpur. The High Rise Committee also approved the construction of G+7 floors.

21. The conduct of parties is always a relevant consideration submits Shri Gupta on the basis of 2011 (11) SCC 34, *(A.P. TRANSCO VS. Sai Renewable Power Pvt. Ltd. And others) and* 1975 (1) SCC 199 *(Godhra Electricity Co. Ltd. And another vs. State of Gujarat and another)*. The conduct of parties shows that they acted in accordance with law.

22. Rule of *'contra proferantum'* is referred to which shows that in the event of ambiguity in the contract, the same must be read/interpreted against the maker of document. This argument is pushed on the basis of 2004 (3) SCC 694, *(United India Insurance Co. Ltd. vs. Pushpalaya Printers) and* 2009 (5) SCC 313, *(Bank of India and another vs. K. Mohandas and others)*.

23. The second issue raised by petitioner is about giving of shops of commercial complex on rent by SBPL in violation of conditions of Promoter Agreement dated 01.05.2006.

24. The learned counsel for the petitioners laid emphasis on promoter agreement dated 01.05.2006 and argued that there is no prohibition in the said agreement that the petitioner cannot give shops/ offices/ chambers on rent to any person. It was open to the allottee to either enjoy the property himself for running his own business or allot it to other persons on rent. The right of J.D.A. arises only if there is further transfer by allottee in which case, it is entitled to get transfer fee. The legal opinion of JDA's counsel (Annexure-P/18) and consequential permission of J.D.A (Annexure-P/19) is again relied upon. Emphasis is also laid on government's order dated 19.06.2017 (Annexure-P/15) wherein a finding is given that as per promoter agreement there was no prohibition for letting out the premises on rent. Lastly, it is submitted that tenants were stake holders but they have not been heard by the official respondents inspite of directions contained in the court order dated 18.02.2016 passed in W.P. No.2506/16 (Annexure-P/11).

25. The petitioner's next contention is relating to justification of construction of G + 7 floors in the commercial complex.

26. The petitioner supported construction of G + 7 floors of the complex on the basis of amended tender condition dated 14.09.2004 (Annexure-P/20), copy of permission granted by Town And Country Planning Department dated 22.05.2006 (Annexure-P/21) and 12.07.2007 (Annexure-P/23), copy of issuance of sanction and approval of Map by Municipal Corporation dated 20.06.2006 (Annexure-P/22) and 09.08.2007 (Annexure-P/24). Similarly, copy of minutes of High Rise Committee dated 24.05.2008 (Annexure-P/25), Completion Certificate dated 11.03.2010 (Annexure-P/26), Environment Clearance Certificate by M.P. Pollution Control Board (Annexure-P/27), Enquiry Report at the instance of Lokayukt (Annexure-P/28) are relied upon. To elaborate, it is submitted that comparative chart of built-up area (Annexure-P/29) clearly shows that petitioner has not constructed even an inch beyond the permission granted. In order dated 27.06.2016 (Annexure-P/12), J.D.A did not find any illegality in the construction of the complex. The State Government in its order dated 19.06.2017 (Annexure-P/15) found the illegality pursuant to which consequential orders (Annexure-P/36, 36-A, 36-B & 36-D) were issued by the J.D.A. Shri Gupta submitted that the entire construction of G+7 floor is in accordance with the

sanction/ approvals given by various statutory authorities. As per tender document, in G+4 floors, total permissible built-up area was 1,06,037 sq.ft whereas total built-up area of G+7 floors is 1,01,213 Sq.ft. Since office of J.D.A is almost adjacent to the Shopping Complex, their Chairman and other Officers have regularly visited and inspected the site and recorded the measurements in their measurement books. No adverse finding in relation to construction of G+7 was ever communicated to the petitioner. As per Rule 98 of Bhumi Vikas Rules, 1984 read with Section 301 of Municipal Corporation Act, 1956, the completion certificate dated 11.02.2010 (Annexure-P/26) issued to the petitioner has a statutory effect.

27. On three different occasions, inquiries were conducted viz. Annxure P/28, P/40 & P/41. Report contained in Annexure-P/41 was prepared by the then C.E.O, J.D.A who did not find any irregularity in construction of G+7 floors at the relevant time but in subsequent report dated 20.01.2016 (Annxure-P/10), he surprisingly reported various illegalities and irregularities. Pointing out irregularities after seven years from the date of issuance of completion certificate is unfounded. In the meantime, third party interests have been created. The J.D.A is "estopped" from branding the construction as illegal. The application of respondents dated 27.10.2017 filed in this case is termed as "mischievous" wherein it is averred that petitioner has constructed an additional area of 19,812 sq.ft. The entire calculation is based on sanctioned area and not as per the tender conditions. The tender document provides a built-up area of 1,06,037 sq.ft at 2.5 FAR. Since sanctioned area was lesser than the area prescribed in tender conditions, permission was sought for construction of additional floors, which was granted after due application of mind. There exists no specific finding in the order of State Government and J.D.A that there was any illegality in construction of G+7 floors.

28. The next point raised is about applicability of reservation policy of Government in the matter of allotment of shops in the commercial complex.

29. It is urged that the extent and applicability of reservation policy of Government needs to be gathered by proper appreciation of circulars dated 01.11.2002 (Annexure-P/30), dated 12.08.2008 (Annexure-P/31), and clarificatory circular dated 30.05.2013 (Annxexure (sic : Annexure) - P/32). The aforesaid circulars are not applicable to promoters/ private builders. The said circulars have no application in respect of shops in commercial complexes. The respondents have misread and attempting to misrepresent the said circulars. The circular dated 01.11.2002 is applicable in respect of residential/ commercial plots and not to constructed buildings. The circular dated 12.08.2008 is applicable only to H.I.G, M.I.G and E.W.S. The circular dated 30.05.2013 clearly stated that reservation policy is inapplicable in respect of shops and commercial plots.

30. The point with regard to legality of action of allotment of additional land to petitioner ad-measuring 6240 sq. ft. is also canvassed by the petitioner.

31. The learned counsel for the petitioner submits that there is no illegality in allotment of additional land ad-measuring 6240 sq.ft which is adjacent to the land in question. The Board, by resolution dated 27.06.2008 (Annexure-P/33), permitted to allot this land. Consequently, N.O.C dated 15.04.11 P/34 was issued by J.D.A, permitted mortgage of this property for obtaining loan from the Bank. High Court by order dated 18.10.2013 passed in W.P. No.9571/06 affirmed such allotment. Hence, no illegality can be found in the allotment. Moreso, when J.D.A supported the present petitioner in W.P. 9751/06 and did not file any writ appeal against the said order of the Single Bench.

32. The J.D.A.'s report dated 27.06.2016 (Annexure-P/12), does not contain any decision for cancellation of allotment of additional land. The State Government in its order dated 19.06.2017 has also not taken any such decision. Thus, Board's resolution dated 24.06.2017 (Annexure-P/36-A) and order of JDA dated 30.6.17 (Annexure-P/36) are illegal. It is pointed out that ***W.A. No.1432/18 (YMCA Vs. JDA)*** is still pending which was filed against the order dated 18.10.2013 passed in W.P. No.9751/06.

33. The learned counsel for the petitioner justified the action of JDA regarding waiver of interest amount of 25% i.e. Rs.10,37,134/- .

34. The said action is supported by the petitioner on the strength of JDAs report dated 27.06.2016 (Annexure-P/12) and copy of order of State Government dated 19.06.2017 (Annexure-P/15). The Board resolution dated 13.01.1992 (Annexure-R/2) was said to be applicable which permits the Chairman to waive interest. It is urged that a careful reading of resolution dated 13.01.1992 clearly brings out that it is in two parts i.e "A" and "B". The part "A" is applicable in relation to aid to displaced person upto Rs.10,000/- whereas part "B" is regarding waiver of interest upto 25%. In the present case, "B" would be applicable and "A" and "B" part are different and disjunctive.

35. The petitioner has argued at length in relation to a question whether a "Nazul Land" received by JDA free of cost and because of that it became "Authority Land" ? Whether permission/approval of the State Government was required to be taken in view of provisions of Vyayan Niyam 1975 ?

36. The argument of petitioner is that a combined reading of Rule 5(c) and 24 of Vyayan Niyam will make it clear that any transfer of land by JDA can be by way of execution of lease deed only. This being the only permissible mode, other modes and methods are forbidden. The lease deed dated 30.5.2018 is in consonance with the said Niyam. The lease deed was executed for a period of 30 years after depositing requisite amount. As per clauses 5, 28 and 41 of the

Promoter Agreement dated 1.5.2006, the promoter had exclusive right of making allotment of constructed or unconstructed shops/ buildings to anyone. In view of said right, promoter preferred an application dated 23.5.2008 for execution of lease deed in the name of SBPL. The said application was duly considered by the JDA and lease deed was decided to be executed. Upon execution of such lease deed, the JDA is only entitled to get yearly lease rent as applicable. There was no collusion between petitioner and officials of JDAs. In a report pursuant to investigation conducted by the Lokayukt, it was found that there were no irregularities in construction and development of the complex.

37. Shri Nidhesh Gupta contended that in some parts of pleadings, the JDA has referred the land in question as "Authority Land" while in some places it is referred as "Government/Nazul Land". In the return of respondent No.2, it is averred that Niyam 5A is applicable whereas in certain other pleadings, applicability of Niyam 3 is insisted upon. As per Niyam 3, 4, 5, 5A and 47 of M.P./C.G. Nagar Tatha Gram Nivesh Viksit Bhumiyon, Griho, Bhavano Tatha Anya Sanrachnao Ka Vyayan Niyam, 1975, it would be clear that: **(i)** if Government land is vested or managed by the authority, the same cannot be transferred except with the general or special sanction of the Government; **(ii)** "Authority Land" can be transferred under Rule 5 and Rule 5A; **(iii)** if Rule 3 applies, Rule 5 and Rule 5A would not apply and conversely, if Rule 5 and Rule 5A applies, Rule 3 will have no application. The argument of Shri Gupta is that if it is assumed that land was originally a Nazul Land, the requirement of Niyam 3 stands fulfilled for the reason that the said land was vested in Town Improvement Trust which is evident from an application for taking document on record dated 27.10.2017 filed by respondent No.1. As per stand of the said respondent, the land came to be vested with the Town Improvement Trust **("Trust")** and, therefore, it became the "Trust Land" and not a "Government Land". Such vesting of the land with Trust was unconditional and without restrictions. After having vested the land, free from all encumbrances to the trust, the transferor (State of Madhya Pradesh) lost all the rights, title and interest over the said land. For all practical purposes, the right and title and interest rests with the transfree i.e. Town Improvement Trust (Trust). After vesting of land with the Trust, as per Section 70 of the Town Improvement Trust Act, 1960, there existed no further requirement of sanction or approval by the Government. Reliance is placed on Section 87 (c)(iii) of 1973 Adhiniyam. In that event, Niyam of 1975 have no application. Great emphasis is laid on the language employed in Clause (c)(iii) of sub-section (1) of Section 87. It is contended that the use of words "belong to" connotes ownership of the land. The expression used in the said provision namely "and be deemed to be assets and liabilities of the Town and Country Development Authority established in place of such Town Improvement Trust under Section 38" is referred to, to submit that by operation of deeming clause, all assets and liabilities

of erstwhile trust became assets of JDA. Hence, land cannot be treated as a "Government Land". It will for all practical purpose will be an "Authority Land" with its full ownership with JDA. Niyam 3 cannot have an overriding effect over the deeming effect of Section 87(c) (iii) of the said Act. In support of this contention, the judgment of Supreme Court reported in 2006 (3) SCC 581, *(K.K. Bhalla Vs. State of M.P.)* was relied upon. It is further urged that Rule 3 has no application on an "Authority Land".

38. Furthermore, it is urged by the petitioner that the findings given in impugned order that no sanction for transfer of land was given by State Government are erroneous because the Promoter Scheme floated by JDA and agreement dated 01.05.2006 were sent for approval of the State Government and in turn, Government approved the same. Para 28 of reply of JDA is referred, to submit that it is admitted by JDA that "mention of approval in the agreement dated 01.05.2006 can be relatable to the approval of Promoter Scheme....." The petitioner has also relied upon a letter dated 02.06.1974 (Page 84 of Volume-III of Paper Book) in support of the contention that there exists a general sanction of Government to the "Promoter Scheme". The notification dated 23.08.1973 (Annexure-WS(P)-1) filed with written submission dated 27.06.2018 is pointed out to canvass the point that this notification was filed by JDA along with its return in ***W.P. No.4522/1996 (K.K. Bhalla Vs. State of M.P.)***. The JDA in its return filed in Bhalla's case, took an unequivocal stand that State Government had sanctioned Scheme No.18. This return is filed along with the said written submission as Annexure-WS (P)-2. In view of these documentary evidence, the stand of the petitioner is that the land in question is an "Authority land". Judgment of Supreme Court in *K.K. Bhalla* (supra) was relied upon to press this point. CEO, JDA's report (Annexure-P/41) is pointed out to show that land is an"Authority Land". For the same purpose, the letters dated 14.12.2004 and 18.02.2005 filed with said written submission were relied upon.

39. The lease deed dated 30.05.2008 was supported by contending that the promoter paid the "cost of the land" and obtained absolute right of allotment and the said right is not circumscribed by any clause of agreement or provision. The Board Resolution dated 25.05.2004 shows that JDA had assessed the cost of land as Rupees Six Crores whereas promoter had offered the price of Rs.7,40,81,021/- which is much higher than the assessment of JDA.

40. The letter dated 18.2.2005 produced during the course of arguments was relied upon to contend that 2% lease rent has been fixed treating the land to be the authority land. The letters dated 14.12.2004 and 18.2.2005 are filed with written submissions as WS(P/3 & P/4) respectively. As per Rule 47 of Niyam, 1975, the annual lease rent needs to be paid at the rate of 2% of the premium to the authority whereas in case of authority land the rate is 6.5% of the premium. Since JDA

treated the land in question as an authority land, it fixed 2% lease rent as per agreement dated 1.5.2006. The JDA now cannot turn around and say that land in question was a Nazul Land. It is argued that principle of aprobate and reprobate would be applicable in the instant case. The judgments of Apex Court reported in 1992 (4) SCC 683, *(R.N. Gosain Vs. Yashpal Dhir);* 2011 (10) SCC 420, *(Cauvery Coffee Traders Vs. Hornor Resources Ltd.)* & 2013 (5) SCC 450, *(Rajasthan State Industrial Development and Investment Corporation vs. Diamond & Gem Development Corporation)* are relied upon. In addition, the lease deed dated 24.1.2008 executed by the JDA in favour of M.D. of Dainik Bhaskar (Annexure-P/51) and lease deed dated 30.3.1981 in favour of M/s Agarwal MJ Enterprises (Annexure P/52) were highlighted to show that there are various lease deeds executed in favour of various persons in Scheme No.18 without any specific sanction from the State Government.

41. Shri Sanjay Agrawal during the course of arguments, produced a chart which contains the description of land allotted to "Dainik Bhaskar", YMCA and the petitioner. It is urged that the land allotted to "Dainik Bhaskar" is Khasra No.5/5, land allotted to YMCA is Khasra No.3/4, 14/1 & 1/11, whereas petitioner's Khasra Nos. are 13, 14/1 & 3/4. These lands are described as "Nazul Land". IA-14738-2017 is relied upon for this purpose. In addition, stand of JDA is quoted wherein it is averred- "reliance of petitioner on the judgment of *KK Bhalla* (supra) to claim that present land is also authority land is misplaced. The said judgment nowhere states that prior permission of State is required. *The present land is not the one involved in the said case*." is the bald stand of JDA which was criticized. Reverting back to the bone of contention, it is argued that whether land is an "Authority Land" or it is treated to be a "Nazul Land", the permission of State Government in both the situations was not required because land travelled from Trust to the JDA. Even otherwise, the previous permission/approval of State Government is evident from certain documents. The petitioner cannot be given discriminatory treatment qua "Dainik Bhaskar". The respondents are bound by the principle of "promissory estoppel". Impugned action which has been taken after long time is impermissible.

Contention of respondents-

42. Shri Samdarshi Tiwari, learned Addl. AG for the State and Shri R.C. Agrawal, learned Senior counsel with Shri Anshuman Singh, Advocate appeared for JDA and advanced their arguments almost in the same line. Shri N.S. Ruprah, appeared for Shri Sushil Mishra and vehemently opposed the case of petitioner and, in addition, prayed for further reliefs based on the PIL. This aspect will be dealt with separately in this order.

43. The learned counsel for the official respondents placed reliance on Clauses 10, 11, 13, 21 & 24 of tender document (Annexure-P/5) and Clause 5, 11,

15, 19, 22, 27, 28, 38, 41 & 45 of Promoter Agreement (Annexure-P/7). It is common ground that a combined reading of these clauses will leave no scintilla of doubt that the promoter was only granted license to construct the commercial complex upon payment of license fee/premium Rs.7,40,81,201/-. The promoter never acquired the right to become owner of the property. The ownership of land & building always remained with the JDA. The promoter was only entitled to receive sale consideration for the first time for the shops, show-rooms, chambers (apartment) from the parties nominated by it. The lease deed was to be executed by JDA in favour of nominees of promoter only for the shops/show-rooms, chambers (apartments) whereafter, such nominees were to become leasees of the JDA. The possession to nominees was to be granted by joint signatures of JDA and the promoter. After getting possession, nominees were to become leasees of JDA. Promoter alone had no right to put third party in possession of shops/show-room/chambers. The lease deed was to be executed in respect of shops/show-rooms/chambers/apartments and there was never any intention to execute lease of plot of land even in favour of the nominees of promoter.

44. It is jointly contended by official respondents that no Government land transferred to JDA can be transferred to petitioner without permission of the State Government. As per Rule 3 of Niyam, 1975 the transfer of land by JDA to petitioner without permission of Government is *void ab initio*. Reference is made to 2012 (4) MPLJ 194, *(Neetu Tejkumar Bhagat and another Vs. JDA and others);* 2000 (3) MPLJ 43, *(Adhartal Shiksha Samiti and another vs. State of M.P. and another)* and AIR 2004 MP 82, *(Motiram Mandhyani and another vs. State of M.P. and another)*. It is urged that as per *ratio* of these judgments, principles of nature (sic : natural) justice are not attracted where lease was cancelled on the ground that mandatory prior permission of Government was not taken. The principle of "promissory estoppel" has no applicability in case of violation of mandatory statutory provisions. Learned Addl. AG placed reliance on 2012 (4) SCC 441 *(Collector, District Gwalior and another vs. Cine Exhibitors Pvt. Ltd. and another)* and contended that rule of promissory estoppel cannot be invoked for enforcement of a "promise", "declaration" or a deed which is contrary to law or outside the authority or power of the person/ department making the deed/promise. Learned Additional Advocate General urged that as per the provisions of Adhiniyam and Niyam, 1975, the petitioner's attempt is to show as if the land was "allotted" to petitioner in consonance with promoter agreement dated 01.05.2006. This being the first "allotment", all the steps taken by allottee to execute rent agreements, are justified. Niyam of 1975 were formulated in exercise of powers conferred under Section 68 /w Section 85 of Adhiniyam and Niyam 3 of Niyam of 1975 clearly stipulates that no Government land vested in or managed by the authority shall be transferred, except under the general or special sanction of the State Government. Since as per agreement dated 01.05.2006, the JDA never

intended to transfer the land to the petitioner, aforesaid Niyam of 1975 have no application. The process of allotment was carried out with an object to get the aforesaid land utilized by raising a commercial construction/ complex through an agency/promoter.

45. The promoter was, at best, an agency to raise construction and to facilitate allotment of shops after its construction. Niyam 5A is not applicable for the simple reason that the object of the agreement dated 01.05.2006 was clearly not for "disposal" of the land by the promoter. Clause 10 of tender document is referred, to show that under promoter scheme, the ownership of constructed building and other development work shall remain with the JDA and the allottees shall be lessees of the JDA. Similarly, Niyam 4 is said to be inapplicable on the ground that there was no intention of JDA to transfer of the title of land in favour of promoter or petitioner. Lease dated 30.5.2008 is granted in a manner which is totally unknown to law. The para 5.53 of WP-9733-2017 is pointed out wherein petitioner himself has described the land in question as "Nazul land". For the same purpose para 4 of order passed in WP-9343-2010 is relied upon.

46. Shri Tiwari, learned Addl. AG stated that map and nazul maintenance sheets filed with return submissions show that the Khasra Nos.83 & 3/4 are government "Nazul Land", whereas Khasra No.13 is an "Authority Land". If any portion of Government "Nazul Land" is vested in the Trust as per notification issued under Section 71(1) of TIT Act, 1960, it becomes subject matter of prior sanction of State Government in terms of Niyam 3. The lease deed dated 30.05.2008 was executed without even referring to the original agreement dated 01.05.2006. The parties played a mischief in getting the lease deed of land executed. Condition No.45 was although proposed to be incorporated in the lease deed but it was deliberately left out for incorporation in the said deed. In support of these submissions, reliance is placed on 2011 (5) SCC 29 *(Akhil Bhartiya Upbhokta Congress vs. State of M.P and others);* 2012 (11) SCC 434, *(Saroj Screens Pvt. Ltd. vs. Ghanshyam and others),* 2012 (4) SCC 441, *(Collector, District Gwalior and another vs. Cine Exhibitors Pvt. Ltd. and another)* and 2016 (4) SCC 469 *(State of Rajasthan and others vs. Gotan Lime Stone Khanij Udyog Pvt. Ltd. and another)*. It is averred in the return submission of the State Government that it is a classic case, where the promoter who was authorized only to construct and develop the commercial complex, manipulated the provisions of agreement in getting the entire plot alongwith the complex allotted to it in the guise of an "allottee" with change name just in order to frustrate the mandate of Niyam 3. The net effect of transaction from execution of agreement till the execution of lease-deed was that the promoter itself became the permanent lease holder substituting the rights of authority in respect of land and use of building and thereby usurped huge monitory gains. It is thus prayed that doctrine of lifting the veil may be applied. Learned Additional Advocate General took inspiration from

Gotan Lime Stone Khanij Udyog Pvt. Ltd. and another (supra). It is further contended that in the manner public largesse are distributed, the Article 14 of Constitution is violated. The process for grant of lease deed in question was not transparent and in consonance with law. Judgment of *Saroj Screens Pvt. Ltd.* (supra) was cited to press this point.

47. The learned counsel for the JDA stated that alleged sanction dated 02.06.74 (Annexure-P/50) issued to the Trust was under Section 70 of the M.P. Town Improvement Trust Act, 1960 (TIT Act) which was regarding permission to acquire land for the Trust. It has no relevance about transfer of property by the Trust. Similarly, in promoter agreement (annexure-P/7), the Government has only stated that there is no role of State Government under Niyam, 1975 for determination of lease rent and the JDA may act as per Niyam 47. Annexure-P/43 is a response to letter dated 26.10.2005 (Annexure-P/42) by which the JDA had sought permission to undertake the work under the "promoter agreement". There was no occasion for the JDA to seek permission for transfer because transfer of plot or building was never intended under the promoter agreement. In cases of abject violation of Niyam 75, the impediment of time or limitation will have no application and lease deed must to be treated as *ab initio void*.

48. The argument of JDA based on Clause 11 & 13 of tender document and Clause 5, 11, 27 & 28 of promoter agreement is that only one form of lease is contemplated i.e., of shops, show-room & chambers. The lease-deed of plot was neither contemplated nor permissible. The lease-deed dated 30.05.2008 (Annexure-P/16) is for the plot of land and not of any shops, show-rooms/chambers. Thus, the same is *ultra vires* the tender and the promoter agreement. As per Clause 26 of promoter agreement, lease-deed was to be executed after completion of construction period. Same is the command ingrained in Clause 45 of Annexure-P/7. The building permission was granted on 09.08.2007(Annexure-P/24). High Rise Committee revised the permission on 25.05.2008(Annexure-P/25) and construction was completed on 11.03.2010 (Annexure-P/26) whereas the lease was executed on 30.05.2008 itself. The lease-deed was executed by collusion between petitioner and officers of JDA which discloses the fraud played by the petitioner. The payment of "premium", by no stretch of imagination can be said to be "price of land". The premium quoted is per square feet basis, but petitioner or promoter did not acquire title of the plot. Clause 22 of promoter agreement specifically prohibits the promoter to claim title even on payment of premium. The transfer of possession is impermissible, contended learned counsel for JDA on the strength of tender document, proceedings of tender committee, draft sale-deed and promoter agreement.

49. The entire action of execution of lease-deed had taken place in undue haste. On 23.05.2008 (Annexure-R/2) request was made by petitioner for

execution of lease deed. On 24.05.2008, ministerial staff of JDA prepared and processed the proposal (Annexure-P/17), on 30.05.2008, Superintended (sic : Superintendent) Engineer recommended in favour of it and on the same date CEO, JDA agreed and directed for preparation of lease deed. Lease-deed was executed on 30.05.2008 itself. The saidaction is assailed on the basis of 2004 (2) SCC 65, *(Bahadursingh Lakhubhai Gohil vs. Jagdishbhai M. Kamalia and others);* 1999 (6) SCC 464, *(M.I. Builders (P) Ltd. vs. Radhey Shyam Sahu and others)* & Order of this Court in MP No.2861/1989, [Vijay Shanker Shukla vs. Municipal Corporation] is also relied upon.

50. In response to the argument of petitioner relating to allegations of fraud, it is urged by Shri Anshuman Singh that concept of "fraud" in administrative law is not the same as "fraud" under ordinary common law. Principles and tests in both the cases are totally different. In administrative law, an action with ulterior motive with intention to extract undue benefit to a party or to defeat the provision of a statute, amounts to fraud. Para 20 of judgment of Shrishti Dhawan, Para 11 of R.C. Chhiba and Para 9 of *Narayan Das* (supra) are referred to. It is highlighted that in the instant case, lease has been granted in hot haste and in complete violation of 1975 Niyam as also the tender document and promoter agreement. The only beneficiary of such violations is the promoter/SBPL. Petitioner initiated action by making persistent request for grant of lease (Annexure-R-2/13). The Note sheets (Page 276 and 277) also disclosed the manner in which the matter was processed in undue haste to grant lease of plot of land- which was never contemplated. Thus, all ingredients of fraud under administrative law are established. It is submitted that Shri J.P. Trivedi was not part of decision making process of execution of lease deed through which lease was granted. He was only authorized to get the lease deed registered after it was executed. Hence, his name finds place in the lease deed. Lease deed was actually executed on behalf of JDA by Shri Mandal who signed it as an Estate Officer of JDA.

51. Shri Singh submits it is incorrect that no financial loss is caused to JDA. The financial claim of promoter was, in fact, limited only to claim one time sale consideration from the nominees/allottees. The creation of sub lessees and licensees by petitioner has resulted into de-frauding the JDA of the transfer fee which is 3% of Collector guideline rate of the property. If lease had been executed as per promoter agreement with the occupiers of shops/showrooms/chambers etc., the transfer fee would have been paid to JDA which must be in crores of rupees. The petitioner has profiteered from the complex by granting lease on its own and by installing third parties. In addition, for every further transfer, the JDA was entitled to charge transfer fee. The JDA was deprived from the same. Lastly, it is argued that no mandamus for enforcement of an agreement which violates a statutory provision can be issued. The lease deed dated 30-05-2008 was issued in violation of promoter agreement and provisions of 1975 Niyam. Thus, it cannot

be saved through a writ under Article 226 of the Constitution. Inspiration is taken from 1987 (1) SCC 13, *(Brij Mohan Parihar vs. M.P. State Road Transport Corporation and others);* 1996 (7) SCC 665, *(Union Territory, Chandigarh, ADMN and others vs. Managing Society, Goswami, GDSDC)* and 1992 (2) SCC 411 *(Amrit Banaspati Co. Ltd. and another vs. State of Punjab and another)*. The judgments reported in 1994 (2) SCC 481, *(State of Maharashtra vs. Prabhu)* and 2015 (15) SCC 588, *(State of Haryana and others vs. Northern Indian Glass Industries Ltd.)* are relied upon in support of submission that even if an administrative order suffers from some infirmities, the same would not be set aside by the writ Court, if such setting aside would do greater harm to the public/society.

52. Shri Agrawal, senior counsel and Shri Anshuman Singh also pressed the need of lifting of corporate veil. They urged that Samdariya Builders, Ajeet Samdariya, Kishore Samdairya and Samdariya Builders Pvt. Ltd. are one and the same. Their address is same. They have made an attempt to achieve a thing indirectly which was impressible by a direct method. They defeated the conditions of promoter agreement and hence it is a fit case to apply the principle of lifting the corporate veil as laid down by apex court in various judgments.

53. The third parties could have been given possession of any shops, show-rooms and Chambers only by joint signature of JDA and Promoter. In none of the cases, this requirement has been complied with by the petitioner whereas the petitioner has admittedly installed 200 parties illegally. What has not been expressly provided is deemed to have been prohibited. The permission granted by JDA is of no consequence as the same is contrary to the provisions of promoter agreement. The petitioner has installed tenants and licensees only to defraud the JDA and to profiteer from the commercial complex (Annexure-R-2/25 & R-2/28). The JDA on every transfer of shops, show-rooms and Chambers was entitled to get transfer fee @ 3% of collector guidelines rate which was denied by installation of sub-leasees and licensees. If lease had been executed strictly as per promoter agreement, the JDA would have earned crores of rupees from the occupiers of shops, show-rooms and Chambers. The details are shown from Annexure-R-2/25, R-2/26, R-2/27 & R-2/28.

54. The respondents raised objection about the stand of petitioner for construction of additional floors (G+7). As per tender document (concept plan), construction was to be made for G+4. FAR has not been specified in Annexure-P/5, only plot area was specified to be 41,179 sq.ft. The amendment of tender condition dated 13.09.2004 (Annexure-P/20) also does not permit adding additional floors. It only permits internal changes. The promoter submitted bid based on original concept plan of G+4. This proposal for G+4 is Annexure-R-2/25 which was submitted by him after amendment to tender. The original building

permission was granted on 09.08.2007 (Annexure-P/24) by Municipal Corporation on the proposal of promoter on G+4 floors. After commencement of construction, the petitioner applied for revised sanction and permission for three additional floors. The High Rise Committee revised the permission of an under construction building on 19.05.2008 (Annexure-P/25) and permitted three additional floors. The promoter constructed three additional floors and earned profit from the same. Hence, the order of State Government dated 19.06.2017 (Annexure-P/15) is not for demolishing the additional floors but for recovery of proportionate profit which is more than equitable for the petitioner.

55. The stand of State Government and JDA is similar on the issue regarding requirement to follow the reservation policy of the Govt. as well. The official respondents, on the strength of Clause 29 of the Promoter Agreement (Annexure-P/7), submit that promoter was bound by the reservation policy in respect of allotment of shops/show rooms/chambers. The circular dated 01.11.2002 (Annexure-P/30) provides reservation for SC/ST/OBC communities. The commercial buildings/shops etc. are not exempted which is evident from the title of the circular. The intent of the circular is decisive. The circular dated 12.08.2008 (Annexure-P/31) also makes reservation in allotment mandatory with no exception for commercial buildings. Indeed, the circular specifically mentions commercial buildings and shops. Para 2 of this circular only excludes development authorities from EWS Chairman quota - no exemption from other kinds of reservations can be gathered. The letter dated 30.05.2013 is a response to a specific query of Gwalior Development Authority regarding redensification scheme. It has no general applicability. It does not exclude the applicability of aforesaid circulars of reservation. The benefits reserved for a particular category (SC/ST/OBC) cannot be usurped by anyone. Such an action is held to be a fraud on the Constitution by Supreme Court in cases reported in AIR 2004 SC 1469, *(R. Vishwanatha Pillai vs. State of Kerala and others)* and 2005 (8) SCC 283, *(Lilly Kutty Vs. Scrutiny Committee, SC & ST and others)*.

56. The right to get additional land is founded upon Niyam 27 (b) of Niyam of 1975. The common stand of official respondents is that as per said provision, the Authority may dispose of any land without auction where such plot is adjacent to a largest plot held previously by a person who has asked for grant of such adjoining plot. Thus, holding the largest plot adjoining the smaller plot for the purpose of allotment, by the party in a valid manner seeking such allotment is *sine qua non*. Since as per promoter agreement dated 01.05.2006 no right to hold a larger plot/land bearing area of 41179 sq.ft. was acquired as a "lessee" or otherwise, the question of grant of smaller piece of land did not arise. The petitioner's claim for smaller plot was founded upon lease deed dated 30.05.2008. Since lease deed stood cancelled by the impugned order, as a consequence, the allotment of additional land also becomes illegal. The counsel for JDA pointed out that lease

deed for 41, 179 sq. ft. was executed on 30.05.2008 whereas petitioner applied for additional land on 06.02.2007 (Annexure-R/2/16) and 01.05.2008 (Annexure-2/16).The High Rise Committee on 19.05.2008 (Annexure-P/25) had directed the JDA to allot additional land i.e. 6240 sq.ft. under Rule 27 on the presumption that the petitioner is already having lease of original land 41,179 sq. ft. The lease for grant of larger plot was applied by the promoter only on 23.05.2008 but the said Committee resolved on 19.05.2008 to grant additional land to the petitioner. The foundation for grant of additional land was existence of lease deed dated 30.05.2008. Once the said lease deed goes, so does the allotment of additional land which had no independent foundation.

57. It is submitted that in W.P. No.3751/2006, there was no dispute with regard to validity of lease deed dated 30.05.2008. Petitioner and JDA stood in relationship of co-defendants/respondents in the said case. There was no adjudication on the validity of allotment of land between petitioner and the JDA. Hence, the judgment dated 18.10.2013 does not operate as *res judicata* between the petitioner and the JDA. The judgments of Supreme Court reported in 2005 (6) SCC 304, *(Makhija Construction & Engineering (P) Ltd. vs. Indore Development Authority and others)* and 1995 (3) SCC 693, *(Mahboob Sahab vs. Syed Ismail and others)* were cited.

58. The respondents contended that petitioner has belatedly paid the installments of premium. Hence, he was liable to pay interest on delayed payment. Petitioner requested for waiver of interest by letter dated 30.03.2008 (Annexure-R/2/21). Two days thereafter, on 01.04.2008, a note sheet was prepared in the Office of JDA stating that Chairman has power to waive the interest on the basis of resolution of Board of JDA dated 13.01.1992 (Annexure-R/2/22-A). It is a common ground that the power of Chairman to exempt interest on belated payment is confined to oustees of natural calamities. The exemption of 25% on interest was without authority of law.

59. The respondents contended that petitioner himself pleaded that land in question is a "Nazul Land". The Niyam 3 read with Niyam 5A of 1975 Niyam prohibits disposal of property without previous sanction of the Government. The reference to previous permission of the State Government in the opening part of the Promoter Agreement (Annexure-P/7) has nothing to do with the sanction required under Niyam 3 of 1975 Niyam. The required sanction for execution of lease deed dated 30.05.2008 has never been obtained. The petitioner has made vague statement regarding alleged 100 of cases where similar lease deed was executed without specific details. The only two examples of two lease deeds (Annexure-P/51 and 52) are related to land which are not related to Nazul Land. If others have been given benefit contrary to law, negative equality cannot be claimed. 2007 (11) SCC 641, *(Doiwala Sehkari Shram Samvida Samiti Ltd. vs. State of Uttaranchal and others);* 2007 (11) SCC 172, *(Vishal Properties (P) Ltd.*

vs. State of Uttar Pradesh and others) and 2012 (3) MPLJ 678, *(Asmeen Vaishya vs. Union of India and others)* are relied upon. At the cost of repetition, it is argued that principle of promissory estoppel has no application where the deed is contrary to statutory provisions/law.

60. It is also common ground that in the case of *K.K. Bhalla* (supra), the issue under adjudication was different. It was held that the land in the said case was not the Government Nazul Land but the "Authority Land". In the instant case, most of the area in the plot covered under the agreement dated 01.05.2006 is Government Nazul Land and, therefore, Rule 3 ought to have been followed before the lease deed dated 30.05.2008 was executed. The finding in K.K. Bhalla's case is based on concession made on behalf of the respondents, which is evident from Para 33 of the judgment. The petitioner cannot derive benefit from the said judgment which is based on a different fact situation. The counsel for JDA argued that the said judgment cannot be a precedent on a question of fact. The judgment of *K.K. Bhalla* (supra) is neither binding precedent nor operates as *res judicata*. The petitioner is bound by his own pleading made in Para 5.53 of the petition.

W.P. No.10158/2017

The contention of the petitioner/Bank.

61. This petition filed by Bank of Baroda is directed against the order dated 01.07.2017 (Annexure P/17) whereby the JDA cancelled the mortgage permission document No.3122 dated 15.4.2011 with immediate effect. The order dated 1.7.2017 aforesaid is the off shoot of the order of State Government dated 19.6.2017 (Annexure-P/15) and consequential order of JDA dated 30.6.2017.

62. Briefly stated, the contention of the Bank is that the respondent No.3 M/s Samdariya Builders Pvt. Ltd. (SBPL) entered into an agreement with respondent No.2 to construct commercial complex. The lease deed dated 30.5.2008 was executed by JDA in favour of said builder. The commercial complex was constructed over the lease hold land which was called as "Samdariya Mall".

63. Shri V.S. Shroti, learned senior counsel assisted by Shri Vikram Johri, Advocate contended that respondent No.2 (JDA) gave consent to respondent No.3 promoter to create mortgage of said commercial complex in favour of petitioner bank. A term loan of Rs.40.00 crore was sanctioned by the petitioner bank against mortgage of said immovable property in its favour. One of the conditions in the consent granted by JDA is that in case the lease is determined by it, JDA shall be responsible to liquidate the dues of the bank. The bank is aggrieved by impugned order of State Government dated 19.6.2017 and consequential order of JDA dated 30.6.2017 which became reason for passing another order dated 01.07.2017. These orders are challenged on the ground that based on the consent to mortgage the property, the loan of Rs.40.00 crore was granted to respondent no.3. The

impugned order dated 01.07.2017 is passed by JDA without affording any opportunity to the petitioner. The respondent No.1 and 2 are bound by principle of "promissory estoppel" inasmuch as the petitioner bank has acted upon the written consent given by JDA which included an assurance that in case of determination of lease, the liquidation of dues shall be the responsibility of JDA.

64. The learned senior counsel pointed out the relevant factual matrix to bolster the said submission. It is pointed out that lease was executed by JDA in favour of M/s Samdariya Builders on 30.5.2008 (Annexure-P/2). By 13.3.2010 shopping complex/mall was completely constructed and completion certificate was issued. On 21.12.2010, the SBPL applied to bank for grant of loan of Rs.40.00 crore by mortgaging the shopping complex and submitted the title documents in respect thereof (Annexure-RJ/1). The bank sanctioned the loan of Rs.40.00 crore on 25.02.2011 (Annexure-P/13) subject to mortgaging the property and other tangible, movable and other assets. On 21.3.2011, the SBPL executed an agreement (Annexure-P/14) in favour of the bank. It is an assignment of rent under "loan against rent receivable scheme" for liquidation of loan dues. JDA gave consent-cum-undertaking letter dated 15.4.2011 (Annexure-P/11) to SBPL to mortgage the property with undertaking to pay the loan dues in the event of cancellation/determination of lease. The search report of property dated 14.3.2011 (Annexure-P/10) is pointed out with the document dated 16.4.2011 (Annexure-P/12) whereby petitioner bank created equitable mortgage of complex and hypothecation of other tangible property. It is noteworthy that the order dated 19.6.2017 and 30.6.2017 are also called in question by SBPL in WP No.9733/2017.

65 The argument of learned senior counsel for the bank is that three questions mainly emerge for consideration in this case viz. (i) whether the petitioner bank advanced the loan of Rs.40.00 crores to SBPL on the security of mortgage of Samdariya Mall?; (ii) whether JDA is liable for payment of loan dues outstanding against SBPL, to the bank as per principle of promissory estoppel and (iii) whether cancellation of lease and withdrawal of consent to mortgage the property (Annexure P/11) by the JDA is legal ?

66. To buttress question No.(i), it is urged that JDA not only gave its consent unequivocally allowing SBPL to mortgage the present property but also furnished guarantee by stating in the consent letter- (a) in case of default, the bank will have the right to sell the property to realized its dues subject to the terms of the lease; (b) the JDA will pay fare and reasonable compensation for being appropriated towards dues of the bank, if outstanding, in the event lease is required to be cancelled. Section 128 of the Contract Act is shown to submit that liability of the surety is co-extensive with that of the principle debtor. Mortgage of property is the primary security for the loan. It is a collateral security. The judgment of Supreme

Court in AIR 1969 SC 297, *(Bank of Bihar vs. Dr. Damodar Prasad);* AIR 1970 SC 1972, *(PNB Vs. BC Mills)* and AIR 1992 SC 1740, *(SBI Vs. Indexport Regd.)* are relied upon in support of said point.

67. In relation to question No.(ii), the bank submits that JDA is liable for payment of loan because of principle of "promissory estoppel". It cannot resile from the undertaking on the basis of said principle. Reference is made to AIR 1968 SC 718, *(Union of India vs. Indo Afghan Agencies)* and 2002 (2) SCC 188, *(Sharma Transport vs. Government of A.P. and others)*.

68. In relation to question No.(iii), it is submitted that Section 74 of the Adhiniyam envisages that opportunity of hearing was a condition precedent before passing impugned orders. The direction passed by this court on 18.2.2016 in WP No.2506/2016 (SBPL Vs. JDA) Annexure P/37 is also grossly violated. Bank was very much a stakeholder having advanced a substantial amount of Rs.40.00 crores to SBPL and hence was entitled to an opportunity of hearing before any adverse orders are passed whereby the primary security of bank is jeopardized. Argument is supported by AIR 1970 SC 150, *(A.K. Kraipak and others vs. Union of India and others);* 2015 (10) SCC 400, *(Rajendra Shanker Shukla and others vs. State of Chhattisgarh and others)* and 2012 (13) SCC 14, *(Manohar vs. State of Maharashtra and another)*.

The contentions of respondent/JDA.

69. Shri Anshuman Singh, learned counsel for JDA on the other hand urged that the loan was sanctioned on 25.02.2011 (Annexure-P/11) whereas the bank had executed an agreement dated 21.03.2011 (Annexure-P/14) for assignment of the rent from the shops to the bank for settlement and repayment of loan. The search report was prepared on 14.03.2011 (Annexure P/10). Thus, loan was not granted on the representation of JDA. Shri Singh again relied on the judgment of *Motiram Mandhyani* (supra) and submitted that principles of natural justice have no application where lease has been cancelled by JDA being illegal and contrary to rules. Once lessees have no right of hearing as per settled legal position, bank cannot claim any wider right. The lease deed was the foundation which is found to be illegal. Even if opportunity would have been granted to the bank, it would have been a useless formality in view of 2000 (7) SCC 529, *(Aligarh Muslim University vs. Masoor Ali Khan)* and 2002 (4) SCC 503, *(Kendriya Vidhyalaya Sangathan vs. Ajay Kumar Das)*.

W.P. No. 12898/17

Contentions of tenents/lesees.

70. The challenge is mounted in this case against the order dated 19.06.2017 (para 13.2) wherein respondent No.1 observed that as per clause-5 of the

agreement executed with the promoter, although there exists no prohibition for letting the shops and chambers on rent, in absence of any specific enabling clause which permits such letting of property, it would have been in the interest of JDA to sell the same for which JDA would have received premium and ground rent. The attack is further mounted against impugned order dated 24.6.2017 passed by JDA whereby permission granted to the promoter regarding letting out of the shops/offices/chambers/property has been cancelled and direction for recovery of rent alongwith interest has been ordered. Yet another challenge is made to consequential order of JDA dated 30.6.2017, whereby promoter has been communicated the fact of cancellation of its mortgage related NOC and permission for letting out the property to the petitioners/tenants. The petitioners/ tenants are aggrieved by publication of public notice in daily newspaper *(Dainik Bhaskar)* dated 06.07.2017 by which tenants were required to submit their license agreements/ sale purchase agreements and other relevant documents in the office of JDA. The JDA directed respondent No.5 (SBPL) to hand over vacant possession of building of the Shopping Complex to respondent No.4.

71. Shri Sankalp Kochar learned counsel for tenants contended that aforesaid orders are issued pursuant to resolution of Board of JDA dated 01.07.2017 coupled with decision based thereupon. The petitioners are adversely affected pursuant to action sought to be taken under the impugned orders because they have spent huge money in furnishing of their respective shops/ establishments/ showrooms and have also invested huge amount in their respective businesses operating from such shops. The dispossession of petitioners will have adverse consequences and will deprive them from the source of livelihood.

(72) The bone of contention of petitioners is that the impugned orders are passed without affording any opportunity of being heard in the matter which is in gross violation of the directions passed by this court in W.P. No.2506/16 decided on 18.02.2016 (Annexure-P/19). The impugned action is against principles of natural justice. The tenants have also relied on doctrine of "promissory estoppel" and urged that the shops etc. were allotted to them by JDA after having obtained legal opinion from their counsel and after permitting the shops to be rented out by issuing an express order in this regard. The allotment of shops in their favour cannot be treated as illegal. The JDA cannot now take a U-turn and contend that such allotment and giving the shops on rent was improper. Lastly, Shri Kochar submits that impugned orders are arbitrary and malafide in nature.

Contentions of official respondents.

73. Shri Samdarshi Tiwari, learned Additional Advocate General and Shri Anshuman Singh, learned counsel for JDA opposed the said contentions. Shri N.S. Ruprah, learned counsel for Shri Sushil Mishra almost borrowed the stand taken by JDA. It is common ground that in view of judgments of this Court

in *Nitu Prajapati, Motiram Mandhyani & Adhartal Shiksha Samiti* (Supra), it is clear that tenants were not required to be heard separately. If lease deed itself is bad in law and void since inception, action of SBPL founded upon it cannot be said to be improper and illegal. No right accrued in favour of SBPL to give the shops on rent. As per promoter agreement, the shops could have been given on joint signature of JDA and SBPL. Admittedly, this process was never adopted. A preliminary objection is raised that tenants have no *locus standi* to file this petition and challenge the impugned orders passed by State Government and JDA.

74. To elaborate, it is submitted that the action of SBPL in giving the shops in rent runs contrary to specific conditions of promoter agreement. SBPL was engaged to construct the shopping complex and, therefore, he was merely a licensee and not an owner of the shopping complex. SBPL had limited right which is detailed in the promoter agreement. SBPL acted contrary to said agreement which makes the entire action of giving shops etc. to present tenants as illegal. After following the procedure laid down in promoter agreement, a lease was required to be executed between JDA and the shopkeeper. The SBPL had limited right to nominate the first shop keeper etc. and for the first time take monetary consideration for such allotment.

W.P.No.10406/17 : (PIL)

Contention of Petitioner

75. The petitioner, a whistle blower has filed this petition challenging the order dated 19.06.2017 and prayed for (i) a declaration that additional allotted area of 1399 sq.ft be declared as illegal and wrongly occupied by SBPL. Hence SBPL be directed to vacate the said area; (ii) quash para 14.6 of order dated 19.06.2017 (Annexure-P/1) and direct recovery of Rs.42,43,258/- plus interest from SBPL against construction and installation of high tension 33 KV electricity line; (iii) the State Government and JDA be directed to impose ground rent on SBPL as per rule by taking into account order dated 18.02.2013 passed in W.P.No.9343/10 which is 6.5% + 10% service charge (reference is made to rule 47 of Niyam, 1975); (iv) to order demolition of three additional floors of shopping complex. In alternatively, to order calculation of premium for the three additional floors as per Niyam -5 of 1975; (v) to order the construction of 24 meters= 78 feet open road on all four sides of complex according to rule 41(1) of the M.P. Bhumi Vikas Niyam, 2012 and (vi) directions be issued to Lokayukt to include the findings given in the report date 20.1.2016 and 19.06.2017 in the criminal investigation and to carry the said investigation to its logical end; (vii) the name of shopping complex/ Mall should be changed from that of an individual to some other name like "JDA Complex", "Mahatma Gandhi Mall", or the like.

76. Shri Ruprah contended that his petitioner is a public spirited citizen and a RTI Activist. In order to save public property being misused by SBPL, the petitioner obtained documents under the RTI Act and found there were brazen violation of norms and statutory provisions in the matter of construction of complex, execution of lease deed in the name of SBPL, obtaining electricity connection of high load at the cost of JDA whereas it was responsibility of Promoter, enjoying rent from illegally installed lessees, depriving JDA from transfer fee etc. The petitioner was required to file various petitions before this Court pursuant to which the respondents were compelled to take some steps against the Promoter/SBPL. In compliance of an order passed in W.P. No.7549/2015 (PIL), which was disposed of on 17.06.2015 (Annexure-P/13), the JDA and the Government were directed to decide the matter in accordance with law. The attention of this Court is drawn on the operative portion of said Court order which reads as under:

> "Besides deciding the representation, if the appropriate Authority independently finds any illegality committed in construction and implementation of the project, must proceed in the matter in accordance with law, which it would be duty bound to do so as per the statutory provision."
>
> **[Emphasis Supplied]**

77. Shri Ruprah contended that a report by the then CEO dated 20.01.2016 was prepared, wherein various irregularities/illegalities were found. The then CEO was instantly transferred on the date of submission of the said report itself. This Court directed the Government to take steps by taking into account the said report of CEO. The State avoided to take any decision. The Court further ordered - "if decision is not taken by the State Government and JDA, the Principal Secretary of Urban Administration and Housing Department and the CEO of JDA shall remain present in the Court". After this only, order dated 19.06.2017 was passed.

78. Shri N.S. Ruprah, learned counsel for the petitioner pointed out that sanction area of the commercial complex was 39780 sq.ft whereas land actually allotted was 41179 sq.ft. Meaning thereby, an additional 1399 sq.ft land is illegally and wrongfully given to the promoter. In the report dated 20.1.2016, the findings regarding construction and installation of High-tension 33 KV Line is wrong. As per the contract, the said expenditure was to be borne by promoter/ SBPL. The said point has been erroneously decided and to this extent, impugned order dated 19.06.2017 and particularly para- 14.6 is contrary to record. The petitioner relied on para-4.1 of (Annexure-P/1) wherein the State Govt. has reproduced the findings of earlier report dated 20.1.2016 wherein it is stated that the lease rent should be 6.5% whereas only 2% has been demanded. Impugned order is being criticized in as much as it was held that pending decision in W.A. No.334/13 the said aspect does not require consideration. Learned counsel urged

that this stand is wrong because in order dated 18.2.2013 passed in W.P. No.9343/10, the direction was given to JDA to decide the issue as per rules. In said W.A, there is no interim order staying the direction for adjudication of the issue by the respondents. Mere pendency of W.A cannot be a ground for not deciding the rent.

79. The petitioner raised objection about construction of G+4 floors and stated that the width of all sides of it is less than the requirement. It is submitted that width on all sides of complex should be 200 feet but in para-14.8 of impugned order, the respondent No.1 has recorded its satisfaction by merely recovering the proportional additional amount of profit from SBPL without taking any other coercive action like broadening of the road or ordering the demolition of three additional floors constructed on shopping complex over the said plot. There was no allotment of three additional floors as per Niyam-5 of 1975. For these additional floors, no auction was held, no tenders were invited, no premium was charged and yet three floors in additional to original sanction, were permitted to be constructed.

80. By placing reliance on rule 42(1) of M.P. Bhumi Vikas Niyam, 2012 it is argued that it is statutory mandate ingrained in the said rule to provide 24 meter road (78 feet) on all sides of the Mall whereas the Samdariya Mall is closed from back side. The map (Annxexure-P/9) shows that only 60 feet frontage is left by builder. The State and JDA have completely failed to ensure compliance of rule 42 aforesaid. In addition, it is urged that impugned order is silent on the issue of passing necessary directions to Lokayukt to include the finding of report dated 20.1.16 in criminal investigation and to carry the criminal investigation to its logical end. Moreso, when Lokayukt was a party in W.P. No.2119/16 but no efforts are made in this regard. In support of these contentions, Shri Ruprah relied on 2000 (6) SCC 359, *(Kunhayammed and others vs. State of Kerala and another);* 1991(1) SCC 761, *(Vasantkumar Radhakisan Vora vs. Board of Trustees of the Port of Bombay and another);* 1992(2) SCC 411, *(Amrit Banaspati Co. Ltd. And another vs. State of Punjab and another);* 2010(3) SCC 274, *(State of Bihar and others vs. Kalyanpur Cement Ltd.)* and 1986(3) SCC 156, *(Central Inland Water Transport Corporation Ltd. And others vs. Brojonath Ganguly and another)*.

Contention of respondents

81. *Per contra*, the learned counsel for the State and JDA supported the impugned order. It is urged that petitioner's concern is duly taken care of while passing the impugned order. There is no illegality on which interference can be made. The decision to calculate premium is in accordance with law. Niyam-47 of 1975 is rightly implemented. The construction of G+4 floors had taken place after the decision of high rise Committee constituted under Rule-14 of Bhumi Vikas

Niyam, 1984. The said Committee permitted the construction upto height of 24 meters taking note of the width of the road, frontage, FAR and ground coverage percentage etc.

82. As per Rule 90-A and 90-B of Niyam of 1984, for multiplex and Mall which are surrounded by road from three sides, specific FAR and minimum land area are prescribed. Rule-42 referred by petitioner has no applicability on Multiplex/ Malls. The planning norms like building in question provides different requirements which is reduced in writing in the shape of a chart (para-6) of return. It is submitted that the State Government dwelled upon construct of G+ 7 floors and alongwith the aspect that JDA would have put it on higher rates of premium and, therefore, after execution of the agreement permitting to construct a complex having G+7 floors, there was clear loss of premium and hence, this loss must be recovered. Learned counsel for State reiterated this stand during the course of argument. Shri Anshuman Singh based his argument on the basis of the return filed by JDA in this case.

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

84. In support of aforesaid contentions, the parties filed written submissions. We have bestowed our anxious considerations on rival contentions and perused the record.

85. In view of rival contentions of the parties, broadly following issues emerge for our consideration:

Issue No.1: Whether lease deed dated 30.5.2008 executed by JDA in favour of the present petitioner is illegal and runs contrary to tender document, promoter agreement dated 1.5.2006 and other statutory provisions ?

Issue No.2: Whether M/s Samadariya Builders has given shops of commercial complex on rent in violation of conditions of promoter agreement dated 1.5.2006 ?

Issue No.3: Whether construction of G+7 floors was improper/illegal ?

Issue No.4: Whether petitioner violated reservation policy of the Govt. in the matter of allotment of shops ?

Issue No.5: Whether allotment of additional land ad measuring 6240 sq. ft. was improper/illegal ?

Issue No.6: Whether waiver of interest amount of 25% i.e. Rs.10,37,134/- by JDA was improper which resulted into financial loss to the JDA ?

Issue No.7: Whether the land in question was a "Nazul Land" received by JDA free of cost and therefore before allotment of said land, permission from the State Government was required to be taken in view of provisions of Vyayan Niyam?

Issue No.8: Whether JDA is liable for payment of loan dues outstanding against SBPL to the Bank ?

Issue No.9: Whether cancellation of lease and withdrawal of consent to mortgage the property by the JDA is illegal and whether JDA was bound by the principle of estoppel ?

Issue No.10 : Whether a declaration that additional allotment of area of 1399 sq. ft. to promoter/SBPL needs to be declared as illegal and wrongly occupied by petitioner.

Issue No.11: Whether for construction and installation of high tension 33 KV electricity line and consequential recovery, any directions are required to be issued ?

Issue No.12: Whether State and JDA are required to be directed to impose ground rent on SBPL @ 6.5% + 10% ?

Issue No.13: Whether any direction to demolish three additional floors of shopping complex needs to be issued ?

Issue No.14: Whether any direction to Lokayukta is required to be given for including the findings given in the report dated 20.01.2016 and 19.06.2017 in the criminal investigation with any further appropriate direction ?

Issue No.15: Whether any direction to JDA/State is required to be given to change the name of the shopping complex ?

Issue No.16: Whether the action of the official respondents in issuing the impugned orders without giving opportunity of hearing to the tenants/leasees is bad in law/illegal?

FINDINGS

Issue No.1 & 7:

86. Since these issues are inter related, we deem it proper to deal with these issues conjointly. Before dealing with rival contentions advanced by the parties relating to legality and validity of lease deed dated 30.5.2018, it is necessary to refer to certain clauses of tender document (Annexure-P/5) and promoter agreement (Annexure-P/7) which read as under:

S. No.	General Conditions of Tender Documents under Promoter Scheme of JDA (Annexure P/5 at Pg. 70)	General Conditions of Tender Documents under Promoter Scheme of JDA (Annexure P/5 at Pg. 70)	General Conditions of Agreement between the Promoter and JDA for construction of Commercial Complex (Annexure P/7 at Pg. 121)
	10. <u>भवन स्वामित्व</u> : प्रमोटर स्कीम के अंतर्गत निर्मित भवन एवं विकास कार्य का स्वामित्व जाविप्रा. जबलपुर को होगा स्थल मंजिल/प्रथम मंजिल/अन्य मंजिल पर दुकान/ प्रकोष्ठ भवन निर्माण के दौरान अथवा पूर्ण होने पर जो अनुबंध दिनांक से 2½ वर्ष के अंदर होगी प्रमोटर को निर्धारित एक वर्ष का लीज रेंट अग्रिम जमा करवाकर आवंटित व्यक्तियों से जविप्रा जबलपुर से नियमानुसार लीज अनुबंध सम्पादित कराना आवश्यक होगा। (लीज अनुबंध का प्रारूप संलग्न है)	**9. <u>क्षतिपूर्ति/प्रतिरक्षा</u> :** प्रमोटर द्वारा निर्मित किये गये वाणिज्यिक भवन का प्रथम आवंटन प्रमोटर द्वारा किया जावेगा। आवंटन प्राप्त करने वो किसी भी व्यक्ति द्वारा कन्जूमर एक्ट 1986 के अंतर्गत वाद केवल प्रमोटर के विरूद्ध किया जा सकेगा। प्रमोटर जविप्रा. जबलपुर को ऐसे समस्त न्यायालयीन वादों से होने वाली क्षति से मुक्त रखेगा साथ ही शासकीय अथवा अन्य किसी संस्था द्वारा रायल्टी, टैक्स, फीस आदि जो निविदा दिनांक अथवा कार्य सम्पादन अवधि पर नियमानुसार प्रमोटर द्वारा देय हो, से जविप्राजबलपुर को प्रमोटर ऐसे किसी भी बकाया वसूली आदि से मुक्त रखेगा तथा शासन अथवा अन्य किसी संस्था में जमा की गई राशि भुगतान की जानकारी प्रतिमाह की 10 तारीख को मेजरमेंट बुक रिकार्ड करते समय उपलब्ध करायेगा। भवन निर्माण पूर्ण होने पर खनिज विभाग से रायल्टी चुकता प्रमाण पत्र विकास प्राधिकरण में प्रस्तुत करेगा। तद्उपरांत लीज डीड सम्पादन की कार्यवाही की जा सकेगी।	5. प्रमोटर द्वारा समस्त दुकानें, चेम्बर्स, भवन इत्यादि विक्रय किये जाकर प्रीमियम की राशि प्रमोटर द्वारा ही ली जावेगी तथा प्रमोटर द्वारा दी गई सूची अनुसार ही लीजडीड विकास प्राधिकरण द्वारा बनाई जावेगी तथा आवंटी विकास प्राधिकरण के लेसी रहेंगे, जिसके लिये उन्हें नियत भू–भाटक प्रतिवर्ष विकास प्राधिकरण में जमा करना होगा।

	11. आवंटन : निर्मित अथवा निर्माणाधीन दुकानों/भवनों का आवंटन करने का अधिकार प्रमोटर को रहेगा, शासन निर्देशानुसार आवंटन में नियमानुसार आरक्षण रखते हुये आवंटन प्रमोटर द्वारा किया जाकर प्रीमियम की राशि प्रमोटर द्वारा ही ली जावेगी। आवंटी प्राधिकरण के लेसी रहेंगे। प्राधिकरण उन्हें लीज डीड बनाकर देगा जिसमें वर्णित नियमानुसार भूमाटक प्रति वर्ष प्राधिकरण कोष में जमा करना होगा। प्राधिकरण लीज डीड का सम्पादन कार्य पूर्ण होने के उपरांत करावेगा। किसी कारणवश यदि प्रमोटर दुकान/भवन का आवंटन एवं लीज अनुबंध भवन पूर्ण होने के एक वर्ष की अवधि में न कर सके तब प्रमोटर स्वयं विकास प्राधिकरण को वार्षिक (Lease Rent) की क्षतिपूर्ति करेगा।	**26. दुर्घटना बीमाः** प्रमोटर द्वारा निर्माणाधीन भवन में कार्यरत कर्मचारी/मजदूर व अन्य व्यक्ति/सम्पत्ति के दुर्घटना होने पर नुकसान की देनदारी प्रमोटर की होगी। प्रमोटर उक्त संदर्भ में आवश्यक उचित राशि का बीमा करायेगा तथा जबलपुर विकास प्राधिकरण को ऐसे समस्त दावों से मुक्त रखेगा।	11. जविप्रा, जबलपुर द्वारा निर्मित दुकानों पर बाजार उपविधि लागू होगी और इस अनुबन्ध के साथ संलग्न लीज अनुबन्ध के प्रारूप अनुसार आवंटित व्यक्तियों से निर्धारित समयावधि में लीज अनुबन्ध सम्पादन एवं पंजीयन कराना पक्षकार क्रमांक 2 की जवाबदारी होगी।
	13. अनुबंध अनुसार लीज डीड पंजीयन : प्रमोटर को जविप्रा जबलपुर से उसके द्वारा आवंटित व्यक्तियों की लीजडीड का पंजीयन कराना आवश्यक होगा। पंजीयन उपरांत ही आवंटी को कब्जा दिया जावेगा तथा इस मद में विकास प्राधिकरण द्वारा किसी भी प्रकार का व्यय वहन नहीं किया जावेगा। कब्जा प्रमाण पत्र प्रमोटर एवम् प्राधिकरण के प्राधिकृत अधिकारी द्वारा संयुक्त रूप से हस्ताक्षरित किया जावेगा।		15. यदि किसी कारवणवश पक्षकार क्रमांक 1 द्वारा अनुबन्ध निरस्त किया जाता है तो पक्षकार क्रमांक 2 द्वारा किये गये कार्य का भुगतान जबलपुर विकास प्राधिकरण में निविदा दिनांक 01.10.2004 के समीपस्थ समय में भवन निर्माण हेतु मध्यप्रदेश पी. डब्ल्यू. डी. एस. ओ. आर. (प्रचलित दिनांक 1 नवम्बर 1999 संशोधन रहित) पर 12.25 अधिक स्वीकृत दर से किया जावेगा।
	21. भवन का रखरखाव : व्यावसायिक भवन के सामूहिक उपयोग के स्थानों जैसे बराण्डा, पैसेज, स्टेयरकेस, कामन टॉयलेट,लिफट/ एस्केलेटर/ ए.सी प्लांट/ जनरेटर इत्यादि व टूल्स एवं प्लांटस इत्यादि के रख–रखाव हेतु भवन के		19. निर्माण कार्यों के सम्बन्ध में पी. डब्ल्यू.डी. मेनुअल एवं एस.ओ.आर. में दी गई शर्तों का पालन आवश्यक होगा। यदि निर्माण में कुछ आईटम ''जो कि एस.ओ.आर. मे सम्मिलित नही है'' को एक्जीक्यूट कराया जाना आवश्यक है, तो आईटम की दरों की गणना एवं स्वीकृति आईटम

	लीज धारकों को म.प्र. प्रकोष्ठ अधिनियम अनुसार एक ए.ओपी. (Association of Persons) का गठन करना होगा। ए.ओ.पी. द्वारा ही उक्त स्थलों के साथ भवन एवं उपकरणों का समस्त रख–रखाव किया जावेगा तथा इसमें आने वाले व्यय उक्त ए.ओ. पी. द्वारा वहन किया जावेगा। समय–समय पर इसका निरीक्षण का अधिकार जबलपुर विकास प्राधिकरण, जबलपुर को होगा। ए.ओ.पी.के गठन की पूर्ण कार्यवाही प्रमोटर द्वारा की जावेगी। रख–रखाव अथवा अन्य किसी भी मद में विकास प्राधिकरण द्वारा कोई भुगतान नहीं किया जावेगा।		एक्जीक्यूट करने के पूर्व प्राधिकरण से कराना आवश्यक होगा।
	24. <u>हस्तांतरण शुल्क</u> : प्रमोटर द्वारा भवन के किसी प्रकोष्ठ को प्रथम बार आवंटन का अधिकार है। एक बार लीजडीड सम्पादित होने के पश्चात दुकान/प्रकोष्ठ के विक्रय किये जाने पर प्राधिकरण के प्रचलित नियमानुसार हस्तांतरण शुल्क प्राधिकरण कोष में जमा करना होगा।		**22. <u>स्थल का कब्जा</u> :** जबलपुर विकास प्राधिकरण द्वारा कर्यास्थल का कब्जा कार्यादेश दिनांक को दिया जावेगा, जिससे प्रमोटर निर्माण कार्य प्रारंभ कर सके। परन्तु इस कब्जे से प्रमोटर को किसी भी प्रकार का भूस्वामित्व अधिकार अथवा अन्य किसी प्रकार का (प्रीमियम की राशि जबलपुर विकास प्राधिकरण में जमा करने के बावजूद भी) कोई भूस्वामित्व संबंधी अधिकार प्राप्त नहीं होगा। निर्माण कार्य प्रारंभ करने पर भूमिगत पानी, बिजली, टेलीफोन की लाईन, केवल प्राप्त होने पर प्रमोटर बिना उन्हें कोई क्षति पहुँचायें जबलपुर विकास प्राधिकरण को सूचित करेगा। उन्हें यदि स्थानांतरित करना आवश्यक हो तो जबलपुर विकास प्राधिकरण द्वारा स्वयं के व्यय से उन्हें स्थानांतरित किया जा सकेगा परन्तु यदि प्रमोटर द्वारा भूमिगत पानी, बिजली, टेलीफोन, केबिल लाईन को कोई क्षति पहुंचती है तो उसका सुधार प्रमोटर को स्वयं के व्यय से करना होगा अथवा उसकी क्षतिपूर्ति जबलपुर विकास प्राधिकरण कोष में जमा करनी होगी, जिसका निर्णय मुख्य कार्यपालिका अधिकारी, जबलपुर विकास प्राधिकरण द्वारा

			किया जावेगा तथा प्रमोटर पर बंधनकारी होगी।
			27. <u>भवन स्वामित्व</u> : प्रमोटर स्कीम के अंतर्गत निर्मित भवन एवं विकास कार्य का स्वामित्व जाविप्रा. जबलपुर को होगा स्थल मंजिल/प्रथम मंजिल/अन्य मंजिल पर दुकान/प्रकोष्ठ भवन निर्माण के दौरान अथवा पूर्ण होने पर जो कि अनुबंध दिनांक से 2) वर्ष के अंदर होगी प्रमोटर को निर्धारित एक वर्ष का लीज रेंट अग्रिम जमा करवाकर आवंटित व्यक्तियों से जविप्रा. जबलपुर से नियमानुसार लीज अनुबंध सम्पादित कराना आवश्यक होगा। (लीज अनुबंध का प्रारूप संलग्न है)
			28. <u>आवंटन</u> : निर्मित अथवा निर्माणाधीन <u>दुकानों/भवनों</u> का आवंटन करने का अधिकार प्रमोटर को रहेगा, शासन निर्देशानुसार आवंटन में नियमानुसार आरक्षण रखते हुये आवंटन प्रमोटर द्वारा किया जाकर प्रीमियम की राशि प्रमोटर द्वारा ही ली जावेगी। आवंटी प्राधिकरण के ले भी रहेंगे। प्राधिकरण उन्हें लीज डीड बनाकर देगा जिसमें वर्णित नियमानुसार भूमाटक प्रति वर्ष प्राधिकरण कोष में जमा करना होगा। प्राधिकरण लीज डीड का सम्पादन कार्य पूर्ण होने के उपरांत करावेगा। किसी कारणवश यदि प्रमोटर <u>दुकान/भवन</u> का आवंटन एवं लीज अनुबंध भवन पूर्ण होने के एक वर्ष की अवधि में न कर सके तब प्रमोटर स्वयं विकास प्राधिकरण को वार्षिक किराया (Lease Rent) की क्षतिपूर्ति करेगा।
			38. <u>भवन का रखरखाव</u> : व्यावसायिक भवनों के सामूहिक उपयोग के स्थानों जैसे बराण्डा, पैसेज, स्टेयरकेस, कामन टॉयलेट, लिफट/एस्केलेटर/ए.सी प्लांट/जनरेटर इत्यादि व टूल्स एवं प्लांटस इत्यादि के रख–रखाव हेतु भवन के लीज धारकों को म.प्र.

			प्रकोष्ठ अधिनियम अनुसार एक ए.ओ.पी. (Association of Persons) का गठन करना होगा। ए.ओ.पी. द्वारा ही उक्त स्थलों के साथ भवन एवं उपकरणों का समस्त रख–रखाव किया जावेगा तथा इसमें आने वाले व्यय उक्त ए.ओ.पी. द्वारा वहन किया जावेगें। समय–समय पर इसका निरीक्षण का अधिकार जबलपुर विकास प्राधिकरण, जबलपुर को होगा। ए.ओ.पी. के गठन की पूर्ण कार्यवाही प्रमोटर द्वारा की जावेगी। रख–रखाव अथवा अन्य किसी भी मद में विकास प्राधिकरण द्वारा कोई भुगतान नहीं किया जावेगा।
			41. <u>हस्तांतरण शुल्क</u> : प्रमोटर द्वारा भव के किसी प्रकोष्ठ को प्रथम बार आवंटन का अधिकार है। एक बार लीजडीड सम्पादित होने के पश्चात भवन/भवन प्रकोष्ठ के विक्रय किये जाने पर प्राधिकरण के प्रचलित नियमानुसार हस्तांतरण शुल्क प्राधिकरण कोष में जमा करना होगा।
			45. निविदा प्रपत्र की कण्डिका 11 (आवंटन) में वर्णित ''प्राधिकरण लीजडीड का सम्पादन कार्य पूर्ण होने के उपरांत करावेगा'' के स्थान निम्न संशोधन किया जाता हैः– (i) प्रमोटर द्वारा भूतल तथा प्रथम तल के निर्माण कार्य को पूर्ण करने पर भूतल का 50% एवं प्रथम तल का 25% निर्मित दुकानें अथवा निर्मित प्रकोष्ठों की लीजडीड सम्पादन/पंजीयन प्राधिकरण से करा सकेगा। (ii) प्रमोटर द्वारा जब द्वितीय तल का निर्माण कार्य पूर्ण करा लिया जावेगा तब वे भूतल की 25% जो कि कुल भूतल की दुकानों/प्रकोष्ठों का 75% होगा, इसी प्रकार प्रथम तल का 25% जो कुल प्रथम तल का 50% होगा, की लीजडीड का सम्पादन/पंजीयन प्राधिकरण से कराने का अधिकारी होगा। (iii) प्रमोटर द्वारा शेष दुकानों/प्रकोष्ठों की लीजडीड/पंजीयन सम्पूर्ण निर्माण कार्य पूर्ण होने पर प्राधिकरण द्वारा किया जावेगा।

87. Clause 9 of tender document (Annexure-P/5) provides that the commercial complex constructed by promoter shall be allotted for the first time by the promoter. The allottee can bring a suit only against promoter as per Consumer Act. The promoter shall keep the JDA free from expenses/ compensation/loss from all legal claims. In addition, the payment required to be made to government or other institutions relating to royalty, fees, etc. shall be paid by promoter and he will ensure that JDA is free from requirement to make payment of monitory dues. The promoter shall inform JDA till 10th day of every month about any such payment made to government or other institution. The promoter shall furnish information about such payments to JDA every month on 10th day while providing the measurement book. In the event of non-completion of construction work of building, promoter shall deposit royalty receipt issued by Mining Department before JDA. Thereafter, lease deed can be executed.

88. As per Clause 10 of tender document, the building and its development work under the scheme shall be owned by JDA. In other words, the JDA shall be the owner of constructed building and its development work. The shops/"prakoshtha" constructed in ground floor/first floor/other floors, after completion of construction/during construction, can be given to persons of promoter's choice after depositing lease rent of one year in advance and by executing a lease deed between JDA and such allottees.

89. Clause 11 of tender document (Annexure-P/5) shows that the right to allot under construction or constructed shops/building shall remain with promoter. After following reservation policy of Government, allotment shall be made by promoter and in turn, promoter will receive the amount of premium. Allottees shall become "lessee" of JDA. JDA shall provide them a lease deed therefor, which shall include the condition of deposit of lease rent per year as per rule before JDA. It is specifically mentioned that lease deed shall be executed by JDA after completion of the work. If promoter fails to allot shop/building for any reason whatsoever and lease could not be executed within one year after completion of building, then promoter himself shall compensate the JDA by paying lease rent to it.

90. As per Clause 13 of Annexure-P/5, promoter shall get the lease deed registered from the allottees of his choice. After registration of lease deed only, possession to allottees can be given. For this purpose, JDA will not bear any expenses. Possession certificate shall be joiontly (sic : jointly) signed by promoter and specified authority of JDA.

91. Clause 21 talks about maintenance of building and provides that for the purpose of maintenance of building and to maintain places of common use such as varrandah, passage, staircase, common toilet, lift/escalator, AC plant, Generators, tools and plants etc., the lease holders shall constitute an Association of Persons

(AOP) as per Prakoshtha Adhiniyam. The said AOP shall take care of common places, building and equipments. AOP shall bear the expenses of persons of maintenance. The JDA shall have right of inspection from time to time. The constitution of AOP shall be the responsibility of promoter. The JDA shall not make any payment for maintenance or in any other head.

92. Clause 24 of tender document is also relevant. This clause provides that the promoter has the right to allot the "prakoshtha" for the first time. In the event of sale of shop/prakoshtha after execution of lease deed, the transfer fee as per rules applicable to JDA, shall be deposited in the account of JDA.

93. Clause 26 of tender document provides that the promoter is responsible under this clause for any accident which may take place during construction of building. He shall be responsible for the loss caused to any employee/worker engaged in the construction work because of any accident. In this regard, the promoter shall ensure that an insurance policy for payment of just compensation is taken by it. The promoter shall keep JDA free from any claim of compensation.

94. Clause 5 of Annexure-P/7 provides that after sale of shops, chambers, building, etc., premium amount shall be taken by promoter. As per the list provided by promoter, lease deed shall be prepared by JDA. The allottees shall be the lessees of JDA for which they will pay yearly lease rent to JDA.

95. Clause 11 of Annexure-P/7 is also relevant which prescribes that on the shops constructed by JDA, Market Regulations shall be applicable. The execution of attached lease deed would be necessary within stipulated time and promoter shall be responsible for the same.

96. Clause 19 of Annexure-P/7 talks about applicability of PWD Manual and compliance of conditions mentioned in SOR.

97. Clause 22 of Annexure-P/7 shows that the JDA will give possession of work place on the date of issuance of work order so that promoter can start construction work but because of this possession, promoter shall not get any kind of title and right on the land or any other right relating to said title despite payment of amount of premium to JDA. On commencement of construction work, underground water, electricity and telephone line or cable etc. shall be protected by promoter and he shall inform the JDA in this regard. If said things are required to be transferred, the JDA on its expenses can transfer them. During the construction of the building if any loss is caused to underground water, electricity, telephone or cable line, promoter will bear the expenses of its repair and shall deposit the expenses/compensation in the account of JDA for which decision shall be taken by CEO of JDA. This decision will be binding on the promoter.

98. Clause 27 of Annexure-P/7 is analogous to Clause 10 of Annexure-P/5. Similarly, Clause 28 of Annexure P/7 is *pari materia* to Clause 11 of Annexure-P/5. Similarly, Clause 38 of Annexure-P/7 is verbatim same as Clause 21 of Annexure-P/5.

99. Clause 10 of Tender document and Clause 27 of Promoter Agreement in no uncertain terms makes it clear that ownership of the building will remain with JDA, Clause 11 of tender document and Clause 28 of Agreement provide that nomination of third parties to be done by Promoter but lease-deed is to be executed by JDA. Same intention is flowing from Clause 13 of tender document and Clauses 5, 11 & 30 of Promoter Agreement. JDA is entitled to receive the transfer fee is the outcome of bare reading of Clause 24 of tender document and Clause 41 of agreement. At the cost of repetition, in our considered opinion, neither as per tender document nor as per promoter agreement, any right of ownership or transfer of land to promoter was envisaged. Indeed, in clear terms, it was laid down that ownership of land/complex will remain with the JDA. This is trite that a loose terminology used in an instrument at some place is not determinative. To find out the real intention of the parties, the complete document needs to be read to understand what is decipherable from it. The real purpose behind the agreement/document can be gathered by taking assistance of relevant statutory provisions governing the field so that correct meaning can be assigned to the words or expressions loosely used. The conduct of parties is also relevant. In the minutes of allotment committee (Annexure-P/3) dt.13.10.2004 in the proposal portion, although loosely the words "cost of the land" were used but in the next para itself, it was made clear by specifically mentioning the "Vyayan Niyam" that as per said Niyam, there is no provision of sale of land under the promoter scheme. It was clearly mentioned that it requires special attention of Board of JDA that possession of land should not be given to the promoter. The permission to construct the building alone should be given to the promoter. The attention of Board of JDA was specially drawn on this aspect again which can be gathered from the minutes of the Tender Committee (Annexure-P/4). As per the above documents, ownership of shops/showrooms/chambers was to remain always with the JDA. The promoter had limited right to nominate a party for the purpose of execution of lease in favour of that party so that party concerned becomes lessees of JDA. The promoter was also entitled to receive the sale consideration on selling the shop/office/ showroom for the first time.

100. The petitioner has taken pains to contend that there was no restriction on the right of promoter in the matter of allotment. The JDA had no right to raise any objection regarding said right of petitioner. Petitioner, as per agreement, can undertake the exercise of allotment to a single person or to multiple persons. In absence of any restriction/prohibition in the contract, there cannot be any implied restriction on the petitioner. It is argued that as per definition given in General

Clauses Act and as per judgments of Supreme Court, singular includes plural. On the strength of Section 2, 3(b), 3(i) and 4(2) of Prakoshta Adhiniyam, petitioner tried to justify the action of execution of lease-deed in relation to land in favour of the petitioner. This point requires serious consideration.

101. The aim and object of Prakoshta Adhiniyam reproduced herein under for ready reference:

> "An Act to provide for the ownership of an **individual apartment in a building** together with an undivided interest in the common areas and facilities appurtenant to such apartment and to make such **apartment** an interest heritable and transferable and for enforcement of obligations on promoters and apartment owners and to provide for matters connected therewith on incidental thereto."

102. Section 2 of the Prakoshta Adhiniyam reads as under:

> **"2. Application. -** The provisions of this Act shall apply to every apartment in any building constructed (or converted into apartments) by a promoter before or after the commencement of this Act on freehold land or land held on lease :
>
> Provided that where a building constructed, whether before or after the commencement of this Act, contains only two apartments, the owner of such building may, by a declaration duly executed and registered under the provision of the Registration Act, 1908 (No. 16 of 1908), indicate his intention to make the provision of this Act applicable to such building, and on such declaration being made, such owner shall execute and register in respect of each apartment a deed of apartment in accordance with the provisions of this Act, as if such owner were the promoter in relation to such building and a certified copy of the declaration shall be filed in the office of the Competent Authority within three months of its execution."
>
> **[Emphasis Supplied]**

103. Certain definitions given in the Prakoshta Adhiniyam are also important for lawful adjudication of this matter which are reproduced -

> **"3(a)** "allottee" in relation to an apartment, means the person to whom such apartment has been allotted, sold or otherwise transferred by the promoter;
>
> **(b)** "apartment" (which may be called block, chamber, dwelling unit Oat, lot, premises, suite, tenement, unit or by any other name), means a separate and self-contained part of any properly, including one or more rooms or enclosed spaces, located on one or more floors (or any part of parts thereof) in a building or in a plot of land, used or intended to be used for residence, office, shops, showrooms or godowns or for carrying or

any business, industry, occupation, profession or trade, or for any other type of independent use, and with a direct exit to a public street, road or highway or to a common area leading to such street, road or highway and includes any garage or room (whether or not adjacent to the building in which such apartment is located) provided by the promoter for the use by the owner of such apartment for parking any vehicle or, as the case may be, for the residence of any domestic servant employed in such apartment :

Provided that the number and sizes of the apartments in a building shall be in conformity with municipal regulations :

Provided further that if a basement, cellar, garage, room, shop or storage space is sold separately from any apartment it shall be treated as an independent apartment and not as part of any other apartment or of the common areas and facilities;

Explanation. - Notwithstanding that provision is made for sanitary washing, bathing or other conveniences as common to two or more apartments, the apartments shall be deemed to be separate and self contained;

(g) "Building" means a building constructed on any land containing four or more apartments, or two or more buildings with a total of four or more apartments or any existing building converted into apartments, and includes a building containing two apartments in respect of which a declaration has been made under the proviso to Section 2;

(n) "Land" means a portion of the surface of the earth, comprising the ground or soil and everything under it or over it, and things which are attached to the earth (such as buildings, structures and trees), things which are permanently fastened to the earth or to things attached to the earth, easements, rights and appurtenances belonging to them and benefits arising out of them and includes the sites of villages, towns and cities;

4. Ownership Apartments. - (1) Every person, to whom an apartment is allotted, sold or otherwise transferred by the promoter, either before or after the commencement of this Act, shall be entitled, save as otherwise provided in Section 7 and subject to the other provisions of this Act, on and from such commencement, or on such allotment, sale or transfer, as the case may be, to the exclusive ownership and possession of the apartment so allotted, sold or otherwise transferred to him :

Provided that an apartment which is occupied by a tenant shall not be allotted, sold or otherwise transferred to a person other than such tenant, unless it has first been offered to him on market value and refused by him, or fails to give reply within one months and in such case the new owner will be deemed to have given such apartment on tenancy to him.

> (2) Every person who becomes entitled to the exclusive ownership and possession of an apartment under sub-section (1) shall be entitled to such percentage of undivided interest in the common areas and facilities as may be specified in the deed of apartment and such percentage shall be the ratio of the built up area of the apartment to the total built up area of all the apartments of the building. In respect of limited common areas and facilities reserved for the use of certain apartments to the exclusion of other apartments, such percentage shall be the ratio of the built up area of those apartments for which the use is reserved. the actual built up area should be taken into account for the calculation of the percentage and any different area which may be stated in the agreement between the promoter and the person taking the apartment, shall be ignored :
>
> Provided that if all or any of the apartments is put to any non-residential use, the percentage shall be as prescribed."
>
> **[Emphasis Supplied]**

104. A minute reading of different clauses of tender document and promoter agreement shows that the respondents have not used similar words in different clauses. For example- in Clauses 9 & 11 of tender document, the expression used is "allotment of shops/buildings" or "first allotment of building" etc. In clause 24, it is mentioned that promoter has a right to allot an *apartment of the building* for the first time. The parties are at loggerheads on the question of interpretation of right and extent of allotment. Petitioner contended that agreement is wide enough to give power/authority to the promoter to allot the land and entire building to a person of his choice including to himself or to a sister concern (SBPL). To bolster this, assistance is taken from certain provisions of Prakoshta Adhiniyam. The JDA's stand is that lease-deed contemplates lease of the apartment which may be verified as per the language of Section 3(b) & 4(1) of said Adhiniyam. Section 4(2) r/w Section 3(i) confers undivided share in common areas to apartment owner. Lease-deed dated 30.05.2008 (Annexure-P/8) is not a lease-deed of an apartment but a lease-deed of a land. The draft lease-deed (page 108) also talks about "multi-storied apartment sale-deed".

105. In our considered view, if different expressions/terminology are used in an instrument in difference places, the proper method of construction of that instrument is to read it in its entirety to understand the real intention in the light of relevant statutory provisions. In the words of Chinappa Reddy, J: "interpretation must depend on the text and context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. [See: 1987 (1) SCC 424, *(Reserve Bank of India vs. Pearless General Finance and Investment Co.)]*. As stated by Krishna Iyer J: "to be literal

in meaning is to see the skin and miss the soul. The judicial key to construction is the composite perception of the *deha* and *dehi* of the provision. [See: AIR 1977 SC 965, *(Chairman, Board of Mining Examination & Chief Inspector of Mines v. Ramjee)]*. The said principles can be made applicable for proper interpretation of relevant clauses.

106. In the aim and object of the Prakostha Adhiniyam, it is clearly expressed that the Act is provided for "ownership" of "an individual apartment" "in a building". Thus, "apartment(s)" is/are part of building. "Apartment" & "Building" are not synonymous as per Prakoshta Adhiniyam. For this reason, in the said Act both,"'apartment" and "building" are defined separately viz. S. 3(b) and (g) respectively. The definition of "apartment" shows that it is "self contained part of any property "..... " in a building" or "in a plot of land". Thus, the legislative intent as per said Adhiniyam is to reorganize ownership of "an apartment" in a constructed "building". The "apartment" is a part of "building" and not the building itself. The plain reading of Section 2 i.e. applicability clause, leaves no room for any doubt that the Adhiniyam is applicable to "every apartment" in any "building" constructed by a promoter... It can be safely concluded by a plain reading of Section 2 that Act is made applicable to the "apartment(s)" in any building and not on the land or building itself.

107. The argument of Shri Gupta and Shri Agrawal to support lease deed of land on the ground that "land" includes building and anything & everything over and beneath the land, on the first blush, appears to be attractive but on minute scrutiny, loses its complete shine. No doubt, definition of "land" is wide enough to include building, structures etc. but it cannot be forgotten that the Prakoshtha Adhiniyam sought to recognize the right of ownership of an individual in respect of "an apartment" and not in respect of "building" or "land". A conjoint reading of aims and object, applicability clause and different definitions given for "land", "building", "apartment etc", leads us to the said conclusion. In addition, Section 4 makes it further clear that ownership is reorganized in respect of allotment of an "apartment" or "common places" etc. Putting it differently, if aforesaid *judicial key* of construction is applied in the present case and text is seen in the light of context, it will be clear that Prakosth Adhiniyam intends to recognize the right of ownership on an apartment and not on any land or building. The statutory requirement of establishing an A.O.P. under the Prakostha Adhiniyam further shows that legislature in its wisdom realized that apartments situated in a buildings will be owned by various/different persons and, therefore, in order to ensure proper cleanliness and maintenance of building in which apartments are situated, assistance and association of such owners will be required. We are, therefore, constrained to hold that a comprehensive reading of tender document, promoter agreement with relevant provisions of Prakoshta Adhiniyam shows that a license was given to the promoter to construct the building and give first

allotment to a person of his choice and receive sale consideration for the first time out of it. The execution of lease deed in respect of "land" is *de hors* the tender document, agreement and Prakostha Adhiniyam. The "land" by no stretch of imagination could have been given to SBPL by executing the lease deed dated 30.05.2008.

108. The ancillary question is whether the allotment of land by the promoter to himself or to SBPL was permissible? As discussed above, various clauses of agreement, tender document and provisions contained in Adhiniyam provide that individual lease for apartment/s is permissible. Lease of entire "land" or "building" is not at all envisaged. Interestingly, Section 4(2) of Prakoshta Adhiniyam talks about every person who *becomes entitled to the exclusive ownership* and possession of an "apartment". It is, thus, clear that under the Prakoshta Adhiniyam, ownership of "land" or "building" is not recognized and hence, no right to execute the lease deed in respect of land had accrued or crystallized in favour of the petitioner. In other words, as per the Prakostha Adhiniyam, the allotment of "land" or "building" by way of lease deed to SBPL or promoter himself is clearly impermissible.

109. The judgment of *P Rami Reddy* (supra), is not based on provisions of said Prakostha Adhiniyam and similar Clauses which are applicable in the instant case. The definition of word "land" is not decisive while determining rights as per the Prakoshta Adhiniyam. Thus, reference made to the dictionary meaning of "land" is also irrelevant because said Adhiniyam and Clauses of documents are couched in a different language and for a difference (sic : different) purpose. In the case of *Ashim Kumar Kar* (supra), a different nature of agreement was under consideration, which can be seen from this passage -"..... the developer is, under the *agreement with the owner,* ***promised a part of constructed premises as owner thereof*** *together with the proportionate area of the land.*". Needless to emphasis that the judgment of Full Bench of Calcutta High Court in the said case is based on the construction of a differently worded Clause of agreement entered into between the parties which recognizes the right of ownership whereas, in the present case by express terms (in tender and promoter agreement) it was made clear that promoter will not have any right of ownership. Thus, said judgment is of no assistance in the factual matrix of the present case. At the cost of repetition, the Calcutta High Court used the expression "in law, however, *a development agreement* ***of the kind described*** herein entails the transfer of immovable property". This expression demonstrates that the Full Bench judgment is based on the interpretation of a differently worded clause of agreement which entails/creates right of transfer of immovable property. In our considered view, in the case in hand, no such right of transfer of ownership is flowing in favour of promoter/petitioner as per tender document and promoter agreement. A conjoint reading of relevant clauses of said documents and Adhiniyam does not leave any ambiguity or difficulty in gathering

the intention, meaning and effect of aforesaid clauses and in absence of any such ambiguity, the rule of *"contra proferantum"* has no application. For the same reason, judgments of A.P. TRANSCO & Godhra Electricity Co. Ltd. (supra), and judgments reported in 2004 (3) SCC 694, *(United India Insurance Co. Ltd. Vs. Pushpalaya Printers)* & 2009 (5) SCC 313 *(Bank of India and another Vs. K. Mohan Das and others)* cannot be pressed into service.

110. It is relevant to note that when promoter preferred application dated 23.05.2008 seeking execution of lease deed in favour of SBPL, the said application was processed in the office of JDA which contains following details:

> "3. *प्राप्त पत्र क्रमांक 6623 दिनांक 23.5.08 के माध्यम से समदड़िया बिल्डर्स द्वारा प्रमोटर योजनांतर्गत लिये गये इस भूखण्ड की अनुबंधानुसार संपूर्ण राशि जमा करने की स्थिति में इस भूखण्ड का पट्टी विलेख, श्री अजीत समदड़िया एवं श्री किशोर समदड़िया डायरेक्टर, समदड़िया विल्डर्स प्रायवेट लिमिटेड के नाम से संपादित करने का निवेदन किया गया है।*
>
> ***अनुबंध कंडिका 11, 27, 28, 30, एवं 45 अनुसार भूखण्ड की लीजहीड संपादन करने का प्रावधान नहीं है तथा प्रमोटर द्वारा दुकान/भवन प्रकोष्ठों को जिन व्यक्तियों को आवंटित किया जायेगा उन्हीं के नाम सेलडीड/लीज अनुबंध प्राधिकरण द्वारा संपादन करने का प्रावधान है। प्रमोटर को दुकानें/भवन प्रकोष्ठ को प्रथम बार आबंटन करने का अधिकार है। एक बार लीजडीड संपादन होने के पश्चात् भवन/भवन के प्रकोष्ठ का विकय किये जाने पर प्राधिकरण के प्रचलित नियम के अनुसार हस्तांतरण शुल्क प्राधिकरण कोष में जमा करना होगा।***
>
> *प्रमोटर के उपरोक्तानुसार एक साथ तीन पत्र प्राप्त हुए है जो उपरोक्त टीप कंडिका 1, 2, 3 में वस्तुस्थिति के साथ प्रस्तुत किये गये है जो अवलोकनार्थ एवं उचित आदेशार्थ प्रस्तुत।*
>
> *तत्संबंध में अनुमोदित हो तो अमानत राशि रू0 5.00 लाख जो निर्माण कार्य पूर्ण होने पर अथवा दो वर्ष के पश्चात् वापस की जायेगी को भूखंड की लीजडीड की मांग पर समायोजित की जाय तथा जमा रू0 25.00 लाख का एफ.डी.आर. जो आफर के साथ जमा किया गया था जिसकी नगद राशि जमा हो चुकी है। रिलीज किया जाय एवं आवेदनानुसार उक्तानुसार अनुबंध के विकल्प में आवंटित भूखंड की प्रथम बार अनुबंध शर्त क्रं0 27 अनुसार अन्य फर्म श्री अंजीत समदड़िया एवं श्री किशोर समदड़िया डायरेक्टर समदड़िया विल्डर्स प्रायवेट लिमि0 के नाम प्रमोटर योजनांतर्गत आवेदक और प्राधिकरण के मध्य संपादित अनुबंध दिनांक 1.5.06 की शर्तो को बन्धनकारी रखते हुए लीजडीड में अतिरिक्त शर्त जोड़कर किश्त की ब्याज राशि रू0 51,857/– लेते हुये व्ययन नियम के तहत भूखंड की लीजडीड संपादित की जाय।*
>
> sd/-
> *यो0लि0–रामलाल त्रिपाठी*
> *का सहा. प्रथम ग्रेड*
>
> *शा0प्र0/*

कृ. उपरोक्त प्रस्ताव का

अवलोकन हो तदानुसार

अनुमोदनार्थ एवं आदेशार्थ

Sd/-

शा0प्र0

EM

अवलोकनार्थ एवं आदेशार्थ

Sd/-

EM

अनुबंध की शर्त कंडिका 41 अनुसार श्री अजीत समदड़िया एवं श्री किशोर समदड़िया डायरेक्टर समदड़िया बिल्डर्स प्रा0लिमि0 जो कि दूसरी फर्म है अतः इनके नाम भूखंड की लीजडीड प्रथम बार बनाई जा सकती है ***चूंकि भूखंड की लीजडीड दी जा रही है*** *अतः 5.00 लाख रूपये जमानत राशि कीमत के मद में समायोजित करते हुए आफर के साथ जमा एफ.डीआर. रिलीज करने हेतु एवं पट्टाधारी और प्राधिकरण के मध्य किये गये अनुबंध की शर्ते मान्य होगी। तदानुसार ब्याजराशि लीजडीड संपादित किया जाना प्रस्तावित है।*

Sd/-
सम्पदाधिकारी
29/5/08'''

[Emphasis Supplied]

111. The said note shows that JDA was aware that lease deed of land was impermissible in the teeth of Clauses 11, 27, 28, 30 and 45 of Agreement. Yet the decision was taken to execute the lease deed of the land. The argument of Shri Anshuman Singh was not rebutted by petitioners that as per Clause 6 of the said document (Page 277), condition/Clause 45 of Agreement was required to be added/inserted in the lease deed but in fact, no such condition was actually added. Moreso, when a note was appended that such condition has already been added.Despite full knowledge and realization that lease deed of land is not permissible, we wonder how such a blunder of execution of lease deed of land has been committed.

112. The learned counsel for the petitioner contended that if land in question is treated to be a "Nazul Land", the said land was earlier vested in the Trust. By virtue of Section 70 of TIT Act, the land stood vested in the Town Improvement Trust from the Government and thus became Trust Land and not a Government Land. The earlier transferor (State of M.P.) lost all its right, title and interest over the

property. For this land, which became a land of Trust, no approval/sanction for transfer of land from State Government was required. As per Section 87(c)(iii) of TIT Act, the land became the Trust Land which was transferred to JDA. On such transfer, it became "Authority Land" and not a "Nazul Land". Thus, precondition of Rule 3 regarding prior approval of Government is not applicable.

113. Secondly, the Promoter Scheme and Agreement dated 01.05.2006 was sent to the State Government for approval and Government accorded its approval. Reliance is also placed on para 33 of the judgment of Supreme Court in *K.K. Bhalla* (supra).

114. To press aforesaid points, the learned counsel for the petitioner SBPL placed heavy reliance on the judgment of Supreme Court in *K.K.Bhalla* (Supra). The land in the said case pertains to same scheme number of JDA and deeming clause mentioned in section 87(c)(iii) of 1973 Adhiniyam was applied by Supreme Court, is the bone of contention. The principle laid down in Bhalla's case squarely covers the case of SBPL is the stand of Shri Nidesh Gupta and Shri Sanjay Agarwal.

115. This argument requires serious consideration. Before dealing with the said contention, it is condign to mention certain findings given by Supreme Court in the case of *K.K.Bhalla* (supra). In para-31 of said judgment, the Niyam 3,4,5,19 and 20 of the 1975 Niyam were reproduced and a finding is given that the authority may, *with the previous approval of State Government,* lease out any authority land to any public institution or body registered under any law for the time being in force. In para-33 and 51, the concession of Government is recorded in following words -

> "33. **Concededly**, the lands in question were either acquired lands or Nazul lands. It also stands admitted that in terms of provisions of sub section (2) of section 71 of the 1960 Act even the Nazul land stand admittedly vested in the authority and having regard to the provisions contained in section 87(c)(iii) all assests and liability of Town Improvement Trust shall belong to and be deemed to be the assests and liabilities of the Town and Country Development Authority established in place of such Town Improvement Trust."
>
> "51. We have noticed hereinbefore that the State itself opined that the land in question is "authority land". It, therefore, could not do what is within the domain of J.D.A.
>
> **[Emphasis supplied]**

116. A microscopic reading of the said paras shows that on more than one occassion, the admission/concession of State Government regarding nature of land or its deemed conversion as a land of development authority is recorded by Supreme Court. Our reading of these paras is that it do not lay down any principle of law, indeed, it is based on admission and concession which was essentially confined to the case of *K.K.Bhalla* (supra). We are fortified in our view by the judgments of Apex Court about precedential value of a judgment. In **A**IR 1976 SC 1766, *(The Regional Manager & Anr. vs. Pawan Kumar Dubey);* 2003 (2) SCC 111, *(Bhavnagar University vs. Palitana Sugar Mill (P) Ltd. & Ors.)* and in 2007 (5) SCC 371. *(Commissioner of Customs (Port), Chennai vs. Toyota Kirloskar Motor (P) Ltd.),* it was clearly laid down that a precedent is what is actually decided by Supreme Court and not what is logically flowing from a judgment. The precedent relates to the principles laid down or *ratio decidendi* of a case which, in our view, does not include any factual matrix of a case. The Apex Court in 2003 (11) SCC 584 *(Ashwani Kumar Singh vs. U.P.P.S.C. & Ors.);* 2007 (11) SCC 92 *(U.P. State Electricity Board vs. Pooran Chandra Pandey &Ors.);* 2011 (5) SCC 708, *(Sushil Suri vs. Central Bureau of Investigation & Anr.);* 2015 (10) SCC 161, *(Indian Performing Rights Society Ltd. vs. Sanjay Dalia & Anr.)* and 2016 (3) SCC 762, *(Vishal N. Kalsaria vs. Bank of India & Ors.),* held that a judgment should not be construed as a statute- blind reliance on a judgment without considering the fact situation is not proper. In this view of the matter, we are constrained to hold that finding given in para-33 of *K.K.Bhall* (supra) is confined to the said case and cannot be made applicable in the present case.

117. Certain other paragraphs of *Bhalla's case* are also relevant. In para-35, it was noted that *Rule-3 of the 1975 Rules, put an embargo in the power of J.D.A to transfer government land vested in or managed by it except with the general or special sanction of the State Government given in that behalf*. In the next para of said judgment, the opinion of the Supreme Court is that the *right to transfer land is subject to a limitation i.e approval of the State Government*. In para-37, *the necessity to obtain previous approval of State for grant of lease of land is recognized. Disposal of "authority land" was held to be within the domain of J.D.A, subject only to the previous approval of the State Government*. The findings are crystal clear and makes it pre-requisite to obtain government's previous approval even in cases of disposal/transfer of the "authority land". In para-38, in so many words, it is opined that the State and J.D.A being creatures of statute are bound to act within the four corners thereof. *Procedures of disposal of land having being laid down in the rules, power in that behalf was required to be exercised strictly in conformity therewith and not dehors the same*. This exposition of law, in our view, leaves no *iota* of doubt that no transfer or disposal of Nazul/authority land, is permissible without previous approval of State Government, as mandated in Rule-3/5 of said Rules of 1975. In para-59, the

obligation of State and J.D.A relating to function within the four corners of statute was again noted with an *expression of caution that it could not take action contrary to the scheme framed by it nor can take any action which could defeat such purpose*. Suffice it to say, the State and J.D.A were bound to act as per the scheme and intention ingrained in promoter scheme, tender documents, rules of 1975 as well as provisions of Prakoshtha Adhiniyam.

118. The judgment of *K.K.Bhalla* (supra), reiterates another principle of law that under Article 14 of Constitution, negative parity cannot be claimed. The earlier judgments reported in 1999 (3) SCC 494, *(Jalandhar Improvement Trust Vs. Sampurna Singh)* and 2000 (9) SCC 94, *(State of Bihar Vs. Kameshwar Singh)* were taken note of. The plea of private respondents therein complaining discrimination on the ground that similarly situated persons have been allotted land at a concessional rate is repelled on the ground that when allotment is illegal, Article 14 which carries with it a positive concept, would have no application (para-65). It is laid down that *even a policy decision of government regarding allotment of land which runs contrary to statutory rules, must be held to be ultra vires. The authority is bound to act in conconance with the statutory rules and not dehors the same*. Lastly, in *Bhalla* (supra), it was held that passing of an order by an authority for an unauthorized purpose constitue *malice in law*. Finding is based on the earlier judgments reported in 2005 (8) SCC 394, *(Punjab S.E.B Ltd. Vs. Zora Singh)* and *(Union of India Vs. V. Ramakrishnan)* reported in (2005) 8 SCC - 394. Pertinently, the settled principle that Article-14 of Constitution cannot be invoked for perpetrating an illegality is mentioned by Supreme Court in *K.K. Bhalla* (supra) at the cost of repetition in para-74. Thus, in our considered judgment, the *K.K.Bhalla* (supra), is of no assistance to the SBPL.

119. The true effect of various provisions of T.I.T Act and Adhiniyam of 1973 were considered with great detail in the case of *Cine Exhibitors Pvt. Ltd.* (supra). After taking note of scheme of Chapter-V of the said Act, it was clearly held that a closure scrutiny of the schematic conception of the Act, specially the provisions contained in Chapter-V of the T.I.T Act demostrates that it is dealing with the acquisition of land belonging to private persons. The aforesaid has nothing to do with the land belonging to the State Government. Any land coming under the scheme covered under it has to be governed by the procedure and guidelines for improvement. In the same judgment, the Supreme Court considered section 52 which occures in Chaper-IV which provides for issuance of notifications of sanction of improvement scheme and order regarding vesting of property in the Trust. After considering the scheme and object of said provision, the court came to hold that language employed in the 1960 Act and the 1973 Act would clearly reveal that Nazul land, unless notified, does not automatically get vested in any authority or Trust. The State Government, from time to time, has been issuing notifications to the effect of vesting or transferring the Nazul land to be part of the

Improvement Trust and giving advance possession to the Trust. After taking note of the judgment in *Akhil Bhartiya Upbhogta Congress* (supra), it was emphasized that land belonging to State given to appellant therein contrary to law was disapproved by the Court. In para-35, it was held that *unless affirmative steps are taken by the State Government by issuing a notification, changing the character of the land and transferring it in favour of any authority, Corporation or Municipality, it maintains its own character i.e Nazul land*. This principle is laid down by considering the meaning of "Nazul land" and "Milkiyat Sarkar" as per Revenue Book Circulars (RBC). The scheme of Revenue Book Circular was considered *in extenso* and it was made clear that in abence (sic : absence) of a notification specifically issued under relevant section of T.I.T. Act, the basic nature/ character of land will remain unchanged.

120. In *Bhalla* (supra), the finding in para-33 was based on a concession/ admission whereas in *Cine Exhibitors* (supra), the principles of law for determining the character of land is laid down by minute analysis of relevant provisions of the enactment. Thus, *ratio decidendi* of *Cine Exhibitors* (supra) is a binding precedent. If factual matrix of this case are examined on the touch stone of ratio of *Cine Exhibitors* (supra), it will be clear like noon day that SBPL has failed to show any notification being issued under the relevant provisions of the T.I.T Act whereby the character of land has been changed from Nazul/ Government land to "authority land". Certain letters and communications relied upon by SBPL, by no stretch of imagination can be termed as "notification" issued under the T.I.T Act. As per 1975 Niyam, no transfer through promoter agreement is permissible. Thus, no permission to undertake work under the promoter agreement can construe as a "notification" or "approval" of the government. Similarly, Annexure P-43 is merely a permission to the J.D.A to execute work under the Promoter scheme in response to letter of JDA (Annexure-P/42) whereby JDA had sought permission to work under the promoter scheme. Importantly, J.D.A in aforesaid letter (Annexure-P/42) did not ask for any permission for any transfer of land. Annexure P/50 refers to section-70 of the T.I.T. Act. As noticed above, section 70 and Chapter-V of said Act entirely deals with acquisition of private land. It has nothing to do with Nazul land. In nutshell, in our view, the argument of petitioner based on the judgment of *K.K.Bhalla* (supra) and aforesaid documents must fail. In absence of any requisite notification being issued by State Government, the character of Nazul land remained unaltered. There exists no material on record, which shows previous approval of the government regarding transfer of land as per statutory requirement of Rule 3 or 5.

121. As noticed, regarding allegations of "fraud", parties have taken diamatrically opposite stand whether any such fraud has been committed in execution of lease deed dated 30.05.2008 and in decision making process therefor. In the manner lease-deed was executed and shop/ showroom/ offices were leased

out and rent is received by SBPL, the official respondents alleged that the conduct of petitioner and officers of JDA was not fair and transparent. They acted in collusion and committed fraud. The SBPL, by placing reliance on the provisions of Contract Act, CPC and Criminal Law urged that mere allegation of fraud or strong suspicion is not enough to constitute and establish the "fraud" on the part of SBPL or Officers of JDA.

122. In our view, judgments cited by petitioner are mostly in relation to private law. The concept of "fraud" was considered long ago in celebrated judgment in *Khawaja Vs. Secretary of State for Home Department* reported in 1983(1) All ER-765, *Lord Bridge* speaking for the bench held that "it is dangerous to introduce maxims of common law as to effect of fraud while determining "fraud" in relation to statutory law." The said principle is followed by Supreme Court in the case of *Shirsht Dhawan (Smt.) (Supra),* after following the principle laid down in *Pankaj Bhargav Vs. Mohindernath* reported in 1991(1) SCC 556, it was held that fraud in relation to statute must be a colourable transaction to evade the provisions of the statute. If a statute has been passed for some one particular purpose, a court of law will not countenance any attempt which may be made to extend the operation of the Act to something else which is quite foreign to its object and beyond its scope. The Apex Court carefully recorded that present day concept of fraud on statute has veered a round abuse of power or malafide exercise of power. It may arise due to over stepping the limits of power or defeating the provisions of statute by adopting subterfuge or the power may be exercised for extreneous or irrelevant considerations. The colour of fraud in public law or administrative law, as it is developing, is assuming different shades. "Fraud" is committed when something is done in exercise of jurisdiction which otherwise would not have been exercised. The similar principles are laid down in the case of *R.C.Chhiba and judgment of this court in Naraindas* (supra). Pertinently, in *K.K.Bhalla* (supra) it was held that passing of an order for unauthorized purpose amounts to "malice in law".

123. In the present case, the tender documents and promoter agreement in no uncertain terms make it clear that promoter was given the licence to construct the complex with further right to lease out the shops/ showrooms/ offices for the first time and take the sale consideration. No transfer of ownership of land/ building was intended or envisaged. Same was impermissible in absence of prior approval being granted by State Government under Rule-3/5 of Niyam. Curiously, the JDA was not oblivious of this fact that lease deed of land is not permissible. This fact was duly recorded by JDA in the minutes dated 23.05.2008 (relevant protion (sic : portion) is reproduced in para 110 above) pursuant to which a decision to execute the lease deed of land in favour of SBPL was taken. Thus, the Officers of JDA decided and executed a lease deed contrary to the purpose of tender documents & promoter agreement. They also violated mandate of Rules 3 & 5 of Niyam as well as provisions of Prakoshtha Adhiniyam. In the fashion lease deed was executed,

we hold that it amounts to "malice in law".

124. The matter may be viewed from another angle. This is settled that licencee has a limited right. In AIR 1966 Supreme Court 1017, *(Chevalier I.I. Iyyappan Vs. Dharmodayam Co.)* the court held that -

> "in our opinion no case of licence really arises but if it does what is the licence which the appellant obtained and what is the licence which he is seeking to plead as a bar. *The licence, if it was a licence, was to construct the building and hand it over to the respondent company as trust property. There was no licence to create another kind of trust which the appellant has sought to create*... a licence is deemed to be revoked under section 62(f) of the Indian Easement Act, 1882 where the licnece is granted for a specific purpose and the purpose is attained or abandoned or becomes practicable."
>
> ***(Emphasis supplied)***

125. The priciple laid down in the said case was followed by Supreme Court in *M.I.Builders* (supra). Para-68 of this judgment shows that the licence given to builder was for a limited purpose of construction of underground shopping complex and thereafter under the impugned agreement, the builder was authorized to lease out the shops was held to be a dubious method adopted to subvert the provisions of the Act. The ratio of these judgments will apply to the present case with full force in as much as promoter/ SBPL has acted beyond their authority as analyzed above. By no stretch of imagination the promoter/ SBPL could have asked for execution of lease of the land.

126. While addressing on the issue regarding fraud, learned counsel for the SBPL urged that lease-deed dated 30.05.2008 was signed by Shri JP Trivedi who has signed the pleadings of return/additional return in the present case. Being signatuory (sic : signatory) to the lease-deed aforesaid, it does not lie in the mouth of Shri Trivedi to raise allegations of fraud. We do not see much merit in the said contention because lease-deed was executed/signed on behalf of JDA by one Shri Mandal and not by Shri J.P. Trivedi. In the entire decision making process which resulted into execution of lease-deed, Shri J.P. Trivedi was not a party. Hence, said objection is devoid of substance. Shri Nidesh Gupta in his written submissions relied on the judgment of *Shrisht Dhawan* (supra) and placed reliance on para 10 wherein it is held that he who alleges fraud must do so promptly. Suffice it to say, the argument against respondents in not acting with quite promtitude needs simple rejection for the reason stated in other paras of this judgment where it is clearly held that the delay in issuing the impugned orders cannot be a ground for interference. In said submissions, it is again mentioned that fraud can arise only when there is disclosure of incorrect facts knowingly and deliberately. We have dealt with the factual martix of the case in great detail which shows that conduct of

petitioner/promoter was also not free from blemish. Despite knowing the fact that he has a limited right to construct the building and sell the shop/showroom/office to third party and take sale consideration as a one time measure, he applied for execution of lease-deed of land which was not at all envisaged. Moreso, when he was signatory to the tender documents and promoter agreement. In the case of *Elizabeth Jacaqub* (supra) the Supreme Court emphasised the need of adequte (sic : adequate) material to draw the conclusion of "fraud" being committed and opined that onus is on the State. In our view, as dicussed above, there are sufficient material to reach to the conclusion that action of execution of lease-deed of land amounts to malice in law/fraud and onus has been duly discharged by the respondents. The plea of fraud was not a bald plea, indeed, it was established by producing adequte material, hence, judgments of *Ginus Power Infrastructure Ltd. & Bishudeo Narayan* (supra) are not applicable. In view of judgment of Supreme Court in *Shrisht Dawan* (supra) and judgment of this Court in *Narain Das* (supra), the judgment of Calcutta High Court in *Mihir Kumar Maiti* (supra), judgment of Privy Council in *A.L. Narayan* (supra) and High Court of Bombay in *Nursing Das* (supra) are of no assistance. As per admitted facts, it is clear that the entire decision making process regarding execution of lease-deed had taken place in hot haste. Almost within a week, the lease-deed of land is decided to be executed without addressing the objection in the note-sheet that lease-deed of land is impermissible. Thus, principle of law laid down in 2004 (2) SCC 65, *[Bahadur Sinh vs. Jagdish Bhai]* is applicable where decision making process conducted in undue haste was depricated. The judgment of *SP Kapoor vs. State of H.P.*, reported in 1981 (4) SCC 716, was quoted with profit wherein the SC held that when a thing is done in a post haste manner, malafide would be presumed. This is not a simple case of only breach of certain terms of contract, indeed, it is a case where promoter and officers of JDA have acted contrary to clauses of tender document/promoter agreement and statutory provision of Niyam of 1975. This unathorized act amounts to fraud & malice is (sic : in) law and runs contrary to public interest. Hence, judgments in *Shri Krishnan & C.K. Achutan* (supra) are of no help to SBPL.

127. Apart from this, the Officers of JDA being statutory officers of a statutory body were required to act in a fair and transparent manner and with a view to protect the public interest. Sabyasachi Mukherjee J. in *Fasih Choudhary Vs. D.G. Doordarshan,* 1989 (1) SCC 89 held "... the authorities like the Doordarshan should act fairly and their action should be legitimate and fair and transaction should be without any aversion, malice or affection. Nothing should be done which gives the impression of favoritism or nepotism....".

128. Justice Krishna Iyer in *Charls Sobraj Vs. Supt. Central Jail,* 1978 (4) SCC 104 held as under :-

> "Fair procedure is the soul of Article 21, reasonableness of the restriction is the essence of Article 19(5) and sweeping discretion degenerating into arbitrary discrimination is anathema for Article 14. Constitutional *karuna* is thus injected into incarceratory strategy to produce prison justice."

129. The Supreme Court time and again emphasized the need for acting strictly in public interest and to eschew private/vested interest. It is apposite to quote few passages from the judgments of Supreme Court.

> "Duty to act fairly is part of fair procedure envisaged under Article 14 and 21. Every activity of the public authority or those under public duty or obligation must be informed by reasons and guided by the public interest.
>
> Every action of the public authority or the person acting in public interest or any act that gives rise to public element, should be guided by public interest."
>
> [K. Ramaswamy, J. in *LIC vs. Consumer Education & Research Centre,* (1995)5SCC48, para27&23]
>
> "It is incumbent for each occupant of every high office to be constantly aware that the power invested in the high office he holds is meant to be exercised in public interest and only for public good, and that it is not meant to be used for any personal benefit or merely to elevate the personal status of the current holder of that office. Constant awareness of the nature of this power and the purpose for which it is meant would prevent situations leading to clash of egos and the resultant fallout detrimental to public interest."
>
> [J.S. Verma, J. in *State of Assam vs. P.c. Mishra,* 1995 Supp (4) SCC 139, para 11]
>
> "The Government or the public body represents public interests and whoever is in charge of running their affairs, is no more than a trustee or a custodian of the public interests. The protection of the public interests to the maximum extent and in the best possible manner is his primary duty. The public bodies are, therefore, under an obligation to the society to take the best possible steps to safeguard its interest."
>
> [P.B. Sawant, J. in *State of U.P. vs. State Law Officers Assn.,* (1994) 2 SCC 204, para 17]"

130. The ancient Roman Empire developed a doctrine popularly known as the "doctrine of public trust". The doctrine was founded on the ideas that certain properties were held by government in trusteeship for the free and unimpeded use of general public. The Roman and English Law recognized this doctrine centuries ago. Initially this doctrine was related with natural resources but by passage of

time, it was given a wider meaning. Pertinently, in 2010 (7) SCC 1, *(Reliance Natural Resurce Ltd. Vs. Reliance Industries Ltd.),* the Apex Court expanded the said doctrine in cases of public properties by holding that "even though this doctrine has been applied in cases dealing with environmental jurisprudence, it has its broder application."

131. In 2011 (6) SCC 508, *[NOIDA Entrepreneurs Assn. v. NOIDA],* the Apex Court opined as under:

> 41. Power vested by the State in a public authority should be viewed as a trust coupled with duty to be exercised in larger public and social interest. Power is to be exercised strictly adhering to the statutory provisions and fact situation of a case. "Public authorities cannot play fast and loose with the powers vested in them." A decision taken in an arbitrary manner contradicts the principle of legitimate expectation. An authority is under a legal obligation to exercise the power reasonably and in good faith to effectuate the purpose for which power stood conferred. In this context, "in good faith" means "for legitimate reasons". It must be exercised bona fide for the purpose and for none other. *[Vide Commr. of Police v. Gordhandas Bhanji [AIR 1952 SC 16] , Sirsi Municipality v.Cecelia Kom Francis Tellis* [(1973) 1 SCC 409 : 1973 SCC (L&S) 207 : AIR 1973 SC 855] . State of Punjab v.Gurdial Singh[(1980) 2 SCC 471 : AIR 1980 SC 319] .Collector (District Magistrate) v. Raja Ram Jaiswal [(1985) 3 SCC 1 : AIR 1985 SC 1622] .Delhi Admn.vManohar Lal[(2002) 7 SCC 222 : 2002 SCC (Cri) 1670] and N.D. Jayal v.Union of India [(2004) 9 SCC 362 : AIR 2004 SC 867] .]
>
> ***[Emphasis Supplied]***

132. In 2012(3) SCC 1, *(State of Gujarat and another vs. Justice R.A. Mehta (retired) and others)*, it was held that the object for the agencies/ instrumentalities of government should be to serve the public cause and to do public good by resorting to fair and reasonable methods. The heart of the public trust doctrine is that it imposes limits and obligation upon government agencies and their administrators on behalf of all the people and specially future generations.

133. On "constitutional morality", the view of Supreme Court in 2014 (9) SCC 1, *(Manoj Narula Vs. Union of India)* is under:

> **"75.**The principle of constitutional morality basically means to bow down to the norms of the Constitution and not to act in a manner which would become violative of the rule of law or reflectible of action in an arbitrary manner. It actually works at the fulcrum and guides as a laser beam in institution building. The traditions and conventions have to grow to sustain the value of such a morality. The democratic values survive and become successful where the people at large and the persons

in charge of the institution are strictly guided by the constitutional parameters without paving the path of deviancy and reflecting in action the primary concern to maintain institutional integrity and the requisite constitutional restraints. Commitment to the Constitution is a facet of constitutional morality. In this context, the following passage would be apt to be reproduced:

> "If men were angels, no Government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions. [James Madison as Publius, Federalist 51]

" 76 . Regard being had to the aforesaid concept, it would not be out of place to state that institutional respectability and adoption of precautions for the sustenance of constitutional values would include reverence for the constitutional structure. It is always profitable to remember the famous line of Laurence H. Tribe that a Constitution is "written in blood, rather than ink" [Laurence H. Tribe *.The Invisible Constitution(2008) 29]."*

[Emphasis Supplied]

134. In 2013 (4) SCC 642, *(Niranjan Hemchandra Sashittal vs. State of Maharashtra*) it was held as under:

> "An attitude to abuse the official position to extend favour in lieu of benefit is a crime against the collective and an anathema to the basic tenets of democracy, for it erodes the faith of the people in the system. It creates an incurable concavity in the Rule of Law. Be it noted, system of good governance is founded on collective faith in the institutions."

135. Looking from any angle, whether based on tender document, promoter agreement and statutory provisions or from the angle of fairness or "constitutional morality", the action of execution of lease deed of land in favour of SBPL cannot be countenanced.

136. It is important to note that JDA has pointed out the pleading and stand of petitioner himself wherein petitioner has described the land as "Nazul Land" in Para 5.53 of the petition and Para 4 of judgment passed in W.P. No.9343/2010. The JDA's stand on this question has already been reproduced hereinabove. The petitioner has to establish his case on the basis of his own pleadings and relevant

evidence cannot be permitted to rely on minor contradictions in the stand of respondents.

137. The petitioner SBPL stated that 'cost of land' has been paid by the promoter which has been paid by the promoter which has given him the right of ownership. The amount of "premium" was paid by promoter as per condition of Promoter Agreement. The license to construct and payment of premium, by no stretch of imagination can be treated as payment of "cost of the land". The argument of petitioner whereby amount of premium is sought to be equated with cost of land is not only misconceived, it amounts to misrepresentation as well. Inadvertent use of words "cost of the land" in certain places of Annexure-P/3 & P/4 will not alter the meaning of the word "premium". We find support in our view as per Clause 22 of Promoter Agreement which clearly prohibits transfer of ownership of land.

138. The method of transfer of land under different statutory provisions of Niyam 75 came up for consideration before this Court. In 2000 (3) MPLJ 43, *(Adhartal Shiksha Samiti Vs. State of M.P.) C.K. Prasad J.* (As His Lordship then was) expressed the following view:

> "Having appreciated the rival submissions, I find substance in the submission of Mr. Jha, Principle of Natural Justice is not an unruly horse. Its application depends upon the fact and circumstances of each case. In the present case, illegality has been committed by the Authority while allocating the land to the petitioners. Petitioners have been allocated land contrary to the provisions of law arbitrarily and the same is thus ab initio void. Action of allotment and throw away price is directly against the public interest and in the facts of the present case, I am of the opinion that the cancellation cannot be faulted on the ground that no opportunity was given to the petitioners. Extraordinary jurisdiction of this Court under Article 226 of the Constitution of India, is invoked to advance justice and not to defeat the same. Interference of this Court in exercise of its prerogative power instead of advancing the justice shall defeat the same."

139. It was held that when allotment of land is contrary to the provisions of statute, allotment is not only arbitrary, it is *ab initio void*.

140. In AIR 2004 MP 82, *(Motiram Mandhyani Vs. State of M.P.)* a Division Bench of this Court speaking through *Dipak Misra, J.* (As His Lordship then was) held that no exercise has been undertaken to assess the price of the land. The proceedings are absolutely silent in regard to the exercise undertaken by JDA for determination of price. The statutory requirement of Rule 19 must be complied

with. It was poignantly held that principle of "promissory estoppel" cannot be pressed into service to compel the Government or Public Authority to carry out the representation or promise which is prohibited by law or which was devoid of authority or power of the officers of the Government/Public Authority.

141. It was further held in the said judgment that Doctrine of "promissory estoppel" being an equitable doctrine, it must yield place to the equity, if larger public interest so requires. The argument of Government was accepted that where agreement defeats the provisions of law or where the agreement is contrary to the mandate of statute or if the initial conferral of right is *ab initio void,* the question of "promissory estoppel" does not arise. A specific finding of the Division Bench is noteworthy wherein it was noted with pain that "we are absolutely clear in our mind that it is not that loss which has weighed with us but we have kept ourselves alive to the situation that there had been no exercise by the JDA to find out the real price of the land. *'We have no hesitation in coming to hold that allotments were made and the lease deed in question was executed for a song."* A property belonging to the collective cannot be distributed at the whims and fancies of the people, who are at the helm of affairs totally remaining oblivious to the public interest and ostracizing the conception of collective good. Division Bench further held that "Be it noted, in the prosperity of the collective, the individual gets the benefit and any action that is contrary to the community interest or interest of the collective at large, looses its sancro-sanctity and cannot be treated impeccable or presentable because of certain minor observations made in the Committee. Thus, considering from both the angles, the doctrine of promissory estoppel would not arise".

142. In the same judgment, the attack on impugned orders on the ground of delay is repelled by holding that plea of delay in initiating the proceeding for cancellation is not available where there is an abuse of power by a public authority.

143. In 2012 (4) MPLJ 194, *(Neetu Tejkumar Bhagat and another Vs. JDA and others),* another Division Bench of this Court considered the impact of Rule 3 and Rule 5 of the said Niyam. Aradhe J. opined for the Bench as under:

> **"9.** Before proceeding further, it would be appropriate to notice Rules 3, 5 and 6 of the 1975 Rules, which read as under:—
>
> "3. No Government land vested in or managed by the Authority shall be transferred except with the general or special sanction of the State Government given in that behalf.
>
> 5. Transfer of the Authority land shall be as under-
>
> (a)By direct negotiations with the party; or

(b)By public auction; or

(c)By inviting tenders; or

(d)Under concessional terms.

6(1) In the case of disposal of land by direct negotiations the Authority land shall be disposed off at a premium fixed by the Authority in accordance with the general or special sanction given by the State Government to the scale of premium to be fixed and all the Authority land transferred in accordance therewith, shall be liable to ground rent of two percent of the premium."

Rule 3 of the 1975 Rules, imposes a bar against transfer of Government land vested in or managed by the authority except with the general or special sanction of the State Government.

10. The Authority has been constituted for making better provisions for preparation and development of plans and to ensure town planning. The Authority is under an obligation to ensure that it functions according to the provisions of the Act and the Rules. The property in question is the property of the public, which has to be dealt with in a fair, transparent and rational manner. In the instant case, admittedly, no attempt was made by the Authority to ascertain the market value either by holding a public auction or by inviting tenders. The market value of the property in question could have been ascertained by the Authority only by making its intention known to public to dispose of the property by lease, in accordance with the modes well-known to law for disposal of the public property namely either by inviting tenders or by holding auction. The valuation reports in our considered opinion could not have formed the basis to ascertain the market value of the property for the simple reason that potentiality of the property in question has not been taken into consideration while preparation of the valuation reports. Similarly, the guidelines issued by the Collector could not furnish a reasonable basis for ascertaining the market value of the property for the reason that the guidelines are prepared by the Collector only for the purpose of payment of stamp duty. Therefore, the action of the Authority in not ascertaining the market value of the property by a fair and transparent manner cannot be approved.

11. Admittedly, the property in question belongs to the State Government which on constitution of the authority vested in it. Rule 3 of the 1975 Rules provides that no Government land vested in or managed by the Authority shall be transferred except with the general or special sanction of the State Government given in that behalf. The Authority while dealing with property of the State Government which has vested in it, acts like an agent of the State Government. There are two limitations imposed by law which control the discretion of the authority in granting

largess, firstly with regard to the terms on which largess may be granted and other in regard to the persons who may be recipients of such largess. Therefore, under Rule 3 of the 1975 Rules, the Authority is required to take an approval from the State Government with regard to the manner of disposal of the land as well as the value on which it is proposed to be transferred, as the Authority is the custodian of the property of the Government. In the instant case, the Authority has not obtained the sanction as required under Rule 3 of the Rules. Thus, the property has been transferred in violation of Rules 3 of the 1975 Rules.

12. Now we may advert to the objection raised on behalf of private respondents that since the writ petitions suffer from delay and laches and, therefore, the writ petitions are liable to be dismissed. The lease deeds were executed on 3-7-2010 and 28-8-2010. The writ petitions have been filed before this Court in January, 2011 and in April, 2011, i.e. within 5 months and 9 months respectively, from the date of execution of the lease deeds. It is well settled in law that in considering the question of delay, the test is not of physical running of time. See: Dehri Rohtas Light Railway Company Limited v. District Board, Bhojpur, (1992) 2 SCC 598. The delay may not defeat the claim for relief unless the position of the other side is so altered which cannot be retracted on account of lapse of time or inaction on the other party. However, the question of delay has to be examined in the facts of each case. See: Hindustan Petrol Corporation v. Dolly Das, (1999) 4 SCC 450 and M.P. Ram Mohan Raja v. State of Tamil Nadu, (2007) 9 SCC 78. It is equally well settled legal proposition that delay and laches alone should not be sole ground for throwing out public interest litigation. Keeping in view the magnitude of public interest, the Court may consider the desirability to relax the rigours of accepted norms. See: Bombay Dyeing and Mfg. Co. Ltd. (3) v. Bombay Environmental Action Group, (2006) 3 SCC 434.

14. In view of the preceding analysis, the lease deeds dated 3-7-2010 and 28-8-2010 executed in favour of private respondents are hereby quashed. The Authority is directed to issue a notice inviting tender for disposal of the property in question on lease. It will be open for the private respondents as well to participate in the aforesaid process. In case the bids submitted by private respondents are found to be the highest, the lease deeds would be executed in their favour in respect of property in question. However, in case the bids of private respondents are not found to be the highest, in such an eventuality, the respondent No. 1 authority shall refund the amount spent by private respondents on the construction of property in question from the bid amount which will be received by the Authority subject to private respondents furnishing an account of the amount spent by them in raising the construction, which shall be duly supported by the documents."

[Emphasis Supplied]

144. The common string in all the above decisions of this court is that transfer of land contrary to rules is impermissible and *void ab initio*. In absence of determining market value by undertaking public auction or by inviting tenders, cost of land cannot be fixed. The hurdle of unreasonable delay will not come in cases of this nature where this magnitude of public interest is involved. The principles of natural justice are not applicable where the action is *void ab initio*. Indeed, the *doctrine of useless formality* is applied by the Court.

145. Another argument of petitioner is that no material/essential term of contract is infringed in the matter of execution of lease deed dated 30-05-2008. Thus, as laid down in AIR 1963 SC 1417, *(Banarsi Devi vs. Cane Commissioner, U.P. and another);* 2012 (1) SCC 718, *(Union of India vs. Colonel L.S.N. Murthy and another);* 2011 (7) SCC 493, *(ITC Ltd. vs. State of U.P. and others)* and 2014 (8) SCC 804 *(Jal Mahal Resorts Pvt. Ltd. vs. K.P. Sharma and others)* the endeavor of this Court should be to save the contract. Pertinently, for addressing this question, the Apex Court has laid down a test in *I.T.C. Ltd. vs. State of U.P.* (supra) the questions needs to be asked are mainly (i) whether transferee had acted bonafide and was blameless? (ii) Whether public interest has suffered? Or (iii) will suffer as a consequence of the violation of the regulations? The exercise to search answer was held to be cumbersome yet thought absolutely necessary to examine the necessity to protect the sanctity of contracts and transfers. It is clarified that effort should always be made to save the concluded transactions/transfer, provided (i) it will not prejudice the public interest, or cause loss to public exchequer or lead to public mischief, and (ii) the transferee is blameless and had no part to play *in the violation of regulation.*

146. In the instant case, the shopping complex/mall in question is constructed on a land which is situated in the heart of town Jabalpur. Indisputably, the said complex is constructed on a very valuable land. In catena of judgments, the Apex Court emphasized the need to ensure sound, transparent, discernible methods/procedure for giving public largesse. The Supreme Court in 2011(5) SCC 29, *(Akhil Bhartiya Upbhokta Congress v. State of M.P)* opined as under:-

> **"65** What needs to be emphasized is that the State and/or its agencies/instrumentalities cannot give largesse to any person according to the sweet will and whims of the political entities and/or officers of the State. Every action/decision of the State and/or its agencies/instrumentalities to give largesse or confer benefit must be founded on a sound, transparent, discernible and well-defined policy, which shall be made known to the public by publication in the Official Gazette and other recognized modes of publicity and such policy must be implemented/executed by adopting a non-discriminatory and non-arbitrary method irrespective of the class or category of persons proposed to be benefited by the policy. The distribution of largesse like

> allotment of land, grant of quota, permit license, etc. by the State and its agencies/instrumentalities should always be done in a fair and equitable manner and the element of favouritism or nepotism shall not influence the exercise of discretion, if any, conferred upon the particular functionary or officer of the State.
>
> **66** We may add that there cannot be any policy, much less, a rational policy of allotting land on the basis of applications made by individuals, bodies, organizations or institutions de hors an invitation or advertisement by the State or its agency/ instrumentality. By entertaining applications made by individuals, organizations or institutions for allotment of land or for grant of any other type of largesse the State cannot exclude other eligible persons from lodging competing claim. Any allotment of land or grant of other form of largesse by the State or its agencies/instrumentalities by treating the exercise as a private venture is liable to be treated as arbitrary, discriminatory and an act of favouritism and/or nepotism violating the soul of the equality clause embodied in Article 14 of the Constitution."

147. In the said case, the allotment of 20 acres of land to respondent No.5 therein was declared as illegal and accordingly quashed. The relevant notifications of the State Government were also quashed with further direction to the Commissioner, Town and Country Planning Bhopal to take possession of land and use the same strictly in accordance with Bhopal Development Plan. In view of this judgment, it is clear that a great deal of public interest is involved in the matter of giving public largesse to any person or allotment of land by State or instrumentality by undertaking the exercise in an arbitrary manner .Any act of favoritism or nepotism in distribution of public largesse is held to be in clear breach of equality clause enshrined in Article 14 of the Constitution. The adherence to the conditions of allotment must be followed, is the signature tune of the said judgment. In 2012 (11) SCC 434, *(Saroj Screens Pvt. Ltd. vs. Ghanshyam & Others)*. The Court followed the ratio of judgment of *Akhil Bhartiya Upbhokta Congress* (supra) and came to hold as under:-

> **"37.** In Breen v. Amalgamated Engg. Union [(1971) 2 QB 175 : (1971) 2 WLR 742 : (1971) 1 All ER 1148 (CA)] Lord Denning, M.R. observed: (QB p. 190 B-C)
>
> > "... The discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That means at least this: the statutory body must be guided by relevant considerations and not by irrelevant. If its decision is influenced by extraneous considerations which it ought not to have taken into account, then the decision cannot stand. No matter that the statutory body may have

acted in good faith; nevertheless the decision will be set aside. That is established by Padfield v. Minister of Agriculture, Fisheries and Food [1968 AC 997 : (1968) 2 WLR 924 : (1968) 1 All ER 694 (HL)] which is a landmark in modern administrative law."

38. The question whether the State and/or its agency/ instrumentality can transfer the public property or interest in public property in favour of a private person by negotiations or in a like manner has been considered and answered in negative in several cases. In Akhil Bhartiya Upbhokta Congress v. State of M.P. [(2011) 5 SCC 29 : (2011) 2 SCC (Civ) 531] this Court was called upon to examine whether the Government of Madhya Pradesh could have allotted 20 acres land to Shri Kushabhau Thakre Memorial Trust under the M.P. Nagar Tatha Gram Nivesh Adhiniyam, 1973 read with the M.P. Nagar Tatha Gram Nivesh Vikasit Bhoomiyo, Griho, Bhavano Tatha Anya Sanrachanao Ka Vyayan Niyam, 1975. After noticing the provision of the Act and the Rules, as also those contained in the M.P. Revenue Book Circular and the judgments of this Court in S.G. Jaisinghani v. Union of India [AIR 1967 SC 1427], Ramana Dayaram Shetty v. International Airport Authority of India [(1979) 3 SCC 489], Erusian Equipment and Chemicals Ltd. v. State of W.B. [(1975) 1SCC 70], Kasturi Lal Lakshmi Reddy v. State of J&K [(1980) 4 SCC1],Common Cause v. Union of India [(1996) 6 SCC 530],Shrilekha Vidyarthi v. State of U.P. [(1991) 1 SCC 212 : 1991 SCC (L&S) 742], LIC v. Consumer Education & Research Centre [(1995) 5 SCC 482] and New India Public School v. HUDA[(1996) 5 SCC 510], the Court culled out the following propositions: (Akhil Bhartiya Upbhokta case [(2011) 5 SCC 29 : (2011) 2 SCC (Civ) 531] , SCC p. 60, paras 65-66)

(para 65 & 66 are already reproduced in previous pages of this judgment)

39. The factual matrix of the instant case shows that before granting 30 years' lease of the plot in favour of the appellant, the Corporation neither issued any advertisement nor followed any procedure consistent with the doctrine of equality so as to enable the members of the public to participate in the process of alienation of public property. Therefore, the conclusion reached by the High Court, though for different reasons, that the resolution dated 28-8-1991 and the sanction accorded by the State Government vide Letter dated 12-6-2000 are legally unsustainable does not call for interference by this Court."

[Emphasis Supplied]

148. As noticed above, the lease deed dated 30-05-2008 is executed in clear breach of specific clauses of tender document and promoter agreement. The land could not have been transferred without previous approval of the State

Government. The above mentioned discussion compels us to record that the *litmus* test laid down by Supreme Court in *I.T.C. Ltd.'s case* (supra) is satisfied and it is not possible to hold that execution of lease deed has not prejudiced the public interest and it is not an outcome of a public mischief. Since entire exercise of execution of lease deed was initiated on the application of the promoter, he cannot be held to be blameless nor it can be said that he had played no part in violating the conditions of said documents and Niyam of 1975. The promoter/petitioner was signatory to tender document/agreement and was fully aware about its contents. He, with open eyes, signed the said document. As per AIR 1965 SC 470 *(M/s. Khan Saheb M. Hassanji and Sons vs. State of M.P.),* after having entered into the terms of agreement with open eyes, the party to such agreement cannot raise eyebrows against the terms and conditions. In 1996 (5) SCC 740 *(Yasar Shafique and Others vs. State of J. & K.,)* the Apex Court considered a Constitution Bench judgment in *Har Shankar vs. Deputy Exercise and Taxation Commissioner,* (1975) 1 SCC 737 and clearly held that a person who enters into certain contractual obligations with his eyes open and works the entire contract, cannot be allowed to turn around, according to the said decision of Constitution Bench and question the terms of the contract. The petitioner in the instant case although has not called in question the validity of any clause of contract, advanced interpretation of those clauses in such a fashion which make the relevant clauses as redundant/meaningless. Apart from this, in answer to another issue, we will dwell upon the aspect of public interest and loss to JDA etc. which will also address the aforesaid test. In this view of the matter, we are unable to persuade ourselves with the argument of petitioner that no material/essential term of contract is infringed and no public interest or loss is involved.

149. The alternative argument of petitioner is based on the assumption that land in question is an 'authority land'. The petitioner has drawn support from a report of CEO and a letter dated 26-10-2005 wherein said land is either described as 'authority land' or lease rent @ 2% was charged which is applicable on 'authority land'. Government's letter dated 31-10-2005 is also relied upon to submit that JDA was permitted by the State Government to take appropriate action. In support of these propositions, reliance is again placed on the judgment of Supreme Court in *K.K. Bhalla* (supra). The stand of JDA is being criticized wherein in some places the land is described as 'authority land' and rate of lease rent applicable is also varied. Assistance is taken from 1992 (4) SCC 683 *(R.N. Gosain vs. Yashpal Dhir)* and 2011 (10) SCC 420 *(Cauvery Coffee Traders vs. Hornor Resources)*. It is urged that a party cannot be permitted to blow "hot and cold" and "fast and loose" or "approbate and reprobate". The JDA and State Government placed reliance on the aforesaid judgments of M.P. High Court rendered in *Neetu Prajapati, Motiram Mandheyani and Adhartal Shiksha Samiti* (supra). They again raised the question of violation of Niyam 5 of 1975.

150. Rule 5 talks about transfer of 'authority land'. At the cost of repetition, in our view, as per tender document and promoter agreement, transfer of land was never intended, hence Rule 5 has been violated because no tender proceedings for disposal of plot of land has ever taken place or even processed by the JDA. Thus, this alternative submission of petitioner deserves rejection. The rate of lease rent being charged by JDA is not decisive to determine the character of the land. Moreso, when the question of fixing the correct rate of lease rent is still subjudice in another litigation.

151. The factual matrix of this case shows that the promoter signed the agreement in the year 2006 which gave him limited right highlighted in above paragraphs, yet he filed an application on 23-05-2008 for execution of the lease deed of land in favour of Shri Ajeet and Kishor Samdariya, Directors of SBPL. The parties have taken diametrically opposite stand on the question whether the said application was preferred and consequently lease deed dated 30-05-2008 is executed in favour of two individuals or in favour of a separate firm. Petitioner relied on the Note-sheet of JDA pursuant to which lease deed was executed wherein SBPL was treated to be a separate firm. Based on U.K. Supreme Court judgment *VTB Capital PLC* (supra), it is stated that SBPL is not a cloak or disguise. Shri Nidhesh Gupta, learned counsel for the petitioner placed reliance on the celebrated judgment of *House of Lords in Salomon vs. Salomon & Co. Ltd.* (1897) AC 22. The respondents attacked even on this stand by contending that said two persons are common in both the situations, whether it is "promoter" or the "SBPL". Their address, interest etc. are common. The whole exercise to get the lease executed in favour of SBPL amounts to a mischief and, therefore, principle of piercing the corporate veil may be applied.

152. The doctrine of lifting the corporate veil came up for consideration before Supreme Court in *D.D.A. vs. Skipper Construction Co. (P) Ltd.,* 1996 (4) SCC 622. After considering the judgment of House of Lords in Salomon (supra) and views of American and Indian authors, the Apex Court held as under:-

> 28. The concept of corporate entity was evolved to encourage and promote trade and commerce but not to commit illegalities or to defraud people. Where, therefore, the corporate character is employed for the purpose of committing illegality or for defrauding others, the court would ignore the corporate character and will look at the reality behind the corporate veil so as to enable it to pass appropriate orders to do justice between the parties concerned. The fact that Tejwant Singh and members of his family have created several corporate bodies does not prevent this Court from treating all of them as one entity belonging to and controlled by Tejwant Singh and family if it is found that these corporate bodies are merely cloaks behind which lurks Tejwant Singh and/or

members of his family and that the device of incorporation was really a ploy adopted for committing illegalities and/or to defraud people.

[Emphasis supplied]

153. In another judgment reported in (2000) 3 SCC 312, *(Subhra Mukherjee & Another vs. B.C.C.L.),* the Court again considered the judgment of *Salomon* (supra) and held that the principle laid down in Salomon case more than a century ago in 1897 by the House of Lords is that the company is at law a different person altogether from the subscribers who had limited liability is the foundation of joint stock company and a basic incidence of incorporation both under English and Indian law. To look at the realities of the situation and to know the real state of affairs behind the facade of the principle of the corporate personality, the Courts have pierced the veil of incorporation. It is noted by Supreme Court that 'where a transaction of sale of its immovable property by a company in favour of the wifes of Directors is alleged to be sham and collusive', the Court will be justified in piercing the veil of incorporation to ascertain the true nature of the transaction as to who were the real parties to the sale and whether it was genuine and bonafide or whether it was between the husbands and the wives behind the facade of separate entity of the company. In the case of *Subhra Mukherjee* (supra), the argument of the company that it is a separate legal entity which is independent of its directors and shareholders could not find favour from the Supreme Court.

154. In the instant case, Shri Ajeet Samdariya and Shri Kishor Samdariya, Directors of SBPL have signed the promoter agreement on behalf of promoter firm. Pertinently, the lease deed is also signed by said two persons as Directors of SBPL. Indisputably, the said two persons/Directors in "promoter" and in "SBPL" are same, their address is also same. In the case of D.D.A. (supra), it was clearly laid down that where corporate character is employed for the purpose of committing illegality or for defrauding others, the corporate character needs to be ignored to find out the reality behind the smoke screen so as to enable to the Court to do justice. Interestingly, in the said case, Tejwant Singh and members of his family have created separate corporate bodies which formations were although technically different legal entities/corporate bodies were found to be cloaks. It was clearly held that behind such cloaks, lurks Tejwant Singh and/or members of his family and such device of incorporation was really a ploy adopted for committing illegalities etc. In 2016 (4) SCC 469, *(State of Rajasthan & Others vs. Gotan Lime Stone Khanij Udyog Pvt. Ltd.),* the Apex Court again considered the judgment of Salomon (supra) and followed the *ratio decidendi* of judgment of *D.D.A.* (supra). The books/articles of certain authors, namely, Grower-Modern Company Law, Pennigton-Company Law and Professor S.Ottolenghi were taken into account and a question was posed: what general rule can be laid down for the

purpose of ignoring the corporate entity and the veil drawn should be set aside ? The answer given by American Professor L. Maurice, as far back as in 1912 was quoted with profit, where he opined that when the conception of corporate entity is to defraud creditors *to evade an existing obligations, to circumvent a statute, to achieve or perpetuate monopoly, or to protect Knavery or crime,* the Courts will draw aside the web of entity. *Palmer's Company Law* was considered wherein author opined that where the device of incorporation is used for some illegal or improper purpose.....*where a vendor of land sought to avoid the action for specific performance by transferring the land in breach of contract to a company he had formed the purpose, the Court treated the company as a mere sham.* In Para 33 of this judgment (Gotan Lime Stone), the Court referred the doctrine of public trust and noted that where rule prohibits transfer of mining lease, the acquisition of said lease contrary to the rules is void. In our considered view, the said judgments of *D.D.A., Subhara and Gotam Lime Stone* (supra) are squarely applicable in the present case. The promoter clearly commit illegality, breached the clear terms of tender document, promoter agreement and mandate of Niyam 3 of 1975 and Prakoshtha Adhiniyam and got the lease deed executed for "land" which was wholly impermissible. In a calculated manner, the lease deed was executed in favour of SBPL which is a separate entity for namesake. The beneficiaries behind the curtains are the same persons.

155. The petitioner has also attacked the impugned orders on the ground of undue delay and relied on the principle of "promissory estoppel". This Court in *Adhartal Shiksha Samiti, Motiram Mandhyani and Neetu Prajapati* (supra) which are related with transfer of land under the same Niyam and Adhiniyam, expressed its view that when illegality committed is against public interest, delay will not be an impediment. In *Amrit Vanaspati Co. Ltd.* (supra), the Apex Court laid down as under:-

> **"10.** But promissory estoppel being an extension of principle of equity, the basic purpose of which is to promote justice founded on fairness and relieve a promisee of any injustice perpetrated due to promisor's going back on its promise, is incapable of being enforced in a court of law if the promise which furnishes the cause of action or the agreement, express or implied, giving rise to binding contract is statutorily prohibited or is against public policy. What then was the nature of refund which was promised by the government? Was such promise contrary to law and against public policy? Could it be enforced in a court of law? Taxation is a sovereign power exercised by the State to realise revenue to enable it to discharge its obligations. Power to do so is derived from entries in Lists I, II and III of the Seventh Schedule of the Constitution. Sales tax or purchase tax is levied in exercise of

power derived from an Act passed by a State under Entry 54 of List II of VIIth Schedule. It is an indirect tax as even though it is collected by a dealer the law normally permits it to be passed on and the ultimate burden is borne by the consumer. But 'the fact that the burden of a tax may have been passed on to the consumer does not alter the legal nature of the tax' (Halsbury's Laws of England, Vol. 52, paragraph 20.04). Therefore even a legislature, much less a government, cannot enact a law or issue an order or agree to refund the tax realised by it from people in exercise of its sovereign powers, except when the levy or realisation is contrary to a law validily enacted. A promise or agreement to refund tax which is due under the Act and realised in accordance with law would be a fraud on the Constitution and breach of faith of the people. Taxes like sales tax are paid even by a poor man irrespective of his savings with a sense of participation in growth of national economy and development of the State. Its utilization by way of refund not to the payer but to a private person, a manufacturer, as an inducement to set up its unit in the State would be breach of trust of the people amounting to deception under law.

[Emphasis Supplied]

156. In 1996 (6) SCC 634, *(I.T.C. Bhadrachalam Paperboards v. Mandal Revenue Officer),* the Apex Court held as under:-

> **"30.** Shri Sorabjee next contended that even if it is held that the publication in the Gazette is mandatory yet GOMs No. 201 can be treated as a representation and a promise and inasmuch as the appellant had acted upon such representation to his detriment, the Government should not be allowed to go back upon such representation. It is submitted that by allowing the Government to go back on such representation, the appellant will be prejudiced. The learned counsel also contended that where the Government makes a representation, acting within the scope of its ostensible authority, and if another person acts upon such representation, the Government must be held to be bound by such representation and that any defect in procedure or irregularity can be waived so as to render valid which would otherwise be invalid. The counsel further submitted that allowing the Government to go back upon its promise contained in GOMs No. 201 would virtually amount to allowing it to commit a legal fraud. For a proper appreciation of this contention, it is necessary to keep in mind the distinction between an administrative act and an act done under a statute. If the statute requires that a particular act should be done in a particular manner and if it is found, as we have found hereinbefore, that the act done by the Government is invalid and ineffective for non-compliance with the

> mandatory requirements of law, it would be rather curious if it is held that notwithstanding such non-compliance, it yet constitutes a 'promise' or a 'representation' for the purpose of invoking the rule of promissory/equitable estoppel. Accepting such a plea would amount to nullifying the mandatory requirements of law besides providing a licence to the Government or other body to act ignoring the binding provisions of law. Such a course would render the mandatory provisions of the enactment meaningless and superfluous. Where the field is occupied by an enactment, the executive has to act in accordance therewith, particularly where the provisions are mandatory in nature. There is no room for any administrative action or for doing the thing ordained by the statute otherwise than in accordance therewith. Where, of course, the matter is not governed by a law made by a competent legislature, the executive can act in its executive capacity since the executive power of the State extends to matters with respect to which the legislature of a State has the power to make laws (Article 162 of the Constitution). The proposition urged by the learned counsel for the appellant falls foul of our constitutional scheme and public interest. It would virtually mean that the rule of promissory estoppel can be pleaded to defeat the provisions of law whereas the said rule, it is well settled, is not available against a statutory provision. The sanctity of law and the sanctity of the mandatory requirement of the law cannot be allowed to be defeated by resort to rules of estoppel. None of the decisions cited by the learned counsel say that where an act is done in violation of a mandatory provision of a statute, such act can still be made a foundation for invoking the rule of promissory/equitable estoppel. Moreover, when the Government acts outside its authority, as in this case, it is difficult to say that it is acting within its ostensible authority. If so, it is also not permissible to invoke the principle enunciated by the court of appeal in Wells v. Minister of Housing & Local Govt. [(1967) 2 All ER 1041 : (1967) 1 WLR 1000]"
>
> **[Emphasis Supplied]**

157. In 1988 (4) SCC 709, *(Subhash Kumar Lata vs. R.C.Chhiba & Another)* the clear expression of law is as under:-

> 'none of the decisions lay down that where a sanction granted by the Rent Controller under Section 21 is rendered void by reason of a fraud practiced upon the statute, the delay on the part of tenant in seeking annulment of the order of sanction will cure the order of its voidness'.

158. In catena of judgments, it was held that the principle of estoppel cannot be pressed into service in a case of this nature where huge public interest is involved, petitioner/authorities have acted in flagrant breach of mandatory conditions of agreement/Niyam and where such action harms the public interest and results into loss to public exchequer. No estoppel operates against a statutory provision. Thus,

neither argument of unreasonable delay in passing the impugned order, nor doctrine of estoppel can be of any assistance to the petitioner. More so, when the impugned orders were passed as a result of an exercise which was directed to be undertaken by this Court in a public interest litigation filed by Shri Sushil Mishra.

159. The petitioner contended that he is subjected to discrimination and pointed out three cases in this regard namely Dainik Bhaskar, Kamlesh Agrawal (Annexure-P/51) and M.J. Enterprises (Annexure-P/52).The case of Dainik Bhaskar travelled to supreme court in *K.K. Bhalla* (supra) and in previous paragraphs, the aspect of applicability of said judgment is dealt with extensively. The stand of petitioner about remaining two persons is that they were also sailing in the same boat like SBPL but no coercive action has been taken by JDA/State against them. In our considered opinion, this argument is also devoid of substance for twin reasons. Firstly, the petitioner is unable to show that said two persons got the lease deed executed in respect of 'Nazul lands' and secondly, petitioner cannot claim negative parity regarding a field which is covered by a mandatory statutory provision (Niyam 3 and Niyam 5). It is settled law that Article 14 provides for positive equality and does not permit negative parity. Said Article is not meant to perpetuate illegality. The Courts have taken consistent view in *Vishal Properties (P) Ltd.* (supra)*, Doiwala Sehkari Shram Samvida Samiti Ltd., K K Bhalla* (supra) and judgment of this court reported in 2012 (3) MPLJ 678 *(Asmeen Vaishya vs. Union of India)*. Thus, argument based on discrimination also deserves rejection. In the result, answer of issue No.1 & 7 is against the petitioner.

Issue No.2 :

160. The SBPL has admittedly given shops/offices/showroom situated in commercial complex on rent. The SBPL justified their action on the basis of legal opinion of counsel of JDA Annexure P/18, permission dated 2.7.2010 granted by JDA Annexure P/19 and report of JDA dated 27.6.2016. Assistance is taken from para 13.2 of impugned order dated 19.6.2017 and para 14.3 wherein government opined that there was no prohibition for giving premises on rent. The Board resolution dated 24.6.2017 Annexure P/36A is also relied upon. It is contended that in absence of any prohibition in giving the premises on rent in promoter agreement dated 1.5.2006 and once allottee is vested with bundle of rights, the allottee can either enjoy the property himself by running a business or can derive economic benefits from the allotment i.e. by giving shops on rent. The JDA had limited right to get transfer fee in the event of further transfer by the allottee. The Bank has sanctioned term loan for construction of mall against 45% of net lease rental vide sanction letter dated 25.2.2011 Annexure P/49 with the rejoinder.

161. The JDA opposed the same on the basis of relevant clauses of agreement and reiterated their stand mentioned in the return.

162. In order to appreciate the points raised by the parties, it will be apposite to revert back to the relevant clauses of promoter agreement viz. Clause 5, 11, 22 and 27 of Annexure P/7. The owner of the building, as per the agreement, shall be the JDA. Rule 5A of Niyam of 1975 is also relevant.

163. As per this rule, the prior permission of State Government for granting lease of apartment is mandatory. The third party could have been given possession of any apartment by joint signature of JDA and promoter. In the instant case, possession of apartment is, admittedly, not given by joint signature of JDA and promoter. It is already held while deciding other issues that tender document, promoter agreement and Prakoshtha Adhiniyam permit lease of "apartment" which may be a "shop", "showroom", "chamber" or "office" but "apartment" does not mean "land" or entire "building". As per the scheme and object of Prakoshtha Adhiniyam, individual ownership on an "apartment" situate in a "building" is recognized. In view of express provisions ingrained in said documents Niyam of 1975 and Prakoshtha Adhiniyam no other method is permissible. This is trite law that if a Statute requires a thing to be done in a particular manner, it has to be done in the same manner and other methods are forbidden. {See: AIR 1959 SC 93, *(Shri Baru Ram vs. Smt. Prasanni & others);* 2001(4) SCC 9, *(Dhanajay Reddy vs. State of Karnataka);* 2002(1)SCC 633, *(Commissioner of Income Tax, Mumbai vs. Anjum M.H. Ghaswala & others)* & 2011(2) MPLJ 690, *(Satyanjay Tripathi & another vs. Banarsi Devi).*

164. So far said legal opinion and permission of JDA based thereupon are concerned, suffice it to say that the same run contrary to aforesaid clauses of promoter agreement read with the scheme of Prakoshtha Adhiniyam. Any legal opinion or consequential permission which are in the breach of basic documents including promoter agreement and statutory provisions is of no consequence. Promoter/ SBPL being signatory to promoter agreement are bound by it and principle of "estoppel" is indeed applicable on the promoter/SBPL with full force.

165. The petitioner has admittedly installed a sizable number of (more than 200) tenants and licensees and earned profit by way of rent from them. Admittedly, for every transfer of apartment (shop/showroom/ chamber/office), the JDA was entitled to receive transfer fee @ 3% of Collector guidelines rate of the property. The JDA was deprived from this benefit and also the amount of rent by SBPL by putting sub lessees and licensees. This action is not only against the JDA's interest, it is against public interest as well.

166. A Division Bench of this Court in *Vijay Shankar Shukla* (supra) opined as under:

> "(iii) As the agreement entered into with the builder contractor on 20th January 1989 was authorizing the builder to obtain premium

from the first allottee of the shops and thereafter, recommend for allotment to be made and as this phase is already over, now the Municipal Corporation should take over the entire complex disengage the builder and contractor from any activity concerned with the shopping complex, its management or leasing and now all allotment and regularization of the allotment in accordance to the development plan and permission granted on 05.09.1989 should be undertaken by the Municipal Corporation."

[Emphasis Supplied]

167. We are bound by the said decision and principle laid down in the said case. For this reason also, the impugned orders passed by the JDA and State Government cannot be disturbed.

168. We, therefore, find force in the argument of learned counsel for JDA that if promoter/petitioner would have acted in consonance with the specific provisions and object of promoter scheme, the transfer fee and rent would have been paid to JDA which must have been a huge amount considering the number of shops, showrooms, offices, chambers, etc. in the shopping complex. The JDA duly supported its stand by filing the documents Annexure R-2/25, R-2/26 & R-2/28. Thus, in our view, this issue needs to be answered against the petitioner.

Issue No.3:

169. The construction of G+7 floors is questioned mainly on the ground that original sanction was to construct the complex upto G+4 floors only. The promoter has admittedly taken permission/NOC from various statutory authorities for construction of additional three floors. The High Rise Committee in its meeting dated 19.05.2008 decided to permit the petitioner to raise additional three floors. A careful reading of minutes shows that the meeting was attended by High Ranking officers: Divisional Commissioner, Addl. Collector, Superintendent of Police, Commissioner, Municipal Corporation, Executive Engineer (PWD), Addl. Superintending Engineer, Electricity Company, Fire Fighting Officer, Joint Director, Nagar Tatha Gram Nivesh and CEO, JDA. They assembled to take a decision regarding grant of permission to construct additional three floors, but travelled beyond the said subject and heavily recommended to grant additional land of 6240sq.ft. to the promoter. This decision was taken in purported compliance of Niyam 27 (b) of 1975.

170. We have carefully gone through these minutes. Admittedly, till 19.05.2008 the promoter was not owner or lease holder of any piece of land in scheme No.18. Rule 27(b) of 1975 is applicable provided a person is holding a largest piece of land. The said Committee opined that owner of bigger piece of land can seek allotment of adjacent smaller plot without there being any auction

for the same. The said presumption, in our considered opinion, was without any basis. The said meeting was also attended by the then CEO of JDA. The minutes dated 19.05.2008 shows that in the earlier meeting about the "spot" convened on 30.04.2008, a decision was taken that CEO of JDA will clarify the real situation/position about the "land" on the next date of meeting. CEO being in the helm of the affairs, was directed to apprise the Committee in this regard. The CEO was under an obligation to narrate the correct factual aspect with utmost accuracy. Surprisingly, neither the CEO nor any other Officer who attended the said meeting had taken pains to examine whether promoter was actually having any right to seek allotment of adjacent plot on 19.05.2008. The High Rise Committee, in our view, was obliged to rise to the occasion and examine the claim from a higher pedestal. The Committee was required to examine and determine the factual basis and ground realities dispassionately. Only upon fulfilling such obligation, it can be said that the Committee had risen to necessary height. In absence of any allotment, ownership or lease-deed in favour of promoter on the date of said meeting dated 19.05.2008, there was no occasion for the Committee to recommend for grant of additional adjacent land of 6240 sq.ft.

171. However, the ground reality at present is that G+7 floors have been constructed and the entire shopping complex is functional. Thus, any direction to demolish the construction of additional floors will not serve any pubic (sic : public) interest. Hence, we are not inclined to issue any such directions. However, we deem it proper to countenance the finding given by the official respondents against SBPL in relation to monitory aspect. It cannot be disputed that if initially the advertisement would have been issued for construction of G+7 floors, premium amount would have been on a higher side, resulting into more earning for JDA. In additional floors, the SBPL has opened more shops, show-rooms, offices and earned rent therefrom. Rent is being recovered against individual shop/show- room/office etc. Even assuming that total sq.ft. area of construction in the entire complex remained less than the original grant, this will not make any difference because rent is being charged against a particular shop etc. with construction of additional floors, number of shops/show-rooms/offices were also multiplied which essentially provided more monitory & financial benefits to the petitioner. Thus, no fault can be found on the decision of JDA/Government on this aspect.

Issue No.4:

172. Indisputably, in tender document and in Promoter Agreement, a condition was inserted which makes it obligatory for the Promoter to follow the reservation policy of State Government while allotting the shops etc. of the shopping complex. The stand of SBPL is that so called policy formulated by Circulars dated 01.11.2002 (Annexure-P/30), 12.08.2008 (Annexure-P/31) and

Circular dated 30.05.2013 (Annexure-P/32) were not applicable on the shopping complex. Sounding a contra note, the respondents insisted that the said circulars are indeed applicable.

173. This rival stand leads us to read the said circulars carefully. The circular dated 01.11.2002 in the head of "subject" talks about reservation on house/land/commercial piece of lands/shops but in the entire body of this circular, it is nowhere shown that the reservation was made applicable on commercial complex/land. The first para of the circular shows that the earlier circulars in regard to reservation on house/land/commercial lands/shops etc. have been cancelled and a new/instant circular is being issued. The instant circular in its entire body is silent about its applicability on the commercial lands/complex. Similarly, Circular dated 12.08.2008 (Annexure-P/31) although covers various kinds of land, shops etc. in the head of "subject" in the body, regarding its applicability, it is silent about percentage of reservation to be given, in cases of commercial land/complex of this nature. The percentage of reservation is being provided for HIG/MIG/LIG and EWS accommodations. Same is the situation with letter dated 30.05.2013 (Annexure-P/32). Thus, we find substance in the argument of Shri Gupta, learned counsel for SBPL that circulars relating to reservation are not applicable on the commercial complex/land. This is Golden Rule of interpretation that when contents contained in the body of document/provision are clear and unambiguous, no different meaning can be given by reading the heading of the provision. See: 1990 (1) SCC 400, *(M/s. Frick India vs. Union of India),* wherein it was held that heading cannot control the plain words of the provision, they cannot also be referred to for the purpose of construing the provision when the words in the provision are clear and unambiguous, nor can they be used for cutting down the plain meaning of the words in the provision. This principle can be applied in the present case where subject of circulars covers a wider aspect whereas body and contents of circulars do not match with it. Hence, in our view, this issue must be decided in favour of SBPL

Issue No.5:

174. The admitted facts between the parties are that pursuant to the recommendation of High Rise Committee, the JDA in purported exercise of enabling provision, namely, Rule 27 (b) of Rules of 1975 decided to allot 6240 sq.ft. additional land to the Promoter/SBPL. Relevant portion of Rule 27 reads as under:

> "Notwithstanding anything contained in Rules 24 to 26, the authority may dispose of any land by sale without auction or exchange in the following cases- (a).....

(b) where the plot is to be transferred to *adjacent to a largest plot held* previously by a person who has asked for such adjoining plot."

[Emphasis Supplied]

175. We have already noticed in this judgment that on the date High Rise Committee meeting had taken place, the Promoter/SBPL were not holding any plot of land in the relevant scheme, what to say of a largest plot. In other words, the precondition of applicability of Clause (b) aforesaid was that largest plot is already held by a person who is claiming the adjoining plot. We have also countenanced the decision of official respondents in cancelling the lease deed dated 30.05.2008 which became foundation for grant of additional land of 6240 sq. ft. to the petitioner. Since, the grant of largest piece of land to SBPL through lease deed dated 30.05.2008 stood cancelled, very foundation of allotment of additional land became non-existent automatically.

176. The petitioner seeks to prevent interference by this Court on this issue on the ground that writ petition of YMCA bearing W.P. No.3751/2006 claiming very same piece of land was dismissed. The JDA in the said case, justified the grant of additional land to SBPL. No writ appeal was filed by JDA against the order dated 18.10.2013 passed W.P. 3751/2006.

177. This argument in the first glance appears to be impressive but pales into insignificance for twin reasons. Firstly, in W.P. No.3751/2006, as per the fact situation prevailing at that point of time, the lease deed dated 30.05.2008 was not subject matter of challenge. Hence, withstanding the said sale deed, JDA supported the action of allotment of additional land. At present, the factual scenario has undergone a change and the very foundation on which edifice of additional grant of land was based, does not survive. The settled law is that a singular different fact in the subsequent case may change the precedential value of a judgment. [See: Judgment of Supreme Court in *Bhawnagar University* (supra).].

178. Secondly, the JDA and present petitioner were co-defendants in W.P. 3751/2006. There was no adjudication on the validity of the allotment of land between the petitioner and the JDA. Thus, judgment dated 18.10.2013 does not operate as *res judicata* between the petitioner and the JDA. In 2005 (6) SCC 304, *(Makhija Construction vs. IDA),* it was held as under:

"16. However, the appellant is entitled to succeed on the ground that the order of the Division Bench disposing of Crescent's appeal operated as *res judicata* to bind not only Crescent but also Jagriti and the appellant. It makes no difference that Jagriti was a co-respondent with the appellant. The principle of *res judicata* has been held to bind co-defendants if the relief given or refused by the

> earlier decision involved a determination of an issue between co-defendants (or co-respondents as the case may be). This statement of the law has been approved as far back as in 1939 in *Munni Bibi v. Tirloki Nath* [(1931) 58 IA 158 : AIR 1931 PC 114] , IA at p. 165. where it has been said that to apply the rule of *res judicata* as between co-defendants three conditions are requisite: (AIR p. 117) "*(1)* There must be a conflict of interest between the defendants concerned; *(2)* it must be necessary to decide this conflict in order to give the plaintiff the relief he claims; and *(3)* the question between the defendants must have been finally decided."
>
> **[Emphasis Supplied]**

179. This view has been consistently followed by the Apex Court. *{See: Iftikhar Ahmed v. Syed Meharban Ali,* [(1974) 2 SCC 151] where the principle was extended to bind co-plaintiffs; *Mahboob Sahab v. Syed Ismail* [(1995) 3 SCC 693 : AIR 1995 SC 1205].

180. In 1995 (3) SCC 693, *(Mahboob Sahab Vs. Syed Ismail & Ors.)* the finding is as under:

> "8. But for application of this doctrine *(res judicata)* between co-defendants four conditions must be satisfied, namely, that (1) there must be a conflict of interest between the defendants concerned; (2) it must be necessary to decide the conflict in order to give the reliefs which the plaintiff claims; (3) the question between the defendants must have been finally decided; and (4) the co-defendants were necessary or proper parties in the former suit."
>
> **[Emphasis Supplied]**

181. For these twin reasons, this issue is decided against the petitioner.

Issue No.6:

182. The point needs determination is whether as per Board's decision No.7 dated 13.01.1992 (Annexure-R/2/22-A), the Chairman of the JDA was competent and justified in taking decision to waive the interest on delayed payment of the premium by SBPL. The first portion of this document is the background note prepared for consideration of the Board. In the note, it is mentioned that as per decision taken in the Board's meeting dated 06.06.1991 (Subject No.22), the Chairman of the Board was authorized to waive the interest in special circumstances on humanitarian grounds. The discretion was given to Chairman to exempt 25% interest and grant Rs.10,000/- cash relief. As per said note, the decision taken in the earlier meeting was not clear and, therefore, matter was again

placed for authorizing the Chairman to take decision in general cases. In turn, decision No.713 was taken by cancelling the earlier decision No.22.

183. We have carefully gone through the decision No.713 regarding "waiver of interest" and find force in the argument of Shri Nidhesh Gupta that the said decision is in two parts and both the parts needs to be read disjunctively. The first part covers displaced persons, who are being displaced because of implementation of any Scheme of JDA or because of any natural calamity. The persons who are displaced because of natural calamity, on the recommendation of the Collector became entitled to get exemption up to Rs.10,000/- as per the discretion of the Chairman. The second part is applicable to all such cases where loan was due. By considering the merits of a particular matter, the Chairman was authorized to waive interest up to 25%. The petitioner's claim, in our opinion, is covered by second portion. It cannot be said that the decision of Chairman to waive interest was without any authority. The decision of Chairman is not shown to be mala fide or without competence. Impugned orders to this extent are liable to be interfered with. This issue is answered accordingly.

Issue No.8, 9 & 16:

184. The Bank of Baroda raised three points in its return submissions. Firstly, it is argued that in view of Section 128 of Contract Act, the JDA after having given consent to mortgage the property as security for loan and after taking liability of surety cannot take a U-turn. The judgments of *Bank of Bihar & Punjab National Bank* (supra) are relied upon.

185. The second point is regarding applicability of principle of "promissory estoppel" which is canvased by taking assistance of judgments of Supreme Court in *Anglo Afgan Agencies & in Sharma Transports* (supra). The third point is regarding violation of principles of natural justice because no opportunity of hearing was afforded before cancellation of undertaking given by JDA to the Bank. Reference is made to the judgments of Supreme Court in *AK Kraipak, Rajendra Shukla and Manohar* (supra).

186. We deem it proper to deal with aforesaid points simultaneously. The point one & two are interlinked. The judgments in Bank of Bihar and Punjab National Bank (supra) are related to claim of the Bank founded upon Section 128 of Contract Act against an individual. The aspect of public interest, public property etc. were not subject matter of analysis in the said cases. The question of applicability of principle of promissory estoppel against Government/statutory authority came up for consideration before a Five Judge Bench of Supreme Court in 1973 (2) SCC 650, *[M. Pamanatha Pillai vs. State of Kerala and another]* wherein it was held as under:

> "37.....In American Jurisprudence 2d at page 783 para 1, 2, 3 it is stated 'Generally, a State is not subject to an estoppel to the same extent as in an individual or a private corporation. Otherwise, it might be rendered helpless to assert its powers in government. Therefore, as general rule the doctrine of estoppel will not be applied against the State in its governmental, public or sovereign capacity. An exception however, arises in the application of estoppel to the State where it is necessary to prevent fraud or manifest injustice'." The estoppel alleged by the appellant Ramanatha Pillai was on the ground that he entered into an agreement and thereby changed his position to his detriment. The High Court rightly held that the Courts excludes the operation of the doctrine of estoppel, when it is found that the authority against whom estoppel is pleaded has owed a duty to the public against whom the estoppel cannot fairly operate."

[Emphasis Supplied]

187. In *Mukesh Singh Chaturvedi vs. State of M.P.,* reported in 2013 (2) MPLJ 573, before this Court the petitioner therein pressed the said principle in relation to nature of a land on the basis of certificates/declarations given by various statutory authorities, namely, Nazul Department, Town & Country Planning, Municipal Corporation and Public Health Engineering Department. In addition, the reliance was placed on an answer given in the State Assembly in respect to a star question wherein a nature of a particular land was admitted by the government. In view of aforesaid certificates/decelerations (sic : declarations)/NOCs it was argued that Government cannot resile from their stand in relation to nature of land. The argument was repelled by Gwalior Bench on the basis of judgment of Apex Court in *Ramanatha Pillai* (supra) and it was held that promissory estoppel cannot be pressed into service against government when government is fulfilling public duty as per public policy. If said principle is blindly applied, it will lead to a situation where government would be prevented from acting in public interest and would be debarred from performing public duty. Government is always at liberty to examine the record with accuracy and precisions and ensure that public/government land is not misused or enjoyed by anybody without there being any entitlement for the same.

188. Similarly, in the case of *Amrit Banaspati* (supra), the exposition of law is that promissory estoppel being an extension of principle of equity, the basic purpose of which is to promote justice founded on fairness and releave a promise of any injustice perpetrated due to promisor going back on its promise is incapable of being enforced in a Court of law if the promise which furnished the cause of action or the agreement, expressed or implied, giving rise to binding contract is statutory prohibited *or is against public policy*. It is further held that any promise or agreement to refund amount which was due in accordance with law would be a fraud on the constitution and breach of faith of the people.

189. As analyzed above, the execution of lease-deed of land dated 30.05.2008 which became reason/foundation for grant of loan to SBPL, itself was contrary to law and against public interest. Thus, principle of promissory estoppel or for that matter Section 128 of Contract Act cannot be pressed into service in the case of this nature. Since the cancellation of sale-deed dated 30.05.2008 got a stamp of approval from this Court which was the foundation for SBPL to obtain loan, no fault can be found in the action of JDA in withdrawing its consent/undertaking letter dated 15.04.2011. The decision of JDA is taken in public interest and as per public trust doctrine. Curiously, the judgment of *Sharma Transport* (supra) was heavily relied upon by Shri Shroti, learned senior counsel in the case of *Motiram Madhiyam* (supra) also. The Division Bench of this Court opined that if said judgment is understood in proper perspective, the ratio laid down therein does not assist the appellants, on the contrary, it reiterates the principle of public interest. Thus, we have no hesitation to hold that public interest is a paramount consideration in cases of this nature. We are bound by the principle laid down by Five Judge Bench in *M. Ramanatha Pillai* (supra) and in view of aforesaid Constitution Bench judgment, the other judgments cited by Shri Shroti, learned senior counsel are of no assistance.

190. So far third point regarding applicability of principles of natural justice is concerned. Suffice it to say that in *Nitu Prajapati, Motiram Mandhyani* (supra) and in *Adhatala Shiksha Samiti* (supra) this Court clearly held that where transfer of land had taken place in flagrant violation of mandatory provisions of Niyam of 1975, the action is *void ab inito* and principles of natural justice has no application. On the contrary, principle of useless formality is applicable. Hence for the reasons stated above, neither the bank nor the tenants' prayer for interference on the ground of violation of principles of natural justice of estoppel can be entertained. Thus, these issues are decided against the Bank/tenants.

Issue No.10:

191. The whistle blower has urged that allotment of additional land of 1399 sq.ft. to the promoter was bad in law. The contention of said petitioner is that the advertisement was issued for allotment of 39780 sq.ft. land for construction of shopping complex, whereas 41179 sq.ft. was actually allotted to the promoter. The premium with interest for allotment of this additional land be recovered from promoter/SBPL.

192. The SBPL refuted the said allegation of petitioner and contended that the land mentioned in the advertisement is 3827 sq. mt. which comes to 41179 sq. ft. The same amount of land is shown in Page 6 of the tender document. Drawing of site plan of such scheme attached to the tender notice also provide the area statement of the complex to be constructed over the land ad-measuring 41179 sq. ft.

193. The petitioner, during the course of argument, was unable to substantiate that additional land was allotted to SBPL. Thus, this issue is decided against the petitioner of PIL. Similarly, the claim of petitioner for construction of road as per M.P. Bhumi Vikas Niyam, 2012 i.e. 78ft. wide, cannot be accepted for the simple reason that at the time of construction of complex, the Rules of 2012 were not even introduced. At the relevant time, M.P. Bhumi Vikas Rules, 1984 were prevailing. The petitioner of PIL is unable to show that any violation of the Rules in vogue, had taken place. In addition, it is stated by the State also in its return that provisions of M.P. Bhumi Vikas Rules, 1984 were complied with. Rules 90-A and 90-B prescribe the norms for establishment of *Mall* which were duly complied with. Thus, prayer made in the PIL in this regard must fail.

Issue No. 11:

194. The petitioner of PIL raised objection about the action of JDA wherein expenses for laying high-tension electricity line was borne by JDA.

195. We have carefully gone through this aspect. In the impugned order dated 27.06.2016 (Annexure-P/12) the JDA has dealt with this point extensively. The factual backdrop in which said decision was taken is clearly spelled out. The Board's decision is based on a resolution dated 23.10.2009. In the said resolution it was pointed out that in scheme No.18, various complexes are coming up such as Dainik Bhasker, Apex Bank, Samdariya Shopping Mall etc. for which a high power load of electricity will be required. It is clearly mentioned that in the financial year 2009-10, there was no provision for expenditure in the head of "electrification". Such "head" is given for a different scheme i.e., Scheme No.31. In Scheme No.31, the work was not progressing and, therefore, the said amount of Rs.30 lac may be transferred from the head of Scheme No.31 for utilization in Scheme No.18.

196. It is seen that Clause 34 of promoter agreement provides about "development work" and shows that it is the duty of promoter to draw high-tension electricity line, install transformer and draw cable from transformer to the building. The promoter and JDA being party/signatory to this agreement were bound by the conditions of said agreement. As per condition No.34 aforesaid, the expenditure for getting high power electricity connection was required to be borne by the promoter and not by the JDA. Thus, we fine (sic : find) substantial force in the argument of Shri NS Ruprah that the said expenditure must be borne by the promoter/SBPL. We order accordingly and set aside the impugned orders to the extent JDA had taken the said financial burden of electrification against the public interest on its shoulders.

Issue No.12:

197. The question of fixing of rate of ground rent is subject matter of adjudication in WA-334-2013. No doubt, in WP-9343-2010 the respondent JDA

was directed to calculate the amount of yearly rent as per provisions of amended rule 47 of Niyam of 1975. Against this order of writ court, said WA is pending. Although no interim order has been granted by Division Bench in said appeal, since this very same issue is subject matter of adjudication, propriety demands that the said issue may be decided in the previously instituted litigation. Thus, we refrain to address this issue.

Issue No.13:

198. The petitioner of PIL prayed for demolition of three additional floors or in alternatively prayed for necessary directions against SBPL in order to realize the monitory benefits earned by it by constructing additional floors. We are of the view that the additional floors were constructed after obtaining necessary permission from High Rise Committee. The complex and the additional floors are property of JDA/public and therefore, no useful purpose would be served in issuing the direction to demolish three additional floors. However, as discussed, the official respondents will at liberty to take appropriate steps for implementation of impugned orders in this regard. This issue is answered accordingly.

Issue No.14:

199. The petitioner of PIL prayed for direction to Lokayukta organization to take into account the impugned orders/reports and findings recorded therein for the purpose of investigation and proceed on that basis and the take proceedings to a logical end.

200. As per the parent Adhiniyam i.e., M.P. Lokayukt Evam Up-Lokayukt Adhiniyam, 1981 the petitioner has a remedy to approach the competent authority and, therefore in this petition, we are not inclined to entertain this prayer. Liberty is, however, reserved to the petitioner to approach the appropraite (sic : appropriate) Forum.

Issue No.15:

201. In the PIL, the petitioner has raised serious objection in the manner name of shopping complex is given as "Samdariya Mall" and prayed for a direction to change the name of Mall as Mahatma Gandhi Mall or any other name of like nature etc. We are only inclined to observe that in this judgment we have clearly held that the ownership of land and shopping complex always remained with the JDA. Thus, it is within the province/domain of JDA to decide the name of the shopping complex. The promoter/SBPL had no authority to decide the name of a shopping complex as per the tender document, promoter agreement r/w provisions of Prakoshta Adhiniyam. Thus, it will be open to JDA to appropriately change the name of the Shopping Complex/Mall. This issue is decided accordingly.

202. We will be failing in our duty if WP-2119-2016 (PIL) and WP-3665-2004 are not taken into account. During the course of hearing, nobody appeared in WP-3665-2004 and nobody pressed any relief arising out of WP-2119-2016. In WP-3665-2004 the relief claimed was to prevent the JDA from permitting any construction on the land in question and keep open/parking place for general public. By passage of time these reliefs have lost their significance. Shopping complex has already been constructed and in previous paragraphs, we have dealt with the aspect of width of road etc. In WP-2119-2016 the petitioner has prayed for certain reliefs which were already considered by this Court in this judgment. Hence, this petition also does not require any further consideration.

203. In view of foregoing analysis, in WP-9733-2017, the impugned orders passed by State/JDA to the extent SBPL was held responsible for not following the reservation policy for allotment of shop and to the extent the action of Chairman of JDA in waiver of interest on belated payment of premium was held to be illegal, are set aside. Remaining part of impugned orders with regard to SBPL are affirmed. The WP-10158-2017 filed by Bank of Baroda against JDA is dismissed. WP-12898-2017 filed by leasees/tenant is also dismissed. WP-10406-2017 (PIL) is allowed in part to the extent mentioned in answer to Issue No.2 & 11. As a consequence, the JDA shall recover the expenditure of laying high-tension electricity line for commercial complex constructed by promoter/SBPL. It will also be open to the JDA to take appropriate action in accordance with law as per the findings given relation to Issue No.15. For the reasons stated in Para No.202, WP-2119-2016 & WP-3665-2004 are also disposed of. There shall be no order as to cost.

Order accordingly

I.L.R. [2019] M.P. 102 (DB)
WRIT PETITION
Before Mr. Justice P.K. Jaiswal & Mr. Justice Vivek Rusia
W.P. No. 6304/2011 (Indore) decided on 23 October, 2018

IDEA CELLULAR LTD. (M/S.) …Petitioner
Vs.

ASSISTANT COMMISSIONER,
COMMERCIAL TAX & ors. ...Respondents

(Alongwith W.P. Nos. 6645/2012, 8408/2013, 2760/2014, 7534/2014, 5517/2015, 2328/2016, 308/2017, 6076/2018, VATA Nos. 2/2013, 3/2013, 13/2014, 14/2014, 2/2015, 3/2015, T.R. Nos. 108/2017, 109/2017 & 110/2017)

A. Entry Tax Act, M.P. (52 of 1976), Section 2(1)(aa) & 3(1) – Dealer – Telecommunication Services – Liability for Taxation **– Held – As per**

definition of Section 2(1)(aa) "entry of goods into a local area" means entry of goods into that local area from any place outside other than that local area – Assesse, in order to do the business brings plant & machinery, equipment etc to the local area from outside – Entry Tax is chargeable on entry of such goods – Appellant/assesse is engaged in activities of supply or distribution of goods for its consumption and use and thus is a "Dealer" as per the Act of 1976 and is covered by charging Section 3(1) of the Act – Assesse liable to pay entry tax – Petitions/Appeals & TR dismissed. (Para 25 & 26)

क. प्रवेश कर अधिनियम, म.प्र. (1976 का 52), धारा 2(1)(एए) व 3(1) – डीलर – दूर–संचार सेवायें – कराधान हेतु दायित्व – अभिनिर्धारित – धारा 2(1)(एए) की परिभाषा के अनुसार ''स्थानीय क्षेत्र में माल का प्रवेश'' का अर्थ है उस स्थानीय क्षेत्र के व्यतिरिक्त अन्य किसी बाहरी स्थान से उस स्थानीय क्षेत्र में माल का प्रवेश – निर्धारिती, व्यवसाय करने के लिए, बाहर से स्थानीय क्षेत्र में संयंत्र व मशीनरी, उपस्कर इत्यादि ले आया – उक्त माल के प्रवेश पर प्रवेश कर प्रभार्य है – अपीलार्थी/निर्धारिती माल के उपभोग एवं उपयोग हेतु उसके प्रदाय या वितरण के क्रियाकलापों में लिप्त है और इसलिए 1976 के अधिनियम के अनुसार एक ''डीलर'' है और अधिनियम की प्रभारी धारा 3(1) द्वारा आच्छादित है – निर्धारिती प्रवेश कर अदा करने के लिए दायी है – याचिकाएँ/अपीलें व कर निर्देश खारिज।

***B. Entry Tax Act, M.P. (52 of 1976), Section 3(1) – SIM Cards – Liability for Taxation* – Held – Assesse company though not selling the SIM cards to its customers, but are supplying the same in order to provide services – SIM cards can be termed as "goods" for purpose of Entry Tax as the same is being used and consumed in order to provide service to the customer by the Assesse – It will fall under the incidence of taxation u/S 3(1) of the Act of 1976.**

(Para 22 & 26)

ख. प्रवेश कर अधिनियम, म.प्र. (1976 का 52), धारा 3(1) – सिमकार्ड – कराधान हेतु दायित्व – अभिनिर्धारित – निर्धारिती कंपनी, यद्यपि उसके ग्राहकों को सिम कार्ड का विक्रय नहीं कर रही परंतु सेवाएं प्रदान करने के लिए उसका प्रदाय कर रहे हैं – सिम कार्ड को, प्रवेश कर के प्रयोजन हेतु ''माल'' कहा जा सकता है क्योंकि निर्धारिती द्वारा उसका उपयोग एवं उपभोग, ग्राहकों को सेवा प्रदान करने के लिए किया जा रहा है – यह, 1976 के अधिनियम की धारा 3(1) के अंतर्गत कर के भार के अंतर्गत आयेगा।

***C. Entry Tax Act, M.P. (52 of 1976), Section 3(1) and VAT Act, M.P. (20 of 2002), Sections 2(1), 2(1)(a) & (d) – Liability for Taxation – Classification* – Held – Entry Tax is not part and parcel of VAT Act, where a dealer who is covered under the VAT Act is only liable to Entry Tax – Any businessman who brings goods for consumption, use or sale is liable to pay Entry Tax whether he is a dealer under VAT Act or not. (Para 21)**

ग. प्रवेश कर अधिनियम, म.प्र. (1976 का 52), धारा 3(1) एवं वैट अधिनियम, म.प्र., (2002 का 20), धाराएँ 2(1), 2(1)(ए) व (डी) – कराधान हेतु दायित्व – वर्गीकरण – अभिनिर्धारित – प्रवेश कर, वैट अधिनियम का अनिवार्य अंग नहीं है जहां एक डीलर जो वैट अधिनियम के अंतर्गत आच्छादित है, केवल प्रवेश कर के लिए दायी है – कोई व्यवसायी जो उपभोग, उपयोग या विक्रय हेतु माल लेकर आता है, प्रवेश कर अदा करने के लिए दायी है चाहे वह वैट अधिनियम के अंतर्गत एक डीलर हो अथवा नहीं हो।

Cases referred :

(2006) 145 STC 91, (2001) 26 TLD 81 (SC), (2007) 11 STJ 297 MP, W.P. No. 7631/2014 order passed on 03.01.2017, 1995 Supp (1) SCC 673, (1994) STC 589, (2004) 4 SCC 705, 2017 SCC Online Bom. 8555 = 2018 (3) Mah. Law Journal 430, (2011) 2 SCC 54.

Sumeet Nema with *Gagan Tiwari*, for the Assesses.
Romesh Dave, G.A. for the respondents/State.

O R D E R

The Order of the Court was passed by :
VIVEK RUSIA, J. :- All above writ petitions, VAT Appeals and T.R.s' involves common questions of law; hence all are being decided by this common order.

Interpretations of provisions of following enactments are involved in these cases :-

(i) Madhya Pradesh Sthaniya Kshetra Me Mal Ke Pravesh Par Kar Adhiniyam, 1976 (hereinafter referred as **"MP Entry Tax Act")**

(ii) Madhya Pradesh Commercial Tax Act, 1994 (hereinafter referred as **"MPCT Act"**) and

(iii) Madhya Pradesh Value Added Tax Act, 2002 (hereinafter referred as "VAT Act").

2. The Assesses and appellants company are engaged in the activities of providing telecommunication services are herein after referred as **"Assesse"**.

W.P. No.6304/2011 has been filed by the Assesse being aggrieved by order dated 29.3.2010 passed by Assessing Authority and order dated 30.4.2011 passed by the Appellate Authority, by which, entry tax has been imposed under the M.P. Entry Tax Act for the period 2007-2008 over various goods like building material, plant & machinery, computer hardware, computer software, furniture fixers, office-equipment, vehicle, CWIP plant & machinery, SIM cards, recharge voucher, marketing material, etc. brought within the local area.

W.P. No.6645/2012 has been filed by the Assesse being aggrieved by assessment order dated 16.4.2012 passed by the Assessment Authority, by which,

entry tax has been imposed over various goods brought within the local area under the M.P. Entry Tax Act for the period 2009-2010.

W.P. No.2760/2014 has been filed by the Assesse being aggrieved by assessment order dated 21.12.2012 passed by the Assessment Authority, by which, entry tax has been imposed over various goods brought within the local area under the M.P. Entry Tax Act for the period 2008-2009.

W.P. No.8408/2013 has been filed by the Assesse being aggrieved by assessment order dated 19.3.2013 passed by the Assessment Authority, by which, entry tax has been imposed over various goods brought within the local area under the M.P. Entry Tax Act for the period 2010-2011.

W.P. No.7534/2014 has been filed by the Assesse being aggrieved by assessment order dated 31.7.2014 passed by the Assessment Authority, by which, entry tax has been imposed over various goods brought within the local area under the M.P. Entry Tax Act for the period 2011-2012.

W.P. No.5517/2015 has been filed by the Assesse being aggrieved by assessment order dated 28.2.2015 passed by the Assessment Authority, by which, entry tax has been imposed over various goods brought within the local area under the M.P. Entry Tax Act for the period 2012-2013.

W.P. No.2328/2016 has been filed by the Assesse being aggrieved by assessment order dated 30.1.2016 passed by the Assessment Authority, by which, entry tax has been imposed over various goods brought within the local area under the M.P. Entry Tax Act for the period 2013-2014.

W.P. No.308/2017 has been filed by the Assesse being aggrieved by assessment order dated 30.12.2015 passed by the Assessment Authority, by which, entry tax has been imposed over various goods brought within the local area under the M.P. Entry Tax Act for the period 2003-2004.

W.P. No.6076/2018 has been filed by the Assesse being aggrieved by assessment order dated 23.1.2018 passed by the Assessment Authority, by which, entry tax has been imposed over various goods brought within the local area under the M.P. Entry Tax Act for the assessment year 2015-2016.

VATA No.2/2013 has been filed by the appellant u/s. 53 of M.P. VAT Act, 2002 against the order dated 23.10.2012 passed in the appeal by M.P. Commercial Tax Appellate Board, Bhopal for the period 2006-2007 (entry tax).

VATA No.3/2013 has been filed by the appellant u/s. 53 of M.P. VAT Act, 2002 against the order dated 23.10.2012 passed in the appeal by M.P. Commercial Tax Appellate Board, Bhopal for the period 2005-2006 (entry tax).

VATA No.13/2014 has been filed by the appellant u/s. 53 of M.P. VAT Act, 2002 against the order dated 22.7.2014 passed in the appeal by M.P. Commercial Tax Appellate Board, Bhopal for the period 2003-2004 (entry tax).

VATA No.14/2014 has been filed by the appellant u/s. 53 of M.P. VAT Act, 2002 against the order dated 22.7.2012 passed in the appeal by M.P. Commercial Tax Appellate Board, Bhopal for the period 2003-2004 (entry tax).

VATA No.2/2015 has been filed by the appellant u/s. 53 of M.P. VAT Act, 2002 against the order dated 3.9.2015 passed in the appeal by M.P. Commercial Tax Appellate Board, Bhopal for the period 2004-2005 (entry tax).

VATA No.3/2015 has been filed by the appellant u/s. 53 of M.P. VAT Act, 2002 against the order dated 6.4.2015 passed in the appeal by M.P. Commercial Tax Appellate Board, Bhopal for the period 2005-2006 (entry tax).

T.R. No.108/2017, T.R. No.109/2017 and **T.R. No.110/2017** are references sent to this Court by M.P. CommercialTax Appellate Board, Bhopal vide order dated 26.12.2014 respectively for the period 1.4.1998 to 31.3.1999; 1.4.1999 to 31.3.2000; and 1.4.2000 to 31.3.2001 on following substantial questions of law :

"1. Whether the appellant who is engaged in the activity of providing telecommunication services to its customers not involving any activity of buying, selling, supplying or distributing of goods can be said to be a 'dealer carrying on business' within the meaning of the provisions of the M.P.C.T. Act, 1994 and whether the applicant can be said to be covered by the provisions of charging section of the M.P. Entry Tax Act, 1976 viz. Section 3(1) and be subjected to Entry Tax?

2. Whether the appellant is liable to pay Entry Tax on goods imported from outside India on which Customs Duty has been paid as the said levy violates Article 286 of the Constitution of India and is also beyond the purview of Section 3 of the Entry Tax Act read with Section 2(aa) of the Act?

3. Whether entry of SIM cards and Recharge Coupons is liable for Entry Tax despite the fact that these SIM Cards and Recharges Coupons have been held not to constitute goods by the Supreme Court and are only covered by Finance Act, 1994 as being liable to Service Tax?"

The answer to the aforesaid questions would also decide the writ petitions challenging various assessment orders as well as appellate order passed by the appellate authority in respective first appeals filed under provision of MP **Entry Tax Act.**

3. The Assesse is a Limited Company incorporated and registered under the provisions of Companies Act, 1956. The Assesse Company is engaged in the activity of providing telecommunication services to its customer under the license granted by the Department of Telecommunication, Government of India. Under the said license, the Assesse has been authorized for establishing, maintaining and operating the basic telecommunication services in the service area. For the aforesaid purpose, the Assesse had established its Branches/Establishment Offices and transmission units for electromagnetic waves and radio frequencies in the entire State of Madhya Pradesh. According to the Assesse, its activities are purely service oriented activity and there is no involvement element of sale and porches of goods and same is also outside the purview of provisions of MPCT Act and thereafter VAT Act. Although later on, the Assesse company obtained a registration under the provisions of MPCT Act and VAT Act, 2002 in view of the amendment under Section 8(3)(b) of the Central Sales Tax Act in order to availing the concessional rates and tax rebate by way of form 'C' etc. The aforesaid benefit of concession was given under the provisions of MPCT Act (now, VAT Act, 2002) to encourage the telecommunication sector as a whole so that the Assesse could spread their network throughout the country. That while obtaining the registration the Assesse Company has declared its activity as that of providing telecommunication service as its principal activity. The Assesse obtained the aforesaid registration as a matter of abundant caution which cannot be presumed that it has accepted the applicability of the Commercial Tax Act and the Central Sales Tax Act as there is no business of sale and purchase. The Apex Court in case of *Bharat Sanchar Nigam Limited and Others Vs. Union of India & Others,* reported in (2006) 145 STC 91 has already held that mobile service is nothing but an electromagnetic waves and radio frequencies which do not constitute goods and no sale of goods as such is involved in the activity of providing telecommunication services. In order to provide the telecommunication services to its users, the telecommunication equipment, plant, machinery were brought within the local area of the State from outside place of Madhya Pradesh even from the outside of India. Such incident of taxation is under the MP Entry Tax Act is upon the dealer who is defined under the MACT / VAT Act and who in course of its business effects the entry of goods into the local area and since the Assesse is neither a dealer nor carrying on business as defined under the MACT/ VAT Act is not subjected to the tax under the MP Entry Tax Act. The respondents have levied the Entry Tax as well as penalty upon the Assesse for deferent periods.

4. Being aggrieved by the order of assessment, the Assesse preferred an appeal before the First Appellate authority who has dismissed and affirmed the order of assessing authority. In some cases, the Assesse preferred an appeal to the second appellate authority under Section 46(2) of the Madhya Pradesh VAT Act, 20202 (sic : 2002) before the Appellate Board. The Board has also maintained the order of assessment authority, hence in those matters assesse have filed, VAT appeals have been filed before this Court and which have been admitted by this Court on three substantial questions of law as reproduced above. In some cases the Appellate Board has send the reference to this court after framing three substantial questions of law as reproduced above.

5. The Assesse has assailed the impugned orders on the ground that the incident of MP Entry tax under Section 3(1) gets attracted if the dealer in course of his business brings the goods as specified either in schedule II or III into the local area. If such person who is affecting entry of goods is not a dealer in the course of business as a dealer then no Entry Tax can be levied. Article 286 of the Constitution of India does not permit the State to levy tax on the sale and purchase of the goods which takes place into course of import or export out of territory of India. Since, the MP Entry Tax does not provide definition of word "Business" but same is defined in the VAT Tax Act, 2002 and same has been borrowed for applying the provisions of MP Entry Tax Act. The Assesse has assailed the impugned orders on the ground that the telecommunication services provided by the Assesse is not a business of buying, selling, supplying or distribution of goods, therefore, the Assesse by no stretch of imagination can be called as **Dealer** for the purpose of MP Entry Tax Act. The plant and machineries, electronic equipment etc. brought by the Assesse within the State of Madhya Pradesh in order to provide the telecommunication service which does not involve any processing of plant and machinery and any conversion of such plant and machinery into new or different commercial commodity does not constitute either used or consumption in the course of business by the dealer, hence, imposition of entry tax and penalty is wholly unjustified and arbitrary.

6. After notice, the State Government filed the return by submitting that the writ petition is not maintainable in which the Assesse has directly approached this Court against the assessment order or against the order passed by the first appellate authority without resorting the remedy of second appeal to the appellate board, hence, petition is liable to be dismissed on this preliminary grounds. On merit, it is submitted that the Assesse is engaged in the business of providing telecommunication services and purchased the goods in the course of business and also consuming/using such goods in order to provide the telecommunication services is definitely liable to pay the Entry Tax. The scope of definition of "Business" under Clause (d) Section 2 of the MP VAT Act, 2002 is very wide and according to which any transaction of sale or purchase of good in connection with

or incidental or ancillary to the trade, commerce, manufacture adventure or concerned are within the purview of Entry Tax. In order to provide the telecommunication services, the Assesse purchased the goods against the form "C" and is also got registered as dealer under the provisions of MP VAT Act and Sales Tax Act, 1956, therefore, liable to pay the tax under Madhya Pradesh VAT Act so also under the Entry Tax Act. Under Section 11 of the MP Entry Tax Act, the burden for proving that the dealer is not liable to pay the Entry Tax is on the dealer. Despite the decision of the Apex Court in case of *Bharat Sanchar Nigam Limited* (supra), the Assesse has continued with its registration under the Sales Tax Act and VAT Act . It is further submitted that for levying the Entry Tax, the term called "on the entry of good into a local area from the outside, alone is relevant and itis immaterial that from where the goods come from.

7. The Apex Court in case of *Assistant Commissioner (Intelligence) Vs. Nandram Construction Company,* reported in (2001) 26 TLD 81 (SC) has held that for carrying on a business, it is not necessary that the goods brought must be sold. Any person who is engaged in the business of construction of immovable property was held to be a dealer and liable to pay purchase tax on the goods purchased from the registered dealer despite that, he is not selling the goods. Accordingly, the Assesse who is carrying on a business purchase the goods are not necessary to be saleable commodity. The Assesse is enjoying the benefit of Section 8(1) & 8(4) of the Central Tax Act, purchased the goods against form 'C', then cannot claim that it is not a dealer, therefore, the Assesse being a dealer is covered under the provisions of Section 3(1) of the MP Entry Tax Act. Since, the Assesse consumed or used the goods while providing the services is liable to pay the entry tax, hence, the petitions and appeals are liable to be dismissed.

8. Shri Sumeet Nema, learned Senior Advocate appearing on behalf of the Assesse argued that when the Assesse started its activities in the State of Madhya Pradesh, the question whether the telecommunication service is covered under the Sales Tax/Commercial Tax and any element of sale of goods is involved in such activities was a doubtful issue, as such, the Assesse obtained the registration under the MPCT Act and the Central Sales Tax Act as a matter of abundant caution, but such registration can by no stretch of imagination make the Assesse a dealer and liable to pay Sales Tax/Commercial Tax. Thereafter Apex Court in case of *Bharat Sanchar Nigam Limited* (Supra) has held that the electromagnetic waves and radio frequencies do not constitute goods and no sale of goods as such is involved. The Assesse has brought various plants and machineries, electronic equipment etc. for installation in the State of Madhya Pradesh for the purpose of setting up the telecommunication network, but the Assesse is neither a dealer, nor carrying on business as defined under the MPCT Act, hence, not liable to pay the Entry Tax in its return. Since, the Assesse is not covered by charging section; no assessment could be made against it. According to Shri Nema, learned senior counsel

appearing on behalf of the Assesse, Section 3 of the MP Entry Tax Act is a charging section and any person settled with the liability under the Act, must be shown that he falls within the charging section. Section 2(2) of the MP Entry Tax Act incorporates the definition of MP VAT Act, 2002 and according to which, any person who carry on the business of buying, selling, supplying and distribution of goods is a dealer. Since, the Assesse company is engaged in the service oriented activity i.e. telecommunication services, which is not a business of buying, selling, supplying or distribution of any goods hence the Assesse cannot said to be a dealer under the VAT Act so also under the MP Entry Tax Act. He placed heavy reliance over the judgment passed by the Apex Court in case of *Bharat Sanchar Nigam Limited* (supra) in which it has been held that in a business of mobile network no element sale of goods are involved therein, the transaction is purely one of service activity as there is no transfer of right to use the goods at all. Shri Nema, learned senior Advocate has further placed reliance over the judgement passed in the case of *Western Coalfields Limited Vs. Commissioner of Commercial Tax (MP), reported in (2007) 11 STJ 297 MP* in which the division bench of this Court held that the definition of a dealer means a person who carries on a business of buying, selling, supplying or distributing the goods as in the case of Defence Department of the Government of India does not carry on the business of buying, selling, supplying or distributing the goods is not a dealer. Shri Nema, learned Senior Advocate further emphsised that the Assesse cannot be assessed simultaneously under Section 3(1) as well as under 3(2) of the MP Entry Tax Act. The assessing authority has levied the tax under sections 3(1) as same is applicable to a dealer who brings the goods in the course of business and Section 3(2) is applicable to any person who brings the good in the local area for consumption, use or sale, therefore, a dealer who is liable to pay the VAT under Section 3(1) is not a class of person notified under notification issued under Section 3(2) of the MP Entry Tax Act. The State of Madhya Pradesh issued a notification dated 31.03.1999 under Section 3(2) for the persons bringing goods into local area within the State of Madhya Pradesh i.e. telecommunication cable and accessories thereof. This establishes that Section 3(2) is applicable to a person other than the Dealers.

9. Shri Nema further submitted that there cannot be any charge of entry tax on the SIM (Subscriber Identity Module) card which is admittedly is not the good as per the decision of this Court passed in case of *M/s Idea Cellular Ltd, Indore Vs. Assistant Commissioner of Commercial Tax, LTU*, decided by order dated 03.01.2017 passed in W.P.No.7631/2014 that SIM Card is nothing but device which helps the service provider to identify the subscriber. It has been observed that service provider also enables the subscriber to receive the service by means of electromagnetic waves, hence, the SIM card cannot be termed to be a good and even under Article 366 (12) SIM is not good as it has no intrinsic value and are not marketable or transferable, hence, the questions of law framed by this Court is

liable to be answered in favour of the Assesse and impugned orders passed by the Assessment Officer and Appellate Authority are liable to be set aside.

10. Shri Nema learned senior counsel also addressed us on the point that Art. 286 of the Constitution of India does not permit the State to levy tax on sale and purchase on the goods which takes place in the course of import or export out of territory of India. The word 'including a place outside the state' do not mean ' outside the country'.

11. ***Per contra***, Shri Romesh Dave, learned Government Advocate appearing for the respondents/State of M.P. and ors. refuted the arguments of Shri Nema and argued that the Assesse company is still having the permanent registration certificate which used to be issued to the dealers under the relevant provisions of MPCT Act and now under the VAT Act. The Assesse company itself declared it's activity as a trading of FCT, sale-purchase of mobile phone, electronic products related to the SIM cards and other goods as per the list attached to the registration form, hence, the Assesse is estopped from raising the plea that it is not a dealer carrying the business within the meaning of provisions of the MACT and VAT act. The MP Entry Tax Act is levied on the goods mentioned in the registration certificate which are brought or being brought by the Assesse within the territory of the Madhya Pradesh during the course of its business i.e. providing telecommunication service and sale of mobile, handset, sale of SIM card, sale of recharge voucher, rating of FCT etc. As per the definition of Section 2(1)(b), the Entry Tax means the entry of a good into a local area for consumption use or sale. The term "entry of good" is also defined under Section 2(1) (aa) and according to which entry of goods into the local area from any place outside for consumption, use & sale. The definition of goods and sale has been imported from the MP VAT Act, 2002. The charging section 3 shows the incident of levy of entry tax and the same is applicable to the Assesses.

12. The Apex Court in case of *Bhagatam Rajeev Kumar Vs. CST,* reported in 1995 Supp(1) SCC 673 has held that the under Section 3 of the Entry Tax Act is on bringing of goods inside local area by a vehicle for consumption, use or sale irrespective of whether the sales tax is payable or not, hence, there is no merit on the contention raised by learned senior Advocate for the Assesse that the Assesse company being a registered dealer is not liable to pay sales tax and is also not liable to pay the Entry Tax . As per the definition of "business", it includes all commercial activities and also includes the transaction for not only selling, but also buying of the goods.

13. At last, Shri Dave, learned GA for the respondent/State has placed reliance over the latest judgement passed by the Bombay High Court in the case of *Bharati Airtel Ltd Vs Mira Bhayandar Municipal Corporation*, reported in 2017 SCC Online Bomb 8555 in which it has been held that E-charge could not be subjected

to levy of LBT (Local Body Tax), but LBT is leviable on the entry of goods into the limits of city for consumption, use or sale and the Taxing Authority well within its power can levy LBT on SIM card and recharge voucher for SIM card and physical form. The provisions of Entry Tax Act are identical to the provisions of Section 127 of the Maharashtra Municipal .Corporation Act, 1949. In view of the above, the issue is no more *res-integra*, hence, petitions as well as appeals are liable to be dismissed.

14. We have heard the learned counsel, gave anxious consideration to their submissions and perused the material available on record.

15. The core issue which is required to be answered first is that a dealer registered under the VAT Act, 2002 is only liable to pay Entry tax u/s. 3(1) of the Entry Tax Act. According to the Assesse it is company providing service not doing the business of sale and purchase of goods, therefore, not liable to pay Entry Tax also. The Madhya Pradesh Legislature has brought the Entry Tax Act in order to levy a tax on entry of goods into a local area of Madhya Pradesh for consumption, use or sale therein. Before coming into force of Entry Tax Act w.e.f. 2.10.1976, all local authorities used to collect Octroi on entry of any goods within their local area. In order to simplify such charging of Octroi by different local authorities, the State Government brought this enactment. As per definition u/s. 2(1)(aa), the entry of goods into local area means entry of goods into that local area from any place outside the State for consumption, use or sale therein. As per Section 2(1)(b), the Entry Tax means a tax on goods brought into local area for consumption, use or sale . For ready refrence section 2(1) (aa) and 2(1)(b) are reproduce below:-

Sec. 2 : Definitions

(1) In this Act unless the context otherwise requires, -

3(a) .....

4[(aa)] entry of goods into a local area with all its grammatical variations and cognate expressions means entry of goods into that local area from any place outside thereof including a place outside the State for consumption, use or sale therein;

(b) entry tax means a tax on entry of goods into a local area for consumption, use or sale therein levied and payable in accordance with the provisions of this Act 5[and includes composition money payable under Section 7-A;]

It is clear from the aforesaid two definitions that if the goods brought into the local area from outside the State for consumption, use or sale, the same is subjected to payment of Entry Tax as per value of the goods. Hence, the goods brought not only for its sale bur (sic : but) consumption and use is also material

eventuality for payment of entry tax. It is also immaterial that who is bringing the good within the local area.

16. Section 2(1)(gg) defines 'registered dealer' as under the VAT Act. As per Section 2(1)(l), the value of goods in relation to a dealer or any person who has effected entry of goods into a local area shall mean the purchase price of such goods. As per definition given in Section 2(2), all those expressions, other than expression "goods" and "sale" which are used but are not defined in this Act and are defined in the VAT Act shall have the meanings assigned to them in that Act. Accordingly, the words "goods" and "sale" have their independent meaning in Entry Tax Act other than the meaning assigned in the VAT Act.

17. Section 3 of Entry Tax Act provides the incidence of charging of Entry Tax. As per Section 3(1), there shall be levied an Entry Tax on the entry in the course of business of a dealer of goods specified in Schedule-II into each local area for consumption, use or sale therein. As per Clause (iii) of Section 3(1), on entry of goods specified in Schedule-III, for consumption or use of such goods, but not for sale therein, there shall be a levy of Entry Tax. Therefore, as per Section 3(1), the Entry Tax is chargeable on a dealer if he brings the goods in his course of business within the local area either for sale, use or consumption as per Schedule-II or Schedule-III. Under sub-section (2)(a) of Section 3, the Entry Tax is payable on entry of such goods specified in Schedule-II and III by such person or class of person as notified by the State Government. As per proviso appended to Section 3(2), that if it is proved before the Assessing Authority that such goods have already been subjected to Entry Tax by any other person or dealer under this Act, then there shall be no levy of Entry Tax on a person or class of persons. Thus, it is clear that Entry tax is payable once either u/s. 3(1) or u/s. 3(2) of the Entry Tax Act by dealer or any person.

18. Shri Sumit Neema, learned senior counsel appearing for the Assesses, has rightly submitted that Section 3(1) is applicable to a registered dealer and Section 3(2) is applicable to any other person other than the dealer. If the dealer has been subjected to Entry Tax u/s. 3(1), then, no other person can be subjected to payment of Entry Tax u/s. 3(2) of the Entry Tax Act. If such person or class of persons satisfies the Assessing Authority that the dealer has already paid the Entry Tax on the goods, then he is not liable to pay the Entry Tax. Therefore, the Government cannot recover Entry Tax u/s. 3(1) as well as u/s. 3(2) on one person. If he is a dealer, then, he would not be covered u/s. 3(1) and if not a dealer, then he is liable to pay the Entry Tax u/s. 3(2) of the Entry Tax Act.

19. Now it is required to decide, whether the Assesse being service provider not a dealer is liable to pay Entry Tax u/s. 3(1) or u/s. 3(2) of the Entry Tax Act?

20. Shri Sumit Neema, learned senior counsel appearing for the Assesses/appellants, fairly conceded that the Assesse is covered u/s. 3(2) of the Entry Tax Act because it is not registered dealer under the VAT Act.

21. The Division Bench of this Court in the case of *Sanjay Trading Co. V/s. Commissioner of Sales Tax & others :* (1994) STC 589, had held that M.P. Entry Tax Act is intended to levy Entry Tax on entry of specified goods into the local area for consumption, use or sale. The Entry Tax is not a tax on goods, but a tax on entry of goods into the local area for particular purpose. The words "liable to pay tax under the Sales Tax Act" clarifies the express the word "dealer" and do not clarify the expression "goods". Every dealer who is a registered dealer is liable to pay the tax under the Entry Tax Act. The Division Bench had no occasion to consider the provisions of Section 3(2). As held above, u/s. 3(1) only the dealer who is registered dealer under the VAT Act is liable to pay Entry Tax. U/s. 3(2), any person is liable to pay tax on entry of goods which has nothing to do with the 'sale' by him. The contention of the Assesse is that its activity is service oriented activity i.e. telecommunication services to its consumers. It may constitute a business in the wider sense, but not in the nature of buying or selling or distributing the goods as necessary to constitute "dealer" under the VAT Act read with Entry Tax Act. The Entry Tax was brought into force in the year 1976 when there was no concept of Service Tax which was introduced by Finance Act 1994 . The definition of 'dealer' is not confined to the business of selling and buying; it is also an activity of supplying or distribution of goods for cash or other valuable consideration. Sec2(i) of VAT Act defines the word Dealer which is as follows:

> (i) **"Dealer"** means any person, who carries on the business of buying, selling, supplying or distributing goods, directly or otherwise, whether for cash, or for deferred payment or for commission, remuneration or other valuable consideration and includes -
>
> > (i) a local authority, a company, an undivided Hindu family or any society (including a co-operative society), club, firm or association which carries on such business;
> >
> > (ii) a society (including a co-operative society), club, firm or association which buys goods from, or sells, supplies or distributes goods to its\members;
> >
> > (iii) a commission agent, broker, a del-credere agent, an auctioneer or any other mercantile agent, by whatever name called, who carries on the business of buying, selling, supplying or distributing goods on behalf of the principal;
> >
> > (iv) any person who transfers the right to use any goods including leasing thereof for any purpose, (whether or not

for a specified period) in the course of business to any other person;

As per judgment of the apex Court in the case of BSNL (supra), providing of SIM Card to a customer is not a 'sale', but is a 'service'. But, the Assesse being the dealer is distributing or supplying the goods i.e. SIM cards by taking service charges in order to run his business of telecommunication services. The assesse is supplying the SIM to it customer and taking service charges is covered under the definition of Dealer Therefore, the "course of business of a dealer of goods" cannot be given restrictive meaning for the purposes of Entry Tax. Under Sec 2(2) of the Entry tax all expression not defined in this act shall have same meaning under the VAT Act, hence only definition and meanings have been borrowed from VAT act in Entry Tax Act. That Entry Tax act nowhere says that it is applicable for only those dealer who are registered under VAT Act . The Entry Tax is not a part and parcel of VAT Act, where a dealer who is covered under the VAT Act is only liable to pay Entry Tax. Any businessman who brings the goods for consumption, use or sale is liable to pay Entry Tax whether he is a dealer under the VAT Act or not because, provisions of u/s. 3(2), are applicable to such person who is not engaged in any business and simply brings the goods within the local area for any purpose. Section 3(1) is applicable to those persons who are engaged in the business and effecting entries of the goods in the local area for use, sale and consumption in his course of business. Sec.2(d) of VAT Act defines the word Business which is as follows :-

(d) "Business " includes, -

(i) any trade, commerce, manufacture or any adventure or concern in the nature of trade, commerce or manufacture, whether or not such trade, commerce, manufacture, adventure or concern is carried on with a motive to make gain or profit and whether or not any gain or profit accrues from such trade, commerce, manufacture, adventure or concern and irrespective of the volume, frequency, continuity or regularity of such trade, commerce, manufacture, adventure or concern; and

(ii) any transaction of sale or purchase of goods in connection with or incidental or ancillary to the trade, commerce, manufacture, adventure or concern referred to in clause (i), that is to say -

(a) goods whether or not they are in their original form or in the form of second hand goods, unserviceable goods, obsolete or discarded goods, mere scrap or waste material; and

(b) goods which are obtained as waste products or by-products in the course of manufacture or

> processing of other goods or mining or generation of or distribution of electrical energy or any other form or power;

Therefore, the Assesse is covered under the provisions of Section 3(1) of Entry tax Act .

22. The Assesse is providing service of telecommunication and in order to do the business, brings the plant & machinery, equipment, etc. to the local area for the use and consumption, therefore, Assesse is subjected to the liability of Entry Tax. The main concern of the Assesses is in respect of payment of Entry Tax on a SIM Card. As held by the apex Court in the case of *BSNL* (supra), the SIM Card is not 'goods' and the company is not engaged in the business of selling the SIM Card. The contention of the Assesse that the 'goods' has not been defined in the Entry Tax Act, but defined under the VAT Act. As per Entry 52 List II of Seventh Schedule of Entry Tax Act, the tax on an entry of a goods into the local area for consumption, use or sale therein. As per Article 366(12), goods include all materials, commodities and articles. As per judgment of apex Court in the case of *BSNL* (supra), the SIM Card cannot be termed as 'goods' even under Article 366(12) of the Constitution of India because SIM cards have no intrinsic value, are not marketable and cannot be transferred. This Court in the case of *M/S. IDEA CELLULAR LTD. V/s THE ASSISTANT COMMISSIONER OF COMMERCIAL TAX* (W.P. No.7631/2014 decided on 3.1.2017 has held that the amount received by the cellular telephone company from its subscribers towards SIM Card will form part of the taxable value for levy of Service Tax as the SIM Cards are not sold as goods independent by the service provided. In view of the above verdict of apex Court as well as of this Court, the Assesse Company is not selling the SIM Cards to its customers, but it can safely be held that assesse is supplying SIM cards to its customers in order to provide service. Since, the SIM Card is being used and consumed in the course of business of service. Hence, it will fall under the incidence of Taxation under Section 3(1) of the Entry Tax Act.

23. In case of *Maheshwari Fish Seed Farm v. T.N. Electricity Board,* (2004) 4 SCC 705, the Apex court has held that the definition of the term in one statute does not afford a guide to the construction of the same term in another statute and the sense in which the term has been understood in the several statutes does not necessarily throw any light on the manner in which the term should be understood generally.

> *16. The learned Senior Counsel for the appellants invited our attention to the definition of the term "agriculture" as given in the definition sections or interpretation clauses of several other enactments such as sub-section (2) of Section 2 of the Tamil Nadu Agricultural*

Produce Marketing (Regulation) Act, 1987, clause (b) of Section 2 of the Tamil Nadu Agricultural University Act, 1971, clause (a) of Section 2 of the Agricultural and Rural Debt Relief Scheme, 1990, so defining the term " agriculture" as to include therein " pisciculture". These definitions were pressed into service by Shri Iyer, the learned Senior Counsel, to support his submission for a similar meaning being assigned in the present case. Suffice it to observe that the common-parlance meaning of the term " agriculture", in the context in which it has been used and is arising for determination before us, cannot be determined by reference to definitions given in other statutes. This we say for more reasons than one. Firstly, none of the statutes referred to by Shri Iyer, the learned Senior Counsel, can be called statutes in pari materia. Secondly, it is common knowledge that the definition coined by the legislature for the purpose of a particular enactment is often an extended or artificial meaning so assigned as to fulfil the object of that enactment. Such definitions given in other enactments cannot be freely used for finding out meaning to be assigned to a term of common parlance used in an altogether different setting. And lastly, as Justice G.P. Singh points out in Principles of Statutory Interpretation (9th Edn., 2004, at p. 163):

" [I]t is hazardous to interpret a statute in accordance with a definition in another statute and more so when such statute is not dealing with any cognate subject or the statutes are not in pari materia."

24. The Division Bench of Bombay High Court in its recent judgment passed in case of *Bharti Airtel Ltd. V/s. Mira Bhayandar Municipal Corporation. :* 2017 SCC OnLine Bom. 8555 = 2018 (3) Mah. Law Journal 430 has held that e-charge cannot be subjected to levy of Local Body Tax (LBT), but SIM card and Re-charge Voucher in the physical form are subject to levy of LBT. Para 21 of the aforesaid judgment is reproduced below :

"21. *The SIM cards are normally made of plastic or paper. The SIM cards are capable of being brought and sold. The SIM cards have utility value. The SIM cards are capable of being transferred, stored and possessed. The concept of Sales Tax and LBT are not the same. LBT can be levied on the goods brought within the limits of a Municipal Corporation even if the same are not sold, but the same are brought either for consumption or use. Going by what is held by the Apex Court in paragraph 11 of its decision in the case of Idea Mobile, SIM cards are capable of being used by putting the same in a mobile phone handset. A SIM card is a portable memory chip used in cellular*

telephones. It is a tiny encoded circuit board which is fitted into the cell phones at the time of signing on as a subscriber. Even assuming that by itself the SIM cards have no intrinsic sale value, considering the nature of its use, it has a value in terms of money apart from its value as a portable memory chip. Even recharge vouchers which are made of paper or plastic are capable of being brought and sold. The same are capable of being used. The same are capable of being transferred, stored and possessed. The recharge vouchers or cards made up of paper or plastic may have a little value by itself, but the same are capable of being used and that its use has a value as the holder thereof can get a talk time or internet data which has a value in terms of money. SIM cards and recharge vouchers are tangible goods which are capable of being brought into the limits of a city. The same are capable of being used after the same are brought into the limits of a city. Hence, the same will be goods within the meaning of clause 25 of Section 2 of the said Act. In the decision of the Apex Court in the case of Idea Mobile, the High Court had come to the conclusion that the SIM card has no intrinsic sale value and therefore, the sales tax is not payable. But the Apex Court has not considered the question whether the SIM cards are capable of being used which is a relevant consideration for charging LBT. "

Even otherwise it is important to mention here that the Assesses had obtained the registration under the VAT Act and supplied the list of goods chargeable under the VAT Act. One hand assesse is counting with dealer registration certificate and other hand challenging the applicability of VAT Act and Entry Tax.

25. That as per definition of 2(1)(aa) " entry of goods into a local area" means "entry of goods into that local are (sic : area) from any place outside" hence assesse is liable to pay entry tax on goods brought from outside . Hence Entry tax is chargeable on entry of good into local area brought from outside other than that local area. The Division Bench of this Court in the case of *Sanjay Trading Co. V/s. Commissioner of Sales Tax & others :* (1994) STC 589, had held that M.P. Entry Tax Act is intended to levy Entry Tax on entry of specified goods into the local area for consumption, use or sale. The Entry Tax is not a tax on goods, but a tax on entry of goods into the local area for particular purpose. Hence it is immaterial whether good is coming from place outside the state or outside the country.

26. In case of *DDA v. Bhola Nath Sharma,*reported in (2011) 2 SCC 54 the apex court has explained the word 'includes' used in definition clause and according to which the word 'includes' when used, enlarges the meaning of the expression defined so as to comprehend not only such things as they signify according to their natural import but also those things which the clause declares that they shall include

> *25. The definition of the expressions local authority" and "person interested" are inclusive and not exhaustive. The difference between exhaustive and inclusive definitions has been explained in P. Kasilingam v. P.S.G. College of Technology7 in the following words: (SCC p. 356, para 19)*
>
> *"19. ... A particular expression is often defined by the legislature by using the word 'means' or the word 'includes Sometimes the words 'means and includes' are used. The use of the word 'means' indicates that 'definition is a hard-and-fast definition, and no other meaning can be assigned to the expression than is put down in definition'. (See Gough v. Gough8; Punjab Land Development and Reclamation Corpn. Ltd. v. Labour Court9, SCC p. 717, para 72.) The word 'includes' when used, enlarges the meaning of the expression defined so as to comprehend not only such things as they signify according to their natural import but also those things which the clause declares that they shall include. The words 'means and includes', on the other hand, indicate 'an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions'. [See Dilworth v. Commr. of StampslO (Lord Watson); Mahalakshmi Oil Mills v. State of A.P.ll, SCC p. 170, para 11.] The use of the words 'means and includes' in Rule 2(b) would, therefore, suggest that the definition of 'college' is intended to be exhaustive and not extensive and would cover only the educational institutions falling in the categories specified in Rule 2(b) and other educational institutions are not comprehended. Insofar as engineering colleges are concerned, their exclusion may be for the reason that the opening and running of the private engineering colleges are controlled through the Board of Technical Education and Training and the Director of Technical Education in accordance with the directions issued by the AICTE from time to time."*
>
> *26. In Bharat Coop. Bank (Mumbai) Ltd. v. Employees Union12 this Court again considered the difference between the inclusive and exhaustive definitions and observed: (SCC p. 695, para 23)*
>
> *" 23. ... when in the definition clause given in any statute the word 'means' is used, what follows is intended to speak exhaustively. When the*

word 'means' is used in the definition . it is a 'hard-and-fast' definition and no meaning other than that which is put in the definition can be assigned to the same. . On the other hand, when the word 'includes' is used in the definition, the legislature does not intend to restrict the definition: it makes the definition enumerative but not exhaustive. That is to say, the term defined will retain its ordinary meaning but its scope would be extended to bring within it matters, which in its ordinary meaning may or may not comprise. Therefore, the use of the word 'means' followed by the word 'includes'in [the definition of 'banking company' in] Section 2(bb) of the ID Act is clearly indicative of the legislative intent to make the definition exhaustive and would cover only those banking companies which fall within the purview of the definition and no other."

27. In N.D.P. Namboodripad v. Union of India13 the Court observed: (SCCp. 509, para 18)

" 18. The word 'includes' has different meanings in different contexts. Standard dictionaries assign more than one meaning to the word 'include'. Webster's Dictionary defines the word 'include' as synonymous with 'comprise' or 'contain'. Illustrated Oxford Dictionary defines the word 'include' as: (i) comprise or reckon in as a part of a whole; (ii) treat or regard as so included. Collins Dictionary of English Language defines the word 'includes'as: (i) to have as contents or part of the contents; be made up of or contain; (ii) to add as part of something else; put in as part of a set, group or a category; (iii) to contain as a secondary or minor ingredient or element. It is no doubt true that generally when the word 'include' is used in a definition clause, it is used as a word of enlargement, that is to make the definition extensive and not restrictive. But the word 'includes' is also used to connote a specific meaning, that is, as 'means and includes' or 'comprises' or 'consists of'."

(emphasis in original)

28. In Hamdard (Wakf) Laboratories v. Labour Commr. 14 it was held as under: (SCC p. 294, para 33) "33. When an interpretation clause uses the word 'includes', it is prima facie extensive. When it uses the word 'means and includes', it will afford an exhaustive explanation to the meaning which for the purposes of the Act must invariably be attached to the word or expression."

The questions of law framed in these petitions are reproduced and answered accordingly as under:

" 1. Whether the appellant(Assesse) who is engaged in the activity of providing telecommunication services to its customers not involving any activity

of buying, selling, supplying or distributing of goods can be said to be a 'dealer carrying on business' within the meaning of the provisions of the M.P.C.T. Act, 1994 and whether the applicant can be said to be covered by the provisions of charging section of the M.P. Entry Tax Act, 1976 viz. Section 3(1) and be subjected to Entry Tax?

Answer : The Assesse is engaged in the activities of supplying or distributing of goods for its consumption and use, is a dealer within the meaning of Entry Tax Act and covered by the charging section 3(1) of M.P. Entry Tax Act, 1976.

2. Whether the appellant is liable to pay Entry Tax on goods imported from outside India on which Customs Duty has been paid as the said levy violates Article 286 of the Constitution of India and is also beyond the purview of Section 3 of the Entry Tax Act read with Section 2(aa) of the Act?

Answer : That as per definition of 2(1)(aa) " entry of goods into a local area" means " entry of goods into that local are (sic : area) from any place outside" hence assesse is liable to pay entry tax on goods brought outside . Entry tax is chargeable on entry of good into local area brought from outside other than that local area.

3. Whether entry of SIM cards and Recharge Coupons is liable for Entry Tax despite the fact that these SIM Cards and Recharges Coupons have been held not to constitute goods by the Supreme Court and are only covered by Finance Act, 1994 as being liable to Service Tax?"

Answer : SIM cards can be termed as 'goods' for the purposes of Entry Tax as the same is being used and consumed in order to provide service to the customer by the Assesses.

27. In view of the foregoing discussion, all these petitions/appeals/TR fails and are hereby dismissed.

No order as to costs.

Petition dismissed

I.L.R. [2019] M.P. 122
WRIT PETITION
Before Mr. Justice Rohit Arya
W.P. No. 7051/2016 (Indore) decided on 8 January, 2019

RAJASTHAN PATRIKA PVT. LTD. (M/S) …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

***Working Journalists and Other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act, (45 of 1955), Sections 13, 17(1) & (2) and Recommendations of Majithia Wage Board, Clause 20(j) – Recovery of Wages from Employer* – Held – On recommendations of Wage Board, Central Government notification issued on 11.11.2011 and as per clause 20(j) of recommendations, three weeks period of submission of option by employees expired on 02.12.2011 – Employee(R-3) was not even in employment on that date as he was initially appointed on 01.11.2012 and hence clause 20(j) has no application in case of R-3 – As per notified recommendations, the revised wages and emoluments are higher than what is paid to R-3 which is in violation of Section 13 of the Act of 1955 – He is entitled to receive revised wages and emoluments – Recovery Certificate rightly issued – Petition dismissed. (Paras 9 to 12)**

श्रमजीवी पत्रकार और अन्य समाचार–पत्र कर्मचारी (सेवा की शर्तें) और प्रकीर्ण उपबंध अधिनियम, (1955 का 45), धाराएँ 13, 17(1) व (2) तथा मजीठिया वेज बोर्ड की सिफारिशें, खंड 20(जे) – नियोक्ता से मजदूरी की वसूली – अभिनिर्धारित – वेज बोर्ड की सिफारिशों पर, दिनांक 11.11.2011 को केंद्र सरकार की अधिसूचना जारी हुई तथा सिफारिशों के खंड 20(जे) के अनुसार कर्मचारियों द्वारा विकल्प प्रस्तुत करने की तीन सप्ताह की अवधि दिनांक 02.12.2011 को समाप्त हो गई – उस तिथि को कर्मचारी (प्रत्यर्थी क्र.–3) नियोजन में भी नहीं था क्योंकि वह प्रारंभिक रूप से दिनांक 01.11.2012 को नियुक्त किया गया था और इसलिए खंड 20(जे) का प्रत्यर्थी क्र.–3 के प्रकरण में कोई प्रयोजन नहीं है – अधिसूचित सिफारिशों के अनुसार, पुनरीक्षित मजदूरी तथा उपलब्धियां, प्रत्यर्थी क्र.–3 को किये गये भुगतान से अधिक हैं, जो कि 1955 के अधिनियम की धारा 13 का उल्लंघन है – वह पुनरीक्षित मजदूरी तथा उपलब्धियां प्राप्त करने का हकदार है – वसूली प्रमाण–पत्र उचित रूप से जारी किया गया – याचिका खारिज।

Cases referred :

AIR 1958 SC 507, AIR 1987 SC 1869, W.P. No. 1821/2018 decided on 09.08.2018 (Bombay High Court), Special Civil Application No. 764/2018 to Special Civil Application No. 869 decided on 02.02.2018 (High Court of Gujarat at Ahmedabad), Letters Patent Appeal No. 433/2018 decided on 26.06.2018 (High Court of Gujarat at Ahmedabad).

Jagdish Baheti, for the petitioner.
Vibhor Khandelwal, G.A. for the respondent Nos. 1 & 2/State.
Navnidhi Parharya, for the respondent No. 3.

O R D E R

ROHIT ARYA, J. :- Petitioner - M/s Rajasthan Patrika Private Limited - a registered company in terms of the Memorandum of Association of the company engaged in publication of daily Hindi news paper in various States including the State of Madhya Pradesh amongst other works, the news paper published from the State of Madhya Pradesh is known as "Patrika" has approached this Court in this writ petition under Article 226 & 227 of the Constitution of India challenging the legality, validity and propriety of the order dated 31/08/2016 (Annexure P/14) passed by the respondent No.2 under section 17(1) of the Working Journalists and Other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act, 1955 (for short, the Act, 1955') and the consequent recovery certificate of the even date, Annexure P/15 with a further direction that the affidavit filed by respondent No.3 before the said authority if treated as an application, the same be sent to the labour Court for conducting the enquiry under section 17(2) of the Act, 1955.

2. Before adverting to the facts relevant and the contentions advanced by both the parties, it is expedient to reiterate peripheral facts giving raise to the present petition.

The Central Government constituted two wage boards on 24/05/2007 under sections 9 and 13C of the Act, 1955 to determine the wages to be paid to the working journalists and non-journalist employees under the chairmanship of Dr. Justice Narayan Kurup, However, he has resigned with effect from 31/07/2008. Therefore, Justice G.R. Majithia was appointed as Chairman with effect from 04/03/2009 (hereinafter referred to as 'the Majithia Wage Board') and the recommendations were submitted to the Central Government on 31/12/2010. Consequent upon acceptance of the recommendations on 25/10/2011, the Central Government has issued a notification to the said effect under section 12(1) of the Act, 1955 which was published on 11/11/2011. Even before publication of the notification, various news paper establishments affected by the Majithia Wage Board had challenged the same before the Hon'ble Supreme Court under Article 32 of the Constitution of India, lead case being *ABP Pvt. Ltd., and another Vs. Union of India,* Writ Petition (Civil) No.246 of 2011. During pendency of the writ petitions, the recommendations of the Majithia Wage Board were published by the Central Government vide notification dated 11/11/2011 under section 12(1) of the Act, 1955, therefore, the same have also been challenged by way of amendment in writ petitions.

Hon'ble Supreme Court dismissed bunch of writ petitions on 07/02/2014 (supra). The part of operative portions of the order relevant for the purpose of this writ petition are quoted below:

> "(iv) Accordingly, we hold that the recommendations of the Wage Boards are valid in law, based on genuine and acceptable considerations and there is no valid ground for interference under Article 32 of the Constitution of India. Consequently, all the writ petitions are dismissed.
>
> (v) In view of our conclusions and dismissal of all the writ petitions, the wages as revised/determined shall be payable from 11/11/2011 when the Government of India has notified the recommendations of the. the Majithia Wage Boards. All the arrears up to March, 2014 shall be paid to all eligible persons in four equal installments within a period of one year from today and continue to pay the revised wages from April, 2014."
>
> (Emphasis supplied)

It appears that the order passed by the Hon'ble Supreme Court since was not implemented, sizable number of employees have filed contempt petitions before the Hon'ble Supreme Court complaining non-compliance of the order. All the contempt petitions were clubbed together, lead case being Contempt Petition (Civil) No.411 of 2014, *Avishek Raja and others Vs. Sanjay Gupta* arising out of Writ Petition (Civil) No.246 of 2011 have been **decided on 19/06/2017.** A detailed comprehensive order was passed clarifying the mandate contained in the order dated *07/02/2014 (supra)* while dispelling the unsustainable objection raised by the petitioners/establishments. Relevant for the purpose of this writ petition is paragraph 24 wherein clause 20(j) of the notified recommendations of the Majithia Wage Board are dealt with. Clause 20(j) of the recommendations and paragraph 24 of the order are quoted below:

> "20(j) The revised pay scales shall become applicable to all employees with effect from 1st July, 2010. However, if any employee within three weeks from the date of publication of Government Notification under Section 12 of the Act enforcing these recommendations exercises his option for retaining his existing pay scale and "existing emoluments", he shall be entitled to retain his existing scale and such emoluments."
>
> "24. Insofar as the highly contentious issue of Clause 20(j) of the Award read with the provisions of the Act is concerned it is clear that what the Act guarantees to each "newspaper employee" as defined in Section 2(c) of the Act is the entitlement to receive wages as recommended by the Wage Board and approved and notified by the Central Government under Section 12 of the Act.

> The wages notified supersedes all existing contracts governing wages as may be in force. However, the Legislature has made it clear by incorporating the provisions of Section 16 that, notwithstanding the wages as may be fixed and notified, it will always be open to the concerned employee to agree to and accept any benefits which is more favourable to him than what has been notified under Section 12 of the Act. Clause 20(j) of the Majithia Wage Board Award will, therefore, have to be read and understood in the above light. The Act is silent on the availability of an option to receive less than what is due to an employee under the Act. Such an option really lies in the domain of the doctrine of waiver, an issue that does not arise in the present case in view of the specific stand of the concerned employees in the present case with regard to the involuntary nature of the undertakings allegedly furnished by them. The dispute that arises, therefore, has to be resolved by the fact finding authority under Section 17 of the Act, as adverted to hereinafter."

At this stage, it shall be appropriate to refer to the relevant provisions of the Act, 1955 which regulate the conditions of service of the working journalists and non-journalist employees employed in the news paper establishments throughout the country *inter alia* their entitlement to gratuity, provident fund, leave with pay, hours of work, minimum wages, fixation of wages, etc.,

Section 9 empowers the Central Government to constitute Wage Board for fixing and revising rates of wages to the working journalists and other employees. Recommendations are to be made by the Board under section 10. After acceptance of the recommendations, the same are required to be notified by the Central Government under section 12. Section 13 empowers that after coming into force of the order published by the Central Government, every working journalist shall be entitled to be paid by the employer the wages at the rate which shall in no case be less than the rate of wages specified in the order.

Chapter IIA deals with non-journalist news paper employees and contains the provisions which are *para materia* with the provision with regard to the working journalists in the news paper establishments, i.e., for fixation and revision of rate of wages, etc.,

Section 16(1) provides that the provisions of the Act, 1955 shall have the effect notwithstanding anything inconsistent therewith contained in any other law or in the terms of any award, agreement or contract of service, whether made before or after the commencement of the Act with the proviso quoted below:

> "Provided that where under any such award, agreement, contract of service or otherwise, a newspaper employee is entitled to benefits in respect of any matter which are more

> favourable to him than those to which he would be entitled under this Act, the newspaper employee shall continue to be entitled to the more favourable benefits in respect of that mater, notwithstanding that he receives benefits in respect of other matters under this Act."

Section 16A imposes an embargo on the employer, in the matter of discharge, or dismissing any employee. The same is quoted below:

> "16A. Employer not to dismiss, discharge, etc., newspaper employees.— No employer in relation to a newspaper establishment shall, by reason of his liability for payment of wages to newspaper employees at the rates specified in an order of the Central Government under section 12, or under section 12 read with section 13AA or section 13DD, dismiss, discharge or retrench any newspaper employee."

Section 17 deals with recovery of money due from an employer.

The controversy involved in this case revolves around section 17. Hence, the same is quoted extenso.

> "17. Recovery of money due from an employer.—(1) Where any amount is due under this Act to a newspaper employee from an employer, the newspaper employee himself, or any person authorised by him in writing in this behalf, or in the case of the death of the employee, any member of his family may, without prejudice to any other mode of recovery, make an application to the State Government for the recovery of the amount due to him, and if the State Government, or such authority, as the State Government may specify in this behalf, is satisfied that any amount is so due, it shall issue a certificate for that amount to the 'Collector, and the Collector shall proceed to recover that amount in the same manner as an arrears of land revenue.
>
> (2) If any question arises as to the amount due under this Act to a newspaper employee from his employer, the State Government may, on its own motion or upon application made to it, refer the question to any Labour Court constituted by it under the Industrial Disputes Act, 1947 (14 of 1947), or under any corresponding law relating to investigation and settlement of industrial disputes in force in the State and the said Act or law shall have effect in relation to the Labour Court as if the question so referred were a matter referred to the Labour Court for adjudication under that Act or law,
>
> (3) The decision of the Labour Court shall be forwarded by it to the State Government which made the reference and any

amount found due by the Labour Court may be recovered in the manner provided in sub-section (1)."

Facts of the case:

3. The respondent No.3 was initially appointed on contract basis by the petitioner/company vide appointment letter dated 01/11/2012 (Annexure R/3-1) as "Chief Reporter" in Editorial Department at Gwalior Branch office for a period of one year from the date of joining, on a consolidated amount of Rs.12,000/- per month inclusive of D.A., and all other allowances. In addition thereto, he is entitled for a sum of Rs.5,000/- as house rent allowance and Rs.2,000/- as conveyance allowance as well as Rs.1,000/- as mobile allowance. It appears that the period was extended with effect from 01/10/2013 vide appointment letter dated 30/09/2013 (Annexure P/3) as Chief Reporter in Editorial Department at Gwalior Branch. The same was further extended twice vide letters dated 01/10/2015 (Anenxure P/4) and 31/12/2015 (Anenxure P/5).

Due to non-implementation of the notified recommendations of the Majithia Wage Board even after decision in **W.P.No.246/2011** (supra) by the Hon'ble Supreme Court and with the strength of the order; particularly paragraph 24 passed by the Hon'ble Supreme Court in **Contempt Petition No (C) No.572 of 2014 arising out of W.P.No.246/2011 (supra)**, the respondent No.3 has raised a grievance in the office of Assistant Labour Commissioner, Gwalior on 21/07/2015 and the same was processed under section 17(1) of the Act, 1955 but, for want of territorial jurisdiction the same was made over to the Labour Commissioner, Indore vide communication dated 04/04/2016 (Annexure P/7).

Thereafter, it appears that the respondent No.3 was terminated from service with effect from 31/03/2016. Respondent No.3 had raised an industrial dispute and upon failure of conciliation proceedings, reference was made to the Labour Court, No.1, Gwalior. The said reference was answered by the Labour Court in favour of the respondent No.3 on 23/05/2017 in case No.COC/26/A/I.D.Act/2016 (Reference). There is nothing on record that the said Award has been further challenged by the petitioner. Hence, the same has attained finality.

The Labour Commissioner, Indore has issued notice to the Branch Manager, Patrika Office, Gwalior on 12/05/2016 (Annexure P/8) and the case was fixed for 31/05/2016. Initially, time was sought by the office of Patrika, Gwalior office and submitted the reply dated 13/06/2016 on 25/07/2016 (Annexure P/9) wherein the claim was denied with the sole contention that the respondent No.3 has signed the undertaking by way of option under clause 20(j) to prefer the existing wages and other benefits but, not the recommendations of the Majithia Wage Board. Therefore, he is precluded from raising any claim on the basis of recommendations of the Majithia Wage Board.

The petitioner again submitted a reply (written submissions) on 06/08/2016 with the contention that similar averments were made in the State of Rajasthan by sizable number of journalists (168 in number) and after examination of their cases, the Labour Commissioner has found that the claim raises a dispute and referred the matter to the Labour Court for adjudication. On similar lines, another reply was submitted on 10/08/2016 by the petitioner.

However, the respondent No.3 has brought on record of the original file; the affidavit dated 05/08/2015 submitted on 07/08/2015 in the pending contempt petition before the Hon'ble Supreme Court *inter alia* contending that since 01/11/2012 he is serving with Rajasthan Patrika as Chief Reporter at Gwalior edition but, he has not been extended the benefits of revised wages and interim relief granted under the notified recommendations of the Majithia Wage Board as notified by the Central Government on 11/11/2011. As such, neither the order passed by the Hon'ble Supreme Court has been complied with nor the monetary benefits have been released. It is further alleged that in the month of June, 2014, he was called in the Gwalior Office of Patrika by one Ashok Sharma and asked the respondent No.3 and other employees to sign on two sets of papers without allowing them to go through the contents thereof. He was given to understand that the aforesaid signed papers were obtained to treat them as an undertaking purportedly in terms of clause 20(j) of the recommendations of the Majithia Wage Board. Hence, prayed that a direction be issued to the petitioner/establishment for payment of revised wages and other emoluments under section 17(1) of the Act, 1955 to him.

4. The Labour Commissioner after due opportunity to either party during the proceedings and upon due consideration of the written arguments has passed the impugned order dated 31/08/2016 (Annexure P/14) by which opined that clause 20(j) of the recommendations of the Majithia Wage Board has no application to the facts of the case as the undertaking in the form of option was required to be given within three weeks from the date of publication of the Government notification under section 12 of the Act, 1955, i.e., with effect from 11/11/2011 for retaining his existing pay scale and existing emoluments or the revised pay scales with effect from 01/07/2010.

In the instant case, the respondent No.3 has been appointed as Chief Reporter in Editorial Department at the Branch Office, Gwalior initially with effect from 01/11/2012 and thereafter with effect from 01/10/2013 further appointment letter has been issued, much after the date of notification published by the Central Government on 11/11/2011 under section 12(1) of the Act, 1955 enforcing the revised pay scales with effect from 01/07/2010 in accordance with recommendations of the Majithia Wage Board. Even otherwise, the undertaking which is undated allegedly obtained some where in the month of June, 2014 from the respondent No.3 is of no consequence. In that context, relied upon the orders

of the Hon'ble Supreme Court in **W.P.No.246/2011 (supra)** and the **Contempt Petition (Civil) No.411/2014 (supra)** wherein it has been observed that it will be open for each affected employee to lay before the State Government/labour commissioner the details of the amount that he/she claims to be due under the recommendations of the Majithia Wage Board over and above the emoluments drawn by him. If such a resort is made to the State Government/labour Commissioner the concerned authority would be fully empowered to carry out necessary adjudication and pass consequential orders in terms of section 17 of the Act. Hence, the labour Commissioner has found that no dispute existed warranting reference of dispute to the Labour Court under section 17(2) of the Act, 1955. Resultantly, on 31/08/2016 ordered for payment of arrears of wages and other emoluments payable to the respondent No.3 to the tune of Rs.21,46,945/- (Annexure P/14) and thereafter, on the even date, issued the recovery certificate for recovery of the amount as arrears of land revenue vide Annexure P/15.

5. Questioning the aforesaid orders, the learned counsel for the petitioner primarily contends that in view of the undertaking given by respondent No.3 by way of option for existing pay and the emoluments, as on the date of his initial appointment and thereafter, the claim for revised wages and emoluments notified by the Central Government on 11/11/2011 in terms of the recommendations of the Majithia Wage Board are not extendable to the respondent No.3 in the teeth of clause 20(j) thereof. In the rejoinder a faint attempt is made even to dispute the status and duties being performed by the respondent No.3 on the premise that he does not fall within the definition of 'working journalist' under section 2(f) of the Act, 1955 though no such plea was raised before the Labour Commissioner in any of the replies referred to above.

6. *Per contra*, respondent No.3 contends that he has been initially engaged with effect from 01/11/2012 as "Chief Reporter" in Editorial Department at Gwalior Branch office but, not on 30/09/2013 as pleaded in the writ petition. The recommendations of the Majithia Wage Board have been made applicable by the Central Government vide notification dated 11/11/2011 published under section 12(1) of the Act, 1955 and the revised pay and emoluments are effective from 01/07/2010. Under clause 20(j), the option was to be exercised within three weeks from the date of notification which expires on 02/12/2011. The said period has expired much earlier to the initial date of appointment of the respondent No.3 with effect from 01/11/2012. Further, once the recommendations of the Majithia Wage Board were notified by the Central Government on 11/11/2011 and as disclosed by the petitioner/establishment that they have implemented the same with effect from the said date before the Labour Commissioner, Jaipur, State of Rajasthan vide letter dated 03/06/2016 (Annexure R/3-2), the respondent No.3 cannot be

denied the benefits of notified revised pay/wages and emoluments. Besides, the alleged undertaking even otherwise is undated and was obtained from the respondent No.3 alongwith other similarly situated employees under threat and duress in the month of June, 2014 is of no consequence. Hence, the petitioner cannot deny payment of dues payable to the respondent No.3 in terms of recommendations of the Majithia Wage Board under the pretext that a 'dispute' as regards entitlement of the respondent No.3 for payment resting on the alleged undertaking which required to be enquired by the labour Court under section 17(2) of the Act, 1955.

7. Heard.

8. The sole controversy revolves around sub-sections (1) & (2) of section 17 of the Act, 1955 quoted above, in the factual backdrop of the case in hand.

9. The initial appointment letter of the respondent No.3 dated 01/11/2012 (Annexure R/3-1) as "Chief Reporter" in Editorial Department at Gwalior office is not denied by the petitioner. Thereafter, his further continuance till termination on 31/03/2016 though set aside by the labour Court vide award dated 23/05/2017 (supra) which has attained finality has also not been disputed by the petitioner.

10. The recommendations of the Majithia Wage Board are notified by the Central Government on 11/11/2011 under section12(1) of the Act, 1955 making the revised pay and emoluments to the working journalists and the non-working journalists of the news papers with effect from 01/07/2010. The option under clause 20(j) of the recommendations was available to the employees covered under the Majithia Wage Board for three weeks from the date of notification. The said period expired on 02/12/2011. The respondent No.3 was not even in employment on that date as his initial date of appointment is 01/11/2012. Hence, the recommendations of clause 20(j) of the Majithia Wage Board have no application to the facts in hand, as a consequence thereof, the alleged undated undertaking is of consequence. Moreover, the petitioner himself has disclosed before the Labour Commissioner, Jaipur, State of Rajasthan vide communication dated 03/06/2016 (Annexure R/3-2) as regards implementations of the recommendations of the Majithia Wage Board to its employees with effect from 11/11/2011.

There is no dispute that the revised wages and the emoluments notified by way of recommendations of the Majithia Wage Board are higher than the wages paid to the respondent No.3 under his appointment letter. As a matter of fact, such payment of wages and emoluments are in violation of section 13 of the Act, 1955 which contemplates that the working journalists entitled to wages at rates not less than those specified in the order notified by the Central Government under section 12(1) thereof.

The petitioner claimed that the respondent No.3 is not entitled for the revised wages and emoluments in terms of clause 20(j) of the recommendations of the Majithia Wage Board. There is no other question or dispute was raised by the petitioner before the Labour Commissioner. There is nothing on record to construe that the claim of the respondent No.3 is shrouded with suspicion or dispute as tried to be presented by the petitioner. Hence, the reasoning assigned by the Labour Commissioner based on the material placed on record while concluding entitlement of respondent No.3 for revised wages and emoluments in terms of recommendations of the Majithia Wage Board is in consonance with the provisions of the Act, 1955. As such, the order dated 31/8/2016 (Annexure P/14) passed by the said authority determining the revised wages and emoluments and recovery of the amount as 'dues' as arrears of land revenue by issuance of the recovery certificate of the even date vide Annexure P/15 cannot be faulted with.

11. The petitioner tried to contend that the respondent No.3 himself had claimed arrears of Rs.16,37, 256/- which is evident from the chart annexed with the affidavit of the respondent No.3 dated 21/07/2015 whereas the Labour Commissioner has determined the arrears due as Rs.21,46,945/-. As such, there is apparent dispute of entitlement of dues. From a perusal of the original record, it is apparent that the respondent No.3 has submitted a revised chart of arrears due dated 31/05/2016 wherein the amount shown is 22,81,857/- but, there is nothing on record that the petitioner at any point of time objected to the same. As a matter of fact, it is not a case of dispute of entitlement of claim but, arithmetical variations. It needs no mention that while computing the claim under section 17(1) of the Act, 1955 as 'amount due' from an employer to the employee, the authority is empowered to make summary enquiry in that behalf to ascertain the exact amount due as laid down by the Hon'ble Supreme Court in the case of *Kasturi and Sons (Private) Ltd., Vs. N. Salivateeswaran and others,* AIR 1958 SC 507. Hence, no interference is warranted in the orders under challenge.

12. The judgments cited by learned counsel for the petitioner, viz., *Samarjit Ghosh Vs. Bennett Coleman and Co., and another*, AIR 1987 SC 1869, Bombay High Court in W.P.No.1821 of 2018 *D.B.Corp., Ltd., Vs. State of Maharashtra* decided on 09/08/2018 and High Court of Gujarat at Ahmedabad in Special Civil Application No.764 of 2018 to Special Civil Application No.869 decided on 02/02/2018 & Letters Patent Appeal No.433 of 2018 - *Devji Maganbhai Vacheta Vs. D.B.Corp. Ltd.,* decided on 26/06/2018 are distinguishable on facts; particularly, the denial of claim is restricted to clause 20(j) of the recommendations of the Majithia Wage Board only before the Labour Commissioner and this Court but, the period for submission of option by the employees in terms of notification issued by the Central Government stood expired on 02/12/2011 and thereafter, the respondent No.3 has been initially appointed as "Chief Reporter" in Editorial Department at Gwalior office vide

order dated 01/11/2012 (Annexure R/3-1) as discussed above and are of no assistance to the petitioner.

13. Writ petition sans merit and is hereby dismissed.

Petition dismissed

I.L.R. [2019] M.P. 132
MISCELLANEOUS PETITION
Before Mr. Justice Vijay Kumar Shukla
M.P. No. 5103/2018 (Jabalpur) decided on 30 October, 2018

NOOR MOHAMMAD & anr. …Petitioners

Vs.

STATE OF M.P. & ors. …Respondents

***A. Constitution – Article 227 and Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act (54 of 2002), Section 34 – Attachment and Auction of Pledged Property – Maintainability of Civil Suit* – Petitioners filed civil suit claiming that they are owners of suit property and neither they are borrowers nor guarantors, thus said property cannot be attached and auctioned – Held – Suit for declaration is maintainable as Tribunal does not decide the title – Further, trial Court considering provisions of Section 34 of the Act, rightly rejected the prayer of injunction because admittedly the property is pledged with the Bank by Respondent Nos. 4 & 8 who are family members of petitioners – No illegality in impugned order – Petition dismissed. (Paras 3 to 6)**

क. संविधान – अनुच्छेद 227 एवं वित्तीय आस्तियों का प्रतिभूतिकरण और पुनर्गठन तथा प्रतिभूति हित का प्रवर्तन अधिनियम (2002 का 54), धारा 34 – गिरवी रखी गई संपत्ति की कुर्की एवं नीलामी – सिविल वाद की पोषणीयता – याचीगण ने यह दावा करते हुए सिविल वाद प्रस्तुत किया कि वे वाद संपत्ति के स्वामी है तथा वे न तो उधार लेने वाले है न ही प्रत्याभूति–दाता है, अतः उक्त संपत्ति को कुर्क एवं नीलाम नहीं किया जा सकता – अभिनिर्धारित – घोषणा हेतु वाद पोषणीय है क्योंकि अधिकरण हक का विनिश्चय नहीं करता – इसके अतिरिक्त, विचारण न्यायालय ने अधिनियम की धारा 34 के उपबंधों को विचार में लेते हुए, व्यादेश की प्रार्थना को उचित रूप से अस्वीकार किया क्योंकि स्वीकृत रूप से संपत्ति को प्रत्यर्थी क्र. 4 व 8, जो कि याची के परिवार के सदस्य है, द्वारा बैंक के साथ गिरवी रखा गया है – आक्षेपित आदेश में कोई अवैधता नहीं – याचिका खारिज।

***B. Constitution – Article 227 – Scope and Jurisdiction* – Held – It is settled law that jurisdiction under Article 227 cannot be exercised to correct all errors of Subordinate Court – It can be exercised where any order is passed in grave dereliction of duty and flagrant abuse of fundamental**

principles of law and justice. **(Para 10)**

ख. संविधान – अनुच्छेद 227 – व्याप्ति एवं अधिकारिता – अभिनिर्धारित – यह सुस्थापित विधि है कि अनुच्छेद 227 के अंतर्गत अधिकारिता का प्रयोग, अधीनस्थ न्यायालय की सभी त्रुटियों को सुधारने के लिए नहीं किया जा सकता – इसका प्रयोग वहां किया जा सकता है जहां कोई आदेश कर्तव्य की घोर उपेक्षा में पारित किया गया है तथा विधि एवं न्याय के सिद्धांतों का प्रत्यक्ष दुरूपयोग है।

Cases referred :

AIR 2004 SC 2371, AIR 2011 Bombay 144, (2007) 1 SCC 106, 1990 (Supp) Supreme Court Cases 727, 2016 (1) SCC 743, (2018) 3 SCC 85, (2010) 9 SCC 385, (2010) 8 SCC 329, 2004 (2) MPHT 14.

Umesh Trivedi, for the petitioners.
Janhvi Pandit, G.A. for the respondents/State.

O R D E R

VIJAY KUMAR SHUKLA, J. :- The instant petition filed under Article 227 of the Constitution of India the petitioner has challenged the legality and validity of the order dated 20.08.2018 passed by the 2nd Additional District Judge, Balaghat in Misc. Civil Appeal No. 27/2018 affirming the order dated 26.07.2018 passed by the 2nd Civil Judge Class-II, Balaghat in Civil Suit No. 104-A/2018.

2. By the impugned orders the application filed by the plaintiff for temporary injunction restraining the defendant no.2 the Authorized Officer Central Bank of India Regional Office, Chhindwara from. attaching the property and to put it for auction.

3. The petitioners have filed the Civil Suit for declaration that they are the owners of the property in question and the respondents/defendants No. 4 to 8 have no share and right in the property. They also prayed for declaration that the order of the Collector dated 11.06.2018 for giving the property to the Bank is null and void and also the consequential proceedings of attachment and auction proceedings. The said application has been dismissed by order dated 26.07.2018 and thereafter the appeal has also been dismissed by order dated 20.08.2018. The Bank has published the auction notice on 10.10.2018 and the auction is scheduled to take place on 30.10.2018. It is also contended that the plaintiffs are neither the borrowers nor guarantors and therefore, the property cannot be attached and put to be auctioned under the Provisions of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as the "Act, 2002").

4. Respondents no. 4 & 8 had taken loan of Rs.6,00,000/- from the bank and they did not repay the said amount, therefore, the bank has instituted the recovery proceedings under the Provisions of the Act, 2002. It is submitted that both the Courts below have erred while not granting the injunction in favour of the appellants/plaintiffs taking into consideration the Provisions of Section 34 of the Act, 2002. It is contended that the Civil Suit is maintainable in view of the Judgment passed by the Apex Court in the case of *Mardia Chemicals Ltd. Vs.Union of India* AIR *2004* SC 2371. He also relied on the judgment passed by the Bombay High Court in the case of *State Bank of India v. Sagar Pramod Deshmukh* AIR 2011 Bombay 144. The jurisdiction of the Civil Court to entertain, try and decide the suit are proceeding in respect of the property which is the subject matter of the Security Interested created in favour of the Secured Creditor is barred only to the extent of the matter which is covered under the jurisdiction of Debt Recovery Tribunal.

5. There is no dispute to the proposition laid down by the aforesaid judgments that the suit for declaration is maintainable as the Tribunal does not decide the title but I do not find any illegality and infirmity in the orders rejecting the injunction because admittedly the property is pledged with the Bank by the respondents no. 4 & 8. The suit has been filed on 25.05.2018. In the case of *Industrial Investment Bank of India Ltd. Vs. Marshal's Power & Telecom (I) Ltd. & another* (2007)1 SCC 106, the challenge was made to grant of an interim injunction granted by the Division Bench of the High Court in favour of the plaintiff in the Civil Suit. In the said case the bar under Section 18 was considered and it was held that the bar extends to the grant of interim relief by the Civil Court as well.

6. Both the Courts below have taken into consideration the Provisions of Section 34 of the Act, 2002 and declined to grant any interim injunction. The said order has been affirmed by the appellate Court. The plaintiffs and the private respondents belong to the same family and in view of the facts of the present case, the Courts have declined to interfere for granting injunction in favuour (sic : favour) of the plaintiffs.

7. In the case of *Wander Ltd. and another Vs. Antox India P. Ltd.* 1990 (Supp) Supreme Court Cases 727 the Apex Court has considered the scope of interference in appeal in the matter of temporary injunction. The relevant paragraph of the aforesaid judgment is reproduced as under:

> *" The Appellate Court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law*

regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate Court will not reassess the material and seek to reach a conclusion different from the one reached by the court below solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the Trial Court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. ***(Para-14) ".***

8. In the case of *West Bengal Housing Board Vs. Pramila Sanfui & Ors. reported in* 2016(1) SCC 743 the Apex Court has held that no injunction can be granted against the non-payment. In the recent judgment passed in the case of *Authorized Officer State Bank of Travancore and another Vs Mathew K.C.* (2018)3 SCC 85 The Apex Court has deprecated passing of the interim order in the cases of recovery by secured creditor under the Provisions of Act, 2002.

9. In the conspection of the above discussion and taking into consideration the law as discussed herein above, I do not find any illegality warranting any interference with the order impugned under Article 227 of the Constitution of India.

10. Even otherwise, it is settled law that jurisdiction under Article 227 of the Constitution of India cannot be exercised to correct all errors of subordinate Courts within its limitation. It can be exercised where the order is passed in grave dereliction of duty and flagrant abuse of the fundamental principle of law and justice [See. *Jai Singh and another V:,. MCD,* (2010)9 SCC 385 *and Shalini Shetty Vs. Rajendra S. Patil,* (2010)8SCC 329].

11. Further, a Co-ordinate Bench of this Court in the case of *Ashutosh Dubey and another Vs. Tilak Grih Nirman Sahakari Samiti Maryadit, Bhopal and another, 2004(2) MPHT 14* held that supervisory jurisdiction under Article 227 of the Constitution of India is exercised for keeping the subordinate Courts within the bounds of their jurisdiction, when a subordinate Court has assumed a jurisdiction which it does not have or the jurisdiction through available is being exercised by the Court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step into exercise its supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied - (i) the error is manifest and apparent on the fact of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law; and (ii) a grave injustice or gross failure of justice has occasioned thereby.

12. In view of the aforesaid enunciation of law, the instant petition is devoid of merit and is hereby **dismissed**. The order impugned in the present writ petition passed by the Court below is upheld.

Petition dismissed

I.L.R. [2019] M.P. 136
MISCELLANEOUS PETITION
Before Mr. Justice Sujoy Paul

M.P. No. 1459/2018 (Jabalpur) decided on 14 November, 2018

ARUN KUMAR BRAHMIN & ors. …Petitioners

Vs.

SMT. MAANWATI & ors. …Respondents

***A. Civil Procedure Code (5 of 1908), Order 14 Rule 2 – Preliminary Issue – Question of Limitation* – Trial Court refused to decide the question of limitation as preliminary issue – Held – While dismissing an earlier application filed under Order 7 Rule 11 by petitioner/defendant, trial Court held that question of limitation can be decided while deciding the entire matter on merits – This order has attained finality – Apex Court has concluded that question of limitation is a mixed question of law and fact and it is discretion of Court to decide issue based on law as preliminary issue – Court below took a plausible view and discretion was exercised in a permissible manner – Further, if the issue of limitation is decided at later point of time, no prejudice will be caused to petitioner – Petition dismissed.**

(Paras 8 to 11)

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 14 नियम 2 – प्रारंभिक विवाद्यक – परिसीमा का प्रश्न – विचारण न्यायालय ने परिसीमा के प्रश्न को प्रारंभिक विवाद्यक के रूप में विनिश्चित करने से इंकार किया – अभिनिर्धारित – याची/प्रतिवादी द्वारा आदेश 7 नियम 11 के अंतर्गत प्रस्तुत एक पूर्व आवेदन को खारिज करते समय, विचारण न्यायालय ने अभिनिर्धारित किया कि परिसीमा के प्रश्न का विनिश्चय संपूर्ण मामले को गुणदोषों के आधार पर विनिश्चित करते समय किया जा सकता है – इस आदेश ने अंतिमता प्राप्त की है – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि परिसीमा का प्रश्न विधि और तथ्य का मिश्रित प्रश्न है तथा यह न्यायालय का विवेकाधिकार है कि वह विधि पर आधारित विवाद्यक का प्रारंभिक विवाद्यक के रूप में विनिश्चय करे – निचले न्यायालय ने एक संभाव्य दृष्टिकोण अपनाया तथा एक अनुज्ञेय ढंग से विवेकाधिकार का प्रयोग किया था – इसके अतिरिक्त, यदि परिसीमा का विवाद्यक बाद में विनिश्चित किया जाता है, तो याची को कोई प्रतिकूल प्रभाव कारित नहीं होगा – याचिका खारिज।

***B. Constitution – Article 227 – Scope and Jurisdiction* – Held – Interference u/S 227 can be made on limited grounds, if impugned order**

suffers from any jurisdictional error, manifest procedural impropriety or palpable perversity – "Another view is possible" is not a ground for interference – High Court is not obliged to correct the mistakes of facts and law which does not have any drastic effect. (Para 11)

ख. संविधान – अनुच्छेद 227 – व्याप्ति एवं अधिकारिता – अभिनिर्धारित – यदि आक्षेपित आदेश किसी अधिकारिता की त्रुटि, प्रकट प्रक्रियात्मक अनुचितता अथवा प्रत्यक्ष विपर्यस्तता से ग्रसित हो तो धारा 227 के अंतर्गत सीमित आधारों पर हस्तक्षेप किया जा सकता है – ''अन्य दृष्टिकोण संभव है'' यह हस्तक्षेप का आधार नहीं है – उच्च न्यायालय तथ्यों एवं विधि की भूल जिनका कोई कठोर प्रभाव नहीं है, को सुधारने हेतु बाध्य नहीं है।

Cases referred :

AIR 1966 SC-153, 1979 JLJ (FB) 720, 2005 (2) MPLJ-114, 2018 (6) SCC-422, 2015 (6) SCC 412, 2015 (5) SCC 674, 2006 (5) SCC 638, 200 (2) SCC 48, 2010 (8) SCC 329.

Aditya Adhikari with *Abhijeet Bhowmic*, for the petitioners.
Umesh Shrivastav, for the respondent Nos. 1 & 2.
Abhinav Jain, G.A. for the respondent No. 7.

O R D E R

SUJOY PAUL, J. :- This petition filed under Article 227 of the Constitution of India takes exception to the order dated 20.11.2017 (Annx.P/1) whereby the application filed by the petitioners/ defendants under Order 14 rule 1 and 2 CPC is dismissed by the court below.

2. The admitted facts between the parties are that in the instant civil suit filed for declaration of title and nullifying the sale deeds, the petitioners/ defendants initially filed an application under Order 7 rule 11 CPC for dismissal of the suit on the ground of limitation. The court below by order dated 27.2.2015 rejected the said application and said order of court below, in absence of any further challenge, has attained finality. The petitioners/ defendants after completion of pleadings and framing of issues, filed an application dated 07.09.2017 (Annx.P/5) with a prayer to decide issue No.3 as a preliminary issue.

3. Shri Aditya Adhikari, learned Senior counsel contends that issue No.3 is relating to limitation and goes to the root of the matter. The court below should have decided the said issue as a preliminary issue. Reliance is placed on *Pandurang Dhondi Chougule Vs. Maruti Hari Jadhav and others*-AIR 1966 SC-153 to bolster the contention that plea of limitation or a plea of *res judicata* is a plea of law which is concerned with the jurisdiction of the court which tries the proceedings. The court below has erred in treating the said question as mixed

question of fact and law. Learned Senior counsel further submits that the stage of order 7 Rule 11 is over and at appropriate stage application under Order 14 Rule 1 and 2 was filed. He placed heavy reliance on Order 14(2)(2) of the C.P.C. and urged that the court below was under a legal obligation to decide the issue No.3 as a preliminary issue. The court below has erred in not deciding the said issue as a preliminary issue.

4. *Per contra,* Shri Umesh Shrivastav, learned counsel for respondents No.1 and 2 supported the impugned order. He submits that once an application under Order 7 rule 11 CPC claiming same relief is dismissed by the court below and it was not found covered under Order 7 Rule 11(d), the suit has to be decided in one go and issue of limitation cannot be decided as a preliminary issue. He placed reliance on *Ramdayal lUmraomal Vs. Pannalal Jagannath*-1979 JLJ(FB) 720 and *Shanti Shukla Vs. Shanti Bai and another*-2005(2) MPLJ-114 to contend that question of limitation is essentially a mixed question of fact and law and, therefore, the court below has not committed any error of law in not deciding the question of limitation as a preliminary issue. Lastly, reliance is placed on *Chhotanben and another Vs. Kirtibhai Jalkrushnabhai Thakkar and others*-2018(6) SCC-422 to urge that the question of limitation can be decided at appropriate stage.

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

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

7. During the course of argument, learned senior counsel handed over the order of the Court below dated 27.02.2015 whereby an application preferred by the petitioner under Order 7 Rule 11 C.P.C. was disallowed by the Court below. A plain reading of this order shows that the plaintiffs' statement that they came to know about the impugned sale deed on 22.06.2004 was not disbelieved at this stage. The Court opined that this is a question of fact which can be decided at the stage of final hearing. Admittedly this order, in absence of any further challenge to it has attained finality.

8. The bone of contention of petitioner is that in view of Constitution Bench judgment of Apex Court in the case of *Pandurang Dhondi Chougule* (supra), the question regarding limitation must be treated to be a plea of law and, therefore, the Court below be directed to decide the issue No.3 as a preliminary issue. This point is certainly ponderable one. The judgment of *Pandurang Dhondi Chougule* (supra) was considered by Supreme Court in 2015 (6) SCC 412 *(Foreshore Cooperative Housing Society Ltd. Vs. Praveen D. Desai)*. The Apex Court considered the scheme and object of un-amended Order 14 Rule 2 CPC with amendment which had taken place in the said provision. It was held that Order 14 Rule 2(2) CPC relaxes the mandate to a limited extent by conferring discretion

upon the court that if the court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first. The exercise of this discretion is further limited to the contingency that the issue to be so tried must relate to the jurisdiction of the court or a bar to the suit created by a law in force.

9. In Para 62 of the judgment, it was made clear that in cases where the suits are governed by the provision of Order 14 Rule 2 CPC, it is the discretion of the Court to decide issue based on law as a preliminary issue.

10. The judgment of Apex Court in *Foreshore Cooperative Housing Society Ltd.* (supra), clearly shows that it is the discretion of the Court to decide the issue based on law as a preliminary issue. The question is : whether in the present case the Court has committed any error of law or jurisdiction in not deciding the Issue No.3 as a preliminary issue. In my judgment, no fault can be found in the manner discretion is exercised by the Court below. The Court below was bound by its finding given in its earlier order dated 27.02.2015 wherein it was clearly held that the question of limitation can be decided while deciding the entire matter on merits. Apart from this, the Apex Court in 2015 (5) SCC 674 *(Satti Paradesi Samadhi and Pillayar Temple Vs. M. Sankuntala & ors)*, 2006 (5) SCC 638 *(Ramesh B. Desai & others Vs. Bipin Vadilal Mehta & others)* and 200 (2) SCC 48 *(Municipal Council, Ahmednagar & another Vs. Shah Hyder Beig & others)* opined that the question of limitation is a mixed question of law and fact. Similar view is taken by this Court in *Shanti Shukla* (supra). In view of these judgments, it cannot be said that the Court below has exercised its discretion in an impermissible manner.

11. Interference under Article 227 of the Constitution can be made on limited grounds. If impugned order suffers from any jurisdictional error, manifest procedural impropriety or palpable perversity, interference can be made. Another view is possible is not a ground for interference. The High Court is not obliged to act as a bull in a china shop to correct the mistakes of fact and law which does not have any drastic effect. Issue No.3 can be decided at appropriate stage and if it is decided at a later point of time, no prejudice will be caused to the petitioner. Since Court below has taken a plausible view, no case is made out for interference. [See: *Shalini Shyam Shetty and another Vs. Rajendra Shankar Patil*, 2010 (8) SCC 329].

12. Resultantly, petition fails and is hereby dismissed.

Petition dismissed

I.L.R. [2019] M.P. 140
APPELLATE CIVIL
Before Mr. Justice Vivek Rusia
F.A. No. 407/1999 (Indore) decided on 26 November, 2018

JAGDISH CHANDRA GUPTA …Appellant

Vs.

MADANLAL …Respondent

***A. Civil Procedure Code (5 of 1908), Order 41 Rule 21 – Cross Appeal/ Cross Objection* – Held – If respondent is interested in challenging the adverse findings recorded against him by Court below, he is required to file at least his memo of objection in writing which may not be in form of cross objection or cross appeal – Respondents not permitted to challenge the findings recorded in favour of plaintiff in respect of will without filing any cross objection in appeal. (Paras 21 & 26)**

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 41 नियम 21 – प्रति–अपील/प्रत्याक्षेप – अभिनिर्धारित – यदि प्रत्यर्थी निचले न्यायालय द्वारा उसके विरूद्ध अभिलिखित किये गये प्रतिकूल निष्कर्षों को चुनौती देने में रूचि रखता है, उसे कम से कम लिखित में अपना आक्षेप ज्ञापन प्रस्तुत करना अपेक्षित है जो कि प्रत्याक्षेप अथवा प्रति–अपील के प्रारूप में नहीं हो सकता – प्रत्यर्थीगण को अपील में कोई प्रत्याक्षेप प्रस्तुत किये बिना, वसीयत के संबंध में वादी के पक्ष में अभिलिखित निष्कर्षों को चुनौती देने की अनुज्ञा नहीं।

***B. Civil Procedure Code (5 of 1908), Order 23 Rule 3 & Order 43 Rule 1A – Compromise Decree – Appeal* – Held – An appeal lies against a compromise decree under Order 43 Rule 1A CPC – Provisions is applicable to those persons who are party in the suit as well as to the compromise – In present case, appellant/plaintiff was not a party to suit as well in the compromise – Appellant can certainly filed a suit seeking declaration that decree passed in earlier suit is void and not binding on him – Findings recorded by trial Court set aside – Appeal allowed. (Paras 30 to 33 & 41)**

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 23 नियम 3 व आदेश 43 नियम 1ए – समझौता डिक्री – अपील – अभिनिर्धारित – समझौता डिक्री के विरूद्ध, आदेश 43 नियम 1ए सि.प्र.सं. के अंतर्गत अपील होती है – उपबंध उन व्यक्तियों को लागू होते हैं जो वाद के साथ ही समझौते के भी पक्षकार हैं – वर्तमान प्रकरण में, अपीलार्थी/वादी वाद के साथ साथ समझौते में भी पक्षकार नहीं था – अपीलार्थी निश्चित रूप से यह घोषणा चाहते हुए वाद प्रस्तुत कर सकता है कि पूर्वतर वाद में पारित डिक्री शून्य है तथा उस पर बंधनकारी नहीं है – विचारण न्यायालय द्वारा अभिलिखित निष्कर्ष अपास्त – अपील मंजूर।

C. Land Revenue Code, M.P. (20 of 1959), Section 57(2) & 189 –

***Jurisdiction of Court* – Held – The relief to the effect that decree passed in earlier suit is void and not binding on plaintiff can only be granted by Civil Court and not by Revenue Court – Relief of possession was consequential relief – Court below wrongly held that plaintiff can approach Revenue Court u/S 189 of the Code for obtaining possession – Suit is maintainable. (Para 39)**

ग. भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 57(2) व 189 – न्यायालय की अधिकारिता – अभिनिर्धारित – इस प्रभाव का अनुतोष कि पूर्वतर वाद में पारित डिक्री शून्य है एवं वादी पर बंधनकारी नहीं है, केवल सिविल न्यायालय द्वारा प्रदान किया जा सकता है और न कि राजस्व न्यायालय द्वारा – कब्जे का अनुतोष, परिणामिक अनुतोष था – निचले न्यायालय ने गलत रूप से अभिनिर्धारित किया कि वादी, संहिता की धारा 189 के अंतर्गत, कब्जा अभिप्राप्त करने के लिए, राजस्व न्यायालय के समक्ष जा सकता है – वाद पोषणीय है।

***D. Civil Practice – Principle of Estoppel* – Held – Defendants who are beneficiary of the said Will are stopped from challenging the said Will because on the basis of the same Will, one defendant was brought in the suit as legal representative who later entered into compromise with defendants and suit was decreed in their favour – Defendants took indirect advantage of the Will hence, they are estopped to challenge the validity of the Will in the suit. (Para 27)**

घ. सिविल पद्धति – विबंध का सिद्धांत – अभिनिर्धारित – प्रतिवादीगण, जो कि कथित वसीयत के हिताधिकारी हैं, को उक्त वसीयत को चुनौती देने से रोका गया क्योंकि उसी वसीयत के आधार पर एक प्रतिवादी को वाद में विधिक प्रतिनिधि के रूप में लाया गया था, जिसने बाद में प्रतिवादीगण के साथ समझौता किया और वाद उनके पक्ष में डिक्रीत किया गया था – प्रतिवादीगण ने वसीयत का अप्रत्यक्ष लाभ उठाया, अतः उन्हें वाद में वसीयत की विधिमान्यता को चुनौती देने से विबंधित किया गया।

***E. Interpretation – "Legal Heir" & "Legal Representative"* – Held – The meaning of word "legal representative" is having different connotation from the word "legal heir" in CPC – Name of legal representative recorded in earlier suit was for purpose of contesting the suit but not as owner of the property – Defendant, as a legal representative was not competent to enter into a compromise against the interest of the plaintiff – Impugned order to this effect is set aside. (Para 38)**

ङ. निर्वचन – ''विधिक वारिस'' व ''विधिक प्रतिनिधि'' – अभिनिर्धारित – सि.प्र.सं. में शब्द ''विधिक प्रतिनिधि'' के अर्थ का शब्द ''विधिक वारिस'' से भिन्न लाक्षार्थ है – पूर्वतर वाद में अभिलिखित विधिक प्रतिनिधि का नाम, वाद लड़ने के प्रयोजन हेतु था किंतु संपत्ति के स्वामी के रूप में नहीं था – प्रतिवादी, विधिक प्रतिनिधि के रूप में, वादी के हित के विरूद्ध समझौता करने के लिए सक्षम नहीं था – आक्षेपित आदेश, इस प्रभाव तक अपास्त किया गया।

Cases referred:

(2005) 10 SCC 124, AIR 1976 MP 160 (FB), AIR 1999 SC 3571, 1993 (1) SCC 581, 2007 (1) MPLJ 337, 2000 (6) SCC 310, AIR 2008 SC 2195, AIR 2004 SC 436, 1989 Supp. 2 SCC 275, (2018) 11 SCC 382, C.A. No. 9956/2018 decided on 25.09.2018 (Supreme Court), (2003) 9 SCC 606, 2011 (1) MPLJ (SC) 317, AIR 2000 MP 83, AIR 1982 SC 98, AIR 1993 SC 1139, AIR 2009 MP 232, (2009) 6 SCC 194, AIR 2011 MP 21, AIR 1994 Raj 31, AIR 2008 SC 2866.

A.K. Sethi with *Nitin Phadke* and *Harish Joshi*, for the appellant.

Sunil Jain with *Kushagra Jain, Parika Singh* and *Parul Verma,* for the respondent Nos. 1, 2 & 3.

None, for others though served.

J U D G M E N T

VIVEK RUSIA, J. :-The appellant (hereinafter referred as "plaintiff") has filed the present appeal being aggrieved by the judgment and decree dated 15.12.1999 passed by the First Additional District Judge, Mandsaur by which the civil suit has been dismissed.

Facts of the case in short are as under:

2. The plaintiff filed the suit for the reliefs of declaration, permanent injunction, possession and damages for the property bearing Survey No.790 (Area 0.031 are) (Old No.1232 of 2002), situated at Mandsaur. The boundaries of the suit property described in the plaint are as under:

"North — remaining land of Survey No. 790.
South — Kailash Marg Bus Stand.
East — Survey No. 791.
West — Road from Bust Stand to Gandhi Square.
Measurement of the land: length from east to west — 50 feet, width from north to south 50 feet.(50x50 square feet)"

(Hereinafter referred as the "suit property")

3. According to pleadings in the plaint, the "suit property" as well as nearby land was initially owned by Late Ramteerath and his ancestors. That "suit property" 50x50 sq.ft. and nearby lands owned by the ancestors of Late Ramteerath namely Hukumchand Onkar, Smt. Judab Bai and Ganga Bai were given on lease to ancestors of defendant Nos.6 to 18 namely Girdharilal on 10.09.1901. Late Ramteerath initiated proceedings for resumption of the aforesaid land under Section 189 of the Madhya Pradesh Land Revenue Code' 1959 (hereinafter referred as "MPLR Code") before the Sub Divisional Officer, Mandsaur which was registered as Case No.2/60xA/45. In the said case, the order of resumption dated 20.02.1968 was passed by the Revenue Commissioner in

favour of Late Ramteerath in Appeal No. 109/66-67 which had been upheld by the Board of Revenue vide order dated 26.08.1968 in Case No.91/3/68. In compliance of the aforesaid order, improvement and construction cost was deposited in the revenue Court by Late Ramteerath.

4. In order to protect their possession over the suit land and others lands Mandanlal, Maniklal, Laxmi Narayan and Smt. Badam Bai filed the suit for declaration and permanent injunction against Late Ramteerath and 4 others which was registered as Suit No.739-A/1996. Initially, the temporary injunction was granted in favour of the plaintiffs therein on 21.10.1976 which remained valid upto 14.05.1997. During pendency of the said suit, Late Ramteerath expired and the name of defendant No.5 Mohd. Shafi was brought on record as his legal representative by virtue of Will dated 04.05.1977 executed by him. According to the plaintiff, defendant No.5 colluded with defendant Nos.1 to 4 and got disposed of the suit by way of compromise. He had no authority or right to enter into the compromise in respect of the suit land which was granted to him by Late Ramteerath by way of Will dated 04.05.1977. By judgment dated 14.05.1997, the suit has been decreed in favour of defendant Nos.1 to 4 on the basis of compromise which came to the knowledge of plaintiff on 02.06.1997, hence, he filed the present suit on 23.06.1997. According to the plaintiff, by virtue of Will dated 04.05.1977, he had become the owner of the suit property. The defendant No.5 was only made a legal representative to pursue the suit, who had no right to enter into a compromise against the interest of plaintiff. The suit was disposed of without following the provisions under Order 23 Rule 3 (b) of the CPC, hence, the decree 14.05.1997 is liable to be declared void. The plaintiff has also claimed damages @ Rs.16,500/- per year and also claimed reliefs of possession and permanent injunction.

5. After notice, the defendants No.1 to 4 filed the written statement by submitting that they are in possession from the period of their ancestors *viz* Roopchand and defendants No. 6, 7 and Mangilal as Upkrushak i.e. the year 1949. Late Ramteerath did not initiate any proceedings against defendant Nos.1 to 4 or their ancestors for resumption of land, hence, the said order is not binding on them. By virtue of Will, Mohd. Shafi had validly entered into an agreement and the trial Court has rightly disposed of the suit. Even otherwise, the defendants No.1 to 4 have become Bhumiswami by virtue of provisions of MPLR Code which came into force w.e.f. 02.10.1959. By way of specific pleading, it was pleaded that the Will was executed during the pendency of Civil Suit No.739-A/1996, therefore, the provisions of Section 52 of the Transfer of Property Act would apply, and hence, the deed would not come under the purview of Will. The suit is not maintainable by virtue of Section 185, 189, 250 and 257 of MPLR Code. Late Ramteerath had expired on 04.12.1980, therefore, the present suit is barred by limitation.

6. The defendant No.5 filed the written statement admitting the Will dated 04.05.1977 in favour of plaintiff in respect of the suit land 50x50 sq.ft. He further submitted that the plaintiff did not obtain the possession at the relevant time hence he entered into compromise by virtue of rights given in the Will. He also admitted the possession of defendant Nos.1 to 4 since 1949 over the suit land. He entered into the compromise leaving the land 140 x 140 sq.ft. given to him by way of same Will.

7. The defendant Nos.6 to 18 also filed the written statement refuting the averments made in the plaint. They also denied the Will dated 04.05.1977 in favour of the plaintiff and they also challenged the order passed under Section 189 in MPLR Code for want of necessary party i.e. Ramgopal, brother of Late Ramteerath. They also contested the suit on the ground that the land is situated within the territory of Municipal Council, therefore, the provisions of MPLR Code are not applicable. They also attacked the compromise entered between defendant Nos.1 to 4 with defendant No.5. They entered into compromise because the defendant No.5 is international smuggler and due to his threat they entered into a compromise.

8. On the basis of pleadings, learned trial Court framed 8 issues for adjudication which are reproduced below:

1. क्या वादग्रस्त भूमि का दिनांक 4–5–77 को राम तीर्थ स्वामी था ?

2. क्या उक्त दिनांक 4–5–77 को रामतीर्थ ने विवादित भूमि की वसीयत वादी के पक्ष में की ? अतः वादी विवादित भूमि का भूमि स्वामी है ?

3. क्या प्र.क्र. 739–ए/96 तृतीय व्य. न्या. वर्ग–1 मंदसौर के प्रकरण में वादी आवश्यक पक्षकार था जिसे पक्षकार न बनाये जाने से वह प्रकरण दुरभिसंधि पूर्ण होने से उसमें की गई डिग्री शून्य है ?

4. क्या वादी विवादित भूमि पर कब्जा न होने से प्रतिवादीगण से गत तीन वर्ष का हर्जा 49,500/– रू. प्राप्त करने का अधिकारी है ?

5. क्या वादी ने वादमूल्य सही करते हुए सही न्याय शुल्क अदा किया है ?

6. क्या भू–राजस्व संहिता की धारा 257, 185, 189, 250 के प्रकाश में यह दावा इस न्यायालय में प्रचलन योग्य नहीं है ?

7. क्या दावा अवधि अन्दर है ?

8. क्या वादी का यह दावा मुख्य रूप से कब्जा का होने से प्रत्यावर्तन की कार्यवाही में आने से प्रचलन योग्य नहीं है?

9. सहायता एवं व्यय ?''

9. In support of the plaint, the plaintiff examined himself as PW1, Laxmi Narayan as PW2 who identified the signature of Ramlal, witness of Will, Madanlal Sharma (Advocate) as PW3 who transcribed the Will on innstructions (sic : instructions) of Late Ramteerath. The plaintiff has got exhibited 48 documents as Exhibit P/1 to P/48.

10. The defendant No.1 examined himself as DW1, defendant Nos.8 to 17 examined Ratan Singh Mathur as DW2 and have got exhibited 43 documents as Exhibit D/1 to D/43.

11. Learned Additional District Judge while recording the findings on issue No.1 has held that as on 04.05.1977, the Late Ramteerath was owner of the suit property and the ownership of defendant Nos.6 to 18 has been disbelieved. The defendant Nos.1 to 4 have not been found sub-lessee, but were found in possession from the period of their ancestors Roopchand as Upkrushak, but not as sub-lessee. They have been denied the title on the basis of adverse possession also.

While answering the issue No.2, learned trial Judge has found the Will dated 04.05.1977 proved in favour of the plaintiff. The will was challenged by defendants No.1 to 4 on various grounds like Section 63 and 68 of the Indian Evidence Act, manipulation and correction etc.

Learned Additional District Judge answered the issue No.3 against the plaintiff that compromise decree is not void because the plaintiff was not party in the Civil Suit No.739-A/1996 and so far as to the declaration of the decree as void by virtue of collusion is concerned, it has been held that this Court is not having jurisdiction and the plaintiff ought to have filed the suit before the same Court who passed the decree, hence, the decree passed in Civil Suit No.739-A/1996 is binding on the plaintiff.

While answering the issue No.4 and 5, the learned Additional District Judge has found that the plaintiff has suffered the loss of Rs.2,400/- per year.

While answering the issue Nos. 6 and 8 the learned trial Court has held that the plaintiff is having right to obtain possession before the revenue authority as the jurisdiction of civil Court is barred under Section 257 of the MPLR Code.

While answering issue No.7, learned Additional District Judge has held that the suit filed by the plaintiff is within limitation.

Finally, vide judgement dated 15.12.1999 learned 1st Additional District Judge has dismissed the suit on the basis of findings given on issue No.3, 6.

Being aggrieved by the aforesaid judgement and decree, the plaintiff has filed the present first appeal before this Court.

12. The plaintiff has assailed the findings recorded on issue No.3 and 6 mainly on the ground that learned Additional District Judge has committed grave error of facts and law as well in deciding these issues. He should to have held that the decree passed in Civil Suit No.739-A/1996 is nullity having been passed in contravention of provisions of Order 23 Rule 3(b) of the CPC and the same is not binding on the plaintiff as he was not party to it. Learned Additional District Judge has also committed an error of law as well as on fact while holding that the suit for possession filed by the plaintiff is barred under the provisions of Section 257 of the MPLR Code, whereas the suit for possession based on the title is very much maintainable. The plaintiff is already having a decree of resumption by the revenue Court as the Will has been found proved. It is pertinent to mention here that none of the defendants have filed first appeal/cross-objection against the findings recorded against them.

13. Shri A.K. Sethi, learned Senior Advocate appearing on behalf of the appellant has argued that the learned trial Court has committed grave error of law while dismissing the suit as not maintainable on the ground that the plaintiff ought to have filed the suit before the same Court who passed the judgement and decree because he is alleging that the same was obtained by fraud. He further submitted that in the Will dated 04.05.1997, Mohd. Shafi (defendant No.5) was given the right to pursue the litigation started by Late Ramteerath, therefore, he had limited right to continue the suit proceedings for the interest of actual legal heir of Late Ramteerath. In decree, it is specifically mentioned that the defendant No.5 is being appointed legal representative. The word "legal representative" as provided under Order 22 (3) & (4) is different from "legal heir". The legal heir can be a legal representative but not *vice versa*, is not there therefore, the defendant No.5 Mohd. Shafi had no right to enter into a compromise with defendant Nos.1 to 4 against the interest of plaintiff. Once, the trial Court has held that the plaintiff has proved the Will and he got the suit property of Late Ramteerath, then in this suit itself, the decree passed in Civil Suit No.739-A/1996 ought to have been declared void.

14. Shri A.K. Sethi, learned senior counsel has further argued that the learned trial Court has wrongly dismissed the suit by virtue of Section 257of the MPLR Code. Plaintiff filed the suit for the relief of declaration and permanent injunction The relief to the effect that the decree passed in earlier suit is void and not binding on him can be granted by the Civil court not by the Revenue court. In support of his contention, he has placed reliance over the judgement passed by the Apex Court in the case of *Hukam Singh Vs State of M.P.* reported in (2005) 10 SCC 124 in which the Supreme Court has held that for the suit for possession, declaration and permanent injunction is maintainable and the bar under Section 57(2) of the MPLR Code would not come in the way. He has also placed reliance over the judgement passed by the full bench of this Court in case of *Ramgopal Vs Chetu*

Batte : AIR 1976 MP 160(FB) where the suit for possession, declaration and permanent injunction has been held to be maintainable. Shri Sethi submitted that as an abundant precaution, the plaintiff has also filed the first appeal challenging the judgement and decree passed in Civil Suit No.739-A/1966 and the same has been dismissed and against which second appeal has been filed but there would no requirement to argue in Second Appeal in the event of this First appeal being allowed.

15. *Per Contra,* Shri Sunil Jain, learned Senior Advocate appearing on behalf of the respondents no.1 to 4 argued in support of the judgment and decree specially in respect of the findings recorded against the plaintiff. Shri Jain tried to assail the findings recorded in favour of the plaintiff in respect of the Will by way of oral submissions. According to Shri Jain, by virtue of amendment in Order 41 Rule 22 of the CPC, the defendants are not required to file any cross-objection or appeal to assail the findings recorded against them. They are permitted to argue against the findings without filing any memorandum of objection in this very appeal. In support of his contention, he has placed reliance over the judgement passed by the Supreme Court in the case of *Ravindra Kumar Sharma Vs. State of of Assam, reported in* AIR 1999 SC 3571 *(Para 18 to 22)*. He further submitted that defendant No.5 was given the absolute right by Late Ramteerath in Will dated 04.05.1997 in respect of the land Survey No.790, therefore, he had right to enter into a compromise with defendant no. 1to 4 also. The plaintiff has utterly failed to prove the Will by which the suit land was said to have been given to him. According to him, the Will (Exhibit P/1) is in two parts and by virtue of Section 88 of the Indian Succession Act, the later part shall prevail over the first part of the Will. The second part of the Will starts from para 8 . In the second part, the suit land had already been given to defendant No.5. In first part of the Will, the plaintiff has claimed title for the land area 2500 sq.f.t as per the map appended to the Will as furnishes to Schedule B, but there is no Schedule B in the Will, therefore, the learned trial Court has wrongly held that the plaintiff has proved the Will in respect of suit land 50x50 sq.ft. Shri Jain has placed reliance over the judgement passed by the Apex Court in case of *Banwarilal Vs. Chando Devi,* reported in 1993(1) SCC 581 on the ground that no appeal lies under Section 96(3) from the decree passed by the trial Court on consent of parties which implies that the decree is valid and binding on the parties.

16. After the amendment in the CPC, neither the appeal against the order recording compromise, nor remedy by way of filing the civil suit is available in the cases covered under Rule 3A of Order 23. He further placed reliance over the judgement passed by this Court in case of *Har Prasad Vs. Dhannulal,* reported in 2007(1) MPLJ 337 in which this Court has held that the suit for ejectment of the occupancy tenant in the civil Court is not maintainable by virtue of the bar under Section 257 (k) of the MPLR Code. He further placed reliance over the judgement

passed in the case of *Balwant Kaur Vs. Chanan Singh,* reported in 2000(6) SCC 310 in which it has been held that the last clauses of the Will represents the latest intentions of the testator. In case of *Anil Kak Vs. Kumari Shraddha, reported in* AIR 2008 SC 2195**,** the Apex Court has held that the Will in question is in 2 parts and appendix not in existence at the time of execution of the Will, hence, the Will is surrounded by the suspicious circumstances. Refusal to grant probate is proper. He has further placed reliance over the judgement passed in the case of *Bhagat Ram Vs. Suresh,* reported in AIR 2004 SC 436 on the point that codicil is also required to be proved with the same standard which is applicable for proving of the Will where neither the Registrar, nor the witnesses were called in the witness box to depose the attestation. The codicil cannot be said to have been proved. On the issue of legal representative respondent has placed reliance over the judgement passed in the case of *Custdodian of branches of Banco National Ultramarino Vs. Nalini Bai Naique,* reported 1989 Supp. 2 SCC 275 in which it has been held that the definition of legal representative is inclusive in character and its scope is wide and not confined to the legal heirs only. It includes heir as well as the person who represents the State even without title either as executor or administrator in possession of State of the deceased.

17. Shri Jain ld. Sr counsel further submitted that in other civil suits filed by the other legal heirs of Late Ramteerath, the said Will has not been found proved, but those judgements have not been filed alongwith the application under Order 41 Rule 27 of the CPC. Shri Jain further submitted that the defendant has filed an application under Order 41 Rule 27 of the CPC in order to establish that the plaintiff is in fact is not Jagdish whose name is appearing in the Will. His actual name is Santosh and he is an imposer filed the suit in the name of Jagdish. An FIR has been registered against him and he is facing the trial, therefore, these documents are necessary for taken on record and the suit is liable to be remanded back on this ground alone.

18. In rejoinder, Shri Sethi, learned senior counsel appearing on behalf of the appellant submitted that in absence of any cross-appeal, the defendant Nos.1 to 4 are not permitted to assail the findings on the issues recorded in favour of the plaintiff. In support of his contention, he has placed reliance over the judgement passed in the case of *Union of India Vs. Vijay Krishna Uniyal,* reported in (2018) 11 SCC 382 (para 45) in which it has been held that without filing formal cross-objection in the appeal, it is not open to the respondents to challenge the adverse findings recorded by the two Courts below. He has also placed reliance over the latest judgement of the Apex Court passed in case of *Biswajit Sukul Vs. Deo Chand Sarda and Others, (Civil Appeal No.9956/2018, decided on 25.09.2018)* and also placed reliance over the latest judgement passed in the case of *Banarsi & Others Vs. Ram Phal,* reported in (2003) 9 SCC 606 *(Para 10, 11 and 32)*, and the judgement passed by the Apex Court in case of *Laxman Tatyaba Kankate and*

Another Vs.Taramati Harishchandra Dhatrak, reported in 2011 (1) MPLJ (SC) 317 (para 16).

19. Before adverting on other issues it would be proper to first answer the following issue :-

Whether without filing cross-objection the defendants can be permitted to argue against the findings recorded in favour of plaintiff ?

20. Shri Jain, learned senior counsel appearing on behalf of the respondents argued that the learned Court has wrongly found the Will proved in favour of the plaintiff. and according to him the defendant can still challenge such findings without filling any separate appeal or cross- objection in this appeal. Shri Jain has placed heavy reliance over provisons the Order 41 Rule 22 of the CPC, according to which any respondent, though he may not have appealed from any part of the decree may not only argue in support the decree but may also **state** that the finding against him in the Court appeal in respect of any issue ought to have been in his favour and may also take any cross-objection to the decree which he could have been taken by the appellant . In view of the aforesaid provisions of O.41-R.21 of CPC, if the defendant wants to assail any part of the decree, he is required to file a separate appeal or cross-objection in the appeal instituted by the appellant but in case he has not filed any appeal from any part of the decree even than he is permitted to support the decree and may also state that the finding against him in the Court below ought to have been answered in his favour. The Apex Court in case of *Ravindra Kumar Sharma* (supra) has held that the cross-objection is wholly unnecessary in case adverse finding was to be attacked. Relevant portion of the aforesaid judgement is reproduced below:

"18. In connection with Order 41 Rule 22, CPC after the 1976 Amendment, we may first refer to the judgment of the Calcutta High Court in Nishambhu Jana vs. Sova Guha [(1982) 89 CWN 685]. In that case, Mookerjee,J. referred to the 54th report of the Law Commission (at p.295) (para 41.70) to the effect that Order 41 Rule 22 gave two distinct rights to the respondent in the appeal. The first was the right to uphold the decree of the court of first instance on any of the grounds which that court decided against him. In that case the finding can be questioned by the respondent without filing cross-objections. The Law Commission had accepted the correctness of the Full Bench of Madras High Court in Venkata Rao's case. The Commission had also accepted the view of the Calcutta High Court in Nrisingha Prosad

Rakshit vs. The Commissioners of Bhadreswar Muncipality that a cross-objection was wholly unnecessary in case the adverse finding was to be attacked. The Commission observed that the words "support the decree..." appeared to be strange and "what is meant is that he may support it by asserting that the ground decided against him should have been decided in his favour. It is desirable to make this clear". That is why the main part of Order 41 Rule 22 was amended to reflect the principle in Venkata Rao's case as accepted in Chandre Prabhuji's case.

20. These recommendations of the Law Commission are reflected in the Statement of Objections and Reasons for the Amendment. They read as follows:

> ***"Rule 22(i.e.as it stood before 1976) gives two distinct rights to the respondent in appeal. The first is the right of upholding the decree of the Court of first instance on any of the grounds on which that court decided against him; and the second right is that of taking any cross-objection to the decree which the respondent might have taken by way of appeal. In the first case, the respondent supports the decree and in the second case, he attacks the decree. The language of the rule, however, requires some modifications because a person cannot support a decree on a ground decided against him. What is meant is that he may support the decree by asserting that the matters decided against him should have been decided in his favour. The rule is being amended to make it clear. An Explanation is also being added to Rule 22 empowering the respondent to file cross-objection in respect to a finding adverse to him notwithstanding that the ultimate decision is wholly or partly in his favour."***
>
> ***Mookerjee, J. observed in Nishambhu Jana's case (see p.689) that "the amended Rule 22 of Order 41 of the Code has not brought any substantial change in the settled principles of law" (i.e. as accepted in Venkata Rao's case) and***

clarified (p.691) that "it would be incorrect to hold that the Explanation now inserted by Act 104 of 1976 has made it obligatory to file cross-objections even when the respondent supports the decree by stating that the findings against him in the court below in respect of any issue ought to have been in his favour.

21. A similar view was expressed by U.N.Bachawat, J. in Tej Kumar vs. Purshottam [AIR 1981 MP 55] that after the 1976 Amendment, it was not obligatory to file cross-objection against an adverse finding. The Explanation merely empowered the respondent to file cross-objections."

21. It is clear from the aforesaid judgement that the respondents in order to attack the adverse findings recorded against him by the Court below is not required to file cross-objection, but keeping in view peculiar facts of this case it was necessary for him to disclose at the time of admission of the appeal that he is going to challenge the adverse findings at the time of final hearing of the appeal. Normally, the appeal once admitted comes for final hearing after 5/10/15 years and after such long period if the respondent starts arguing against the findings recorded in favour of plaintiff then it would be a surprise for the appellant to give response to those arguments, therefore, if the respondent is interested in challenging the findings recorded against him, he is required to file at least his memo of objection in writing which may not be in the form of cross-objection or having status of appeal which is required to filed only when any part of the decree is under challenge by the respondents.

22. In case of *Babulal Agrawal Vs Smt. Jyoti,* reported in AIR 2000 MP 83*,* the Division Bench of this High Court has held that under order 41, Rule 22, C.P.C. cross-objection in lieu of cross appeal is permissible as also cross-objection is permissible against an adverse finding and the cross objection which is merely against an adverse finding would not attract applicability of Art. 1-A but where the cross-objection is in lieu of cross appeal as contemplated by Order 41, Rule 22 (1), C.P.C. it would attract ad valorem Court-Fees under Art. 1-A .Para 20A and 21 are reproduce below:-

20A. Under Order 41, Rule 22, C.P.C. cross-objection in lieu of cross appeal is permissible as also cross-objection is permissible against an adverse finding. The Explanation added below Order 41, Rule 22 was introduced by Amendment Act of 1976 with a specific purpose that cross-objection may be allowed to be filed even against adverse

finding by the respondent who may have been successful on other findings of the Court below. The cross objection which is merely against an adverse finding would not attract applicability of Art. 1-A but where the cross-objection is in lieu of cross appeal as contemplated by Order 41, Rule 22 (1), C.P.C. it would attract ad valorem Court-Fees under Art. 1-A and omission of the words 'cross-objection ' in Art. 1-A would have no different legal effect . The cross-objection against adverse finding and cross-objection in lieu of cross appeal have thus to be treated differently for the purpose of Court-fee.

21. We are, therefore, of the considered view that the memorandum of cross-objection in so far as it challenges the adverse finding on legal necessity, order to support of the decree of dismissal of suit for specific performance is, on this additional ground, clearly maintainable and would not attract any payment of ad valorem Court-fees.

23. In case of *Choudhary Sahu (Dead) Vs. State of Bihar* reported in AIR 1982 SC 98, the apex court has held that while exercising the power under this O.41 rule 21 or O.41 rule 33 of CPC the Court should not lose sight of the other provisions of the Code itself nor the provisions of other laws, viz., the Law of Limitation or the Law of Court-fees etc. Relevant portion is reproduced below:-

4. The sole contention raised on behalf of the appellants in the various appeals is that in the absence of any appeal or cross-objection filed by the State of Bihar the Commissioner was not justified in reversing the finding in favour of the appellants, namely, the finding on the question of allotment of units or regarding the classification of land. This contention, as observed earlier, 'was raised before the High Court in the writ petition as well. The High Court, however, repelled the contention by applying the provisions of O. 41, R. 22. Reliance has also been placed by the State of Bihar on the provisions of O. 41, R. 33, C. P. C. in support of the order of the Commissioner. The High Court, however, did not rely upon O. 41, R. 33 and rest content by relying on provisions of O. 41. R. 22.

5. By R 49 of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Rules, 1963, O. 41; C. P. C. has been made applicable in disposing of the appeals under the Act.

6. We will first refer to the provisions of O. 41, R. 22. Insofar as it is material for the purposes of this case, it reads :

> ***"22.(1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree on any of the grounds decided against him in the Court below, but take any cross objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the appellate Court may see fit to allow."***

7. The first part of this rule authorises the respondent to support the decree not only on the grounds decided in his favour but also on any of the grounds decided against him in the Court below. The first part thus authorises the respondent only to support the decree. It does not authorise him to challenge the decree. If he wants to challenge the decree, he has to take recourse to the second part, that is, he has to file a cross-objection if he has not already filed an appeal against the decree. Admittedly, the State of Bihar had neither filed any appeal nor cross-objection. Obviously, therefore, on the strength of the first part of sub-cl. (1) of R. 22 of O. 41 the State of Bihar could only support the decree not only on the grounds decided in its favour but also on the grounds decided against it. The Commissioner however, has set aside the finding in favour of the appellant on the strength of O. 41, R. 22 (1). In our opinion this he could not do.

8. The only other Order on which the State of Bihar could rely upon is O. 41, R 33, C. P. C. The High Court did not consider the provisions of O. 41, R. 33 as in its opinion the order of the Commissioner could be supported on the strength of O. 41, R. 22. In the view that we have taken regarding the applicability of O. 41, R. 22 it becomes pertinent to consider the applicability of O.41, R. 33, C. P. C. Insofar as material, it reads :

> ***"33. The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or, order, as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection.***

Illustration.- A claims a sum of money as due to him from X or Y, and in a suit against both, obtains a decree against X X appeals and A and Y are respondent. The appellate Court decides in favour of X. It has power to pass a decree against Y." This rule is widely expressed and it must be applied with great caution. The object of this rule is to empower the appellate Court to do complete justice between the parties. Under this rule the Court has power to make a proper decree notwithstanding that the appeal is as to part only of the decree and such power may be exercised in favour of all or any of the parties even though they may not have filed an appeal or objection.

12.The object of this rule is to avoid contradictory and inconsistent decisions on the same questions in the same suit. As the power under this rule is in derogation of the general principle that a party cannot avoid a decree against him without filing an appeal or cross-objection, it must be exercised with care and caution. The rule does not confer an unrestricted right to re-open decrees which have become final merely because the appellate Court does not agree with the opinion of the Court appealed from.

13.Ordinarily, the power conferred by this rule will be confined to those cases where as a result of interference in favour of the appellant further interference with the decree of the lower Court is rendered necessary in order to adjust the rights of the parties according to justice, equity and good conscience. While exercising the power under this rule the Court should not lose sight of the other provisions of the Code itself nor the provisions of other laws, viz., the Law of Limitation or the Law of Court-fees etc.

14.In these appeals the Collector on the basis of the material placed before him allowed certain units to the various appellants. In the absence of any appeal by the State of Bihar there was no justification for the Commissioner to have interfered with that finding in favour, of the appellants. The facts and circumstances of these appeals are not such in which it would be appropriate to exercise the power under O. 41, R. 33. The Commissioner as well as the High Court committed, a manifest error in reversing the finding regarding allotment of units to the various appellants in the absence of any appeal by the State of Bihar when the same had become final and rights off

the State of Bihar had come to an end to that extent by not filing any appeal or cross-objection within the period of limitation.

24. That in case of *Banarsi & Others Vs. Ram Phal* (supra) in which the apex Court has held that the first appellate Court ought to not to have while dismissing the appeal filed by the defendant-appellant before the modifying the decree in favour of the respondent in absence of cross-appeal or cross-objection. The interference by the first appellate Court has reduced the appellants to a situation worse than in what they would have been if they had not appealed. Para 22 is reproduced below:

"22. For the foregoing reasons we are of the opinion that the first Appellate Court ought not to have, while dismissing the appeals filed by the defendant-appellants before it, modified the decree in favour of the respondent before it in the absence of cross-appeal or cross-objection. The interference by the first Appellate Court has reduced the appellants to a situation worse than in what they would have been if they had not appealed. The High Court ought to have noticed this position of law and should have interfered to correct the error of law committed by the first Appellate Court."

25. The similar view has been taken again by the Apex Court in case of *Union of India Vs. Vijay Krishna Uniyal* (supra) and observed that permitting the respondent to assail the finding of the Court below on the issue of ownership of the property would be overlooked the cardinal principle that the Court would not ordinary make an order, direction or decree placing the party appealing to which in a position more disadvantageous than in what it would have been had if any appealed. Recently in the case of *Biswajit Sukul* (supra) the Apex Court has held that the plaintiff in his first appeal did not challenged the finding of the trial Court recorded on the first part of the issue No.4 because it was partly answered in his favour. The first appellate Court, therefore, could not examine the legality and accordingly all these findings in the plaintiff's appeal unless it was challenged by the defendant by filing cross-objection under Order 41 Rule 22 of the CPC. Relevant portion of the aforesaid judgement is reproduced below:

"17. The plaintiff in his first appeal did not challenge the finding of the Trial Court recorded on the first part of issue No.4 and rightly so because it was already answered by the Trial Court in his favour. The First Appellate Court, therefore, could not plaintiff's appeal unless it was challenged by the defendants by filing cross objection under Order 41 Rule 22 of the Code in the appeal.

18) As mentioned above, the defendants though suffered the adverse finding on first part of issue No. 4 but did not file any cross objection questioning its legality. In the light of these admitted facts arising in the case, the First Appellate Court had no the finding on first part of issue No. 4 in plaintiff's appeal and reverse it against the plaintiff.

19) Second, the High Court also committed the same mistake by not noticing the aforesaid jurisdictional error committed by the First Appellate Court. The High Court, in plaintiffs revision again, went into the legality of the findings of first part of issue No.4 on merits and affirmed the finding of the First Appellate Court. This finding ought to have been set aside by the High Court only on the short ground that the First Appellate Court had no jurisdiction to examine it in plaintiff's appeal."

26. Therefore, in view of the above verdicts of the Apex Court as well as of this High court, the respondents/defendant Nos.1 to 4 are not permitted to challenge the findings recorded in favour of the plaintiff in respect of the Will dated 04.05.1977, without filing any cross-objection in this appeal, hence, the issue framed above is answered against respondent Nos.1 to 4 and in favour of the plaintiff.

27. Even otherwise, the defendants No.1 to 4 who are beneficiary of the said Will are estopped from challenging the Will because on the basis of the same Will, the defendant No.5 was brought as a legal representative of Ramteerth in the suit. He was given certain share in the properties of Late Ramteerath by virtue of Will. Since, the name of Mohd.Shafi came into the civil suit in place of Late Ramteerath by virtue of Will and thereafter, he entered into a compromise with the defendant Nos.1 to 4 in respect of the suit property and the suit was disposed of in their favour, therefore, the defendant No.1 to 4 took indirect advantage of the Will, hence, they are estopped from challenging the validity of the Will in the suit.

28. Now, the only issue which is required to be considered is to ***whether the plaintiff can challenge the decree passed in earlier suit on the basis of compromise by way of fresh suit or he ought to have challenge before the same Court who has passed the decree of compromise?***

29. Undisputedly, the plaintiff was not a party in the C.S.No.739-A/1996. When Late Ramteerath died during the pendency of the suit, the name of Mohd.Shafi was brought on record as legal representative by virtue of the Will dated 04.05.1977. Whether, Mohd.Shafi can enter into a compromise against the interest of plaintiff in C.S.No.739-A/1996 would be considered later on in this judgement ?

30. Under Order 23 Rule 3 of the CPC where it is proved to the satisfaction of the Court that the suit adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties, the Court shall order such agreement, compromise or satisfaction to be recorded and shall pass the decree in accordance with law so far as it relates to the parties to the suit, therefore, if any decree is passed on the basis of compromise arrived at between the plaintiff and the defendant, it would be a decree between the parties in the suit. Under Order 43 Rule 1A of the CPC, an appeal lies against the decree passed on compromise. The right of appeal has been given under Order 43 Rule 1 A(2) to the party who challenged the record of a compromise to question the validity thereof while preferring an appeal against the decree. In the case of *Banwari Lal v. Smt. Chando Devi (through L.R.) and another* reported in AIR1993 SC 1139 the apex court has held as under:-

> ***13. When the amending Act introduced a proviso along with an explanation to Rule 3 of O. 23 saying that where it is alleged by one party and denied by other that an adjustment or satisfaction has been arrived at, "the Court shall decide the question", the Court before which a petition of compromise is filed and which has recorded such compromise, has to decide the question whether an adjustment or satisfaction had been arrived at on basis of any lawful agreement. To make the enquiry in respect of validity of the agreement or the compromise more comprehensive, the explanation to the proviso says that an agreement or compromise "which is void or voidable under the Indian Contract Act " shall not be deemed to be lawful within the meaning of the said Rule. In view of the proviso read with the explanation, a Court which had entertained the petition of compromise has to examine whether the compromise was void or voidable under theIndian Contract Act. Even R. 1(m) of O. 43 has been deleted under which an appeal was maintainable against an order recording a compromise. As such a party challenging a compromise can file a petition under proviso to R. 3 of O. 23, or an appeal under S. 96(1) of the Code, in which he can now question the validity of the compromise in view of R. IA of O. 43 of the Code.***
>
> ***14. The application for exercise of power under proviso to R. 3 of O. 23 can be labelled under S. 151 of the Code but when by the amending Act specifically such power has been vested in the Court before which the petition of compromise had been filed, the power in appropriate cases has to be exercised under the said proviso to R. 3. It has been held by different High Courts that even after a compromise has been recorded, the Court concerned can entertain***

an application under S. 151 of the Code, questioning the legality or validity of the compromise. Reference in this connection may be made to the cases Smt. Tara Bai v. V. S. Kr-ishnaswamy Rao, AIR 1985 Kar 270; S. G. Thimmappa v. T. Anantha, AIR 1986 Kar 1, Bindeshwari Pd. Chaudhary v. Debendra Pd. Singh, AIR 1958 Pat 618; Mangal Mahton v. Behari Mahton, AIR 1964 Pat 483 and Sri Sri Iswar Gopal Jew v. Bhagwandas Shaw, AIR 1982 Cal 12, where it has been held that application under S. 151 of the Code is maintainable. The Court before which it is alleged by one of the parties to the alleged compromise that no such compromise had been entered between the parties that Court has to decide whether the agreement or compromise in question was lawful and not void or voidable under the Indian Contract Act. If the agreement or the compromise itself is fraudulent then it shall be deemed to be void within the meaning of the explanation to the proviso to R. 3 and as such not lawful. The learned Subordinate Judge was perfectly justified in entertaining the application filed on behalf of the appellant and considering the question as to whether there had been a lawful agreement or compromise on the basis of which the Court could have recorded such agreement or compromise on 27-2-1991. Having come to the conclusion on the material produced that the compromise was not lawful within the meaning of R. 3, there was no option left except to recall that order.

31. In the above case party in the suit after entering in the compromise filed an application for setting aside the decree and apex court has held that such part can file appeal as well as application for setting aside decree before the same court.

32. There is bar under Section 96(3) that no appeal shall lie against a decree passed by the Court with the consent of parties. In case of *Mahila Bhanwari Bai Vs. Kashmir Singh,* reported in AIR 2009 MP 232, the co-ordinate bench of this Court has held that where the parties who entered into a compromise had no power to enter into a compromise and the compromise had been entered into by playing fraud, such compromise and settlement is void, therefore, appeal against the award would be maintainable under Section 96. In the aforesaid case, the division Bench Court has permitted the parties to file an appeal, but in the present case, admittedly, the plaintiff was not a party in the suit as well as in the compromise. In the case of *Sneh Gupta Vs. Devi Sarup & Others,* reported in (2009) 6 SCC 194, the Apex Court has held that Order 23 Rule 3 of the CPC provides that the decree is not binding on such defendant who are not party thereto. The consent decree is merely an agreement between the parties with the seal of the Court. In case of *Santosh Kumar & Another Vs. Hachchu & Others,* reported in AIR 2011 MP 21, this Court has held that no guardian of defendant

No.4 was appointed by the Court and the suit was filed mentioning his uncle as guardian and compromise was recorded, therefore, such decree based on the compromise can be challenged by way of separate suit if the person is not a party to the decree and the decree is void. Relevant portion of the aforesaid judgement is reproduced below:

> ***"18. I am conscious the judgements passed by this Court and other High Courts to the effect that in view of the Order 23 Rule 3-A of the CPC, an independent suit is not maintainable to challenge a compromise decree, however, if a person is not a party to the decree and the decree is void, then certainly a suit is maintainable and the bar of Order 23 Rule 3-A of the CPC would not be applicable in that case."***

33. Therefore, the provisions of Order 23 Rule 3-A and Order 41 Rule 1-A(2) are applicable to those persons only who are party in the suit as well as to the compromise. Admittedly in the present case appellant was not party to the compromise certainly can institute a suit seeking declaration that the decree passed in C.S.NO.739-A/1996 is void and not binding on him, therefore, the findings recorded by the trial Court on this issue are liable to be set aside.

34. Learned Trial Court has held that the plaintiff is having rights over the property which was having by Late Ramteerath hence Mohd.Shafi was representing him before the trial Court in the pending C.S.No.739-A/1996 and if any compromise is arrived by him as per law, the same would be binding on the plaintiff, despite he was not party to it. Learned Court came to the aforesaid conclusion only on the ground that Mohd. Shafi was given authority through the Will to contest the suit on behalf of Late Ramteerath, hence, the decree is not void merely because the plaintiff was not party to it, therefore, the issue under consideration would be "whether in the pending suit, Mohd.Shafi was having authority by virtue of Will to enter into compromise with the defendant Nos.1 to 4 (plaintiffs in the C.S.No.739-A/1996) and whether Mohd.Shafi was representing the plaintiff also and thus the decree passed in C.S.No.739-A/1996 is binding on the present plaintiff ? In order to decide this entire facts and circumstances are required to be reminiscences under which the C.S.No.739-A/1996 was filed.

35. Late Ramteerath being an owner of the land filed the application under Section 189 of the MPLRC before the SDO for resumption of the other land alongwith the suit land. In a second appeal his claim was allowed by the Additional Commissioner and the same was affirmed by the Board of Revenue by order dated 26.08.1968 (Exhibit P/26). In this background, the defendant Nos.1 to 4 along with others filed the Civil Suit No.739-A/1996 before the Civil Judge, Class-I, Mandsaur seeking relief of ownership and declaration that the order of resumption is not binding on them. Late Ramteerath was impleaded as one of the

defendant No.4 alongwith other co-owners (Exhibit P/29). During his lifetime Late Ramteerath filed the detail written statement (Exhibit P/30) denying the title of plaintiffs Nos.1 to 4 (Defendant No. 1to4 in this appeal) in the said suit filed on 02.05.1977. Thereafter, he executed the Will on 04.05.1977 appointing Mohd.Shafi as legal representative to represent him in the pending civil suit proceedings. In para 2 of the Will he has specifically mentioned that Beni Singh, Fateh Singh, Mangilal etc. are in possession and he is contesting against them since last 34 years in the Court for obtaining possession. The order passed by the Board of Revenue for resumption of the land had become final but they filed the suit in the name of Madanlal etc. In para 3, he has also mentioned that in order to take possession legally from the Court, he labored for continuous 34 years, therefore, the intention of Late Ramteerath behind appointing Mohd.Shafi as legal representative was to obtain the possession from the plaintiffs there in. His intention was very clear in the Will that he was interested in taking possession of his land from plaintiffs and for which he appointed Mohd.Shafi as a legal representative. The contents of para 2, 3 and 4 are reproduced below:

''2 यह कि मैने इस सम्पत्ति को जो मन्दसौर नगर के मध्य मोटर स्टैण्ड के पास स्थित है जिसे ठाकुर सा के बाग के नाम से सम्बोधित करते है इस सम्पत्ति को मेरे विरोधी बेणीसिंह, फतेहसिंह, मांगीलाल आदि के कब्जे से प्राप्त करने के लिये गत 34 वर्ष से न्यायालय में लड़ रहा हूँ। मेरे हक में उक्त भूमि इनके कब्जे से प्राप्त करने एवं अर्जित करने का आदेश भी सक्षम राजस्व न्यायालय से अन्तिम हो चुका है। परन्तु इन्होने मदन लाल वगैरा को मेरे विरूद्ध लड़ने के लिये खड़े कर दिये है और स्वयं भी दिवानी अपील में लड़ रहे है। मैंने अपील तरफ इस भूमि सम्बन्धी तमाम प्रकरणों में पैरवी करने के लिये अन्य समस्त कार्यवाही के लिये मुख्तयार आम श्री महम्मद शफी पिता हाजी अब्दुल रहीम जी निवासी मन्दसौर को लिखकर रजिस्टर्ड विलेख के द्वारा नियत किया है। मेरे मुख्तयार आम को जो अधिकार मेरे द्वारा प्रदान किया है वह मेरी मृत्यु के बाद भी यह एल आर के समस्त अधिकार श्री महम्मद शफी पिता हाजी अब्दुल रहीम जी को रहेगा। अतः इसके लिये मै यह लिखकर अधिकार श्री महम्मद शफी पिता हाजी अब्दुल रहीम जी को देता हूँ। मेरे जीवित स्थिति मे यह मेरे मुख्तयार आम की हैसियत से कार्य को करेंगे मृत्यु के बाद मेरे लीगल रिप्रेजेन्टेटिव बनकर इन तमाम प्रकरण में मेरे स्थान पर पक्षकार बनकर तमाम प्रकरणों की पैरवी करावेगें। इस प्रकार मैं यहाँ श्री महम्मद शफी पिता हाजी अब्दुल रहीम को उपरोक्त कार्य के हेतु अपनी सम्पत्ति में इन्टर मेडल करने का अधिकार देता हूँ।

3 यह कि किसी कारणवश श्री महम्मद शफी पिता हाजी अब्दुल रहीम किसी कारणवश वे इस कार्य को नहीं कर सके या अन्य कोई अड़चन पैदा होवे तो मैं इनकी सहायता व सहयोग के लिये श्री बंसीलाल पिता अम्बालाल जी गुप्ता एडवोकेट मन्दसौर को इस कार्य को विधिसम्मत करने के लिये मेरी मृत्यु के बाद अधिकृत करता हूँ और लीगल रिप्रेजेन्टेटिव इनके अनुपस्थिति में बनाता हूँ।

4 यह कि मैंने उक्त सम्पत्ति को न्यायालय में विधिवत अर्जन करने के लिये 34 वर्ष से निरन्तर परिश्रम किया है और मुझे इसकी निःशुल्क कानूनी मदद निरन्तर श्री मोहनलाल जी द्विवेदी सा मन्दसौर के द्वारा मिलती रही है। इनके सहयोग से मैं मन्दसौर कलैक्टरी उज्जैन कमीशनरी, ग्वालियर रेवेन्यू बोर्ड मन्दसौर दिवानी न्यायालय आदि में कामयाब होता रहा हूँ। मेरा यह अथक परिश्रम निष्फल नहीं जावे मेरी जायदाद मेरे विरोधी से मिलकर मेरे रिस्तेदार वारिस आदि नष्ट नहीं कर देवे इस प्रकार मेरे 34 वर्षों का परिश्रम व्यर्थ नही जावे। इस कारण मैं अपने रिश्तेदारों को मेरे वारिस की हैसियत से लीगल रिप्रजेन्टेटिव बनने का अधिकार नहीं दे रहा हूँ केवल श्री महम्मद शफी या इनके अनुपस्थिति में बंसीलाल गुप्ता ही मेरे कानुनन उत्तराधिकारी : रू बनकर पैरवी श्री मोहनलाल जी द्विवेदी वकील सा के सहयोग से करवाऐगे। श्रीमान मोहनलाल द्विवेदी के द्वारा जो सहयोग व मदद मुझे दी है वह मेरे लीगल रिप्रजेन्टेटिव : रू को भी इसी प्रकार करते रहेंगे यह मुझे पूरा विश्वास एवं भरोसा है।''

36. Late Ramteerath gave 22,500 sq.ft. to Mohd. Shafi from his properties as reward for his services given to him, and in addition to it he was given right to contest the suit on behalf of Late Ramteerath. No authority was given to him to enter into compromise with the plaintiffs against the interest of actual owners of the property of Late Ramteerath. Needless to explain that the word "legal representative" is having different connotation from the word "legal heir" in the CPC. Under the provisions of Order 22 Rule 3 & 4 of the CPC, the meaning of word "legal representative" is used. The name of Mohd. Shafi was brought on record of the civil suit as legal representative of Late Ramteerath. In case of *Kalu Ram v. Charan Singh* reported in AIR 1994 Raj 31 it has been held that Persons other than legal heir can also be legal representative. Even an intermiddler with the estate of deceased can also be allowed to represent estate for purpose of pending proceedings before court. The decision as to who is legal representative for purpose of proceedings is necessarily limited for the purpose of carrying on the proceedings and cannot have effect of conferring of any right of heirship to the estate of deceased.

6. Having given my careful consideration to the rival contentions raised before me, I am of the opinion that this Revision Petition merits acceptance. Section 2(11) of the C.P.C., which defines 'legal representative', makes it abundantly clear that the persons other than legal heir can also be legal representative. Even an intermiddler with the estate of deceased can also be allowed to represent the estate for the purpose of pending proceedings before the court. It is true that all legal heirs are, ordinarily, also legal representatives, but the converse is not true. All legal representatives are not necessarily legal heirs as will. The decision as to who is the legal representative for the purpose of proceedings is necessarily limited for the purpose of carrying on the proceedings and cannot

have the effect of conferring of any right of heirship to the estate of the deceased. The decision on this issue also does not operate res judicata on the question of heirship in the subsequent proceedings. In view of this settled position of law, it must be held that the enquiry into right to heirship is not the determining factor in deciding whether a person is or is not a legal representative for the purpose of proceedings before the court. What is required to be considered is whether the person claiming to represent the estate of the deceased for the purpose of lis has sufficient interest in carrying on litigation and is not any imposter. In case of rival claimants, it may also be necessary to decide that out of the rival claimants, who really is the person entitled to represent the estate for the purpose of particular proceedings. Even that determination does not result in determination of inter se right to succeed to property to the deceased and that right has to be established in independent proceedings in accordance with law.

37. In case of *Jaladi Suguna (Dead) through L. Rs. Vs. Satya Sai Central Trust and Ors.* reported in AIR 2008 SC 2866 the Supreme court has held as under :-

10. Filing an application to bring the legal representatives on record, does not amount to bringing the legal representatives on record. When an LR application is filed, the Court should consider it and decide whether the persons named therein as the legal representatives, should be brought on record to represent the estate of the deceased. Until such decision by the Court, the persons claiming to be the legal representatives have no right to represent the estate of the deceased, nor prosecute or defend the case. If there is a dispute as to who is the legal representative, a decision should be rendered on such dispute. Only when the question of legal representative is determined by the Court and such legal representative is brought on record, it can be said that the estate of the deceased is represented. The determination as to who is the legal representative under Order 22 Rule 5 will of course be _ for the limited purpose of representation of the estate of the deceased, for adjudication of that case. Such determination for such limited purpose will not confer on the person held to be the legal representative, any right to the property which is the subject matter of the suit, vis-a-vis other rival claimants to the estate of the deceased.

(emphasised supplied)

38. The name of legal representative recorded under Order 22 Rule 3 & 4 of the CPC is only for the purpose of contesting the suit not as owner of the property,

therefore, the Court below has wrongly held that Mohd.Shafi was representing the interest of plaintiff also in the suit and was competent to enter into the compromise. Hence, the finding recorded on issue No.3 is hereby set aside.

39. The learned Court below has also non-suited the plaintiff on the ground that he is having right to obtain possession under Section 189 of the MPLR Code. The relief to the effect that the decree passed in earlier suit is void and not binding on him can only be granted by the Civil court not by the Revenue court. The Apex Court in the case of *Hukam Singh Vs State of M.P.* reported in (2005) 10 SCC 124 has held that for the suit for possession, declaration and permanent injunction is maintainable and the bar under Section 57(2) of the MPLR Code would not come in the way. Full bench of this Court in case of *Ramgopal Vs Chetu Batte :* AIR 1976 MP 160(FB) has also retreated the suit possession, declaration and permanent injunction is be maintainable. The plaintiff who sought the relief declaratory in nature for which only the civil Court is competent to grant. The relief of possession was the consequential relief, therefore, learned Court below has wrongly held that the plaintiff can approach the revenue Court under Section 189 of the CPC for obtaining possession from the defendant Nos.1 to 4.

40. In view of the above findings, pending applications are also disposed of as under:

I.A.No.53/2016, an application under Order 41 Rule 27 of the CPC has been filed by the respondents for taking additional documentary evidence on record.

I.A.No.54/2016, an application under Order 6 Rule 17 of the CPC has also been filed by the respondent seeking amendment in the written statement. Aforesaid two applications have been filed in order to establish that the plaintiff is not Jagdishchandra Gupta in whose favour the Will in question was executed. His real name is Santosh Kumar Gupta S/o Ramchandra Gupta but filed appeal in the name of Jagdishchandra Gupta.

That respondent No.2 himself appeared as witness before the trial Court and admitted that the plaintiff Jagdish was also known to him as Santosh and alongwith Commission when he came to his house then he came to know that Santosh is actually planitiff Jagdish.

In view of this admission made by respondent No.2 this issue is not liable to be considered in this appeal, hence, both the applications are rejected.

The appellant has filed an application under Section 340 of the Cr.P.C seeking appropriate action against respondent No.2 for swearing false affidavit and commiting contempt of this Court. According to the appellant, the respondent No.2 has filed an application under Order 6 Rule 17 & Order 41 Rule 27 disputing

his identity contrary to his own statement made before the Court, therefore, he submitted a false affidavit.

Since, the aforesaid two applications have been rejected and the fact remains that one criminal case is pending against the present appellant on the same charges, therefore, it would not be proper to decide the application under Section 340 of the Cr.P.C in this appeal because any finding recorded may give adverse effect in the trial, hence, this application (I.A.No.2848/2016) is also rejected.

41. In view of the above, judgement and decree dated 15.12.1999 is hereby set aside so far as it relates to the findings recorded against issue No.3, 8 & 9. The suit is liable to be decreed in favour of the plaintiff . The appeal stands allowed with following terms:

1. The judgement and decree passed in C.S.No.739-A/1996 on basis of compromise between Defendant no. 1 to 4 with defendant no.5 is herby declared void and not binding on the plaintiff.

2. As per the contents of the Will Mohd. Shafi had no right to enter into compromise with the defendant Nos.1 to 4.

3. The plaintiff is entitled to take possession from defendant Nos.1 to 4 hence the (sic:they) are directed to hand over the possession of the suit land 50X50 sqr fit (sic : ft.) to the plaintiff within the period of 2 months from today.

4. The decree in respect of compensation of Rs.7,200/- is her by (sic : hereby) maintained.

No order as to cost. Decree be drawn.

Appeal allowed

I.L.R. [2019] M.P. 164
APPELLATE CIVIL
Before Mr. Justice Subodh Abhyankar
S.A. No. 386/2003 (Jabalpur) decided on 23 January, 2019

DHIRAJ JAGGI …Appellant

Vs.

SMT. CHUNTIBAI & ors. …Respondents

***Evidence Act (1 of 1872), Section 90 – Presumption – Validity of Document* – Held – Original sale deed never produced before Court – Sale deed produced before Court although 30 yrs. old is actually a certified copy – Even original defendant/purchaser neither got his name mutated in revenue**

records nor was examined before Court, thus cannot be said to be a valid sale deed – Conditions enumerated u/S 90 of the Act of 1872 not satisfied thus presumption to validity of such document not available – Appeal dismissed.
(Para 9 & 10)

साक्ष्य अधिनियम (1872 का 1), धारा 90 – उपधारणा – दस्तावेज की विधिमान्यता – अभिनिर्धारित – मूल विक्रय विलेख न्यायालय के समक्ष कभी भी प्रस्तुत नहीं किया गया – न्यायालय के समक्ष प्रस्तुत विक्रय विलेख, यद्यपि 30 वर्ष पुराना है, वास्तविक रूप से एक प्रमाणित प्रति है – यहां तक कि मूल प्रतिवादी/क्रेता ने न तो राजस्व अभिलेखों में उसके नाम को नामांतरित किया, न ही न्यायालय के समक्ष उसका परीक्षण किया गया था, अतः विधिमान्य विक्रय विलेख नहीं कहा जा सकता – 1872 के अधिनियम की धारा 90 के अंतर्गत प्रगणित शर्तों की संतुष्टि नहीं की गई अतः उक्त दस्तावेज की विधिमान्यता की उपधारणा उपलब्ध नहीं – अपील खारिज।

V.R. Rao, for the appellant.
R.P. Khare with *Satyendra Pandey,* for the respondent Nos. 3, 7 & 8.

J U D G M E N T

SUBODH ABHYANKAR, J. : -This second appeal under Section 100 of CPC has been filed by the appellant/defendant against the judgment and decree dated 22.03.2003 passed by the V Additional District Judge, Jabalpur in Civil Appeal No.11-A/2003 reversing the judgment and decree dated 21.03.2002 passed in Civil Suit No.68-A/2001 by IX Civil Judge Class I, Jabalpur whereby the suit of the plaintiff for declaration and injunction in respect of Khasra No.40/3 and 40/4 situated at village Manegaon Tehsil and District Jabalpur has been dismissed.

2. In brief the facts of the case are that the original plaintiff Budhua @ Teerath Prasad filed a suit for declaration that the plaintiff is the owner and in possession of the land bearing Khasra No.40/3 area 0.032 hectare and Khasra No.40/4 area 0.162 hectare situated at village Manegaon Tehsil and District Jabalpur and the defendants have no right over the same. A permanent injunction was also sought that the defendants should not interfere with the peaceful possession of the plaintiff. The aforesaid suit was filed on the ground that the plaintiff is the owner and in possession of the property in dispute and the defendants are trying to encroach upon the said property by dislodging the possession of the plaintiff, hence a notice was also issued to the defendants on 06.10.1995 and subsequently the civil suit was filed.

3. After the death of original plaintiff Budhua @ Teerath Prasad, the legal representatives of Budhua also amended the plaint to the effect that their father Budhua had never execute the sale deed on 05.10.1966 and in the revenue records the name of the plaintiff has continued to be reflected. It is further pleaded that the

alleged purchaser of the property Daulat Ram Grover never existed and no sale deed was executed in his favour by the plaintiff and this fact was also suppressed by the defendants in their earlier written statement but subsequently introduced by way of amendment in their pleadings. Thus it was stated that the defendants have no claim over the suit property and the plaintiff was the sole owner of the suit land.

4. The learned Judge of the Civil Court after recording the evidence has dismissed the suit vide its judgment dated 21.03.2002 and in the appeal against the aforesaid judgment, the learned V Additional District Judge Jabalpur has reversed the aforesaid judgment and the suit of the plaintiffs was decreed holding that the plaintiffs are the owners of the suit land Survey No.40/3 and 40/4 situated in village Manegaon District Jabalpur and the defendant No.1 Dhiraj Jaggi (the appellant herein) was restrained from disturbing the possession of the plaintiffs.

5. The present appeal was admitted by this Court on 27.1.2004 on the following substantial question of law :

> "Whether the finding of the lower Appellate Court that sale deed was not executed in favour of the appellant by Buddha, is perverse as the sale deed was more than 30 years old and was duly registered?"

6. Counsel for the appellant/defendant has submitted that the defendant is the owner of the property as his father had purchased the same through Daulat Ram Grover who in turn had purchased the same from the original plaintiff Budhua through a registered sale deed. It is further submitted that the learned Judge of the lower appellate Court erred in not appreciating the fact that the sale deed in itself was 30 years' old and was duly executed before the Registrar (Property). It is further submitted that the learned Trial Court had rightly held that although the plaintiffs are in possession of the property but their possession was held to be unlawful and as such no illegality was committed by the learned Trial Court in dismissing the civil suit of the plaintiffs.

7. Counsel for the respondents/plaintiffs on the other hand has supported the impugned judgment and decree and has submitted that no illegality has been committed by the learned Judge of the lower appellate Court in reversing the judgment and decree as the original sale deed was never produced in the Court and even its certified copy was not proved in accordance with law. It is submitted that the possession has rightly been held to be of the plaintiffs by the learned lower appellate court. Thus it is submitted that no substantial question of law is made out in the present appeal and the same deserves to be dismissed.

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

9. From the record, this Court finds that the alleged sale deed was executed by the original plaintiff Budhua @ Teerath Prasad in favour of Daulat Ram Grover vide Ex. D/2 dated 05.10.1966 admittedly it is 30 years old. The aforesaid document Ex. D/2 is actually the certified copy of the sale deed and not the sale deed itself which was never produced in the Court, thus, the conditions enumerated under Section 90 of the Indian Evidence Act, 1872 cannot be said to be satisfied hence the presumption as provided under Section 90 cannot be said to be available in the present case. The learned Judge of the lower appellate Court, although has held that otherwise the validity of the said document which is 30 years old has to be presumed but other circumstances have also to be looked into while deciding upon the validity of such document and has also taken note of the fact that even after the execution of the sale deed, the purchaser Daulat Ram Grover did not get his name mutated in the revenue record for a long period of time and, in fact, the information regarding the execution of sale deed was not even disclosed till the death of original plaintiff Budhua and this information was also not provided to Budhua prior to filing of the plaint when the notice was sent by him to the defendant. The learned Judge of the lower appellate Court has also held that the record keeper of the Registrar (Properties) has stated that he is not acquainted with the signatures of Budhua and in the absence of examination of other witnesses to the sale deed it cannot be said to be a valid sale deed and apart from that even Daulat Ram Grover has not been examined by the defendant in support of the execution of the sale deed.

10. After perusing the record, this Court also finds that although there is a general presumption of genuineness of a document which is 30 years old but it is intriguing that the factum of execution of sale deed was not brought to the notice of the plaintiff soon after the notice dated 06.10.1995 was sent by Budhua before filing of the plaint on 01.02.1996 and subsequently during the time when the original plaintiff Budhua was alive during the proceedings of the suit as he died on 05.06.1997 and the amendment carried out in the written statement clearly discloses that the amendment regarding the sale deed was first time made on 09.11.2001 only whereas the original written statement was filed on 21.11.2000 which clearly shows the surreptitious manner in which the defendant has tried to set up his defense in the case. In view of the same, in the considered opinion of this Court, the learned Judge of the lower appellate Court has rightly held that the sale deed cannot be relied upon in the facts and circumstances of the case.

11. As a result, the substantial question of law is answered in negative and the appeal being devoid of merits is hereby **dismissed.**

Appeal dismissed

I.L.R. [2019] M.P. 168
APPELLATE CRIMINAL
Before Mr. Justice Anand Pathak
Cr.A. No. 7295/2018 (Gwalior) decided on 11 October, 2018

ATENDRA SINGH RAWAT …Appellant

Vs.

STATE OF M.P. …Respondent

***A. Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), Section 3(1)(w)(i), Penal Code (45 of 1860), Section 354-A and Criminal Procedure Code, 1973 (2 of 1974), Section 438 – Anticipatory Bail – Grounds* – Held – Appellant and complainant working under CMHO Shivpuri – Date of incident is 01.08.2017 whereas appellant was transferred to Sagar and was relieved from office on 14.07.2017, thus appellant was not at the helm of affairs at Government Hospital Shivpuri on date of incident – FIR lodged on 19.05.2018 after delay of about 10 months – Delayed FIR is a material fact – *Prima facie*, offence not made out – Appellant, a government servant and his arrest may bring adverse departmental proceedings prejudicial to his interest – Matter can be investigated without causing arrest – Anticipatory bail granted with conditions – Appeal allowed. (Paras 11, 19, 21 & 23)**

क. अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 3(1)(डब्लयू)(i), दण्ड संहिता (1860 का 45), धारा 354–ए एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 438 – अग्रिम जमानत – आधार – अभिनिर्धारित – अपीलार्थी एवं परिवादी, सी.एम.एच.ओ., शिवपुरी के अधीन कार्यरत – घटना 01.08.2017 की है जबकि अपीलार्थी को सागर स्थानांतरित किया गया था और 14.07.2017 को कार्यालय से अवमुक्त किया गया था, अतः घटना दिनांक को अपीलार्थी के पास शासकीय चिकित्सालय, शिवपुरी के मामलों की पतवार नहीं थी – प्रथम सूचना प्रतिवेदन, 19.05.2018 को दर्ज किया गया, करीब 10 माह के विलंब के पश्चात् – विलंबित प्रथम सूचना प्रतिवेदन एक तात्विक तथ्य है – प्रथम दृष्ट्या अपराध नहीं बनता – अपीलार्थी एक शासकीय सेवक है और उसकी गिरफ्तारी से उसके हित को प्रतिकूल रूप से प्रभावित करते हुए प्रतिकूल विभागीय कार्यवाहियां की जा सकती है – मामले में गिरफ्तारी कारित किये बिना अन्वेषण किया जा सकता है – शर्तों के साथ अग्रिम जमानत प्रदान की गई – अपील मंजूर।

***B. Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Amendment Act (27 of 2018), Section 18-A and Criminal Procedure Code, 1973 (2 of 1974), Section 438 – Anticipatory Bail – Amendment of 2018 – Jurisdiction* – Held – Although vide amendment of 2018, preliminary enquiry has been dispensed with and power of investigating officer to arrest has been reiterated, still the power of judicial review and power to grant bail u/S 438**

Cr.P.C., if offence is not *prima facie* made out, is not curtailed and cannot be curtailed by any Act. (Para 8)

ख. अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) संशोधन अधिनियम (2018 का 27), धारा 18—ए एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 438 — अग्रिम जमानत — 2018 का संशोधन — अधिकारिता — अभिनिर्धारित — यद्यपि 2018 के संशोधन द्वारा, प्रारंभिक जांच से अभिमुक्ति दी गई है और गिरफ्तारी हेतु अन्वेषण अधिकारी की शक्ति को दोहराया गया है, तब भी, यदि प्रथम दृष्ट्या अपराध नहीं बनता है, न्यायिक पुनर्विलोकन की शक्ति एवं धारा 438 दं.प्र.सं. के अंतर्गत जमानत प्रदान करने की शक्ति कम नहीं हो जाती तथा किसी अधिनियम द्वारा कम नहीं की जा सकती।

***C. Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Amendment Act (27 of 2018), Section 18-A, Criminal Procedure Code, 1973 (2 of 1974), Section 41 and Penal Code (45 of 1860), Section 26 – Amendment of 2018 – Procedure – Effect* – Held – Amendment Act of 2018 nowhere restricts procedure of Section 41 Cr.P.C., whereby, before arresting a person, police officer must have "Credible Information" which is different from a mere complaint and must have "Reasons to believe" which is different from mere suspicion or knowledge that arrest is necessary – Provisions are still intact and not taken away by amendment of 2018. (Paras 13 & 14)**

ग. अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) संशोधन अधिनियम (2018 का 27), धारा 18—ए, दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 41 एवं दण्ड संहिता (1860 का 45), धारा 26 — 2018 का संशोधन — प्रक्रिया — प्रभाव — अभिनिर्धारित — 2018 का संशोधन अधिनियम कहीं भी धारा 41 दं.प्र.सं. की प्रक्रिया को निर्बंधित नहीं करता जिससे एक व्यक्ति को गिरफ्तार करने से पूर्व, पुलिस अधिकारी को ''विश्वसनीय सूचना'' होनी चाहिए जो कि मात्र एक शिकायत से भिन्न है तथा ''विश्वास के लिए कारण'' होने चाहिए जो कि मात्र संदेह या यह ज्ञान कि गिरफ्तारी आवश्यक है, से भिन्न है — उपबंध अभी भी अविकल है और 2018 के संशोधन द्वारा हटाये नहीं गये है।

D. Constitution – Article 21 – Right to Life and Personal Liberty – **Held – Even otherwise, Article 21 of Constitution wherein right to life and personal liberty are secured, no person can be debarred of such liberty at the instance of false complaint. (Para 8)**

घ. संविधान — अनुच्छेद 21 — प्राण और दैहिक स्वतंत्रता का अधिकार — अभिनिर्धारित — अन्यथा भी, संविधान का अनुच्छेद 21 जिसमें प्राण और दैहिक स्वतंत्रता सुनिश्चित है, किसी व्यक्ति को, मिथ्या परिवाद के आधार पर उक्त स्वतंत्रता से विवर्जित नहीं किया जा सकता।

Cases referred:

(2018) 6 SCC 454, AIR 1980 SC 1632, AIR 2011 SC 312, (2014) 8 SCC 273, Cr.A. 5233/2018 order passed on 27.08.2018, Cr.A. No. 6880/2018 order

passed on 24.09.2018, 1993 Suppl. 2 SCC 497, (2005) 4 SCC 303, (1992) Suppl. 1 SCC 335, (2014) 2 SCC 1, (2014) 4 SCC 453.

Atul Gupta, for the appellant.
Prakhar Dhengula and *G.S. Chauhan*, P.P. for the respondent No. 1/State.
V.K. Saxena, as amicus curiae assisted by S.K. Shrivastava.

(Supplied: Paragraph numbers)

O R D E R

ANAND PATHAK, J. :- Present appeal has been filed under Section 14(A)(2) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for brevity 'the Atrocities Act') against the order dated 19-09-2018 passed by Special Judge (Atrocities), Shivpuri whereby the application of the appellant under Section 438 of Cr.P.C. seeking anticipatory bail has been rejected in connection with Crime No.224/2018 registered at Police Station Karera District Shivpuri for the offence under Section 354 -A of IPC and under Section 3(1)(w)(i) of the Atrocities Act.

2. As per prosecution case, on 19-05-2018 complainant lodged the report at Police Station Karera District Shivpuri against the appellant with the allegations that she is working as Asha Worker in the Health Department where the appellant is working as Eyes Technician/Eyes Assistant and since complainant did not receive her incentive/remuneration for a considerable period of time, therefore, she went to appellant for release of payment, on which appellant sought sexual favour from her for release of payment. Police registered the complaint under Section 354 -A of IPC and under Section 3(1)(w)(i) of theAtrocities Act and matter was taken into investigation, therefore, the appellant is apprehending his arrest which may bring social disrepute to him, therefore, appeal has been preferred after rejection of the same before the Special Court.

3. As per the submission advanced by learned counsel for the appellant, the appellant is working as Eyes' Assistant in the Community Health Center, Karera and on 10-07-2017 vide Annexure P/4 was transferred from Shivpuri to the office of Chief Medical and Health Officer, Sagar and in pursuance thereof he got relieved on 17-07-2017 for which counsel for the appellant referred the letter dated 21-12-2017 (through registered AD) addressed by his wife to the Superintendent of Police, Gwalior making complaint with certain allegations in respect of some senior officers of the department.

4. It is further submitted that Asha Workers under the scheme dated 17-04-2015 vide Annexure P/2 are given incentives on the work done by them and no regular monthly payment is made to them. Therefore, no question of release of monthly salary exists; that too at the instance of appellant who has no authority to

release the amount specially in the circumstance when he himself transferred to a different place and relieved at the relevant point of time when complaint was made.

5. One more fact was specifically addressed by counsel for the appellant that FIR is dated 19-05-2018 and the date of incident is 01-08-2017 meaning thereby after ten months of alleged incident, complaint has been made. Delay in filing of FIR establishes the fact that appellant has been ostracized through false implication. Appellant has been unnecessarily harassed for no substantive ground. He is a Government Servant and has no chance to flee from justice. His service conditions would be adversely affected and bring social disrepute to him, if he is arrested on such false pretext. He undertakes to cooperate in the investigation. Complainant has already received her incentives as per her entitlement (as per document attached with the appeal) and lodged the false complaint against him. Appellant prayed for release on bail.

6. Learned Public Prosecutor for respondent No.1/State opposed the prayer and submitted that the investigation is going on and any order as sought by the appellant would hamper the investigation. He referred Section 18 and amendment notified in the Gazette Notification dated 17-08-2018 by way of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2018 and submitted that it specifically bars entertainment of such application under Section 438 of Cr.P.C. Therefore, according to the respondent/State appeal is not maintainable. It is further submitted that the case is to be tested on its merits as well as on the basis of the Amendment Act, 2018.

7. Shri V.K. Saxena, learned senior counsel appearing as *amicus curiae* at the request of this Court submits that the Amendment Act, 2018 brought for incorporation of Section 18-A in the Atrocities Act is in fact to nullify the effect of consequences likely to flow from the judgment of Hon'ble Apex Court in the matter of *Dr. Subhash Kashinath Mahajan Vs. State of Maharashtra and another,* (2018) 6 SCC 454 wherein certain conclusions have been recorded in para 79 which reads as under:

> ***"79. Our conclusions are as follows:***
>
> *79.1. Proceedings in the present case are clear abuse of process of court and are quashed.*
>
> *79.2. There is no absolute bar against grant of anticipatory bail in cases under the Atrocities Act if no prima facie case is made out or where on judicial scrutiny the complaint is found to be prima facie mala fide. We approve the view taken and approach of the Gujarat High Court in Pankaj D Suthar (supra) and Dr. N. T. Desai*

(supra) and clarify the judgments of this Court in Balothia (supra) and Manju Devi (supra);

79.3. In view of acknowledged abuse of law of arrest in cases under the Atrocities Act, arrest of a public servant can only be after approval of the appointing authority and of a non-public servant after approval by the S.S.P. which may be granted in appropriate cases if considered necessary for reasons recorded. Such reasons must be scrutinized by the Magistrate for permitting further detention.

79.4. To avoid false implication of an innocent, a preliminary enquiry may be conducted by the DSP concerned to find out whether the allegations make out a case under the Atrocities Act and that the allegations are not frivolous or motivated.

79.5. Any violation of direction (iii) and (iv) will be actionable by way of disciplinary action as well as contempt.

79.6. The above directions are prospective."

8. Therefore, preliminary enquiry has been dispensed with and power of investigating officer to arrest has been reiterated. Similarly Section 18 of the Atrocities Act has been reframed under Section 18 A (2) of the Amendment Act, 2018 whereby the provisions of Section 438 of Cr.P.C. and its applicability has been taken out from the purview of the Atrocities Act, notwithstanding any order or direction of any Court. Still the power of judicial review and power to grant bail under Section 438 of Cr.P.C. if any offence is not made out prima facie, has not been curtailed and cannot be curtailed by any Act. Even otherwise, Article 21 of the Constitution of India wherein right to life and personal liberty are secured, no person can be debarred of such liberty at the instance of false complaint.

9. Learned senior counsel Shri Saxena assisted by Shri Shrivastava referred the judgment of *Gurubaksh Singh Sibbia etc. Vs. The State of Punjab,* AIR 1980 SC 1632, *Siddharam Satlingappa Mhetre Vs. State of Maharashtra and others,* AIR 2011 SC 312 and the judgment rendered in the matter of *Arnesh Kumar Vs. State of Bihar and another,* (2014) 8 SCC 273 and submits that the scope of Section 438 of Cr.P.C. is not limited and Court can take care of personal liberty of individuals. The orders of Coordinate Bench of Principal Seat at Jabalpur dated 27-08-2018 passed in Cr.A.No.5233/2018 *(Surendra Raghuvanshi Vs. State of M.P. & Anr.)* and the Coordinate Bench of this Court dated 24-09-2018 in

Cr.A.No.6880/2018 were also referred where the Court has allowed the appeal filed by the appellant seeking anticipatory bail.

10. Heard learned counsel for the parties as well as amicus curiae at length and perused the case diary.

11. So far as **Factual Matrix** of the present case is concerned, it appears that the appellant who is working as Eyes' Assistant in the office at Karera under CMHO, Shivpuri, was transferred from Karera to Sagar vide order dated 10-07-2017 (Annexure P/4) and as per the complaint made by the appellant's wife vide Annexure P/5 it appears that the appellant had been relieved on 14-07-2017. It further appears from such letter dated 14-07-2017 written by the wife of appellant that appellant himself is suffering from financial distress at the instance of the department, therefore, she/he referred certain names also who are conspiring against them and may cause injury and damage to their family. Therefore, on facts it appears ***prima facie*** that the appellant relieved on 14-07-2017, therefore, on 01-08-2017 appellant was not at the helm of affairs at Government Hospital, Karera District Shivpuri. This fact, coupled with the fact that the date of incident referred is 01-08-2017, whereas FIR has been made on 19-05-2018 i.e. almost 10 months after the incident and delayed FIR is a material fact in this case. Therefore, prima facie it appears that accusation of having committed any offence of Atrocities Act, is not made out. Investigation shall unfold the truth. It is also true that the appellant is a Government servant and his arrest may bring adverse departmental proceedings prejudicial to the interest of appellant. Therefore, on given set of facts, *prima facie* appellant deserves consideration for grant of anticipatory bail without any expression on merits of the case.

12. So far as the bar of Section 438 of Cr.P.C. *vis a vis* Atrocities Act is concerned, it appears that the recent Amendment Act, 2018 brought Section 18A of the Act into statute in following words:

> ***"18A. (1) For the purposes of this Act-***
> *(a) preliminary enquiry shall not be required for registration of a First Information Report against any person;or*
>
> *(b) the investigating officer shall not require approval for the arrest, if necessary, of any person.*
>
> *against whom an accusation of having committed an offence under this Act has been made and no procedure other than that provided under this Act or the Code shall apply.*

> *(2) The provisions of Section 438 of the Code shall not apply to a case under this Act, notwithstanding any judgment or order or direction of any Court."*

13. Perusal of the said Amendment Act reveals that the conclusions drawn by the Hon'ble Apex Court in para 79 of the case of *Dr. Subhash Kashinath Mahajan* (supra) have been taken care of, however the Amendment Act, 2018 nowhere restricts the procedure provided under Cr.P.C. Meaning thereby, Section 41 of Cr.P.C. is intact which gives powers to the police officer to arrest any person without any order from the Magistrate and without warrant against whom the 'reasonable complaint' has been made or 'credible information' has been received or 'reasonable suspicion' exists that he has committed cognizable offence punishable with imprisonment for a term which may be less than 7 years or which may extend to 7 years, if certain conditions as referred in Section 41 of the Code are satisfied. The said section contemplates that "police officer must have reason to believe". The said expression "Reason to Believe" has been defined under Section 26 of IPC in following words:

> *" **26. " Reason to believe".**—A person is said to have " reason to believe" a thing, if he has sufficient cause to believe that thing but not otherwise."*

14. The said expression has been dealt with in catena of decisions including in the case of *Joti Prasad Vs. state of Haryana,* 1993 Suppl. 2 SCC 497 and in the case of *Adri Dharam Das Vs. state of West Bengal,* (2005) 4 SCC 303. Similarly **"Credible Information"** as appeared in Section 41 of the Code has also been explained by the Hon'ble Apex Court in the case of *State of Haryana Vs. Bhajan Lal,* (1992) Suppl. 1 SCC 335 and in the case of *Lalita Kumari and others Vs. Government of U.P. and others,* (2014) 2 SCC 1. Therefore, before arresting a person, officer must have "Credible Information" which is different from a mere complaint and must have reason to believe which is different from mere suspicion or knowledge that arrest is necessary for prevention of tampering the evidence, fleeing from justice, cooperation in investigation and to secure his attendance in the Court. These provisions are still intact and not taken away by the effect of Amendment Act, 2018.

15. Here, it appears that being a Government servant, petitioner neither can flee from justice nor tamper with the evidence and he shall have to cooperate in investigation and his attendance can be secured in the Court.

16. The Hon'ble Apex Court in the matter of *Siddharam Satlingappa Mhetre* (supra) discussed the historical perspective of Section 438 of the Code and scope of exemption. Discussion was on the anvil of Article 21 of the Constitution of India where right to life and right to personal liberty are sacrosanctly preserved for

every individual. The reiteration of Section 18A of the Act *vis a vis* bar created under Section 438 of the Code is in effect repetition of Section 18 of the Act incorporated in the Act of 1989 by the Legislature but with certain qualified terms. In the wake of Section 18 of the Act, the judgments of Hon'ble Apex Court like in *Siddharam Satlingappa Mhetre* (supra)*, Dr. Subhash Kashinath Mahajan* (supra) and in the matter of *Hema Mishra Vs. State of Uttar Pradesh and others,* (2014) 4 SCC 453 and in the matter of *Arnesh Kumar* (supra) were passed and guidance was given.

17. True it is, that the Amendment Act, 2018 bars application of any judgment or order of any court while considering Section 438 of the Cr.P.C. but procedure of the Cr.P.C. along with the Atrocities Act have been accepted and preserved intact. The judgments referred above take care of different provisions of the Code as well as Article 21 of the Constitution of India and thereafter extended the guidance.

18. Similarly, Section 18A(b) of the Amendment Act, 2018 contemplates discretion by the Investigating Officer regarding arrest of the accused by qualifying words; 'if necessary'. Therefore, one perspective of the Amendment Act, 2018 itself indicates that the authority has discretion and if found necessary then without approval from the higher authority, can arrest any person. Therefore, enough leverage exists for the Investigating Officer to exercise his own discretion on perusal of complaint whether from the ingredients of the complaint any offence is made out or not. Scope of Section 438 of Cr.P.C. *vis a vis* the Atrocities Act is to be seen in that perspective.

19. In the present case, perusal of FIR *prima facie* indicates that the matter can be investigated without causing arrest to the appellant and ingredients *prima facie* do not match with the facts. Section 3(1)(w)(i) of the Atrocities Act is reproduced for ready reference:

> ***"3(1)(w)(i)****. intentionally touches a woman belonging to a Scheduled Caste or a Scheduled Tribe, knowing that she belongs to a Scheduled Caste or a Scheduled Tribe, when such act of touching is of a sexual nature and is without the recipient's consent."*

20. As explained above ingredients of Section 3(1)(w)(i) of the Atrocities Act do not match the allegations while going through the contents of FIR.

Since the Section 18A of the Amendment Act, 2018 is repetition of Section 18 of the Atrocities Act couched in different language, therefore, earlier discussion of the Hon'ble Apex Court and different High Courts in different cases can be borrowed for discussion value. Coordinate Bench of this Court vide order dated 27-08-2018 in Cr.A.No.5233/2018 (Principal Seat at Jabalpur) and vide order dated 24-09-2018 in Cr.A.No.6880/2018 (Gwalior Bench) have allowed the

appeal filed by the accused seeking anticipatory bail.

21. In the instant set of facts, no likelihood of the appellant/accused to terrorise the victim exists, nor the appellant can hinder the investigation process. Therefore, considering the overall fact situation of the instant case as well as application of the Code in the procedure adopted for investigation along with the provisions of the Atrocities Act, instant case appears to be a case for grant of anticipatory bail.

22. In the given set of facts, it appears that **Justiciability** and **Justifiability** are at loggerheads and only their reconciliation, would further the cause of justice. Reconciliation between different provisions of Cr.P.C. vide Section 41 *vis a vis* 438 would also strengthen the case of appellant.

23. *Resultantly*, without expressing any opinion on merits of the case, appeal is allowed while appreciating the assistance rendered by the senior counsel **Shri V.K. Saxena** ably assisted by Shri S.K. Shrivastava, Advocate. It is directed that in the event of arrest, the appellant shall be released on bail on furnishing a personal bond in the sum of **Rs.70,000/-(Rupees Seventy Thousand only)** with one solvent surety of the like amount to the satisfaction of Arresting Authority/ Investigating Authority.

24. This order will remain operative subject to compliance of the following conditions by the appellant:-

1. The appellant will comply with all the terms and conditions of the bond executed by him;

2. The appellant will cooperate in the investigation/trial, as the case may be;

3. The appellant will not indulge himself in extending inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or to the Police Officer, as the case may be;

4. The appellant shall not commit an offence similar to the offence of which he is accused;

5. The appellant will not seek unnecessary adjournments during the trial; and

6. The appellant will not leave India without previous permission of the trial Court/Investigating Officer, as the case may be.

7. Appellant shall not contact the complainant through any means and

shall not move in her vicinity/proximity in any manner.

8. Appellant shall not make any inducement, threat or promise to the complainant or to any person acquainted with the facts of the case so as to dissuade him from disclosing such fact to the Court or police officer.

A copy of this order be sent to the Court concerned for compliance.

C.c. as per rules.

Appeal allowed

I.L.R. [2019] M.P. 177 (DB)
APPELLATE CRIMINAL

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

Cr.A. No. 678/2005 (Gwalior) decided on 12 October, 2018

BRIJLAL …Appellant

Vs.

STATE OF M.P. …Respondent

A. Penal Code (45 of 1860), Section 300 & 302 – Appreciation of Evidence – Circumstantial Evidence & Medical Evidence – Hostile Witnesses – **Appellant killed his one year old daughter by strangulating her – Held – FIR lodged promptly by father of appellant naming only appellant as accused – At initial stage itself, all eye witnesses named only appellant as accused in statements u/S 161 Cr.P.C. and later turned hostile – All hostile witnesses are relatives and interested witnesses and it seems they are trying to protect and shield appellant having entered into a compromise – Even complainant admitted in cross examination that matter has been compromised – Prosecution story duly corroborated by medical evidence – Case does not fall in any exceptions of Section 300 IPC – Conviction affirmed – Appeal dismissed. (Paras 22 to 24)**

क. दण्ड संहिता (1860 का 45), धारा 300 व 302 – साक्ष्य का मूल्यांकन – परिस्थितिजन्य साक्ष्य व चिकित्सीय साक्ष्य – पक्षविरोधी साक्षीगण – अपीलार्थी ने अपनी एक वर्ष की बालिका को गला घोंटकर मार डाला – अभिनिर्धारित – अपीलार्थी के पिता द्वारा अभियुक्त के रूप में केवल अपीलार्थी का नाम लेते हुए तत्परता से प्रथम सूचना प्रतिवेदन दर्ज किया गया – प्रारंभिक प्रक्रम पर ही, सभी चक्षुदर्शी साक्षीगण ने दं.प्र.सं. की धारा 161 के अंतर्गत कथनों में अभियुक्त के रूप में केवल अपीलार्थी का नाम लिया तथा बाद में पक्षविरोधी हो गये – सभी पक्षविरोधी साक्षीगण, रिश्तेदार और हितबद्ध साक्षीगण हैं एवं यह प्रतीत होता है कि समझौता हो जाने के कारण वे अपीलार्थी की सुरक्षा तथा बचाव करने का प्रयास कर रहे हैं – यहाँ तक कि परिवादी ने प्रति परीक्षण में यह स्वीकार किया है कि मामले में समझौता किया गया है – अभियोजन कहानी, चिकित्सीय साक्ष्य द्वारा सम्यक् रूप से संपुष्ट – प्रकरण भा.दं.सं. की धारा 300 के किसी भी अपवाद में नहीं आता है – दोषसिद्धि अभिपुष्ट – अपील खारिज।

***B. Penal Code (45 of 1860), Section 302 – Hostile Witnesses – Credibility* – Held – Evidence of a person does not become effaced from record merely because he has turned hostile – His deposition must be examine more cautiously – Apex Court concluded that deposition of hostile witness can be relied upon at least upto the extent he supported the prosecution case. (Paras 16, 20 & 21)**

ख. दण्ड संहिता (1860 का 45), धारा 302 – पक्षविरोधी साक्षीगण – विश्वसनीयता – अभिनिर्धारित – एक व्यक्ति का साक्ष्य अभिलेख से मिट नहीं जाता मात्र इसलिए कि वह पक्षविरोधी हो गया है – उसके अभिसाक्ष्य का अधिक सावधानी से परीक्षण किया जाना चाहिए – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि पक्षविरोधी साक्षी के अभिसाक्ष्य पर कम से कम उसके द्वारा अभियोजन प्रकरण का समर्थन किये जाने की सीमा तक विश्वास किया जा सकता है।

Cases referred:

(2003) 7 SCC 291, (2006) 2 SCC 450, (2008) 13 SCC 271, (2009) 13 SCC 480, (2010) 6 SCC 533.

Prabal Solanki, for the appellant.
S.S. Dhakad, P.P. for the respondent-State.

J U D G M E N T

The Judgment of the Court was delivered by:
S.A. DHARMADHIKARI, J.:- The present appeal preferred under Section 374(2) of the Code of Criminal Procedure assails the judgment of conviction and sentence dated 20/9/2005 passed by Sessions Judge, Shivpuri in S.T. No.89/05, whereby the appellant has been convicted under section 302 of the IPC and sentenced to undergo rigorous life imprisonment with fine of Rs.5000/-, in default to suffer 6 months R.I.

2. Prosecution story, in nutshell, is that on 19/2/2005, an FIR was lodged by complainant Kishna Aadivasi (PW1) at Police Station Pohari to the effect that on the last night he and his family members were sleeping separately in their respective homes. At around 12-1 AM, appellant Brijlal, who is son of the complainant, started quarreling with his wife saying that why he was made *Up Sarpanch*, to which his wife Batibai (PW2) replied that Villagers had made him so and not she. Upon this, he scuffled with her. At this juncture, complainant and other neighbours reached the spot. When they objected, the appellant took his own daughter Guddi aged about 1 year, who was sleeping nearby, and killed by strangulating her in the courtyard, saying that now he would get implicated the persons who had come to stop him in the murder case of his daughter. Guddi died on spot. The report could not be lodged the same night due to lack of conveyance. The parents-in-law of appellant were there on the spot, but the next day they left

for their Village along with Bati (PW2). Upon such intimation, FIR (Ex.P/2) was registered at Crime No. 30/05. During investigation, spot map (Ex.P/4) and Naksha Panchyatnama (Ex.P/5) were prepared. The dead body of deceased Guddi was sent for post mortem examination vide Ex.P/11. Sealed packet was seized vide Ex.P/12. Statements of witnesses were recorded and the appellant was arrested.

3. After investigation, charge sheet was submitted in the committal court, which in turn, committed the case to the court of Sessions for trial.

4. The learned trial Court framed charges which were denied by the appellant, who claimed to be tried. The prosecution examined as many as 8 witnesses whereas no witness was examined in defence. The sessions Court on the basis of evidence adduced before it, convicted and sentenced the appellant under various counts as mentioned above. Being aggrieved, the appellant has filed the instant appeal.

5. Learned counsel for the appellant contended that the trial Court has erred in appreciating the evidence on record. It is submitted that all the material witnesses viz. complainant Kishna (PW1), Bati (PW2), Baijanti (PW3), Mahesh (PW4), Manobai (PW6), have turned hostile and the judgment of conviction and sentence passed by the trial Court is based upon mis-appreciation of the evidence on record. It is further submitted that there is absence of *mens rea*. The burden of proof lied on the prosecution and the prosecution has totally failed in discharging the same.

6. *Per contra* learned Public Prosecutor has drawn our attention to the reasoning assigned by the trial Court. The offence is a heinous one, moreso in view of the fact that appellant is father of the deceased. It is submitted that although witnesses have later turned hostile during trial, yet it is not fatal to the prosecution, inasmuch as all of them are related witnesses. In fact complainant himself is father of the applicant. Initially the report was lodged by him and in his cross-examination, he has admitted the fact that all of them have entered into a compromise and in this backdrop the trial Court in paragraph 27 of its judgment has rightly held that occasion of compromise would arise only when there has been any offence. Accordingly, it is submitted that there is no illegality or perversity in the order passed by the trial Court and no interference is warranted.

7. We have heard learned counsel for the parties and perused the evidence on record.

8. Before appreciating other evidence brought on record, it would be apt to advert to the medical evidence. Post mortem examination of the deceased has been conducted by Dr. K.D.Shrivastava (PW8). In his report (Ex.P/3), the doctor found as under:-

"Dead body of little girl aged about one yr, lying supine on the table wearing one woolen jersi, both eyes closed, mouth closed, pupil dilated, conjunctiva congested. Blood stabbed froth came out of mouth and nostrils. Bleeding from ears also occurred. Lips are livid. Following external ante mortem injuries were found over body:-

(1) Contusion of size 5 cm x 3 cm at right superolateral aspect of forehead

(2) Contusion mark over neck at side and front side"

Cause of death was found to be asphyxia due to strangulation by throttling. Death had occurred within 12 to 18 hours of post mortem examination.

9. Thus, from the medical evidence brought on record, homicidal death of deceased is proved beyond reasonable doubt.

10. Now, adverting to the other evidence available on record, Kishna (PW1) is the complainant. He is father of the appellant. He has lodged FIR (Ex.P/2) to the effect on 19/2/2005 that in the night at about 12-1 AM, his son Brijlal i.e. the appellant was unnecessarily quarreling with his wife on the pretext that why he had been made Up-Sarpanch. His wife Bati (PW2) replied that Villagers had made him Up Sarpanch and she had not done so. He started scuffling with Bati. At this juncture, complainant and neighbors reached there and stopped the complainant. Being enraged, appellant took his daughter, who was one year old and sleeping nearby, to the courtyard and strangulated him. Then he said that now he would get the persons stopping him implicated in the murder case. In his statement (Ex.P/3) recorded under section 161, Cr.P.C. the complainant has reiterated the contents of FIR. However, before the trial Court, he has turned hostile. In his cross-examination he denied the FIR version recorded from A to A and has deposed that he had only given intimation as to death of the deceased that someone had killed her. He has further denied giving of statement (Ex.P/3). In paragraph 6 of his cross-examination, he has deposed that he had lodged report about killing of deceased by unknown persons. In paragraph 7 of his cross-examination, he has deposed that his son i.e. the appellant wanted to become Sarpanch, though he denied that appellant was angry for not having been made Sarpanch. In paragraph 8, he has admitted that Bati, wife of appellant resides with him and they have entered into a compromise.

11. Batibai (PW2) is wife of the appellant and mother of the deceased. Though she reiterated the prosecution version in the statement (Ex.P/6) recorded under section 161, Cr.P.C., yet she has turned hostile before the trial Court. In her cross-examination, on being confronted with her 161 statement, she has denied A to A part thereof. She has deposed that somebody had killed her daughter and she did not know as to who had entered the house and killed her.

12. PW3 Baijanti is mother of the appellant and grandmother of the deceased. She has also resiled from her 161 statement (Ex.P/7) and has been declared hostile. On being confronted with her statement (Ex.P/7), she has denied giving A to A part thereof. In her cross-examination, she has denied that appellant had killed the deceased. She deposed that she did not know as to whether the appellant wanted to become Sarpanch. She has also denied that the appellant wanted to become Sarpanch and when the Villagers did not make him Sarpanch, being enraged he had killed the deceased.

13. PW4 Mahesh is brother of the deceased. He has also turned hostile. On being confronted with his statement (Ex.P/8) recorded under section 161, Cr.P.C., he has denied A to A part thereof. In his cross-examination, he has deposed that he was sick and was at a different Village at the relevant point of time. He has further deposed that since he was sick, he does not know how his statement has been recorded by the Police.

14. PW6 Manobai is mother-in-law of the appellant. She has also turned hostile and on being confronted with her 161 statement (Ex.P/10), she has denied A to A part thereof. She has denied having entered into any compromise. In her cross-examination, she has deposed that on the date of incident, she and her husband Babu Aadivasi were working as labourers at Vilage Supat and gained knowledge about death only after about 10 days.

15. PW7 M.L.Sharma is the Investigating Officer. On 19/2/05, he was posted as T.I. at P.S. Pohri. On being confronted with the contradictions in the evidence of above said hostile witnesses, he has proved the same. He has also proved the FIR (Ex.P/2), spot map (Ex.P/4), Panchayatnama Lash (Ex.P/5), post mortem requisition (Ex.P/11), Viscera of deceased (Ex.P/12). In his evidence, he has supported and corroborated the prosecution version.

16. It is well settled that the fact that a witness was declared hostile at the instance of the public prosecutor and he was allowed to cross examine the witness, furnishes no justification for rejecting en bloc the evidence of the witness. However, the court has to be very careful, as *prima facie*, a witness who makes different statements at different times, has no regard for the truth. His evidence has to be read and considered as a whole with a view to find out whether any weight should be attached to it. The court should be slow to act on the testimony of such a witness; normally, it should look for corroboration to his testimony. *(State of Rajasthan v. Bhawani & Anr.,* (2003) 7 SCC 291, referred to).

17. The Apex Court while deciding with the issue in *Radha Mohan Singh @ Lal Saheb & Ors. v. State of U.P.,* (2006) 2 SCC 450, observed as under:

> ".....It is well settled that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to

> treat him as hostile and cross-examined him. The evidence of such witness cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent his version is found to be dependable on a careful scrutiny thereof... "

18. In *Mahesh v. State of Maharashtra* ((2008) 13 SCC 271), this Court considered the value of the deposition of a hostile witness and held as under:

> ".....If PW 1, the maker of the complaint has chosen not to corroborate his earlier statement made in the complaint and recorded during investigation, the conduct of such a witness for no plausible and tenable reasons pointed out on record, will give rise to doubt the testimony of the investigating officer who had sincerely and honestly conducted the entire investigation of the case. In these circumstances, we are of the view that PW.1 has tried to conceal the material truth from the Court with the sole purpose of shielding and protecting the appellant for reasons best known to the witness and therefore, no benefit could be given to the appellant for unfavourable conduct of this witness to the prosecution".
>
> (Emphasis supplied)

19. In *Rajendra & Anr. v. State of Uttar Pradesh* ((2009) 13 SCC 480), the Apex Court observed that merely because a witness deviates from his statement made in the FIR, his evidence cannot be held to be totally unreliable.

20. The Apex Court reiterated a similar view in *Govindappa & Ors. v. State of Karnataka* ((2010) 6 SCC 533*)*, observing that the deposition of a hostile witness can be relied upon at least upto the extent he supported the case of the prosecution.

21. In view of the above, it is evident that the evidence of a person does not become effaced from the record merely because he has turned hostile and his deposition must be examined more cautiously.

22. In the wake of eye-witnesses turning hostile, the trial Court has rightly considered circumstantial evidence available on record. It is noteworthy that all the witnesses who have turned hostile are related and interested witnesses. Complainant Kisna (PW1) is father of the appellant. Though he has turned hostile, yet in his cross-examination he has admitted entering into a compromise and also admitted the fact that appellant intended to become Sarpanch. Similarly, Batibai (PW2) is wife of the appellant, Baijanti (PW3) is mother of the appellant, Mahesh (PW4) is brother of appellant and Manobai (PW6) is mother-in-law of the appellant. Thus, all the witnesses who have turned hostile are relatives of the appellant.

23. In the light of aforesaid facts and circumstances, the trial Court in paragraphs 16 to 32 has rightly appreciated the evidence on record and correctly held that question of entering into compromise, as admitted by complainant (PW1) in his cross-examination, would arise only when there had been any offence. In the prosecution version, it has been alleged that appellant had strangulated the deceased. The said fact is corroborated by medical evidence, inasmuch as in the post mortem report (Ex.P/13), cause of death has been found to be asphyxia due to strangulation by throttling. Thus, the manner in which death had been caused, is correctly mentioned in the FIR. In view of the above, the evidence of complainant Kishna (PW1) before the trial Court that he was sleeping in his room and after being called by appellant and his wife, came to know about death of deceased caused by some unknown person, cannot be accepted. It is also noteworthy that FIR of the incident has been lodged by Kisna (PW1), who is grandfather of the deceased and not by the appellant, who is father of the deceased despite the fact that he was very much present. The offence has been committed on 19/2/05 at about 1 AM in the night and the FIR has been lodged next day at 10.30 AM. There is nothing on record to disbelieve the testimony of Investigating Officer M.L. Sharma (PW9) who has recorded the FIR and statements of witnesses. Thus, from the evidence on record, it is graphically clear that relatives of the appellant are trying to protect and shield him having entered into a compromise. The factum of compromise has been admitted by Kisna (PW1) in his cross-examination. So far as *mens rea* is concerned, it is an admitted position that at the relevant point of time, appellant was Up Sarpanch of the Village and not Sarpanch. Thus, the prosecution version in this behalf that being enraged for not having been made Sarpanch, he committed the crime, is worthy of credence.

24. Thus, if the case is considered in the totality of the circumstances, also taking into consideration the gravity of the charges, the appellant has killed his one year old daughter. The FIR had been lodged promptly, naming the appellant as the person who committed the offence. All the eye-witnesses attributed the commission of the offence only to the appellant in their statements under section 161 Cr.P.C. It is difficult to imagine that the complainant and the eye- witnesses had all falsely named the appellant as being the person responsible for the offence at the initial stage itself. Further, the case does not fall in any of the exceptions as mentioned in section 300 IPC. Thus, we do not see any cogent reasons to interfere with the findings recorded by the trial Court.

The appeal *sans* merit and is hereby dismissed. Impugned judgment of conviction and sentence, as passed by the trial Court is affirmed. Appellant is in jail. He shall continue to serve his remaining sentence as passed by the trial Court.

A copy of judgment be also sent to the trial Court along with the record.

Appeal dismissed

I.L.R. [2019] M.P. 184 (DB)
APPELLATE CRIMINAL

Before Mr. Justice Huluvadi G. Ramesh & Mr. Justice Rajendra Kumar Srivastava

Cr.A. No. 2090/1999 (Jabalpur) decided on 5 December, 2018

BHAGWAN & anr. …Appellants

Vs.

STATE OF M.P. …Respondent

(Alongwith Cr.A. No. 1703/2001)

A. Penal Code (45 of 1860), Sections 363, 366, 376 & 506(2) – Rape – Medical Evidence – Appreciation of Evidence **– Held – As per medical evidence, no injury on private parts and no definite opinion regarding rape – Prosecutrix was earlier engaged with appellant No. 1 – Previous enmity between appellant No. 1 and father of prosecutrix – It can be inferred by Ossification test report that prosecutrix was more than 16 yrs. of age – Prosecutrix never disclosed the incident to her relatives – It is very much probable that prosecutrix was a consenting party – No cogent evidence against appellant No. 2 for abduction – False implication is probable – No offence of rape and abduction made out – Conviction and sentence set aside – Appeal allowed. (Paras 25, 28, 31 to 33 & 35)**

क. दण्ड संहिता (1860 का 45), धाराएँ 363, 366, 376 व 506(2) – बलात्संग – चिकित्सीय साक्ष्य – साक्ष्य का मूल्यांकन – अभिनिर्धारित – चिकित्सीय साक्ष्य के अनुसार गुप्तांगों पर कोई चोट नहीं तथा बलात्संग संबंधी कोई निश्चित राय नहीं – अभियोक्त्री की पूर्व में अपीलार्थी क्र. 1 से सगाई हुई थी – अपीलार्थी क्र. 1 एवं अभियोक्त्री के पिता के बीच पूर्वतर वैमनस्यता – अस्थि विकास परीक्षण प्रतिवेदन से निष्कर्षित किया जा सकता है कि अभियोक्त्री 16 वर्ष से अधिक आयु की थी – अभियोक्त्री ने कभी भी उसके रिश्तेदारों को घटना प्रकट नहीं की – यह अधिक संभाव्य है कि अभियोक्त्री सम्मत पक्षकार थी – अपहरण हेतु अपीलार्थी क्र. 2 के विरूद्ध कोई प्रबल साक्ष्य नहीं – मिथ्या आलिप्ति संभाव्य है – बलात्संग एवं अपहरण का कोई अपराध नहीं बनता – दोषसिद्धि एवं दण्डादेश अपास्त – अपील मंजूर।

B. Penal Code (45 of 1860), Section 376 – Rape – Age of Victim – Birth Certificate **– Held – Birth certificate issued by Station House Officer – There is no mention whether he is entitled to issue such certificate – No explanation for not producing birth register though available with police – Such certificate cannot be relied – Age determined by ossification test is more probable and reasonable. (Para 25)**

ख. दण्ड संहिता (1860 का 45), धारा 376 – बलात्संग – पीड़िता की उम्र – जन्म प्रमाणपत्र – अभिनिर्धारित – थाना प्रभारी द्वारा जन्म प्रमाणपत्र जारी किया गया – कहीं कोई उल्लेख नहीं कि वह उक्त प्रमाणपत्र जारी करने के लिए हकदार है – जन्म पंजी, प्रस्तुत न किये जाने हेतु कोई स्पष्टीकरण नहीं यद्यपि पुलिस के पास उपलब्ध थी – उक्त प्रमाणपत्र पर विश्वास नहीं किया जा सकता – अस्थि विकास परीक्षण द्वारा अवधारित आयु अधिक संभाव्य एवं युक्तियुक्त है।

***C. Penal Code (45 of 1860), Section 376 – Rape – Testimony of Prosecutrix – Medical Evidence – Injury* – Held – Apex Court concluded that guilt in rape case can be based on uncorroborated evidence of prosecutrix – Her testimony should not be rejected on basis of minor discrepancies and contradictions – Further, absence of injuries on private parts of victim will not by itself falsify the offence nor can be construed as evidence of consent – False charges of rape are also not uncommon where parent persuade the obedient daughter to make false charges either to take revenge or extort money or to get rid of financial liability, thus whether there was rape or not would depend ultimately upon facts and circumstances of each case.**

(Para 27)

ग. दण्ड संहिता (1860 का 45), धारा 376 – बलात्संग – अभियोक्त्री का परिसाक्ष्य – चिकित्सीय साक्ष्य – चोट – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि बलात्संग के प्रकरण में, दोषिता, अभियोक्त्री के असंपुष्ट साक्ष्य पर आधारित की जा सकती है – उसके परिसाक्ष्य को गौण असंगतियों एवं विरोधाभासों के आधार पर अस्वीकार नहीं किया जाना चाहिए – इसके अतिरिक्त, पीड़िता के गुप्तांगों पर चोटों की अनुपस्थिति से अपराध का स्वयंमेव मिथ्याकरण नहीं होगा, न ही सम्मति के साक्ष्य के रूप में अर्थान्वयन किया जा सकता है – बलात्संग के मिथ्या आरोप भी असामान्य नहीं जहां माता–पिता, या तो बदला लेने या रकम उद्धापित करने या वित्तीय दायित्व से छुटकारा पाने के लिए उनकी आज्ञाकारी पुत्री को मिथ्या आरोप लगाने के लिए प्रेरित करते हैं, अतः बलात्संग था अथवा नहीं, यह प्रत्येक प्रकरण के तथ्यों एवं परिस्थितियों पर अंतिम रूप से निर्भर होगा।

Cases referred:

AIR 1982 SC 1297, AIR 2011 SC 697, (2010) 3 SCC 232.

Amit Dubey, for the appellants/accused.

Vaibhav Tiwari, P.P. for the State.

J U D G M E N T

The Judgment of the Court was delivered by: **HULUVADI G. RAMESH, J.:-** These two appeals have been filed against the impugned judgment of conviction and order of sentence dated 13.07.1999 passed by the learned Second Additional Sessions Judge, East Nimar, Khandwa in Sessions Trial No.13/1999. Therefore, both the appeals are being taken up for hearing together and decided by this common judgment.

2. Criminal Appeal No.2090/1999 has been filed by the appellants feeling aggrieved by their conviction and sentence whereby the Trial Court has convicted the appellant No.1-Bhagwan for the offence punishable under Section 366 of IPC and sentenced him to suffer RI for three years and fine of Rs.300/-, in default of payment of fine, RI for six months; further convicted him under Section 376 of IPC and sentenced to RI for five years and fine of Rs.500/-, in default of payment of fine, RI for one year; further convicted him under Section 506 Part II of IPC and sentenced him to suffer RI for one year and fine of Rs.200/-, in default of fine RI for further one month. Further convicted appellant No.2 - Devakibai for the offence under Section 363 of IPC and sentenced her to RI for three years and fine of Rs.200/-, in default of payment of fine further RI for six months and further convicted her for the offence punishable under Section 366 of IPC and sentenced her to suffer RI for three years and fine of Rs.300/-, in default of payment of fine, further RI for six months. All sentences to run concurrently.

3. Criminal Appeal No.1703/2001 has been filed by the State under Section 377(i) of Cr.P.C. for enhancement of sentence imposed upon appellant No. 1 - Bhagwan.

4. According to the prosecution, on 08.11.1998, at around 7:30 PM, complainant Jangu (PW-3), who is father of the prosecutrix "S", lodged a report at Police Station Chhaigaonmakhan to the effect that prosecutrix has been lost in their house. The same was recorded at *Rojnamchasanha* No.254 (Ex.P-8). Report is to the effect that they live at Village Karoli and on the date of incident had gone for labour work. His wife had also accompanied him but in the evening she returned back some time earlier than him. When the complainant returned, his wife informed him that the victim is not at home. They searched her here and there but the victim was not found. As such, father of the victim lodged a missing report describing his daughter. Thereafter, the crime was registered at Police Station Chhaigaonmakhan.

5. During the course of investigation, it was found that accused persons had kidnapped the victim from the lawful custody of her parents and appellant No.1 - Bhagwan has committed rape upon her. The victim was medically examined and ossification test was conducted to ascertain her age. The Investigating Agency after investigating the case framed the charges against the appellant No.1 under Sections 363, 366, 376, 506(2) of IPC while appellant No.2 was charged with the offence under Section 363 and 366 of IPC, which the appellants denied and requested for the trial. Apart from the appellants, charge-sheet was also filed against Guddibai and Jashodabai for the offence under Section 363 and 366 of IPC.

6. The prosecution, thereafter, examined its witnesses and also proved certain documents. Learned Trial Court framed following four questions for

determination and holding the appellants-accused guilty of the offence, which are:

(i) Whether on the date of incident all the accused had kidnapped the victim from the lawful custody of her parents without her consent?

(ii) Whether on the date, time and place of incident, the prosecutrix was kidnapped by the accused persons with a view to forcibly commit illegal intercourse or violate her or was induced to marry without her consent?

(iii) Whether during the intervening night of 8.11.1998 and 9.11.1998 in the forest of Sahejla accused Bhagwansingh repeatedly violated the prosecutrix without her consent?

(iv) Whether on 8.11.1998 at about 4 p.m. in village Karoli while kidnapping the prosecutrix accused Bhagwansing threatened to kill her and criminally intimated her with a view to create panic?

7. The learned Trial Court did not find the charge under Section 363 and 366 of IPC to be proved against co-accused Guddibai and Jashodabai and eventually acquitted them from the said charges, while, charge under Section 363 of IPC was also not found to be proven against appellant No.1 Bhagwan and he was also acquitted from the said charge. However, the appellant No.1 - Bhagwan and appellant No.2 Devakibai have been convicted to undergo the sentence, which we have mentioned herein above.

8. In this manner, Criminal Appeal No.2090/1999 has been filed by the appellants assailing their judgment of conviction and order of sentence while the State has preferred Criminal Appeal No.1703/2001 for enhancement of sentence awarded to the appellant No.1 - Bhagwan.

9. We have heard Shri Amit Dubey, learned counsel for the appellants-accused and Shri Vaibhav Tiwari, learned Public Prosecutor for the State and find that the appeal preferred by the appellants-accused deserves to be allowed and the appeal filed by the State for enhancement of sentence deserves to be dismissed.

10. Dr. (Smt.) Meena Verma has been examined by the prosecution as PW-1. She has medico-legally examined the prosecutrix, who was brought to her by Ashok, Constable No.375 on 10.11.1998 at 6.45 p.m. The report is Ex.P-4. She found that the prosecutrix was fully grown. She had sustained an abrasion semi-lunar in shape present on Antero-lateral aspect of upper part of left side of neck size 1.5 cm conversely upward two in number and 1 cm apart, above which scab present. On examining the genitals, no injury was seen on the private parts. Old hymen tags were present and no P/V bleeding was seen. In her opinion, injury No.1 was simple in nature and appears to be caused by nail mark. According to

her, no definite opinion can be given regarding recent sexual intercourse. The prosecutrix was referred for radiological examination to ascertain her age.

11. The prosecutrix "S" has been examined as PW-2. According to her, she was below 16 years of age at the time of incident. Her parents had gone to the well for labour job. She, her brother and younger sisters were at home. Appellant Bhagwan is her neighbour. Devakibai came to her and told that she should give Rs.1300/- which her father has brought for well and then she would bring goat and give that to her before her father comes back. The prosecutrix gave Rs.1300/- to Devakibai and after two hours, Devakibai, Guddibai and Jasodabai came to her and asked her to accompany them to the jungle for bringing wood. Then, all these three women took her to jungle. Appellant No.1 Bhagwan was already standing there on the culvert. She further states that his mother Devakibai gave her hand in the hand of accused Bhagwan. There was nobody near in the fields. Accused Bhagwan took out a knife and said that if she dares to shout, she will be killed. According to her, accused Bhagwan made her to walk all night and after reaching the jungle of Sahejla, he took her to a field where cotton was lying and there were shrubs of *Mahu* tree. She has further deposed that near the shrubs of *Mahu* the accused Bhagwan violated her three times. In the scuffle between them, she got hurt on her neck by nails. Her statement further reads that thereafter in the morning the accused took her to Sahejla where in the house of Guddi's in-laws they have had their meals and thereafter, they reached Bhakrada at 9 a.m. She has stated that accused took her to her *Mausi* (mother's sister) where her father Jangu and Ramsingh had also reached. Seeing her father and Ramsingh, the accused ran away and thereafter, her father and Ramsingh brought her to Chhaigaon Police Station. She has stated that she informed the incident to Ramsingh and her father before the incident was disclosed in the police station. In cross-examination, she has admitted that she is not educated and does not know how to sign. She has admitted that before going to police station, her father and Ramsingh had taken her to Khandwa where a report was prepared through an Advocate, which was given to Captain Sahab. Thereafter, they were sent to police station with the said written report. She, however, stated that in the police station the written work was done by questioning. In cross-examination, this witness has admitted that a year before, she, accused and family members of accused had cut Soyabean crop. She does not go to house of Bhagwan as there is previous enmity with them over *Lekhruo* (accounts) and her father had instructed her not to even speak to them. She has stated that accused belongs to same caste but she denied that she wished to marry him. However, she has admitted that earlier she was engaged with accused Bhagwan. She has admitted that while going to the house of Guddibai after the incident, she met one *Bai* (lady) but she did not disclose to her that accused Bhagwan had forcibly brought her. In the house of Guddibai, her mother-in-law and brother-in-law and sister-in-law were also there but she did not disclose the

incident to them. She also did not disclose the incident to anybody in the neighbour of Guddibai. She could not explain as to why the fact of accused showing knife and using force was missing from her police statement.

12. Jangu, father of the prosecutrix, has been examined as PW-3. He has deposed that the prosecutrix, aged 14 years at the time of incident, is her elder daughter amongst his five children. He and his wife Sugrabai had gone to a well to do labour job leaving their children at home. After coming from work, he did not find her daughter at home. They did not find her even after making search here and there. A missing report was lodged at Police Station Chhaigaonmakhan. The very next day he along with Ramsingh reached village Bhakrada in search of her daughter where she was found along with accused Bhagwan. Seeing this witness, the accused ran away. According to this witness, the prosecutrix narrated the entire incident to him. He is witness to panchnama Ex.P-5 in respect of recovery of the girl. In cross-examination, he has stated that he had given a plain paper to the police bearing signature of Kotwar with regard to birth of the prosecutrix. He has recorded the statement of Lallu Patel, who had informed his nephew Bahadur (not examined) that his daughter and accused Bhagwan were going together. His nephew had told this fact to him and same was informed to the police but he does not know why this fact is missing from the report. He has admitted that he along with prosecutrix initially went to Khandwa and a typed report was submitted to Superintendent of Police and thereafter, they were referred to the Police Station where the case was registered. He denied that there was any previous enmity with accused Bhagwan and that they had ever worked together. He, however, admitted that during the last soyabean crop, accused Bhagwan had worked with him in the field. A contract was taken for Rs. 8-9,000/-, which was shared. A sum of Rs. 500-600/- approx was received. He states that he alone was the contractor. He denied the suggestion that he did not give accused Bhagwan his share of Rs. 500/-. He also denied that he quarrelled with the accused over this issue. Before the incident they were on visiting terms with each other. He denied the suggestion that his daughter wanted to marry accused Bhagwan. He states that it has been one month since his daughter has been married and this was done so due to fear of accused. He has admitted his signature upon Ex. D-2, which is a report made to S.P. He also denied that in Ex. D-2 he had got written that accused Bhagwan violated his daughter six times. He also denied his statement Ex.-D-2 where he has mentioned that he had a talk with Mausi (mother's sister).

13. Dr. B.K. Maheshwari has been examined by the prosecution as PW-4. He was Radiologist posted at District Hospital, Khandwa on 11.11.1998. He conducted ossification test of the prosecutrix to ascertain her age and the report is Ex.-P-6. In cross-examination, he has admitted that in ossification test there is possibility of age varying two years on either side.

14. Babulal Soni (PW-5) was posted as Head Constable at Police Station Chhaigaonmakhan on 08.11.1998. According to him, Jangu (PW-3) had lodged a missing report of her daughter, which is Ex.P-8. He also prepared seizure memo of a sealed packet brought by Constable Ramesh from the hospital on 11.11.1998. He also prepared Ex.P-10 seizure memo of a sealed packet brought by Laxman from the hospital on 16.12.1998.

15. Gulabchand (PW-6) was posted as Head Constable at Police Station Chhaigaonmakhan. He prepared panchnama Ex.P-5 with regard to recovery of the girl. In cross-examination, he has stated that prosecutrix was brought to Police Station by Jangu (PW-3) and Ramsingh s/o Kishan, Panch had also accompanied him.

16. P.L. Raj, Station House Officer (PW-7) has conducted the investigation. He has prepared spot map (Ex.P-12) at the instance of the prosecutrix; seized the broken pieces of bangles through Ex.P-13; arrested accused through Ex.P-1 and P-2; seized the knife produced by accused Bhagwan, the seizure memo is Ex. P-14; arrested accused Bhagwan on 15.12.1998 through memo Ex.P-3; sent accused Bhagwan for his medical examination through memo Ex.P-7. He has also produced birth certificate of the prosecutrix on the basis of birth register of P.S. Chhaigaonmakhan, which is based on record of Chhaigaonmakhan, mentioning the date of birth of the prosecutrix as 19.5.1984. Such certificate is Ex.P-15. In cross-examination by the defence, he has stated that report (Ex.D-2) was a typed report. He did not think appropriate to seize the said document.

17. On behalf of the defence, Ramsingh has been examined as DW-1. He has stated that he had accompanied Jangu (PW-3) to search her daughter but he did not have any talk with the girl. He had not gone to Superintendent of Police before reaching the police station. He denied portion A to A in Ex.D-2 wherein he stated that *"prosecutrix had told .....statement of threat was not given* " and portion B to B wherein it was stated that "*allurement of marriage was given..... she was taken there."* In cross-examination by the prosecution he stated that his statement given to police was only in respect of fetching of girl.

18. Lallu has been examined by the defence as DW-2. He denied his statement Ex.D-3 that he saw accused Bhagwan taking the daughter of Jangu (PW-3) about 20-25 years ago. He was cross-examined by the prosecution. He has stated that he had come to know from the villagers that accused Bhagwan had abducted the daughter of Jangu (PW-3).

19. Learned counsel for the appellants submitted that there is no cogent evidence on record to hold the appellants guilty of the offence and hence, their conviction under Section 363, 366 and 376 of IPC is not sustainable in law. He contended that it is a clear case of false implication as Jangu (PW-3), father of the prosecutrix, has admitted in cross-examination that accused Bhagwan had

cultivated Soyabean crop with him and out of that contract they had received Rs.8-9,000/- and Rs.500-600/- each was shared by the workers. Thus, there had been a dispute between father of the prosecutrix and the appellant with regard to payment of Rs. 500/- to be made to appellant Bhagwan for the work executed by him. Therefore, he falsely implicated the accused in the case. He further contended that the statements of prosecutrix (PW-2) and Jangu (PW-3) are contradictory to each other and hence, the evidence is not plausible. Further, their evidence is contradictory with the evidence of Dr. Meena Verma (PW-1), who medicolegally examined the prosecutrix vide Ex.P-4. She has opined that no definite opinion can be given as to sexual intercourse. Moreover, Radiologist, Dr. B.K. Maheshwari (PW-4) after conducting ossification test found the prosecutrix to be between 14-15 years of age and it may either way be taken two years extra. In this context, learned counsel has placed reliance upon Supreme Court decision rendered in *Jaya Mala v. Home Secretary, Govt. of Jammu & Kashmir and others* (AIR 1982 SC 1297). It is further argued that certificate Ex.P-15 issued by the Investigating Officer regarding the age of the victim without any basis, cannot be relied upon to ascertain her age.

20. On the other hand, the learned Public Prosecutor has supported the impugned judgment with regard to conviction of the appellants. He has contended that the birth certificate Ex.P-15 has been relied upon by the Trial Court. As per that certificate, the age of the victim is 19.5.1984 and date of incident is 8.11.1998 and thus, she was stated to be aged 14½ years on the date of incident. Learned counsel for the State further relied upon a decision of the Supreme Court rendered in *State of U.P. v. Chhoteylal* (AIR 2011 SC 697) to contend that there is no rule muchless absolute one that two years have to be added to age determined by doctor. As such the question of treating the victim to be aged about 16 years does not arise and rightly the conviction has been rendered. It is argued that as per FSL report semen stains were found on the underwear, pubic hair and vaginal smear slide of the victim and semen slide, pubic hair and underwear of the accused. The ground raised by the Public Prosecutor for the State in appeal filed for enhancement of sentence is that the Trial Court has erred in awarding the sentence of five years under Section 376 of IPC though as per the evidence on record, minimum seven years' sentence should have been awarded and it may also extend upto 10 years and that without assigning any reason the sentence has been reduced.

21. On the basis of the aforesaid, the following questions arise for consideration:

(i) Whether there is cogent evidence on record to hold the accused-appellants guilty of the offence for which they have convicted?

(ii) Whether in the facts and circumstances of the case, the evidence of

the prosecution is plausible and prosecution is able to prove the case beyond reasonable doubt against the appellants?

(iii) Whether the learned Trial Court is justified in convicting and sentencing the accused and what offence, if any, the accused have committed?

22. As per the evidence of Dr. Meena Verma (PW-1), who medicolegally examined the prosecutrix, there are no signs of rape on the prosecutrix and there is also an attempt on her part that the injury found on the neck of the prosecutrix could be a self-inflicted injury.

23. As per the report Ex.P-6 of the Radiologist, Dr. B.K. Maheshwari (PW-4), the age of the prosecutrix would be around 14-15 years and he has further stated that there is possibility that either way two years may be taken for consideration for the purposes of assessing the age of the prosecutrix. If such a benefit of doubt is extended to the advantage of the accused in determining the age of the prosecutrix by adding two years, necessarily the prosecutrix would be around 16-17 years of age and if consent was given for sexual intercourse on the date of incident, it does not amount to an offence under Section 376 of IPC. In *Jaya Mala* (supra), the Supreme Court has held that a judicial notice can be taken that the margin of error in age ascertained by Radiological examination is two years on either side. Thus, in the present case, the age determined by ossification test of the prosecutrix can be accepted as above 16 years as on the date of incident for giving consent.

24. In the facts and circumstances of the case, on the date of incident, as per Section 375 of IPC, the sixth description to the offence provides that a man is said to commit "rape" with or without her consent when she is below sixteen years of age. In the present case, since the prosecutrix is found to be around 16-17 years of age on the date of incident, therefore, the aforesaid description is not applicable.

25. As regards, the veracity of birth certificate, Ex.P-15 is concerned, the Investigating Officer, P.L. Raj (PW-7) has admitted that in Ex.P-15 there is no mention that Station House Officer is entitled to give such birth certificate. He could not explain the reason why he did not bring the birth register as it was available in Police Station. Thus, we find force in the submission of the learned counsel for the appellant that such certificate cannot be relied upon to hold that prosecutrix was below 16 years of age on the date of incident. Thus, the age of the prosecutrix determined by the ossification test (Ex.P-6) is more probable and reasonable. The medical evidence indicates that there is no injury on the person of the prosecutrix including her private part and it clearly shows that she was a consenting party to the sexual intercourse. Thus, we are inclined to hold that the prosecutrix was above 16 years of age on the date of incident and looking to the medical evidence on record, since she was a consenting party, it cannot be said that appellant No.1 has committed the offence under Section 376 of IPC.

26. Gulabchand (PW-6), Head Constable, has admitted that the prosecutrix was produced by her father Jangu (PW-3), who was accompanied with Ramsingh. Although Ramsingh was shown to be witness of the prosecution but he has been examined as defence witness as DW-1. His version before the Court is that did not accompany Jangu (PW-3) and the prosecutrix to Superintendent of Police. His version is that he never gave statement to the police as per Ex.D-2. He says that nothing has been told by the prosecutrix. In the cross-examination by the prosecution, nothing has been elicited. In the context to say that as per the prosecution version, this witness had given statement to the police that he had gone along with the prosecutrix and PW-3 Jangu to make report to Superintendent of Police but no such complaint is said to have been given before the police to support the version of the prosecution. The defence version is also to the effect that no such incident has taken place and Lallu (DW-2) has not given any statement to the police as per Ex.D-3 recorded under Section 161 Cr.P.C. As per the statement, he has last seen the accused with the victim but that statement has been denied by him. However, he stated that once the police had enquired from him but nothing has been elicited by the prosecution in this regard. He has further admitted that he had come to know from the villagers that accused had abducted the prosecutrix.

27. In *Radhu v. State of M.P.* [(2007) 12 SC 57] the Supreme Court held that a finding of guilt in a case of rape, can be based on the uncorroborated evidence of the prosecutrix and her testimony should not be rejected on the basis of minor discrepancies and contradictions and absence of injuries on the private parts of the victim will not by itself falsify the case of rape nor can be construed as evidence of consent. The Court further held that at the same time, the Courts should bear in mind that false charges of rape are not uncommon and there are some rare instances where a parent has persuaded a gullible or obedient daughter to make a false charge of a rape either to take revenge or extort money or to get rid of financial liability and thus, whether there was rape or not would depend ultimately on the facts and circumstances of each case.

28. In the case in hand, although PW-3 Jangu has denied any animosity with the accused-appellants but the fact remains that he has admitted that one year prior to the incident, accused-Bhagwan had worked with him where he was contractor and each of the worker was disbursed his share of wages and Rs.500/- had also fallen in the share of accused-Bhagwan. He also admitted that he married his daughter under apprehension of the accused. Thus, even looking to his statement, it is quite possible that he was on inimical terms with the accused and false implication of the accused persons is probable. To fortify the said inference it is seen that the prosecutrix (PW-2) has admitted that there is animosity with the appellant over *Lekhruo* (accounts) and that her father had told her not to go to the house of the accused or even talk to him. She also admitted that she was earlier engaged with Bhagwan. Thus, there appears to be some animosity between the

family of the accused persons and the complainant and therefore, their false implication on that ground by exaggerating the version cannot be ruled out.

29. Apart from the above, it is interesting to note that according to the prosecutrix (PW-2), appellant No.2 - Devakibai had brought the prosecutrix to her son appellant No.1 and thereafter, appellant No.1 committed rape upon her. However, in cross-examination it is clear that the prosecurix (sic : prosecutrix) does not know how to read and write and thus, what was being written in the police complaint she would not know. She also admitted that before lodging the report they had gone to Khandwa where report (Ex.D-2) was prepared through an Advocate. It is interesting to note that from her cross-examination it is elicited that engagement ceremony had taken place between accused and the prosecutrix and it is quite possible that she would be a consenting party for sexual intercourse and as such the presence of semen on the undergarments cannot be ruled out.

30. As far as abrasion on the neck of the prosecutrix is concerned, Dr. Meena Verma (PW-1) has admitted that such injury could be caused by self-infliction. It is also seen that appellant No.1 had worked with Jangu (PW-3), father of the victim under his contractorship and there was some animosity or misunderstanding over payment of Rs.500/-. It is quite probable in the village atmosphere for such petty things such complaints are lodged. Thus, under the circumstances, as per the own version of the prosecutrix that she does not know how to read and write, the possibility of false implication cannot be ruled out.

31. If ever such offence as committed, the prosecutrix had the occasion first to disclose the incident to Guddibai, her mother-in-law, and brother-in-law and sister-in-law of Guddibai when accused took her to their house but in her cross-examination she has admitted that she did not disclose the incident to them and that she was forcibly brought by the accused. She remained in the company of the accused-appellant No. 1 and had her meals in the house of Guddibai. Thus, it is clear case of consent.

32. It is also pertinent to note that the very fact of vital admissions on the part of the prosecutrix shows the fact that she is the consenting party for the commission of sexual intercourse but no evidence is available on record to show that sexual intercourse has taken place with the accused. In this context, reliance can be had to the decision of the Supreme Court rendered in *Dinesh Jaiswal v. State of M.P.* [(2010) 3 SCC 232] wherein the doctor who conducted the medical examination was unable to confirm factum of rape. The Court held that though evidence of prosecutrix is liable to be believed save in exceptional circumstances but to hold that a prosecutrix must be believed irrespective of improbabilities in her story, is unacceptable. The test always is as to whether the given story prima facie inspires confidence.

33. In view of the said decision, may be in the present case, an attempt would have been made as there is presence of semen on the clothes but the question of offence of rape is not proved beyond reasonable doubt because the prosecutrix has admitted that their engagement had taken place earlier with the appellant No.1. The prosecution is unable to establish case of rape and also there is absence of any injury on the private part of the victim. This fact would also probabalise the case of the defence that the appellant No.1 has been falsely implicated in the case and there is no cogent evidence on record to hold the accused-appellant No. 1 guilty of commission of rape and also abduction by appellant No.2.

34. Even if the prosecutrix has stated that rape was committed by the appellant No. 1 upon her but there is no cogent evidence of involvement of appellant No.2 to allure, procure and send the prosecutrix to appellant No.1. The victim has been found to be in the custody of her father Jangu (PW-3). The admission of the prosecutrix (PW-2) is that she does not know reading and writing and what has been written in the complaint also she does not know. It falsifies the fact of giving of report as per the statement made to the police.

35. In view of the aforesaid discussion, the prosecution has failed to prove the offence against the appellants-accused beyond reasonable doubt and it can be inferred that the prosecutrix was aged more than 16 years on the date of incident and was a consenting party and on appreciation of evidence it can be further inferred that no forcible offence of rape was committed by the appellant No.1 and also there is no cogent evidence on record to show that appellant No.2 had kidnapped the prosecutrix. The conclusions drawn by the Trial Court are wholly perverse and illegal.

36. Resultantly, **Criminal Appeal No.2090/1999** filed by the appellants/ accused is **allowed**. The impugned judgment passed by the learned Trial Court is set aside and the appellants are acquitted of the offence with which they were charged and convicted. They are on bail, their bail bonds are discharged. As a natural corollary, **Criminal Appeal No.1703/2001** filed by the State for enhancement of sentence awarded to appellant No. 1 Bhagwan is **dismissed**.

Order accordingly

I.L.R. [2019] M.P. 196
APPELLATE CRIMINAL
Before Mr. Justice J.P. Gupta
Cr.A. No. 2862/1998 (Jabalpur) decided on 12 December, 2018

BADRI …Appellant
Vs.
STATE OF M.P. …Respondent

***A. Penal Code (45 of 1860), Section 376 – Rape – Testimony of Prosecutrix – Credibility – Medical Evidence* – Held – As per medical evidence, no sign of sexual intercourse found – Prosecutrix, during or after incident she did not make any hue and cry or made any effort to call attention of persons, working nearby the field – After returning home, she has not even narrated the incident to her in-laws – Husband and mother-in-law not examined and there is no explanation thereof – Contradictions and omissions in FIR and her deposition – Independent witness simply deposed that there was a quarrel with accused – Infirmity in statement of prosecutrix – Prosecution has not established the case beyond reasonable doubt – Conduct of prosecutrix reflects that she exaggerated the story to give natural shape to incident – Reasonable possibility of false implication cannot be ruled out – Conviction set aside – Appeal allowed. (Paras 9, 11, 12 & 17)**

क. दण्ड संहिता (1860 का 45), धारा 376 – बलात्संग – अभियोक्त्री का परिसाक्ष्य – विश्वसनीयता – चिकित्सीय साक्ष्य – अभिनिर्धारित – चिकित्सीय साक्ष्य के अनुसार लैंगिक संभोग का कोई चिन्ह नहीं पाया गया – अभियोक्त्री ने, घटना के दौरान अथवा पश्चात् कोई कोलाहल नहीं मचाया या नजदीकी खेत में काम कर रहे व्यक्तियों का ध्यान आकर्षित करने के लिए कोई प्रयास नहीं किया – घर लौटने के पश्चात्, उसने उसके ससुरालवालों को भी घटना नहीं बतायी – पति एवं सास का परीक्षण नहीं किया गया और इसका कोई स्पष्टीकरण नहीं है – प्रथम सूचना प्रतिवेदन एवं उसके अभिसाक्ष्य में विरोधाभास और लोप है – स्वतंत्र साक्षी ने केवल यह अभिकथन किया कि अभियुक्त के साथ झगड़ा हुआ था – अभियोक्त्री के कथन में कमी है – अभियोजन ने प्रकरण को युक्तियुक्त संदेह से परे स्थापित नहीं किया है – अभियोक्त्री का आचरण दर्शाता है कि उसने घटना को नैसर्गिक स्वरूप देने के लिए कहानी को अतिरंजित किया है – मिथ्या आलिप्ति की युक्तियुक्त संभावना से इंकार नहीं किया जा सकता – दोषसिद्धि अपास्त – अपील मंजूर।

***B. Penal Code (45 of 1860), Section 376 – Rape – FSL Report – Significance* – Held – FSL report is insignificant as FIR was lodged and prosecutrix was examined after nearabout 5 days of incident – Prosecutrix is a married lady and presence of semen and spermatozoa on her petticoat or vaginal swab can be found otherwise the incident – Further, no question was**

asked to appellant regarding FSL report during his examination u/S 313 Cr.P.C. – FSL report cannot be taken into consideration. (Para 9)

ख. दण्ड संहिता (1860 का 45), धारा 376 – बलात्संग – न्यायालयिक विज्ञान प्रयोगशाला प्रतिवेदन – महत्व – अभिनिर्धारित – न्यायालयिक विज्ञान प्रयोगशाला का प्रतिवेदन महत्वहीन है क्योंकि घटना के करीब 5 दिन पश्चात् प्रथम सूचना प्रतिवेदन दर्ज किया गया तथा अभियोक्त्री का परीक्षण किया गया था – अभियोक्त्री एक विवाहित महिला है और उसके पेटीकोट या वैजाईनल स्वैब में वीर्य एवं शुक्राणु की उपस्थिति, घटना के अन्यथा भी पायी जा सकती है – इसके अतिरिक्त, अपीलार्थी से धारा 313 दं.प्र.सं. के अंतर्गत उसके परीक्षण के दौरान न्यायालयिक विज्ञान प्रयोगशाला के प्रतिवेदन के संबंध में कोई प्रश्न नहीं पूछा गया था – न्यायालयिक विज्ञान प्रयोगशाला का प्रतिवेदन विचार में नहीं लिया जा सकता।

Cases referred:

2018 SCC Online SC 1224, (2009) 15 SCC 566, (1999) 1 SCC 220, AIR 2009 SC 858.

Rajesh Nema, for the appellant.
Sharad Sharma, G.A. for the respondent/State.

J U D G M E N T

J.P. GUPTA, J.:- The appellant has preferred the present appeal being aggrieved with the judgment dated 26.11.1998 passed by II Addl. Sessions Judge, Sehore, in S.T.No.120/1998 whereby the appellant has been convicted for the offence under Section 376 of the IPC and sentenced him to undergo RI for 7 years with fine of Rs. 5,000/-, in default of payment of fine, further R.I. of one year.

2. The prosecution case, in brief, is that on 3.6.1998 at about 8 AM, appellant accused Badri came to call the prosecutrix for working as a labourer and took her for labour on his field on the pretext that his sister-in-law is also working as labourer on his field. On this, the prosecutrix went along with the appellant on his field. However, nobody was present on the field and only one Kailash along with Badri were present on the field. The prosecutrix did the labour work for the half day then took lunch. At that time appellant Badri also started taking lunch and sent Kailash to his house. After the prosecutrix finished her lunch, the appellant inserted cloth on her mouth due to which she could not shout. Thereafter, he threw her down on a nala near Banyan tree. Then he lifted the clothes of the prosecutrix and committed rape with her. Thereafter, the appellant threatened her not to tell anybody about the incident. The prosecutrix returned back to her house and narrated the entire incident to her sister-in-law and mother-in-law. At that time, her husband and elder brother of the husband were not at home. Then she informed Member Poonamchand who went to inform her husband and his elder brother. On

Sunday, i.e. after fifth day of the incident, elder brother of her husband returned home then she narrated the incident to him and to one Patel, Sitaram. Then, information of the incident was given at Police Station Ichharwar, on the basis of which First Information Report, Ex.P/1, was recorded and crime no.133/1998 was registered against the appellant for the offence punishable under sections 376 and 506 of the I.P.C. and the matter was investigated. The prosecutrix was sent for her medico legal examination. Dr.Manju Saxena (PW-6) examined her at District Hospital, Sehore and gave her report Ex.P-4. Spot map, Ex.P/6 was prepared. Appellant was arrested on 15.6.1998 and his medical examination was conducted by Dr. R.S.Verma, PW7. He gave his report, Ex.P/5. Petticoat of the prosecutrix and other necessary seizures were made and sent to FSL for chemical examination. After due investigation, a charge sheet was filed before the concerned JMFC, who committed the case to the Court of Sessions. The court of II Addl. Sessions Judge, Sehore, framed the charge against the appellant for the offence under sections 376(1) of the I.P.C. The appellant abjured the guilt and claimed to be tried. His defence was that he has been falsely implicated on account of enmity with the family of the prosecutrix.

3. The learned court below after appreciating the oral as well as documentary evidence on record arrived at the conclusion that the appellant has committed sexual intercourse with her without her consent and will. Hence, convicted the appellant under section 376 and sentenced him, as mentioned above.

4. Learned counsel for the appellant submitted that the finding of the learned court below is contrary to law. The allegation of commission of rape with the prosecutrix has not been established beyond reasonable doubt. The conviction of the appellant is based on the sole testimony of the prosecutrix. Other witnesses Phulkunwarbai, PW3, sister-in-law and Haricharan, PW2, elder brother of husband of the prosecutrix are not independent witnesses, therefore, their version cannot be relied upon. The incident of commission of rape with the prosecutrix also does not find support from the statement of Dr. Manju Saxena, PW6, who examined the prosecutrix after the incident. As per medical report, no external or internal injury was found on the private part of the prosecutrix. She further opined that the prosecutrix was habitual of sexual intercourse, therefore, no definite opinion can be given whether rape was committed or not. There is 5 days delay in lodging of the FIR. There is no corroboration from the FSL report. In the circumstances, the possibility of false implication of the appellant cannot be ruled out. The statement of the prosecutrix without any corroboration cannot be relied. The learned trial court without appreciating the evidence has mechanically recorded the findings which are not sustainable. Hence, the appeal be allowed and conviction and sentence be set aside.

5. On the other hand, learned Govt. Advocate has contended that the finding of the learned court below is based on legal and proper appreciation of the evidence, which does not require any interference, therefore, the appeal be dismissed.

6. The question for consideration is that whether the prosecution has established beyond the reasonable doubt that the appellant committed sexual intercourse with the prosecutrix without her consent or will ?

7. Having considered the contention advanced by learned counsel for the parties and on perusal of record it is found that the conviction of the appellant is based on the testimony of the prosecutrix, PW1, which got corroboration with the testimony of her sister-in-law Phulkunwarbai (PW-3) to whom she narrated the entire incident. The prosecutrix (PW-1) categorically stated that on 3.6.1998 at about 8 AM, appellant accused Badri came to call her for doing work as labourer and took her for labour on his field on the pretext that his sister-in-law is also doing labour work on his field. On this, she went along with the appellant on his field. However, nobody was present on the field and only one Kailash along with Badri were present on the field. She did the labour work for the half day then took lunch. At that time appellant Badri also started taking lunch and sent Kailash to his house. After the prosecutrix finished her lunch, the appellant inserted cloth on her mouth due to which she could not shout. Thereafter, he threw her down on a nala near Banyan tree. Then he lifted her clothese (sic : clothes) and committed rape with her. Thereafter, the appellant threatened her not to tell anybody about the incident. She returned back to her house and narrated the entire incident to her sister-in-law and mother-in-law. When elder brother of her husband returned back, she narrated the incident to him and thereafter they went to lodge report at Police Station Ichharwar and then was sent for medical examination.

8. Haricharan, PW2, elder brother of husband of the prosecutrix has stated that he and husband of the prosecutrix were out of station at the time of incident. They were at village Sewaniya where Poonamchand, PW4 came to call them and stated that some misdeed has been committed in his house then he alone returned back to his house and the prosecutrix narrated the incident to him. He has also stated that he called Poonamchand and Patel Sitaram and the prosecutrix also narrated the incident to them, who suggested to lodge the report and then he took the prosecutrix to lodge the FIR.

9. So far as other evidence is concerned, Dr. Manju Saxena, PW6, has stated that she examined the prosecutrix on 8.6.1998 but did not find any sign on her person with regard to commission of sexual intercourse with her. So far as FSL report is concerned, it is not tendered in evidence. The appellant has not been given any opportunity to explain the aforesaid evidence as no question has been asked at the time of examination of the accused under section 313 of the Cr.P.C.

Hence, the FSL report cannot be taken into consideration. Apart from it, the FSL report is insignificant as the report has been lodged after nearabout 5 days of the incident and the prosecutrix was medically examined after five days of the incident. The prosecutrix was a married lady and presence of semen and spermatozoa on her petticoat or vaginal swab can be found otherwise the incident. Apart from it, Patel Sitaram, the mother-in-law and the husband of the prosecutrix have not been examined and there is no explanation thereof.

10. The prosecutrix, PW1, has stated that after the incident she on the same day narrated the incident to her sister-in-law Phulkunwarbai, PW3; but, her name has not been mentioned at the time of recording of the FIR, Ex.P/1, which was recorded after five days of the incident, however, names of other persons to whom the incident was narrated have been mentioned. Therefore, statement of the prosecutrix, PW1, that she narrated the incident to her sister-in-law Phulkunwarbai, PW3 and the statement of Phulkunwarbai, PW3 that prosecutrix narrated her the facts of the incident, are not believable. It appears that Phulkunwarbai, PW3, has been implanted later on. So far as statement of Haricharan, PW2 is concerned, the prosecutrix has narrated him the facts of the incident after five days of the incident, who got the information of the incident from Poonamchand, PW4. In the circumstances, statements of these witnesses cannot be admitted under section 6 of the Evidence Act on the principle of *res gestae*. Similarly, the aforesaid statements also do not have much importance under section 157 of the Evidence Act as the witnesses got information of the incident from other sources and the victim has also narrated the incident to many persons before her. Therefore, improvement and twisting in the facts of the incident cannot be ruled out.

11. In view of the aforesaid circumstances, only the statement of the prosecutrix, PW1, is required to be tested meticulously. A bare perusal of her testimony would indicate that during or after the incident she did not make any hue and cry or made any effort to call attention of the persons who were working nearby the field. It also appears that after returning to house, she has not narrated the incident to her mother-in-law and other brothers-in-law and even her sister-in-law Phulkunwarbai, PW3. Independent witness Poonamchand, PW4, denied the fact that she narrated the incident before him and said that she was subjected to sexual assault by the appellant. She simply said that there was quarrel with the accused. Prosecutrix, PW1 has stated that during the incident her two buttons of the blouse were dropped and her bangles were broken on the spot and on account of breaking of bangles, there was injury on her wrist and there was laceration on her hands and legs and on elbow and there were also laceration on her waist and back. But, in this regard, there is no other corroborative evidence on record. She neither shown the injury to any witness nor stated to them that she sustained

injuries on her person. Even she has not made such allegations in the FIR, Ex.P/1. This conduct of the prosecutrix reflects that she exaggerated the story to give natural shape to the incident.

12. Investigating officer, Mahendra Singh Parmar PW8, has not stated that he either seized the buttons of the blouse or broken pieces of bangles from the spot. However, he has stated that he visited the place of incident and the prepared spot map, Ex.P/6, as shown by the prosecutrix.

13. Hon'ble the Apex Court in judgment of *Dola @ Dolagobinda Pradhan vs. The State of Odisha* reported in 2018 SCC Online SC 1224, has held that the sole testimony of the prosecutrix can be relied upon if it inspires the confidence of the court. The relevant paras are 8 and 9 as under :

> "8. In Sadashiv Ramrao Hadbe v. State of Maharashtra, [(2006) 10 SCC 92], this Court reiterated that the sole testimony of the prosecutrix could be relied upon if it inspires the confidence of the Court:
>
> > 9. It is true that in a rape case the accused could be convicted on the sole testimony of the prosecutrix, if it is capable of inspiring confidence in the mind of the court. If the version given by the prosecutrix is unsupported by any medical evidence or the whole surrounding circumstances are highly improbable and belie the case set up by the prosecutrix, the court shall not act on the solitary evidence of the prosecutrix. The courts shall be extremely careful in accepting the sole testimony of the prosecutrix when the entire case is improbable and unlikely to happen.
>
> 9. However, as is also evident from the observations above, such reliance may be placed only if the testimony of the prosecutrix appears to be worthy of credence. In this regard, it is also relevant to note the following observations of this Court in the case of Raju v. State of Madhya Pradesh, [(2008) 15 SCC 133], which read thus:
>
> > 10. The aforesaid judgments lay down the basic principle that ordinarily the evidence of a prosecutrix should not be suspected and should be believed, more so as her statement has to be evaluated on a par with that of an injured witness and if the evidence is reliable, no corroboration is necessary. Undoubtedly, the aforesaid observations must carry the greatest weight and we respectfully agree with them, but at the same time they cannot be universally and mechanically applied to the facts of everycase of sexual assault which comes before the court.
> >
> > 11. It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and

> damage to the accused as well. The accused must also be protected against the possibility of false implication, particularly where a large number of accused are involved. It must, further, be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily such a witness would not tell a lie as to the actual assailants, but there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration."

14. Apex Court in the case of *Tameezuddin @ Tammu Vs. State (NCT of Delhi),* (2009) 15 SCC 566, has held that testimony of the prosecutrix must be given predominant consideration; but, to hold that this evidence has to be accepted even if the story is improbable and belies logic, would be doing violence to the very principles which govern the appreciation of evidence in a criminal matter and looking to the facts of the case some supporting evidence was essential for prosecution's case in view of fallacies in prosecution version.

15. In the case of *Suresh N.Bhusare and others Vs. State of Maharashtra.* (1999)1 SCCC (sic : SCC) 220, the Apex Court has observed that absence of injury on prosecutrix's body even though her version was that she was dragged and had received some scratches is one of the serious infirmity.

16. In the case of *Rajoo and others Vs. State of M.P.,* reported in AIR 2009 SC 858, Apex court has held that the evidence of prosecutrix must be examined as that of an injured witnesswhose presence at the spot is probable but it can never be presumed that her statement should, without exception, be taken as the gospel truth. Additionally her statement can, at best, be adjudged on the principle that ordinarily no injured witness would tell a lie or implicate a person falsely. It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication.

17. In view of the aforesaid legal background and considering the aforesaid circumstances and infirmity in the statement of the prosecutrix, in the considered opinion of this court, it cannot be said that the prosecution has established its case beyond reasonable doubt. Reasonable possibility of false implication cannot be ruled out.

18. In view of the foregoing discussion, the conviction and sentence cannot be upheld. Hence, the appeal is allowed and the conviction and sentence of the appellant for the offence under section 376 of the IPC is set aside. The appellant is on bail. His bail bonds stands discharged. Amount of fine, if deposited, be returned to the appellant.

19. A copy of this judgment be sent to the trial court for information and compliance.

Appeal allowed

I.L.R. [2019] M.P. 203
APPELLATE CRIMINAL
Before Mr. Justice Vijay Kumar Shukla
Cr.A. No. 1476/2014 (Jabalpur) decided on 15 December, 2018

LAL SINGH …Appellant

Vs.

STATE OF M.P. …Respondent

***A. Penal Code (45 of 1860), Section 376 – Rape – Medical Examination – Credibility* – Held – Prosecutrix, an adult married woman – FIR was lodged on the next day of incident and thereafter she was medically examined – In absence of explanation of her stay in the night of the date of incident, as she was a married woman, presence of semen on vaginal swab and on undergarments loses its significance – Further, as per her statement she was thrown on rough surface, does not get any corroboration from medical evidence – No external injury found on her person – Conviction not sustainable – Appeal allowed. (Para 11 & 12)**

क. दण्ड संहिता (1860 का 45), धारा 376 – बलात्संग – चिकित्सीय परीक्षण – विश्वसनीयता – अभिनिर्धारित – अभियोक्त्री एक वयस्क विवाहित महिला – घटना के अगले दिन प्रथम सूचना प्रतिवेदन दर्ज किया गया और तत्पश्चात् उसका चिकित्सीय परीक्षण किया गया – चूंकि वह एक विवाहित महिला थी, घटना की तिथि की रात में उसके रूकने के स्पष्टीकरण की अनुपस्थिति में, वैजाईनल स्वैब एवं अंतर्वस्त्रों पर वीर्य की उपस्थिति अपना महत्व खो देती है – इसके अतिरिक्त, उसके कथन के अनुसार उसे खुरदरी सतह पर फेंका गया था, इसे चिकित्सीय साक्ष्य से कोई संपुष्टि नहीं मिलती – उसके शरीर पर कोई बाह्य चोट नहीं पायी गई – दोषसिद्धि कायम रखने योग्य नहीं – अपील मंजूर।

***B. Penal Code (45 of 1860), Section 376 – Rape – Delay in FIR – Appreciation of Evidence* – Held – FIR lodged after almost 30 hours of the incident and medical examination done thereafter – There was a considerable delay in FIR which has not been explained by the prosecution – Further, one Ranjit Singh who allegedly accompanied the accused was not examined – Statement of prosecutrix do not inspire confidence. (Para 12)**

ख. दण्ड संहिता (1860 का 45), धारा 376 – बलात्संग – प्रथम सूचना प्रतिवेदन में विलंब – साक्ष्य का मूल्यांकन – अभिनिर्धारित – घटना से लगभग 30 घंटों पश्चात् प्रथम सूचना प्रतिवेदन दर्ज किया गया और तत्पश्चात् चिकित्सीय परीक्षण किया

गया – प्रथम सूचना प्रतिवेदन में पर्याप्त विलंब हुआ था जिसे अभियोजन द्वारा स्पष्ट नहीं किया गया है – इसके अतिरिक्त, एक व्यक्ति, रंजीत सिंह, जो अभिकथित रूप से अभियुक्त के साथ था, का परीक्षण नहीं किया गया – अभियोक्त्री का कथन विश्वास उत्पन्न नहीं करता।

S.K. Dixit, for the appellant.
V.S. Mishra, Dy. G.A. for the respondent/State.

J U D G M E N T

VIJAY KUMAR SHUKLA, J.:- The present appeal is filed under Section 374(2) of the Code of Criminal Procedure being aggrieved by the order of conviction and sentence, dated 12-5-2014, passed by the learned Second Additional Sessions Judge, Khandwa, District Khandwa in S.T. No.36/2014 [State of M.P. vs. LalsinghKrishnakant], whereby the accused-appellant has been convicted under Section 376 of the Indian Penal Code [for short 'the IPC'] and sentenced to undergo rigorous imprisonment for 10 years and payment of fine of Rs.5000/-, in default, to suffer further rigorous imprisonment for three months.

2. Filtering unnecessary details, the prosecution case, briefly stated, is that an incident had taken place on 14-11-2013 at about 11:00 AM. It is alleged by the prosecution that when the prosecutrix went to the field known as "Doodhdairy" along with her children to collect Soyabean scattered in the field, the appellant came over there, caught hold of her from backside, threw her on the ground and thereafter sexually assaulted her. He also intimidated to her life. Report to that effect, vide Ex.P/5 was lodged at the Police Station concerned and offence punishable under sections 376 and 506 of the IPC were registered against the accused-appellant and criminal law was set at motion.

3. The prosecutrix was sent for medical examination and the MLC report is Ex.P/3. Spot map was prepared which is Ex.P/6. The accused was arrested, vide arrest memo Ex.P/8 and he was also sent for medical examination. The medical report is Ex.p/4. His undergarments, pubic hair and slides of private parts were seized and the same were sent to the Forensic Lab for analysis. The FSL report is Ex.P/12.

4. The investigating agency after conducting necessary investigation filed charge-sheet before the court of competent jurisdiction which in turn, committed the matter to the Court of Sessions for trial.

5. The accused-appellant abjured his guilt and pleaded to be tried stating that he is innocent and he has been falsely implicated.

6. The prosecutrix was examined as PW-3. She has stated that on the date of incident her husband was not in the village. She had gone to the agricultural field

to collect Soyabean. At that time son of Sakharam, namely, Lal Singh came over there along with one Ranjeet Singh. The accused caught hold of her from behind, threw her on the ground and thereafter sexually violated here (sic : her) against her will. He also threatened her to kill. Another person - Ranjeet Singh fled from the spot. On her return to the village she narrated the entire incident to her mother-in-law and when her husband came back thereafter report was lodged in the Police Station, vide Ex.P/5.

7. The prosecutrix was examined by Dr. Laxmi Dodwe, PW-2. She was taken to the hospital by Constable Sharmila with an application, Ex.P/3. She was medically examined on 15-11-2013 but no external injury was found on her person. The hymen was old and ruptured and there was no injury on her vaginal region. She was carrying on pregnancy of six months. On her undergarment - petticoat there was white spot. Samples of pubic hair and vaginal swab were also prepared and the same were sealed in different packets and handed over to the lady constable. Her medical report is Ex.P/4. In her cross-examination she has stated that white spots which were found on the undergarment were of vaginal secretion.

8. The mother-in-law of the prosecutrix Manoramabai, PW-4 also stated that complainant is her daughter-in-law and on the date of the incident her son Mukesh was out of the Village and the prosecutrix had gone to collect Soyabean from the field -Doodhdairy. After returning from the field she narrated the entire incident. When Mukesh came back to home, thereafter report was lodged in the Police Station.

9. The alleged incident had taken place on 14-11-2013 at about 11:00 AM and the report was lodged on 15-11-2013 at about 18:30 hrs. in the evening after about 30 years (sic : hrs.) . Age of the prosecutrix is not disputed that she is a major and married woman. She was carrying pregnancy of six months. The investigation was carried out by PW-06, Krishna Murari, who stated that after registering the FIR on 15-11-2013 he arrested the accused on 18-11-2013 and the seized articles were sent to the Forensic Lab through the Superintendent of Police, Khandwa. The FSL report is Ex.P/12. He also stated that the undergarments of the accused, his pubic hair and semen slides were prepared vide Ex.P/14 and the same were sent for chemical analysis along with the Head Constable Prahlad. In the FSL report, human semen was found on the underwear of the accused.

10. It is not in dispute that the accused-appellant is the Nandoi (sister's husband of the prosecutrix). The prosecution has not examined the so called person (Ranjeet Singh) who had accompanied the accused at the spot. In para 6 of her statement the prosecutrix stated that the accused is her Nandoi. He got married prior to her marriage and he has two children. Her devar (husband's younger brother) is a handicapped person and he is called 'Langra'. She denied that there was any quarrel in the family with wife of the accused - appellant.

11. Considering the aforesaid background that the accused-appellant is the brother-in-law of the prosecutrix and both the family are residing in the same village and there was suggestion of dispute in the family, the evidence has to be evaluated. The alleged incident is said to have taken place on 14-11-2013 at about 11:00 AM and the FIR was lodged on 15-11-2013 around 06:30 PM. Admittedly, the prosecutrix and the accused both are married persons. The prosecutrix was examined on 15-11-2013 at about 08:00 PM, vide report Ex.P/4. There is no explanation that where did she stay in the night as she was a married woman. In the same manner, the accused was arrested on 18-11-2013 after four days of the incident and his undergarments etc. were seized after his arrest. He is also a married person, therefore, presence of human semen on his undergarments and vaginal slabs of the prosecutrix loses its significance in absence of any explanation by the prosecution that where the prosecutrix had stayed in the night of the date of incident as she is a married woman and report to the police was made next day after about 30 hours and medical examination that too.

12. Taking into consideration the facts that the FIR was lodged after more than 30 hours of the incident and thereafter she was medically examined. Further, the statement of the prosecutrix that she was forcibly thrown on rough surface does not get any corroboration from the medical evidence and the statement of the doctor, Laxmi Dodwe (PW-02). She did not find any external injury on the person of the prosecutrix. Besides, the prosecution has not examined the so called person - Ranjeet Singh, who is said to have accompanied the accused at the time of the incident. Thus, taking into consideration the considerable delay in lodging of the FIR without any plausible explanation and non-examination of Ranjeet Singh, the statement of the prosecutrix does not inspire confidence of this Court. As already held that in absence of explanation of stay of the prosecutrix in the night presence of semen on her vaginal swab and on the undergarments, loses its significance.

13. In the obtaining factual backdrop and on assimilation of the entire facts and evidence available on record, I am of the considered view that the conviction of the appellant is not sustainable.

14. Accordingly, **the appeal is allowed** and the impugned order of conviction and sentence is set aside. The appellant is directed to set at liberty forthwith, if not warranted in other case.

Appeal allowed

I.L.R. [2019] M.P. 207
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice G.S. Ahluwalia
M.Cr.C. No. 31088/2018 (Gwalior) decided on 20 September, 2018

MANOJ SHRIVASTAVA …Applicant

Vs.

STATE OF M.P. & anr. …Non-applicants

***A. Criminal Procedure Code, 1973 (2 of 1974), Sections 177, 178 & 179 and Penal Code (45 of 1860), Sections 420, 467, 409 & 120-B – Territorial Jurisdiction* – Held – Residential township constructed within territorial jurisdiction of police station Sirol, Distt. Gwalior and all sham sale deeds were also executed at Gwalior – Entire offence has been committed in Gwalior – Contention that, Company having registered office at Noida and all decisions were taken at Noida, has no significance – Court at Gwalior has jurisdiction to try the offence – However, it is settled law that where offence has taken place within territorial jurisdiction of more than one police stations, then each police station has jurisdiction to investigate the offence – Application dismissed. (Para 9)**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 177, 178 व 179 एवं दण्ड संहिता (1860 का 45), धाराएँ 420, 467, 409 व 120–बी – क्षेत्रीय अधिकारिता – अभिनिर्धारित – पुलिस थाना सीरोल, जिला ग्वालियर की क्षेत्रीय अधिकारिता के भीतर निवासीय नगरी का संनिर्माण किया गया तथा सभी बनावटी विक्रय विलेखों को भी ग्वालियर में निष्पादित किया गया था – संपूर्ण अपराध ग्वालियर में कारित किया गया है – तर्क कि, कंपनी का पंजीकृत कार्यालय नोएडा में है और सभी निर्णय नोएडा में लिये गये थे, कोई महत्व नहीं रखता – ग्वालियर के न्यायालय को अपराध का विचारण करने की अधिकारिता है – अपितु, यह स्थापित विधि है कि जहां अपराध, एक से अधिक पुलिस थानों की क्षेत्रीय अधिकारिता के भीतर घटित हुआ है, तब प्रत्येक पुलिस थाने को अपराध का अन्वेषण करने की अधिकारिता है – आवेदन खारिज।

***B. Penal Code (45 of 1860), Sections 420, 467, 409 & 120-B and Companies Act (18 of 2013), Sections 439(1),(2), 436(1),(2), 441, 442, 435 & 445 – Applicability of Code* – Held – There is no provision in Companies Act which ousts the applicability of the provisions of Indian Penal Code. (Para 11)**

ख. दण्ड संहिता (1860 का 45), धाराएँ 420, 467, 409 व 120–बी एवं कम्पनी अधिनियम (2013 का 18), धाराएँ 439(1),(2), 436(1),(2), 441, 442, 435 व 445 – संहिता की प्रयोज्यता – अभिनिर्धारित – कंपनी अधिनियम में ऐसा कोई उपबंध नहीं जो भारतीय दण्ड संहिता के उपबंधों की प्रयोज्यता को बाहर करता हो।

***C. Interpretation of Statutes – Companies Act (18 of 2013), Section 430 – Jurisdiction of Court* – Held – It is well established principle of law that exclusion of jurisdiction of Court has to be specific and cannot be inferred and the provisions excluding the jurisdiction have to be construed strictly – In Section 430 of the Act of 2013, word "Civil Court" cannot be read as "Criminal Court" – Jurisdiction of Criminal Court is not barred under the Act of 1956. (Paras 18 to 20)**

ग. कानूनों का निर्वचन – कम्पनी अधिनियम (2013 का 18), धारा 430 – न्यायालय की अधिकारिता – अभिनिर्धारित – यह विधि का सुस्थापित सिद्धांत है कि न्यायालय की अधिकारिता का अपवर्जन विनिर्दिष्ट होना चाहिए एवं अनुमित नहीं किया जा सकता तथा अधिकारिता के अपवर्जन के उपबंधों का कठोर रूप से अर्थान्वयन किया जाना चाहिए – 2013 के अधिनियम की धारा 430 में शब्द ''सिविल न्यायालय'' को ''दाण्डिक न्यायालय'' के रूप में नहीं पढ़ा जा सकता – 1956 के अधिनियम के अंतर्गत, दाण्डिक न्यायालय की अधिकारिता वर्जित नहीं है।

Cases referred:

(2011) 11 SCC 301, 2009 (11) SCC 424, (2014) 9 SCC 772, Cr.A. No. 1195/2018 decided on 20.09.2018 (Supreme Court).

J.S. Kushwah, for the applicant.
B.P.S. Chouhan, for the non-applicant No. 2/State.
Anoop Nigam, for the complainant.

(Supplied : Paragraph numbers)

O R D E R

G.S. AHLUWALIA, J.:- This application under Section 482 of Cr.P.C. has been filed for quashing the F.I.R. in crime no. 27/2017 registered at Police Station Sirol, Distt. Gwalior for offence under Sections 420, 467, 409 and 120-B of I.P.C. read with Section 166, 188-B of Companies Act, as well as for quashing the criminal proceedings in S.T. No.437/2017, which are pending before the Court of 9th Additional Sessions Judge, Gwalior.

2. The necessary facts for the disposal of the present application in short are that the complainant Rajiv Shrivastava lodged a report that Assotec C.P. Infrastructure Pvt. Limited started a project in the name and style of Windsor Hills in Gwalior and a residential township was to be constructed. The applicant was given the charge of looking after the residential township in which Flats, Villas, Shops etc. were to be constructed. It was alleged that the applicant, in connivance of the co-accused P.K. Shrivastava, Mukesh, Dilip, Ankit Ranjan, Anand Shrivastava, and Sidharth Shrivastava, sold 36 Flats and shops and did not deposit the consideration amount in the account of the company. It was alleged the flats and shops were sold in favour of the co-accused persons at a much lower price

than the scheduled price, who in their turn, sold the flats and shops to the *bonafide* purchasers at a higher price and thus, played fraud with the Company, and the actual consideration amount was misappropriated by the applicant, his wife, daughter Aishwarya by depositing the same in their bank accounts. The fraudulent transactions done by the applicant and the co-accused persons for misappropriating the funds of the Company were also mentioned in detail in the F.I.R.

3. The police accordingly, registered the F.I.R. in crime No. 27/2017 for offence under Sections 420, 467, 409 and 120-B of I.P.C. read with Section 166, 188-B of Companies Act. It is not out of place to mention here that some of the co-accused persons are still absconding and the police has filed the charge sheet, showing them to be absconding.

4. The bail application of the applicant has already been rejected by this Court thrice, and the S.L.P. has also been dismissed by the Supreme Court in S.L.P. (Criminal) 5987/2018 by order dated 30-7-2018.

5. It is submitted by the Counsel for the applicant that the registered office of the Company is situated in Noida, and the entire decisions were taken at Noida, therefore, the cause of action has arisen at Noida, thus, the Police Station Sirol, Distt. Gwalior has no jurisdiction to investigate the matter. It is further submitted that the allegations are squarely covered by different provisions of Companies Act and in view of provisions of Sections 439(1)(2), 436(1)(2), 441, 442, 435 and 445 of Companies Act, the prosecution of the applicant under provisions of Indian Penal Code is unwarranted as when a separate provision has been made in the Special Statute, then the applicant should not be prosecuted for offences punishable under Section 420, 467, 409, 120-B of I.P.C.

6. Per contra, it is submitted by the Counsel for the State, that so far as the territorial jurisdiction of the Police Station Sirol, Distt. Gwalior is concerned, undisputedly, the residential Township, known as Windsor Hills was constructed in Gwalior, different fraudulent Sale deeds have been executed at Gwalior, therefore, the entire cause of action has taken place at Gwalior. Merely the registered office of the Company is situated at Noida, would not give rise to any cause of action at Noida. Further, there is no provision in Companies Act, ousting the applicability of provisions of Penal Code.

7. While opposing the prayer of the applicant, for quashment of the proceedings, it is submitted by the Counsel for the complainant that the applicant himself had approached the National Company Law Tribunal, but later on, he withdrew the proceedings.

8. Considered the submissions made by the Counsel for the parties.

9. The first contention raised by the Counsel for the applicant is that the registered office of the Company is situated in Noida and all the decisions were taken at Noida, therefore, only the Noida police has territorial jurisdiction to investigate the matter and the Police Station Sirol, Distt. Gwalior, has no territorial jurisdiction to entertain the matter. The submission made by the Counsel for the applicant is misconceived and is hereby rejected. Undisputedly, the residential township in the name and style of Windsor Hills has been constructed within the territorial jurisdiction of Police Station Sirol, Distt. Gwalior. It is the allegation of the complainant, that initially, the sham sale deeds in respect of 36 flats and shops were executed in favour of the co-accused persons, at a very low price and even much below the actual price of the flats and shops and thereafter, the same property was sold in favour of the actual borrowers at a much higher price, and the consideration amount was not deposited in the account of the Company. All the sale deeds were executed in Gwalior. Thus, it is clear that the entire offence has taken place in Gwalior. In the considered opinion of the Court, the offence has been committed within the territorial jurisdiction of Police Station Sirol, Distt. Gwalior. Even otherwise, if for the sake of argument, it is accepted, that the decision taken at Noida, can also be treated as a part of cause of action/offence, then it is well-established principle of law that where the offence has taken place within the territorial jurisdiction of more than one police stations, then each of the police stations will have jurisdiction to investigate the offence.

10. The Supreme Court in the case of *Sunita Kumari Kashyap vs. State of Bihar & Another,* reported in (2011) 11 SCC 301 has held as under:-

> "8. Chapter XIII of the Code of Criminal Procedure, 1973 (in short "Code") deals with jurisdiction of the criminal courts in inquiries and trials. Sections 177-179 are relevant which are as follows:
>
> > "177. Ordinary place of inquiry and trial -. Every offence shall ordinarily be inquired into and tried by a Court within whose local jurisdiction it was committed.
> >
> > 178. Place of inquiry or trial. (a) When it is uncertain in which of several local areas an offence was committed, or
> >
> > (b) where an offence is committed partly in one local area and partly in another, or
> >
> > (c) where an offence is a continuing one, and continues to be committed in more local areas than one, or
> >
> > (d) where it consists of several acts done in different local areas, it may be inquired into or tried by a Court having jurisdiction over any of such local areas.

> 179. Offence triable where act is done or consequence ensues. When an act is an offence by reason of anything which has been done and of a consequence which has ensued, the offence may be inquired into or tried by a Court within whose local jurisdiction such thing has been done or such consequence has ensued."
>
> From the above provisions, it is clear that the normal rule is that the offence shall ordinarily be inquired into and tried by a court within whose local jurisdiction it was committed. However, when it is uncertain in which of several local areas an offence was committed or where an offence is committed partly in one local area and partly in another or where an offence is a continuing one, and continues to be committed in more than one local area and takes place in different local areas as per Section 178, the Court having jurisdiction over any of such local areas is competent to inquire into and try the offence. Section 179 makes it clear that if anything happened as a consequence of the offence, the same may be inquired into or tried by a Court within whose local jurisdiction such thing has been done or such consequence has ensued."

Thus, the objection of the applicant, with regard to the lack of territorial jurisdiction of Police Station Sirol, Distt. Gwalior is hereby rejected.

11. It is next contended by the Counsel for the applicant, that in view of the specific provisions of Sections 439(1),(2),436(1)(2),441,442,435 and 445 of Companies Act, the applicant cannot be prosecuted for offences punishable under Penal Code. The submissions made by the Counsel for the applicant is misconceived and is hereby rejected.

12. It is fairly conceded by the Counsel for the applicant, that there is no provision in Companies Act, which ousts the applicability of the provisions of Indian Penal Code.

13. Section 26 of General Clauses Act, reads as under :-

> **"26. Provision as to offences punishable under two or more enactments.**— Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence."

14. The Supreme Court in the case of *State of M.P. Vs. Rameshwar* reported in 2009(11) SCC 424 has held as under :-

> "48. Mr Tankha's submissions, which were echoed by Mr Jain, that the M.P. Cooperative Societies Act, 1960 was a complete code in itself and the remedy of the prosecuting agency lay not under the criminal process but within the ambit of Sections 74 to 76 thereof, cannot also be accepted in view of the fact that there is no bar under the M.P. Cooperative Societies Act, 1960, to take resort to the provisions of the general criminal law, particularly when charges under the Prevention of Corruption Act, 1988, are involved."

15. The Supreme Court in the case of *State (NCT of Delhi) Vs. Sanjay* reported *in* (2014)9 SCC 772 has held as under :-

> "61. Reading the provisions of the Act minutely and carefully, prima facie we are of the view that there is no complete and absolute bar in prosecuting persons under the Penal Code where the offences committed by persons are penal and cognizable offence."

16. The Supreme Court in the case of *State of Maharashtra Vs. Sayyad Hassan Sayyad Subhan,* by judgment dated 20-9-2018, passed in Criminal Appeal No.1195 of 2018 has held as under :-

> "8. In Hat Singh's case this Court discussed the doctrine of double jeopardy and Section 26 of the General Clauses Act to observe that prosecution under two different Acts is permissible if the ingredients of the provisions are satisfied on the same facts. While considering a dispute about the prosecution of the Respondent therein for offences under the Mines and Minerals (Development and Regulation) Act 1957 and Indian Penal Code, this Court in State (NCT of Delhi) v. Sanjay 4 held that there is no bar in prosecuting persons under the Penal Code where the offences committed by persons are penal and cognizable offences. A perusal of the provisions of the FSS Act would make it clear that there is no bar for prosecution under the IPC merely because the provisions in the FSS Act prescribe penalties. We, therefore, set aside the finding of the High Court on the first point."

17. This Court is of the considered opinion, that the second contention of the applicant, that he cannot be prosecuted for offences under the Indian Penal Code, and can be prosecuted for punishments provided under the Companies Act only, cannot be accepted, hence, it is rejected.

18. It is next contended by the Counsel for the applicant that as per the provision of Section 430 of Companies Act, the jurisdiction of the Civil Court is barred, therefore, it should be presumed that the jurisdiction of the Criminal Court is also barred.

19. The submission made by the Counsel for the applicant cannot be accepted. Section 430 of Companies Act, reads as under :

> "**430. Civil court not to have jurisdiction.**—No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Tribunal or the Appellate Tribunal is empowered to determine by or under this Act or any other law for the time being in force and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or any other law for the time being in force, by the Tribunal or the Appellate Tribunal."

20. The submission made by the Counsel for the applicant, that the word "Civil Court", should be read as "Criminal Court" also, is misconceived. If the intention of the Legislature was to exclude the provisions of Indian Penal Code, then nothing had prevented the Legislature from making such a provision. Even otherwise, it is a well-established principle of law that the exclusion of the jurisdiction of the Court has to be specific and cannot be inferred, and the provisions excluding the jurisdiction have to be construed strictly. Thus, the word "Civil Court", cannot be read as "Criminal Court", as suggested by the Counsel for the applicant.

21. No other argument is advanced by the Counsel for the applicant.

22. Thus, this Court is of the considered opinion, that the F.I.R. in Crime No.27/2017 registered at Police Station Sirol, Distt. Gwalior for offence under Sections 420,467,409 and 120-B of I.P.C. read with Section 166,188-B of Companies Act, as well as the criminal proceedings in S.T. No.437/2017 pending in the Court of 9th A.S.J., Gwalior cannot be quashed.

The application fails and is hereby **dismissed.**

Application dismissed

I.L.R. [2019] M.P. 214
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice Atul Sreedharan
M.Cr.C. No. 32718/2018 (Jabalpur) decided on 4 December, 2018

RAMBAHOR SAKET …Applicant

Vs.

STATE OF M.P. …Non-applicant

(Alongwith M.Cr.C. Nos. 25031/2018 & 17896/2018)

***A. Criminal Procedure Code, 1973 (2 of 1974), Section 437 & 439 – Bail Applications – Delay in Trial* – Held – In present cases, till date not a single witness has been examined – Accused persons are in jail since a long period – Looking to inordinate delay in recording statement of witnesses, applicants granted bail – Further held – An expeditious examination of prosecution witnesses is the only way to ensure that rights of accused and interest of society are balanced in equal measure, subserving the interest of justice – Guidelines issued for Courts below to expedite recording of prosecution evidence – Applications allowed. (Paras 6, 29 & 30)**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 437 व 439 – जमानत के आवेदन – विचारण में विलंब – अभिनिर्धारित – वर्तमान प्रकरणों में, आज दिनांक तक एक भी साक्षी का परीक्षण नहीं किया गया – अभियुक्तगण लंबे समय से जेल में हैं – साक्षीगण का कथन अभिलिखित करने में अत्यधिक विलंब को देखते हुए आवेदकगण को जमानत प्रदान की गई – आगे अभिनिर्धारित – यह सुनिश्चित करने के लिए कि अभियुक्त के अधिकार एवं समाज के हित, समान मात्रा में संतुलित हो, न्याय का हितसाधन करते हुए, अभियोजन साक्षीगण का शीघ्र परीक्षण ही एक रास्ता है – अभियोजन साक्ष्य शीघ्र अभिलिखित किये जाने हेतु निचले न्यायालयों हेतु दिशानिर्देश जारी किये गये – आवेदन मंजूर किये गये।

***B. Criminal Practice – Delay in Trial – Responsibility of Trial Court* – Held – It is the responsibility of the trial Court to secure presence of prosecution witnesses at the earliest and record their statements within the shortest time possible. (Para 28)**

ख. दाण्डिक पद्धति – विचारण में विलंब – विचारण न्यायालय का उत्तरदायित्व – अभिनिर्धारित – अभियोजन साक्षीगण की यथाशीघ्र उपस्थिति सुनिश्चित करने एवं उनके कथनों को यथासंभव कम से कम समय के भीतर अभिलिखित करने का उत्तरदायित्व विचारण न्यायालय का है।

Jagat Singh, for the applicant in M.Cr.C. No. 32718/2018.
A.K. Dubey, for the applicant in M.Cr.C. No. 25031/2018.

Akash Singhai, for the applicant in M.Cr.C. No. 17896/2018.
Amit Pandey, P.L. for the non-applicant/State.

O R D E R

ATUL SREEDHARAN, J. :- M.Cr.C.No.32718/2018 is the third application for grant of bail under Section 439 of the Code of Criminal Procedure, 1973 moved by the applicant-**Rambahor Saket** who is in judicial custody in connection with Crime No.285/2017, for offences punishable under Sections 376 and 342 of the Indian Penal Code and also under Section 3/4 of the POCSO Act, registered at P.S Gadh, Rewa (M.P). The first bail application was dismissed as withdrawn vide order dated 03.01.2018 passed in M.Cr.C.No.18626/2017, with liberty to file afresh after the statement of the prosecutrix is recorded before the Trial Court. Thereafter, the second application was also dismissed for want of prosecution vide order dated 18.05.2018 passed in M.Cr.C.No.7786/ 2018. **The Applicant is in Judicial Custody since 31/08/17. Till the date of filing of the bail application before this court, not a single witness for the prosecution has been examined.**

2. **M.Cr.C.No.25031/2018** has been filed for grant of bail under Section 439 of the Code of Criminal Procedure, 1973 by the applicant **Balwan @ Balman Singh** herein who is in judicial custody in connection with Crime No.356/2016 for offences punishable under Sections 363, 366, 344, 376-D/34 of IPC and section 5/6 of POCSO Act registered at P. S. Madhav Nagar, District-Katni (M.P). **The Applicant is in Judicial Custody since 26/12/17. Till the date of filing of the bail application before this court, not a single witness for the prosecution has been examined.**

3. **M.Cr.C No. 17896/2018** is the second application for grant of bail under Section 439 of the Code of Criminal Procedure, 1973 by the applicant **Aleem @ Annu Khan** who is in judicial custody in connection with Crime No.356/2016 for offences punishable under Sections 363, 366, 344, 376-D/34 of IPC and section 5/ 6 of POCSO Act registered at Police Station-Madhav Nagar, District-Katni (M.P). **The Applicant is in Judicial Custody since 26/12/17. Till the date of filing of the bail application before this court, not a single witness for the prosecution has been examined.**

4. These bail applications under judgement present a disturbing picture with regard to the status of under trials who may languish in judicial custody interminably during the process of protracted trials. It goes without saying that the jurisdiction of bail which is vested equally before the Court of the Judicial Magistrate First Class under Section 437 Cr.P.C and before the Court of Sessions and High Courts under sections 438 and 439 of Cr.P.C must be exercised judiciously, balancing both the interest of the society and the right of the accused

to a speedy trial. Though both the factors are equally important, but facts of a case may tip the scale in favour of the accused giving due regard to his right to a speedy trial. Time and again the High Courts and the Supreme Court have emphasised the importance of an expeditious trial.

5. The stages of a criminal proceedings are (1) Investigation (2) filing of the charge sheet (3) taking cognizance and summoning the accused (where the accused is not in custody) (4) committal of the accused where the offence is triable by the Court of Sessions (5) framing of charges (6) EVIDENCE FOR THE PROSECUTION (7) statement of the accused u/s. 313 Cr.P.C (8) Evidence for the Defence (9) Final Arguments and (10) Judgement. Though delay can take place at almost all the aforementioned stages, experience shows that the two stages where delay is most apparent is at the stage of investigation, and the stage of evidence for the prosecution. Of the two, delay on account of a lengthy investigation can be redressed by providing succour to an incarcerated accused in the form of a statutory bail u/s. 167(2) Cr.P.C or a regular bail under section 437 or 439 Cr.P.C. But delay at the stage of evidence for the prosecution can play havoc with the rights of the accused to a speedy trial and render futile the very intent and purpose of the criminal justice system.

6. Delay in securing the presence of the witnesses for the prosecution to testify at the earliest before the trial court results in (a) an unjustifiable detention of the accused as an undertrial, (b) it has the propensity to gravely impair the ability of the accused to defend himself effectively if the delay in recording the evidence of the prosecution results in, for example, in the death of a crucial defence witness, (c) it creates an opportunity for the accused to suborn or intimidate the material witnesses of the case to turn hostile when they eventually appear in court to testify and (d) it results in the loss of public faith in the justice delivery system. Delay at this stage, on the one hand effects the human rights of the accused and on the other imperils the society with the prospect of acquitting and setting free a criminal who has effectively used the delay in the production of the witness for the prosecution, by either bribing or threatening the witness to turn hostile. Either ways, an expeditious examination of the prosecution witnesses is the only way to ensure that the rights of the accused and the interest of the society are balanced in equal measure and thereby subserve the interest of justice.

7. Though, no rule of thumb exists for deciding bail applications and each case is required to be adjudged on the basis of its own peculiar facts and circumstances, it is essential for the courts to bear in mind that the continued pre-trial incarceration of an accused person may violate his right to a speedy trial which is more undesirable then (sic:than) keeping a person in continuous incarceration before he is held guilty. A substantial number of the cases in which bail is denied to the accused are offences relating to the human body. In such

cases, the accused is invariably a one time offender and amongst them, several cases are crimes of passion, committed on the spur of the moment without premeditation.

8. It has been seen by this Court that there are several cases, like the cases at hand, where this court dismisses a bail application, taking cognizance of the facts and circumstances of the case and sometimes on account of the applicant/ accused withdrawing the case from the Court, where liberty is given to the accused to approach the court again after a particular witness, a prosecutrix or material witnesses of the case is examined. Thereafter, it is seen that in such cases, the witnesses who needs to be examined before the Trial Court, whereafter only, the accused can once again agitate his plea for bail, the witnesses never turn up before the Trial Court despite repeated attempts to secure their presence. Sometimes, several months to more than a year pass during which the accused continues to remain as an undertrial in judicial custody on account of the non-examination of the material witnesses before the Trial Court.

9. This creates an impression that (a) that the summons being issued by the Trial Court never get served upon the witnesses, (b) the witnesses deliberately make themselves unavailable in order to defeat service of summons upon them and thereby ensure the continued judicial custody of the accused or, (c) do not turn up before the trial court even after summons are served upon them.

10. Perusal of the record of proceedings before the learned trial Court reveals that the trial Court mechanically keeps issuing process to the witnesses to secure their presence and very rarely does it resort to any coercive action. Such a situation before the trial Court reduces the right to a speedy trial of the accused to a joke. This Court has also seen cases where for relatively minor offences, the first application for bail before this Court is preferred by the accused after more than two years of incarceration as an undertrial. The delay in approaching the High Court by the accused in such cases itself reflects the lack of wherewithal of the accused to seek legal remedy. The present situation does not secure the ends of justice. Justice cannot mean an attribution of overbearing and unrealistic importance to the wellbeing of the society at the cost of the individual's liberty. Justice can only be served if a practical balance between both is achieved.

11. The factual background of all the three cases with regard to delay in trial, speak for themselves of the situation that has been discussed hereinafter. In **M.Cr.C. No. 32718/2018,** the applicant is **Rambahor Saket**. He is in judicial custody since 31.08.2017 in Crime No.285/2017. He has been charged for offence under sections 376 and 342 of IPC and 3/4 of POCSO Act. The trial against him is going on at Tyonthar, District Rewa. This is the third application for bail filed before this Court. The first application for bail was dismissed vide order dated 03.01.2018 passed in M.Cr.C.No.18626/2017 as withdrawn, with liberty to file

afresh after the statement of the prosecutrix was recorded before the trial Court. Thereafter, the second application was moved before this Court after the passage of almost four months and the said application was also dismissed but on account of non-prosecution, vide order dated 18.05.2018 passed in M. Cr.C.No.7786/2018. Thereafter, the third application has been filed which is under consideration before this Court.

12. The present application has been filed by the applicant on the ground of delay in trial. The case has been pending at the stage of recording the evidence for the prosecution since framing of charges on 03/01/18. In the past eleven months, not a single witness for the prosecution has been examined. On 12/01/18 the first trial programme was fixed.The dates given were 7th, 8th and 9th of March, 2018. Twelve witnesses were to be examined, four on each date. On all the three dates, none of the witnesses appeared as summons had not been served on them.

13. The second trial programme was fixed on 09/03/18 fixing 16th, 17th and 18th of May, 2018 as the dates for recording the evidence of the prosecution witnesses. Again, on those dates, none of the witnesses appeared as summons were not served on them.

14. Thereafter, the third trial programme was fixed on 18/05/18 and the case was fixed for 18th, 19th and 20th of July, 2018. On 18/07/18 none of the witnesses appeared before the trial Court and the prosecutor was also on leave. On 19th and 20th also, no progress was made, as no witness appeared.

15. On 20th of July 2018, fourth trial programme was fixed by the learned trial Court. The dates fixed for the evidence of the prosecution witnesses were 26th, 27th and 28th of September, 2018. On 26th of September,2018 no witness appeared and for the first time after a passage of nine months after framing of charges, the Court issued bailable warrant of Rs.50/- against the witnesses. On 27th also, no witness appeared and the trial Court calls for the explanation from the Investigating Officer. On 28th of September, 2018 no witness, appeared and the fifth trial programme was prepared by the learned trial Court fixing 22nd and 23rd of October, 2018 as the dates for recording the statements of the prosecution witnesses. On 22nd and on 23rd of October, 201 8 again no prosecution witness appeared.

16. Thereafter, the trial Court prepared the sixth trial programme on 23.10.2018 fixing 19th and 20th of November, 2018. On these dates also, none of the witnesses appeared on behalf of the prosecution. As regards the oral submissions made by the Ld. Counsel for the applicant relating to the sixth trial programme fixed by the trial Court on 23.10.2018, fixing 19 and 20th of November, 2018 as the date for the trial, learned counsel for the applicant submits that he does not have the order sheets of the learned court below to substantiate his

statement in Court and the same has been made upon instruction that he has received from the learned counsel conducting the trial before the trial Court, which he believes to be true. Thereafter, learned counsel for the applicant has no instructions as to the present status of the case. Learned counsel for the State has submitted that the prosecutrix in this case is a thirteen-year-old child, who has indicted the applicant herein in her statement recorded under Section 164 of Cr.P.C.

17. **M.Cr.C.No.25031/2018** has been moved by the applicant **Balwan @ Balman Singh** and M.Cr.C No.17896/2018 has been filed by applicant **Aleem @ Annu Khan** both these applications are connected as they arise from the same FIR. The applicants are in judicial custody since 26/12/17. The offences for which they have been charged for are under sections 363, 366, 344, 376-D/34 of IPC and section 5/6 of POCSO Act. This case is pending trial before the Sessions Court at Katni. This is the first application for bail under section 439 of Cr.P.C.

18. Besides the merit of the case, the learned counsels for the applicants have pressed for bail on ground of delayed trial. The record of proceedings of the learned trial Court filed by the applicants go to reveal that on 20/02/18, the charge sheet was filed by the police against the applicants herein before the court of learned Special Judge (POCSO). Cognizance was taken and a copy of the charge sheet was handed over to the learned counsels for the accused. The next date was fixed for 19/03/18. On 19/03/18, the accused were not produced from jail and their counsels prayed for time to argue on charge.

19. The next date fixed by the Court was 22/03/18 and on that day, the charges were framed by the learned Trial Court for offences already mentioned hereinabove. The trial programme prepared by the prosecution was accepted and summons were issued to the prosecutrix and her parents to appear as witnesses on 20/04/18. On 20/04/18, the record of proceedings of the trial court reflects that the summons itself were not issued to the prosecutrix and to the witnesses Premlata and Ramesh as was required by the order dated 22/03/18. Thereafter, the court directed that the summons be issued to the witnesses and the case was fixed for the evidence of the prosecutrix and her parents on 22/05/18.

20. On 22/05/18, the court records that the summons issued to the witnesses have not been returned to the Court after service and, therefore, directed that fresh summons be issued and listed the case for hearing on 15/06/18. The order sheet of the learned trial Court dated 15/06/18 reveals that summons issued to the witnesses were not received by the court after service and therefore, it once again ordered the issuance of summons to the witnesses and listed the case on 11 /07/18.

21. On 11/07/18, the learned Trial Court records that the summons which were to be issued to the witnesses as required by the order dated 15/06/18 have not

been issued at all and, therefore, the court directed the issuance of fresh summons and listed the case on 04/08/18.

22. On 04/ 08/18, the record of proceedings reveals that the summons issued to the witnesses were not received by the court after service and so learned trial court issued fresh summons yet again and listed the case on 27/08/18.

23. The order-sheet dated 27/08/18 of the learned trial Court reveals that the Presiding Officer was on leave and the link judge has recorded that the summons issued to the witnesses were not received by the court after service and so yet again issued summons and listed the case for recording the evidence of the witnesses on 26/09/18.

24. On 26/09/18, the record of the trial Court reveals that the summons issued to witnesses have not been received by the court after service and this time directed that the summons be served on the witnesses through the office of the Superintendent of Police and listed the case for 12/10/18.

25. On 12/10/18, learned trial Court has recorded that the summons issued to the witnesses have not been received by the court after service and once again directed that summons be served upon the witnesses through the office of Superintendent of Police and then listed the case for 05/11/18 for recording the statement of the witnesses.

26. The account that has been recorded by this Court with regard to the proceedings before the learned trial Court presents a shocking picture that even after the passage of nine months after the filing of the charge-sheet, not a single witness for the prosecution has been examined. On two occasions, the trial court records that the summons which were required to be issued by the previous order were never issued by the court at all and yet the court does not enquire as to why its order was not complied with and neither does it take action against the person who failed to issue the summons.

27. The first time that the learned trial court has taken resort to serve the summons through the office of the Superintendent of Police was after the passage of seven months on 26/09/18 which was followed up again on 12/10/18. The proceedings against the applicants and all such other accused persons who may be languishing under similar conditions reflects judicial apathy, undoubtedly unintentional, not just at the level of the District Judiciary but this Court also where such cases are dealt on an adhoc basis instead of addressing the malady itself. Willy nilly we dispense with justice instead of dispensing justice.

28. The record of proceedings of both the applications which have been reproduced hereinabove, speak up of a malady which requires to be redressed at the earliest else the right to a speedy trial spoken of and discussed so eloquently by

the Supreme Court and the High Courts, which have equated the said right with right to life itself, will be reduced to discussions in the drawing rooms and lecture halls without passing it on effectively to the accused. It is not sufficient for the courts to be merely cognizant about the fact that under trials languish inordinately in jail on account of the delay in trial which is most pronounced at the stage of recording the statement of the prosecution witnesses. It is the responsibility of the Trial Court to secure the presence of the prosecution witnesses at the earliest and record their statements within the shortest time possible. The protraction of the trial is most evident at the stage of recording of the prosecution witnesses. Once the statement of the prosecution witnesses has been recorded by the trial court, then all that is left is recording the statement of the accused under section 313 of Cr.P.C., production of defence witnesses and thereafter the final arguments.Very rarely does the defence produce any witnesses from its side. The statement of the accused under section 313 Cr.P.C is also not a stage that consumes excessive time thus, the most identifiable part of the criminal trial which results in inordinate delay in its disposal and affects the right to a speedy trial of the under trial, is the stage of recording the prosecution evidence.

29. Under the circumstances, this Court feels that laying down certain broad guidelines which the trial court must make all efforts to follow *mutatis mutandis*, tailoring the same to special circumstances that a particular case m ay present, would be beneficial for all concerned. These guidelines are not exhaustive and are illustrative, which this court hopes, if put into practice, may result in the expeditious completion of prosecution evidence.

(1). After framing of charges against the accused, summons be issued to the eye witnesses or, if its a case where there are no eye witnesses, then to those witnesses who are most material to prove the case of the prosecution,

(2). If summons are returned unserved for whatever reasons, instead of wasting further time by resorting to the same process time and again, the next summons must be served through the office of Superintendent of Police to the witnesses where the Trial Court is situated in the District Headquarters and through the office of the SDOP, in the Tahsil Courts. If those summons are also not served, the report of the police must reflect the reasons why they have not been served,

(3). If the reasons given by the police in the report returning the summons unserved, reflect that the witnesses are unreachable/ untraceable and that service cannot be effected on them on account of their non-availability and there is no prospect of them being found within reasonable time, then the trial court must skip those witnesses and proceed to the next set of

witnesses by issuing summons to them. The Trial Court must realise that the case of the prosecution is actually the case of the State through the police, against the accused persons. It is the duty of the police to produce their witnesses before the trial Court. By skipping a set of witnesses, the court is not closing their evidence but merely keeping them in abeyance, to be recorded as and when they are found by the police or appear on their own before the Trial Court at any stage before the conclusion of the trial. In such a case, skipping of such witnesses would necessarily need the consent of Counsel for the defence and if opposed by the defence Counsel, for whatever strategic reasons the defence may have, then the court may issue fresh summons to the same set of witnesses. However, in such a situation, the delay in conduct of trial would then be on account of the conduct of the defence for which accused cannot claim violation of the right to a speedy trial at a later point of time,

(4). If material witnesses cannot be procured without delay, the court must explore the possibility of examining formal witnesses and expert witnesses if any and conclude the same. Thereafter, the remaining witnesses for the prosecution who have not been examined on account of the inability of the police to produce them for reasons reflected in the report of the police, the court must close the case of the prosecution and proceed to the next stage of the case. However, if any of the prosecution witnesses appears at a subsequent stage, before passing of the judgment by the trial Court, the court shall be free to exercise its jurisdiction under section 311 Cr.P.C. and record their statements in the interest of justice after considering opposition of the defence counsel, if any.

(5). The police on its part, must secure the mobile number and E-mails ids of all witnesses, if they possess the same. This must be retained by them in the inner case diary to be used for transmitting the summons or messaging the witness regarding their date and time of appearance before the Trial Court to testify. The police must take care that the aforementioned details are NOT disclosed in the charge-sheet in order to ensure that the access of the accused to the witnesses is minimised to the greatest extent possible.

(6). The Trial Court must also resort to the option of delivering summons through SMS and E-mail in addition to the conventional process, wherever possible. The purpose of the endeavour must be to secure the presence of the witnesses in the shortest possible time to complete the trial. The Courts must be bear in mind that as long as the trial is in progress, presumption is always of innocence and not of guilt.

(7). It shall not be open to the police to put forward reasons of law and order work or any other of their functions as excuses for not complying with the

order of the Trial Court to secure the presence of their witness. Such non compliance on the part of the police may constitute contempt or the Trial Court's order, and the Trial Court shall be at liberty to initiate such proceedings against the police if it is not satisfied with the reply of the police for not complying with the order passed by it.

30. Under the circumstances, on account of the inordinate delay in recording the statement of witnesses, all the three applications are allowed and it is directed that the applicants **Balwan @ Balman Singh, Aleem @ Annu khan and Rambahor Saket** shall be enlarged on bail upon their furnishing a personal bond in the sum of **Rs.50,000/- (Rupees Fifty Thousand only) each** with one solvent surety in the like amount *each* to the satisfaction of the Trial Court.

31. A copy of this order be placed before the Registrar General of this court for transmission to all the Judges of the District Judiciary. A copy of this order be also sent to the Director General of Police, Madhya Pradesh.

Certified copy as per rules.

Application allowed

I.L.R. [2019] M.P. 223
MISCELLANEOUS CRIMINAL CASE
Before Ms. Justice Vandana Kasrekar

M.Cr.C. No. 5172/2017 (Indore) decided on 18 December, 2018

JAI PRAKASH SHARMA …Applicant

Vs.

STATE OF M.P. …Non-applicant

(Alongwith M.Cr.C. Nos. 5876/2017 & 5877/2017)

***A. Criminal Procedure Code, 1973 (2 of 1974), Section 482, Penal Code (45 of 1860), Sections 420, 467, 468, 471 & 120-B and Motoryan Karadhan Adhiniyam, M.P., (25 of 1991), Section 3/16(3)* – Quashment of FIR – Charges of creating fabricated/forged documents and plying buses on routes other than the permitted one and causing tax evasion resulting in loss to government – Held – Perusal of record and charge sheet reveals that there is ample *prima facie* evidence and circumstances available to initiate proceedings against appellants – Offence committed or not is a matter of evidence which can only be decided after recording of evidence by both parties – Application dismissed. (Para 16 & 23)**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482, दण्ड संहिता (1860 का 45), धाराएँ 420, 467, 468, 471 व 120–बी एवं मोटरयान कराधान अधिनियम, म.प्र.

(1991 का 25), धारा 3/16 (3) – प्रथम सूचना प्रतिवेदन को अभिखंडित किया जाना – गढंत/कूटरचित दस्तावेज सृजित करने एवं अनुज्ञप्ति प्राप्त से भिन्न मार्गों पर बसें चलाने तथा कर का अपवंचन कारित करने के परिणामस्वरूप सरकार को हानि के आरोप– अभिनिर्धारित – अभिलेख एवं आरोप पत्र के परिशीलन से प्रकट होता है कि अपीलार्थीगण के विरूद्ध कार्यवाहियां आरंभ करने के लिए पर्याप्त प्रथम दृष्ट्या साक्ष्य एवं परिस्थितियां उपलब्ध है – अपराध कारित किया गया अथवा नहीं यह एक साक्ष्य का मामला है जिसे केवल दोनों पक्षकारों द्वारा दी गई साक्ष्य को अभिलिखित करने के पश्चात् विनिश्चित किया जा सकता है – आवेदन खारिज।

B. ***Criminal Procedure Code, 1973 (2 of 1974), Section 482 – Scope and Jurisdiction*** **– Held – Exercise of powers u/S 482 Cr.P.C. in this nature of case is exception and not rule – While exercising such powers Court does not function as Court of Appeal or Revision – Inherent jurisdiction though wide has to be exercised sparingly, carefully and with caution.**

(Para 19)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – व्याप्ति एवं अधिकारिता – अभिनिर्धारित – इस प्रकृति के प्रकरण में धारा 482 दं.प्र.सं. के अंतर्गत शक्तियों का प्रयोग एक अपवाद है और न कि नियम – न्यायालय ऐसी शक्तियों का प्रयोग करते समय, अपीली या पुनरीक्षण न्यायायल के रूप में कार्य नहीं करता – अंतर्निहित अधिकारिता यद्यपि व्यापक है, इसका प्रयोग मितव्ययिता से, सतर्कता से एवं सावधानी के साथ किया जाना चाहिए।

Cases referred:

MANU/MP/0418/2005, MANU/SC/1010/2004.

Z.A. Khan assisted by *Vaibhav Dubey*, for the applicants.

Manoj Dwivedi, Addl. A.G. with *Govind Purohit,* for the non-applicants/State.

O R D E R

VANDANA KASREKAR, J:- As the common question of law and facts are involved in above mentioned cases, therefore, these petitions are disposed of by common order, however for the sake of brevity facts in all the cases are reproduced as under;

2. The petitioners were engaged in the business of Motor Transport and for his business they obtained several stage carriage permits on various regional and inter-regional routes falling in Ujjain Region. The petitioners obtained stage carriage permits for plying the vehicle as per provision of law and in the year 2006 some business rivals of the petitioners lodged a complaint with Economic Offence Wing against the petitioners on the ground that the petitioners are engaged in fraudulent activities and by generating forged documents they

obtained permits on different buses and plied their buses on different routes and in this way they evade tax duty and caused revenue loss to the Government.

3. On the basis of aforesaid complaint, FIR was registered against the petitioners at Crime No.26/2010 under Section 420, 467, 468, 471, 120-B of IPC read with Section 3/16(3) of the Madhya Pradesh Motoryan Karadhan Adhiniyam, 1991. After a period of six years challan was submitted against the petitioners on 02/11/2016 before the learned CJM, Dewas under Section 420, 467, 468, 471, 120-B of IPC read with Section 3/16(3) of the Madhya Pradesh Motoryan Karadhan Adhiniyam, 1991.

4. The petitioners thereafter filed an application before the CJM, Dewas stating therein that some time may kindly be granted to the petitioners to mark their presence but the same was rejected by the CJM, Dewas vide order dated 02/11/2016 and arrest warrants were issued against the petitioners.

5. According to the charge-sheet submitted by the respondents, the allegation against the petitioners is that 4 buses are registered in the name of the petitioners and a total amount of Tax of Rs.35,39,367/- is due on all those buses and further it is alleged that the petitioners are Director of Free India Bus services and they prepared certain forged documents of buses and obtained stage carriage permits, in this way they committed forgery.

6. Learned counsel for the petitioners submit that out of the vehicles which are shown in the name of the petitioners three vehicles are not in existence as their registration certificates have already been cancelled by the Transport Department and it is clearly mentioned in the cancellation order that since no tax is due, therefore, the registration is being cancelled. Another vehicle bearing registration No.M.P.-09/7262 was seized by the Department and against which a W.P. No.6677/2011 is pending before this Court. Thus, allegations against the petitioners are false and frivolous, as registration of vehicle against which tax is shown to be due have already been cancelled. So far as allegations of forgery is concerned, learned counsel for the petitioners submits that not a single document has been produced by the respondents alongwith the charge-sheet to connect the petitioners in the present case. Although, the record of the vehicles were called from the Transport Department and the respective Department by submitting a letter has stated that the record was destroyed in a fire accident occurred in the Department on 29/12/2006. Thus, it is clear that from contention of the respondents that no material is available against the present petitioners with the respondents. Thus, not a single document is available on record to show that any kind of forgery has been committed by the petitioners and without there being any documentary evidence, the petitioners cannot be compelled to face the trial. It is further submitted that the admission of the Transport Department that the record

was destroyed in the fire, reveals that they are acting against the interest of petitioners.

7. The other allegation against the petitioners is that they are the Directors of a Company namely; Free India Bus Services is also incorrect. He further submits that from the certificate issued by the Company Secretary wherein he has clearly stated that not a single Company has been incorporated in the name of Free India Bus Services. He argued that the documents filed alongwith the charge-sheet would reveal the fact the respondents has also registered the case under Section 16(3) of the M.P. Motor Vehicle Taxation Act, 1991 despite the fact that the Economic Offence Wing is not authorized/empowered to act under this Section, as they have not named by the Government to act under this Section, therefore, they cannot take any action under Section 16(3) of the Motor Vehicle Taxation Act, 1991. He further submits that in the present case without assessing the tax as per law the amount of Tax due has been calculated by the RTO and the same figures have been taken by the respondents just to falsely implicate the petitioners in the above crime.

8. Thus, from the above, it is clear that action has been taken by the respondents to demolish their reputation, as transport operator and also to paralyze their transport business. In such circumstances, learned senior counsel submits that FIR registered against the petitioners be quashed.

9. The respondents have filed their reply and in the said reply, the respondents have stated that Economic Offence Wing has received a complaint regarding the misdeed of the petitioners by which the public exchequer was affected. On the basis of the aforementioned complaint, the respondent -E.O.W. made a preliminary enquiry and when in the enquiry, it was found that a *prima facie* case is established against the present petitioners, the respondents registered an FIR against the petitioners and other co-accused persons. It is further stated that as there was so many accused persons involved in the matter, therefore, enquiry was initiated in respect of all and took considerable time, therefore, the challan was filed in the year 2016. The petitioners never co-operated in the investigation and made all efforts to hamper the investigation and linger it on. As per the investigation, an information was collected by Transport Officers of Indore, Dewas and Ujjain, an amount of Rs.35,39,367/- is due as motor vehicle tax. Not only this, the petitioners have plied the buses on non-permitted routes also, by which the petitioners has caused economic loss to the State. The petitioners has produced some documents with the petition claiming it to be registration cancellation orders different vehicles and date of cancellation is shown to be 06/05/2008, 30/03/2005, 06/05/2008 respectively. It is stated that validity of documents cannot be verified at this stage, as the investigation is over and secondly; the respondent - E.O.W. has received information from the

R.T.O.,Ujjain in which the vehicles are shown in the name of the petitioners and also tax is due on these vehicles. The petitioners have also submitted representation before the S.P., E.O.W. and Director General, E.O.W. against the registration of the case and in the said representation, no plea regarding the cancellation of registration and re-selling of the vehicle to the third party was taken, which makes the validity of the documents produced here doubtful and suspicious. It is also argued that in the final report filed by the respondents, the petitioners have been prosecuted under Section 420, 120-B of the IPC and 3, 16(3) of M.P. Karadhaan Adhiniyam, 1991 and there is no allegation of forgery on the present petitioners. The charge-sheet has already been filed by respondents in the present. Respondents have further stated that the judgments lays down by the petitioners are not applicable in the present case and the police authority is not competent to seize the vehicle under Section 16(3) of Motoryan Karadhan Adhiniyam, 1991 and no confiscation or seizure has been done by the answering respondent. Initially the FIR was registered under Section 420, 120-B of IPC and other Sections of IPC later on, in the investigation it has been found that the tax has not been paid and has not been recovered as per the provisions of Section 16(3) of Motoryan Karadhan Adhiniyam, 1991,therefore, offence under Section 16(3) of Motoryan Karadhan Adhiniyam, 1991 has subsequently added in the charge-sheet. The respondents have stated that tax has rightly or wrongly calculated is not the subject matter for the respondents agency. The amount of due tax has been intimated by the respective RTO Officers and in the charge-sheet the amount written is on the basis of the information supplied by the respective RTO Officers. The FIR has been registered against the petitioners because they have evaded tax and has caused loss to the State exchequer and there is enough evidence on record annexed alongwith the challan which shows that the petitioners have done cheating and has caused loss to the State, which is a matter of evidence and cannot be ignored or quashed at this stage.

10. He placed reliance on the judgment passed by this Court in the matter of *Jayanti Bhai Valji Bhai Kataria vs. Kamlakar* MANU/MP/0418/2005 as well as the judgment passed by *State of Orissa vs. Debendra Nath Padhi* MANU/SC/1010/2004.

11. Thus, on the basis of this, he prays that the petitions deserves to be dismissed.

12. The petitioners have filed the rejoinder and in the said rejoinder, the petitioners have stated that the charges levelled against the petitioners is regarding evade of tax only. No charge under Section 467, 468, 471 of IPC has been levelled against them. No tax assessment was done by the Transport Officers and on the basis of the wrong figures false case has been generated against the petitioners. The Transport Officers under a reply given to the petitioners under Right to

Information Act has admitted that they have not passed any assessment order nor issued they have issued any demand notice in respect of the vehicles of the petitioners. It is a case of Tax Dues which is admitted by the respondents, therefore, for the said purpose, it is pertinent to mention that proper procedure has been mentioned in M.P. Karadhan Adhiniyam, 1991 to recover the amount of tax dues which will be recovered by the Transport Officers and it is no where mentioned in the provisions to registered a FIR against a person to recover the tax and that too by the respondent -E.O.W. The Motor Tax Dues does not falls under the category of cognizable offence, therefore, are not liable to be enquired by E.O.W.

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

14. In the present case, petitioners are in Transport Businessmen and has carrying on business of transport. A complaint was made against the petitioners on the ground that the petitioners evaded tax duty and prepared forged and fabricated documents. On the basis of said complaint, FIR was registered against the petitioner under Section 420, 467, 468, 471, 120-B of IPC readwith Section 3/16(3) of the Madhya Pradesh Motoryan Karadhan Adhiniyam, 1991. Being aggrieved by the registration of FIR, the petitioners have filed the present petition for quashment of the same.

15. Learned senior counsel for the petitioners submit that FIR has been registered against the petitioners without any application of mind. Respondents are not empowered to register the offence under Section 16(3) of M.P. Motoryan Karadhan Adhiniyam, 1991. The respondents have not filed any documents or evidence to connect the petitioners in the above crime. Transport Department has not produced any original record in the matter, as the original record was destroyed in the fire accident. The assessment of tax which is due on vehicle is calculated through an assessment under Section 8 of the M.P. Motor Vehicles Taxation Act, 1991 but in the present case, without assessing the tax, as per law the amount of tax due has been calculated by the RTO. Even if it is assumed that amount is due to be recovered, then too there is a specific provision under Motor Vehicle Act to recover the same but instead of acting as per law, the respondents have falsely implicated the present petitioners, therefore, FIR is deserves to be quashed.

16. From perusal of the record as well as the charge-sheet produced by the petitioners alongwith their petition, which shows that there is ample evidence available on record to show that the petitioners have prepared forged permits for plying the buses and due to which the loss has been caused to State Exchequer. In this way, the petitioners have committed the said offence or not, is a matter of evidence, which can be decided only after recording of the evidence by both the parties.

17. This Court in the case *Jayanti Bhai Valji Bhai Kataria vs. Kamlakar* MANU/MP/0418/2005 has held as under :-

> "Exercise of power under Section 482 of Cr.P.C. in this nature of case is exception and not rule, therefore, while exercising powers under this Section, Court does not function as Court of appeal or revision. Inherent jurisdiction under this Section though wide has to be exercised sparingly, carefully, and with caution and only when such exercise is justified by tests specifically laid down in Section itself."

18. As well as in the case of *State of Orissa vs. Debendra Nath Padhi* MANU/SC/1010/2004 has held that :-

> "The material as produced by the prosecution alone is to be considered and not the one produced by the accused. The latter aspect relating to the accused though has not been specifically stated, yet it is implicit in the decision. It seems to have not been specifically so stated, as it was taken to be well settled proposition. This aspect, however, has been adverted to in ***State Anti-Corruption Bureau, Hyderabad and Anr. vs. P. Suryaprakasam 1999 SCC (Cri.) 373,*** where considering the scope of Section 239 and 240 of the Code, it was held that at the time of framing of charge, what the trial court is required to, and can consider are only the police report referred to under Section 173 of the Code and the documents sent with it. <u>The only right the accused has at that stage is of being heard and nothing beyond that</u> (emphasis supplied). The judgment of the High Court quashing the proceedings by looking into the documents filed by the accused in support of his claim that no case was made out against him even before the trial had commenced was reversed by this Court. It may be noticed here that learned counsel for the parties addressed the arguments on the basis that the principles applicable would be same, whether the case be under Section 227 and 228 or under Section 239 and 240 of the Code."

19. Thus, as per this judgment, the powers under Section 482 of Cr.P.C. in this nature of case is exception and not rule, therefore, while exercising powers under this Section, Court does not function as Court of appeal or revision. Inherent jurisdiction under this Section though wide has to be exercised sparingly, carefully, and with caution and only when such exercise is justified by tests specifically laid down in Section itself.

20. Sufficient material is available on record against the petitioners, therefore, I do not find any reason to interfere into the same.

21. So far as quashment of charges under Section 16(3) of the Act is concerned, the allegation against the petitioner is that they prepared false and fabricated documents and evaded the tax, which amounts to loss of State Exchequer, therefore, action has been taken by the respondents.

22. So far as recovery of tax is concerned, respondents are free to take any action against the petitioners as per the provisions of law.

23. Considering the totality of the facts and evidence and also keeping in view the parameters set for invoking the extraordinary powers of this Court, in my opinion, the circumstances relied upon by the prosecution are *prima facie* sufficient for initiation of the proceedings against the petitioners. Therefore, the petitions are devoid of merits, deserve to be and are **dismissed** hereby.

C.C. as per rules.

Application dismissed

I.L.R. [2019] M.P. 230
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice Virender Singh

M.Cr.C. No. 26515/2018 (Indore) decided on 2 January, 2019

RANJAN …Applicant

Vs.

STATE OF M.P. …Non-applicant

(Alongwith M.Cr.C. No. 46229/2018)

***Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 8/21 & 37 and Criminal Procedure Code, 1973 (2 of 1974), Section 439 – Bail – Grounds – Quantity of Psychotropic Substance – Calculation of* – Held – Government of India vide notification dated 18.11.2009 made it clear that for purpose of determining quantity, gross weight of the drug recovered and not the pure content of psychotropic substance shall be taken into consideration – In present case, even if net quantity is considered, total quantity of seized "Codeine" is 1.993 Kg which is commercial quantity which was kept in possession without any document to show that it was meant for therapeutic use – Restrictions u/S 37 of the Act of 1985 is applicable – Petitioners not entitled for bail – Applications dismissed. (Paras 17, 22 & 32)**

स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 8/21 व 37 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 439 – जमानत – आधार – मनःप्रभावी पदार्थ की मात्रा – की गणना – अभिनिर्धारित – भारत सरकार ने अधिसूचना दिनांक 18.11.2009 द्वारा यह स्पष्ट किया है कि मात्रा की अवधारणा के प्रयोजन हेतु, बरामद औषधि का सकल माप और न कि मनःप्रभावी पदार्थ का शुद्ध तत्व विचार में लिया

जाएगा – वर्तमान प्रकरण में, यदि शुद्ध मात्रा विचार में ली जाए तब भी जब्तशुदा ''कोडीन'' की कुल मात्रा 1.993 कि.ग्रा. है जो कि वाणिज्यिक मात्रा है जिसे बिना किसी ऐसे दस्तावेज के कब्जे में रखा गया था जो दर्शाता हो कि वह रोगोपचारक उपयोग हेतु अर्थान्वित थी – 1985 के अधिनियम की धारा 37 के अंतर्गत निर्बंधन लागू होते हैं – याचीगण, जमानत हेतु हकदार नहीं – आवेदन खारिज किये गये।

Cases referred:

Cr.R. No. 200/2015 order passed on 16.09.2015, Cr.R. No. 1621/2015 order passed on 15.10.2015, 1998 Cr.L.J. 1460, 2018 Cr.L.R. (SC) 206, 2011 Cr.L.R. (SC) 355, 2014 Cr.L.R. SC 896 (2014) 13 SCC 1 : (AIR 2014 SC 3625), 2012 (11) JT 310 : 2013 AIR SCW 817 : (2012) 13 SCC 491, M.Cr.C. No. 11448/2016 order passed on 13.12.2016, M.Cr.C. No. 4310/2017 order passed on 11.05.2017, M.Cr.C. No. 20360/2018 order passed on 28.05.2018 (Supreme Court), 2016 CRI.L.J. 3309 (Rajasthan High Court).

C.L. Yadav with *N.Dave*, for the applicant in M.Cr.C. No. 26515/2018..
A.K. Saraswat, for the applicant in M.Cr.C. No. 46229/2018.
Mukesh Kumawat, P.P. for the non-applicant/State.

O R D E R

VIRENDER SINGH, J:- Both these petitions are the **first** bail applications of Ranjan and Sandeep under Section 439 of Cr.P.C. in **Crime No.08/2018 under Sections 8/21 of the NDPS Act, 1985 registered at Police Station-Narcotics Cell, District-Indore.**

2. In short, the case of the prosecution is that on 09.04.2018, Police Station, Narcotics Cell, Indore received information that last night i.e. 08.04.2018, Eskuf cough syrup having Codeine Phosphate is loaded in a truck bearing registration No. M.P.-09-HH-1996 from a godown near Center Point shrouded among bags of potatoes and onions. The truck is parked at a petrol pump on A.B. Road before Dakachya and driver Mohanlal will take it to Siliguri (West Bangal (sic : Bengal)) to sell that Eskuf cough Syrup to the druggies/addicts. The truck will depart about 5-5:30 P.M. If the action is taken without delay, the contraband can be recovered. Immediately a team headed by Inspector B.D. Tripathi sent to the place indicated by the informer and a trap was laid near Bridge of *Kshipra* River. After a while, the team saw the truck coming from Dakachya side and got it stopped. Following due process, when the truck was searched, 400 boxes containing 64000 bottles of 100 ml each of Eskuf Cough Syrup kept concealed amidst 145 bags of onions and 7 bags of potatoes were recovered. Driver Mohanlal was having no document regarding transport of the same, while at the same time; he was having all relevant documents regarding transportation of onion and potatoes.

3. Mohanlal was taken into custody. On interrogation, he disclosed that owner Kaushal Singh has taken the truck to the godown of Gopal Mittal situated

near Central Point, Mangliai, Indore and from that godown, Ranjan Shukla (the petitioner) has loaded the syrup.

4. The police went to the godown on next day i.e. 10.04.2018, searched for Ranjan Shukla but he could not be traced. The police sealed the godown. Next day on 11.04.2018, the Police traced Ranjan Shukla and inquired regarding cough syrup, who revealed that the godown belongs to Gopal Mittal and is taken on rent by proprietor of Anmol Medical, Manish Bhaskar, who operates his drugs business from this godown and he works for Manish Bhaskar. He also revealed that 223 boxes of Eskuf Cough Syrup are still lying in the godown. The godown was unlocked and searched in his presence. 223 boxes of Eskuf Syrup containing 35680 bottles of 100 ML each were recovered from the godown. No documents regarding storage of this cough syrup were produced by Ranjan Shukla. 13 ATM cards and 5 cheque books of several banks and a note book, a challan book and two plastic seals were also recovered from his possession.

5. The police approached Gopal Mittal, who revealed that the godown, from where the contraband was recovered, belongs to his elder brother Biharilal. Biharilal disclosed that his godown was taken on rent by Sandeep Kale (petitioner) for vegetable business. The Police seized the rent agreement.

6. The Police took out the samples from the seized articles and sent them to the FSL for chemical analyses (sic : analysis), who confirmed existence of Codeine Phosphate and chlorpheniramine maleate.

7. Submissions of the petitioner Sandeep Kale are that he is a transporter and accepts goods to be transported in usual course of his business after verification of tax invoice and bills, keep them in his godown and got them loaded in the trucks to deliver them at the destination. In the present case also, the cartons were booked by one Anmol Medical stating that they contain some medicines. He accepted the goods to transport the same after verification of tax invoice and bills. He or any of his employees was not concerned nor was aware about the legality or illegality of the goods. He is not named in the FIR. Nothing is recovered from his possession. He is in jail since 2/05/2018. The investigation is over and charge-sheet is filed. Trial is likely to take time. He will cooperate with the trial. There is no possibility of his absconding. Therefore, he be released on bail.

8. Almost similar grounds have been taken by the petitioner Ranjan Shukla.

9. In the arguments, much emphasis is been given by the learned senior counsel that Section 21 of the NDPS Act prescribes punishment for dealing in "manufactured drug" in contravention of any provision of The Act, 1985 or any Rule or Order made or condition of license granted there under. "Manufactured Drug" is defined in Section 2(xi) of The Act, 1985. Clause (b) of Section 2(xi) of The Act provides that "Manufactured Drug" means any psychotropic substance or

preparation which the Central Government may, having regard to the available information as to its nature or to a decision, if any, under any International Convention, by notification in the Official Gazette, declared to be a "manufactured drug".

10. In exercise of powers conferred under The Act, 1985, the Central Government issued notification S.O.826 (E) dated 14.11.1985 and S.O.40 (E) dated 29.01.1993. Entry No.35 of this notification defined specifications of Codeine, which reads as under :-

> "35. Methyl morphine (commonly known as 'Codeine') and Ethyl morphine and their salts (including Dionine), all dilutions and preparations except those which are compounded with one or more other ingredients and containing not more than 100 milligrammes of the drug per dosage unit and with a concentration of not more than 2.5% in undivided preparations and which have been established in therapeutic practice."

11. It is averred that in the seizure memo of psychotropic substance itself it is mentioned that each dose of 5 ML contains 10 mg Codeine Phosphate against permissive limit of 100 Mg. Similarly, its concentration is mentioned 1% against permissive limit of 2.5% in undivided preparations. Thus, the substance seized by the police does not fall within the definition of "manufactured drug" and is not punishable under Section 21 of NDPS Act, 1985.

12. It is further asserted by the learned Senior counsel that at the most, the case of the applicants falls under the Drugs and Cosmetics Act, for which, appropriate action can be taken by the competent authority, but in any case, they cannot punished under the NDPS Act, 1985.

13. To bolster his arguments, learned Senior counsel has placed reliance on two orders of co-ordinate Bench of this Court passed in the case of *Shiv Kumar Gupta vs. The State of Madhya Pradesh* dated 16.09.2015 passed in CRR No.200/2015 *and Rohit Chanda vs. The State of Madhya Pradesh* dated 15.10.2015 passed in CRR No.1621/2015 where charges were quashed when the 5 ML of Cough Syrup was containing 10 mg of codeine phosphate in the case of *Shiv Kumar* (supra) and 9.825 mg codeine phosphate in the case of *Rohit Chanda* (supra) holding that the quantity of psychotropic substance was within the permissible limit.

14. A judgement of Punjab and Haryana High Court passed in *Rajeev Kumar vs. the State of Punjab* reported in 1998 Cri.L.J. 1460 is also pressed into service, where the proceedings were quashed by the Court on the similar line that seized drug was containing contraband in the permissive limit.

15. Further reliance is placed by the learned Senior counsel on the judgement of *Binod Kumar @ Binod Kumar Bhagat vs. The State of Bihar* reported in 2018

Cr.L.R (SC) 206 where Hon'ble the Supreme Court has granted bail on the ground that the applicant was only employee of the transport company which was engaged in the business of transportation of goods and both the consignee and the consignor were different companies/persons.

16. On the other hand, learned Public Prosecutor has controverted each and every contention of the learned senior counsel.

17. Earlier, there was some controversy as to how the quantity of psychotropic substance found in any preparation or composition shall be calculated, but this controversy is now set at rest. The Government of India has issued a notification No. S.O. 2941(E) dated 18/11/2009. As per note 4 appended at the end of this notification, it is made clear that for the purpose of determining the quantity, the gross weight of the drug recovered and not the pure content of the psychotropic substance shall be taken into consideration. Note 4 reads thus:

> "(4) The quantities shown in column 5 and column 6 of the Table relating to the respective drugs shown in column 2 shall apply to the entire mixture or any solution or any one or more narcotic drugs or psychotropic substances of that particular drug in dosage form or isomers, esters, ether and salts of these drugs, including salts of esters, ethers and isomers, wherever existence of such substance is possible and not just its pure drug content."

18. The aforesaid notification is considered by the Hon'ble Supreme Court in *Harjit Singh Vs. State of Punjab* reported in 2011 Cr.L.R. (SC) 355. It is held that while considering the quantity of the psychotropic substance, the whole quantity is to be taken into consideration.

19. The Hon'ble Supreme Court in the case of *Union of India and Anr. Vs. Sanjeev V Deshpande,* reported in 2014 Cr.L.R. SC 896 (2014) 13 SCC 1 : (AIR 2014 SC 3625) considered the controversy as to whether the contents of psychotropic salt in the tablets could be separately counted for calculating the weight or volume of psychotropic substance in medicinal preparation. The Supreme Court turned downed the contention and held that the gross weight of the drug is to be counted and not merely the net percentage/contents of the salt in the medicinal preparation for finding out the actual weight of the drugs in reference to the schedule under the NDPS Act.

20. Same view has earlier been taken by the Hon'ble Suprme (sic : Supreme) Court in the case of ***S****hahabuddin and Ors. Vs. State of Assam,* passed in Criminal Appeal No.629/2010 decided on 13/12/2012 reported in 2012(11) JT 310 : 2013 AIR SCW 817: (2012) 13 SCC 491. While considering the similar argument, the Court held that :

> "10. At the very outset, the above said submission of the Learned Counsel is liable to be rejected, inasmuch as, the conduct of the

appellants in having transported huge quantity of 347 cartons containing 100 bottles in each carton of 100 ml. Phensedyl cough syrup and 102 cartons, each carton containing 100 bottles of 100 ml. Recodex cough syrup without valid documents for such transportation cannot be heard to state that he was not expected to fulfill any of the statutory requirements either under the provisions of Drugs and Cosmetics Act or under the provisions of the N.D.P.S. Act.

11. It is not in dispute that each 100 ml. bottle of Phensedyl cough syrup contained 183.15 to 189.85 mg. of codeine phosphate and the each 100 ml. bottle of Recodex cough syrup contained 182.73 mg. of codeine phosphate. When the appellants were not in a position to explain as to whom the supply was meant either for distribution or for any licensed dealer dealing with pharmaceutical products and in the absence of any other valid explanation for effecting the transportation of such a huge quantity of the cough syrup which contained the narcotic substance of codeine phosphate beyond the prescribed limit, the application for grant of bail cannot be considered based on the above submissions made on behalf of the appellants.

12. The submission of the Learned Counsel for the appellants was that the content of the codeine phosphate in each 100 ml. bottle if related to the permissible dosage, namely, 5 ml. would only result in less than 10 mg. of codeine phosphate thereby would fall within the permissible limit as stipulated in the Notifications dated 14.11.1985 and 29.1.1993. As rightly held by the High Court, the said contention should have satisfied the twin conditions, namely, that the contents of the narcotic substance should not be more than 100 mg. of codeine, per dose unit and with a concentration of not more than 2.5% in undivided preparation apart from the other condition, namely, that it should be only for therapeutic practice. Therapeutic practice as per dictionary meaning means 'contributing to cure of disease'. In other words, the assessment of codeine content on dosage basis can be made only when the cough syrup is definitely kept or transported which is exclusively meant for its usage for curing a disease and as an action of remedial agent.

13. As pointed out by us earlier, since the appellants had no documents in their possession to disclose as to for what purpose such a huge quantity of Schedule 'H' drug containing narcotic substance was being transported and that too stealthily, it cannot be simply presumed that such transportation was for therapeutic practice as mentioned in the Notifications dated 14.11.1985 and 29.1.1993. Therefore, if the said requirement meant for therapeutic practice is not satisfied then in the event of the entire 100 ml. content of the cough syrup containing the prohibited quantity of codeine phosphate is meant for human consumption, the same would certainly fall within the penal provisions of the N.D.P.S. Act calling for appropriate punishment to be inflicted upon the appellants. Therefore, the appellants' failure to establish the

> specific conditions required to be satisfied under the above referred two notifications, the application of the exemption provided under the said notifications in order to consider the appellants' application for bail by the Courts below does not arise."

21. Time and again this Court has followed the law laid down by the Hon'ble Supreme Court in *Shahabuddin and Sanjeev Deshpande* cases (supra) in MCRC No. 11448/2016 order dated 13.12.2016, M.Cr.C.No.4310/2017 *Gopal Gupta Vs. The State of M.P. & Another* order dated 11.05.2017, MCRC No. 20360/2018 order dated 28.05.2018 and in MCRC 26037 *Nilesh @ Nilkamal V/s State of MP* order dated 10.07.2018. The Rajsthan High Court has also taken the same view in the case of *Ravi alias Ravikant Vs. State of Rajasthan* reported in 2016 CRI. L. J. 3309 that the gross weight has to be considered for calculation of commercial quantity.

22. Thus, it is evident that the whole quantity of material recovered in the form of mixture is to be considered for the purpose of determining the quantity of psychotropic substance and when the psychotropic drug is kept in possession without any document to show that it was meant for therapeutic use and the gross weight of psychotropic substance is well above the commercial quantity, the restriction contained in Section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985) is directly applicable to the case of the petitioners. Nothing is on record to satisfy the conditions enunciated in this Section.

23. Further, in the year 2015, The Government of India, Ministry of Finance (Department of Revenue), issued a notification No.S.O.1181(E) dated 05.05.2015 and made Codeine as "essential narcotic drug". Relevant paragraph no.1 of this notification reads thus:-

> S.O.1181(E). - In exercise of powers conferred by clause (viiia) of Section 2 of Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985), the Central government hereby notices for medical and scientific use, the following narcotic drugs to be essential narcotic drugs, namely:-
>
> > (1)Methyl morphine (commonly known as 'Codeine') and Ethyl Morphine and their salts (including Dionine), all dilutions and preparations except those which are compounded with one or more other ingredients and containing not more than 100 milligrammes of the drug per dosage unit and with a concentration of not more than 2.5% in undivided preparations and which have been established in therapeutic practice; (2)..... (3).....(4).....(5).....and (6).....

24. In this regard, Rules are also amended and notified by the Government of India vide notification No.G.S.R.359(E) dated 05.05.2015. A new Chapter "CHAPTER VA" is added in the Narcotic Drugs and Psychotropic Substances

Rule, 1985 by this amendment. For the sake of convenience, relevant Rules of this Chapter-VA are being reproduced below:-

"CHAPTER VA"

POSSESSION, TRANSPORT, IMPORT INTER-STATE, EXPORT INTER-STATE, SALE, PURCHASE, CONSUMPTION AND USE OF ESSENTIAL NARCOTIC DRUGS

52A. Possession of essential narcotic drug.-(1) No person shall possess any essential narcotic drug otherwise than in accordance with the provisions of these rules.

(2) Any person may possess an essential narcotic drug in such quantity as has been at one time sold or dispensed for his use in accordance with the provisions of these rules.

(3) A registered medical practitioner may possess essential narcotic drug, for use in his practice, but not for sale or distribution, not more than the quantity mentioned in the Table below, namely:-

S.L. No.	Name of the essential narcotic drug	Quantity
1	2	3
1	Morphine and its salts and all preparations containing more than 0.2 percent of Morphine	500 Milligrammes
2	**Methl morphine (commonly known as 'Codeine') and Ethyl Morphine and their salts (including Dionine), all dilutions and preparations except those which are compound with one or more other ingredients and containing not more than 100 milligrammes of the drug per dosage unit and with a concentration of not more than 2.5% in undivided preparations and which have been established in therapeutic practice.**	**2000 Milligrammes**
3	Dihydroxy Codeinone, (commonly) known as Oxy-codone and Dihydroxycodeinone), its salts (such as Eucodal Boncodal Dinarcon Hydrolaudin, Nucodan, Percodan, Scophedal, Tebodol and the like), it esters and the salts of its ester and preparation, admixture, extracts or other substances containing any of those drugs.	250 Milligrammes
4	Dihydroxycodeinone, (commonly) known as Hydrocodone), its salts (such as Dicodine, Codinovo, diconone, Hycdean, Multacodin, Nyodide, Ydroced and the like) and its esters and salts of its ester, and preparation, admxture, extracts or other substances containing any of theses drugs.	320 Milligrammes
5	i-phenethyl-4-N-propionylanilino-piperidine (the international-non-propreietary name of which is Fentanyl) and its salts and preparations, admixture, extracts or ther substances containing any of these drugs.	Two transdernal patches one each of 12.5 microgram per hour and 25 microgram per hour

Provided that the Controller of Drugs or any other officer authorised in this behalf by him may be special order authorise, in Form 3B, any such practitioner to possess the aforesaid drugs in quantity larger then the specified in the above Table.

Provided further that such authorisation may be granted or renewed, for a period not exceeding three years at a time.

Explanation.- The expression "for use in his practice" covers only the actual direct administration of the drugs to a patient under the care of the registered medical practitioner in accordance with established medical standards and practices

(4) For renewal of the authorisation referred to in the second proviso to sub-rule (3), application shall be made to the Controller of Drugs atleast thirty days before the expiry of the previous authorisation.

(5) (a) The Controller of Drugs may, be order, prohibit any registered medical practitioner from possessing four use in his practice under sub-rule(3) any essential narcotic drug, where such practitioner

(i) has violated any provision of these rules; or

(ii) has been convicted of any offence under the Act; or

(iii) has, in the opinion of the Controller of Drugs, abused such possession or otherwise been rendered unfit to possess such drug.

(b) When any order is passed under clause (a) of this sub-rule, the registered medical practitioner concerned shall forthwith deliver to the Controller of Drugs the essential narcotic drug then in his possession and the Controller of Drugs shall issue orders for the disposal of such drugs.

(6) The Controller of Drugs may, be a general or special order, authorise any person to possess essential narcotic drug as may be specified in that order.

(7) A recognized medical institution may possess essential narcotic drug in such quantity and in such manner as specified in these rules.

(8) A manufacturer may possess essential narcotic drug in such quantity as may be specified in the licence issued under rule 37 of these rules.

(9) A licenced dealer or a licenced chemist may possess essential narcotic drug in such quantity an in such manner as may be specified in the licence issued under these rules.

52B. Provisions regarding licenced dealer and licenced chemist- (1) A licenced dealer or a licenced chemist shall apply for a licence to possess, sell, exhibit or offer for sale or distribution by retail or wholesale, essential narcotic drug, to the authority competent to issue licence to possess, sell, exhibit or offer for sale or distribution by retail or

wholesale, manufactured drugs under the rules framed under Section 10 of the Act by State Government of the State in which he has his place of business.

(2) Every application for issue of licence referred to in sub-rule (1) shall be in such form and manner as may by specified by the authority referred to in the said sub-rule.

(3) The licence to possess, sell, exhibit or offer for sale or distribution by retail or wholesale, essential narcotic drugs shall have the same conditions as are applicable to a licence to possess, sell exhibit or offer for sale or distribution by retail or wholesale, manufactured drugs under the rules framed under section 10 of the Act by the State Government.

(4) The licence under this rule shall be obtained within a period of one hundred and eighty days from the date of commencement of these rules."

25. Thus, after May, 2015 licence to keep the composition containing psychotropic substance is made compulsory and for the convenience of the persons/traders already dealing in such psychotropic substance, six months time was granted to obtain such licence. The incident in the present case is of the year 2018, but nothing is there to show that the petitioners have ever obtained or possessed any licence required by these Rules.

26. It is submitted by learned senior counsel that this Court is bound by earlier decision taken by a Bench of similar strength. As earlier, different Single Benches of this Court has taken a particular view; this Court is bound by that view and cannot take a different view. If this Court is of any different view, in that case, at the most, the matter can be referred to a Larger Bench; therefore, their application cannot be thrown away.

27. But, on the facts, the orders passed in *Shiv Kumar* (supra) and *Rohit Chanda* (supra) are distinguishable, as while quashing the charges on both the occasions, the learned Single Bench of this Court has not considered the note appended to the notification No. S.O. 2941(E) dated 18/11/2009 and also the judgement passed by Hon'ble the apex Court in the case of *Mohd Shahabuddin and Sanjeev Deshpande* (supra) and the notification No.S.O.1181(E) dated 05.05.2015 and Rules made thereunder, therefore, the plea of the learned senior counsel is not tenable.

28. In any case, if we consider that the syrup containing psychotropic substance was in the permissive limit even then Section 8 of the Act, 1985 provides that no person shall possess narcotic drugs or psychotropic substance except for medical or scientific purposes or in the manner and to the extent provided by the provisions of the Act or Rules or Orders made thereunder. Nothing is shown before this Court that the seized contraband was stored or

possessed for any therapeutic purposes. No documents, whatsoever, are produced by the petitioners. On the contrary the contraband was concealed among the bags of potatoes and onion. The godown was taken for storage of vegetables, but under the guise of vegetables, a huge quantity of psychotropic substance was stored and being transported stealthily. All this is sufficient to *Prima facie* show that the intention of the petitioners was not bonafide.

29. In *Mohd. Shahabuddin* (supra) case Hon'ble the Supreme Court has also discussed this issue and has held that apart from the other condition, it is mandatory that the contraband should be only for therapeutic practice. Therapeutic practice means it should be for medicinal purposes only or should be exclusively meant for its usage for curing a disease and as an action of remedial agent.

30. At the cost of repetition I can refer para 13 of the judgement, which says that "As pointed out by us earlier, since the appellants had no documents in their possession to disclose as to for what purpose such a huge quantity of Schedule 'H' drug containing narcotic substance was being transported and that too stealthily, it cannot be simply presumed that such transportation was for therapeutic practice as mentioned in the Notifications dated 14.11.1985 and 29.1.1993. Therefore, if the said requirement meant for therapeutic practice is not satisfied then in the event of the entire 100 ml. content of the cough syrup containing the prohibited quantity of codeine phosphate is meant for human consumption, the same would certainly fall within the penal provisions of the N.D.P.S. Act calling for appropriate punishment to be inflicted upon the appellants. Therefore, the appellants' failure to establish the specific conditions required to be satisfied under the above referred two notifications, the application of the exemption provided under the said notifications in order to consider the appellants' application for bail by the Courts below does not arise."

31. The observation of the Hon'ble Supreme Court reproduced herein above leaves no scope for this Court to entertain the contention canvassed by the learned counsel for the petitioners particularly, looking to the quantity of bottles seized in the present case without any valid documents to justify the possession of such huge quantity of bottles.

32. If, in view of the contention of the petitioners, we consider only the net quantity of 20 mg of psychotropic substance, which each bottle seized contains and multiply this with the total number of bottles (99680) seized, then the total quantity of Codeine comes to 1993600 mg, which is equal to 1.993 kg and it certainly is commercial quantity. Considering this aspect also, the petitioners are not entitle for bail.

33. In view of the foregoing discussions, in my considered opinion, no case for bail is made out. Therefore, both the petitions are dismissed hereby.

Application dismissed