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***Penal Code (45 of 1860), Section 302 – Interested Eye Witness – Credibility* – Held – Apex Court concluded that evidence as a whole having a ring of truth cannot be discarded merely because maker is a related witness – In instant case, evidence of three eye witnesses who are close relative of deceased are trustworthy and reliable and duly corroborated by evidence of Inspector – No reason to disbelieve their testimony. [Pooran @ Punni @ Bhure Ahirwar Vs. State of M.P.] (DB)…1547**

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***Penal Code (45 of 1860), Section 304 Part II – Quantum of Sentence* – Trial Court convicted appellant u/S 304 Part II IPC and sentenced 3 years RI for assaulting and killing his own father – High Court in appeal confirmed the conviction but modified the sentence to period already undergone i.e. 3 months and 21 days – Held – In such a case, there was no further scope for leniency on question of punishment that what had already been shown by trial Court – High Court was not justified in reducing sentence to an abysmally inadequate period of less than 4 months – Impugned judgment of High Court is set aside and that of trial Court is restored. [State of M.P. Vs. Suresh] (SC)…1348**

दण्ड संहिता (1860 का 45), धारा 304 भाग II – दण्डादेश की मात्रा – विचारण न्यायालय ने अपीलार्थी को उसके स्वयं के पिता पर हमला करने एवं हत्या करने हेतु धारा 304 भाग II भा.दं.सं. के अंतर्गत दोषसिद्ध किया तथा 3 वर्ष सश्रम कारावास से दण्डादिष्ट किया – उच्च न्यायालय ने अपील में दोषसिद्धि की संपुष्टि की किंतु पहले ही भुगताई गई अवधि अर्थात् 3 माह 21 दिन, के लिए दण्डादेश उपांतरित किया – अभिनिर्धारित – ऐसे प्रकरण में, दण्ड के प्रश्न पर उदारता की कोई अतिरिक्त गुंजाईश नहीं जो कि पहले ही

विचारण न्यायालय द्वारा दर्शाई गई थी – दण्डादेश को 4 माह से कम की अत्याधिक रूप से अपर्याप्त अवधि तक घटाना उच्च न्यायालय के लिए न्यायोचित नहीं था – उच्च न्यायालय का आक्षेपित निर्णय अपास्त एवं विचारण न्यायालय के निर्णय को पुरःस्थापित किया गया। (म.प्र. राज्य वि. सुरेश) **(SC)…1348**

Penal Code (45 of 1860), Section 307 – Ingredients – Motive & Intention **– Held – If assailant acts with intention or knowledge that such action might cause death and hurt is caused, then provisions of section 307 would be applicable – No requirement for injury to be on a "vital part" of body, merely causing "hurt" is sufficient to attract Section 307 IPC – In present case, multiple blows inflicted by R-1 proves his intention – Motive was also established – Ingredients of Section 307 made out – Prosecution successfully proved that R-1 attempted to murder complainant. [State of M.P. Vs. Harjeet Singh] (SC)…1337**

दण्ड संहिता (1860 का 45), धारा 307 – घटक – हेतु व आशय – अभिनिर्धारित – यदि हमलावर इस आशय अथवा ज्ञान के साथ कार्य करता है कि उक्त कार्य से मृत्यु एवं उपहति कारित हो सकती है, तो धारा 307 के उपबंध लागू होंगे – चोट का शरीर के ''महत्वपूर्ण अंग'' पर होने की आवश्यकता नहीं, भा.दं.सं. की धारा 307 को आकर्षित करने हेतु मात्र ''उपहति'' कारित होना पर्याप्त है – वर्तमान प्रकरण में, प्रत्यर्थी क्र. 1 द्वारा पहुंचाये गये अनेक वार उसका आशय साबित करते हैं – हेतु भी स्थापित हुआ था – धारा 307 के घटक मौजूद – अभियोजन ने सफलतापूर्वक साबित किया कि प्रत्यर्थी क्र. 1 ने परिवादी की हत्या करने का प्रयत्न किया। (म.प्र. राज्य वि. हरजीत सिंह) **(SC)…1337**

Penal Code (45 of 1860), Section 307 & 324 – Modification/ Reduction in Conviction & Sentence – Appreciation of Evidence **– Respondents convicted u/S 307 IPC by Trial Court which was further reduced by High Court in appeal to one u/S 324 IPC – Held – R-1 inflicted four injuries to victim by using knife, causing injury in his lungs which resulted in blood seeping into lungs – Such injury cannot be said to be made on "unimportant part" of body – The act of stabbing a person with sharp knife near his vital organs would ordinarily lead to death of victim – High Court erred in reducing the conviction and sentence of R-1 – Order of Trial Court convicting R-1 u/S 307 is restored – Appeal partly allowed. [State of M.P. Vs. Harjeet Singh] (SC)…1337**

दण्ड संहिता (1860 का 45), धारा 307 व 324 – दोषसिद्धि व दण्डादेश में उपांतरण/घटाया जाना – साक्ष्य का मूल्यांकन – प्रत्यर्थीगण को विचारण न्यायालय द्वारा भा.दं.सं. की धारा 307 के अंतर्गत दोषसिद्ध किया गया जिसे आगे अपील में उच्च न्यायालय द्वारा घटाकर भा.दं.सं. की धारा 324 में उपांतरित किया गया था – अभिनिर्धारित – प्रत्यर्थी क्र. 1 ने चाकू का प्रयोग करते हुए पीड़ित को चार चोटें पहुंचाई, जिससे उसके फेफड़ों में

दण्ड संहिता (1860 का 45), धाराएँ 363, 366ए, 376(2)(एफ)(आई), 376–ए, 376–एबी, 302 व 201 – मृत्यु दण्डादेश – अभिनिर्धारित – यह एक परिस्थितिजन्य साक्ष्य का प्रकरण है जहां प्रज्ञा का सिद्धांत लागू होता है – अभियुक्त (मृतिका का रिश्ते का भाई) की आयु 19 वर्ष है, उसके संपूर्ण जीवन क्रम के सुधार एवं पुनर्वास की संभावना से इंकार नहीं किया जा सकता – कारागृह में अभियुक्त के पूर्वतर एवं पश्चात्वर्ती पूर्ववृत्त से कोई नकारात्मक निष्कर्ष नहीं निकलता – गंभीर बनाने वाली एवं कम करने वाली परिस्थितियों को विचार में लेते हुए, मृत्यु दण्डादेश को 30 वर्ष के आजीवन कारावास में संपरिवर्तित किया गया – अपील अंशतः मंजूर एवं निर्देश नकारात्मक उत्तरित किया गया। (आनंद कुशवाहा वि. म.प्र. राज्य) **(DB)…1470**

***Penal Code (45 of 1860), Section 376(2)(f) – Rape of Minor Girl – Interested Witness – Medical Evidence* – Held – FIR duly corroborated by statement of prosecutrix where she specifically stated about the act of appellant – During examination of prosecutrix, Doctor found bleeding from private parts and also found injuries and gave a definite opinion of intercourse – No reason to disbelieve testimony of prosecutrix – Appellant rightly convicted – Appeal dismissed. [Dhokan @ Dhokal @ Gokul Vs. State of M.P.] (DB)…1541**

दण्ड संहिता (1860 का 45), धारा 376(2)(एफ) – अवयस्क बालिका का बलात्संग – हितबद्ध साक्षी – चिकित्सीय साक्ष्य – अभिनिर्धारित – प्रथम सूचना प्रतिवेदन अभियोक्त्री के कथन जिसमें उसने अपीलार्थी के कृत्य के बारे में विनिर्दिष्ट रूप से बताया है, द्वारा सम्यक् रूप से संपुष्ट – अभियोक्त्री के परीक्षण के दौरान, चिकित्सक ने गुप्तांगों से रक्तस्त्राव पाया तथा चोटें भी पाई एवं संभोग का एक निश्चित मत दिया – अभियोक्त्री के परिसाक्ष्य पर अविश्वास करने का कोई कारण नहीं – अपीलार्थी उचित रूप से दोषसिद्ध – अपील खारिज। (ढोकन उर्फ ढोकल उर्फ गोकुल वि. म.प्र. राज्य) **(DB)…1541**

***Penal Code (45 of 1860), Section 376(2)(f) and Criminal Procedure Code, 1973 (2 of 1974), Section 154 – Delayed FIR* – Held – FIR lodged after three days of the incident – Prosecutrix is a child belonging to village and in such cases, victim and her family members find it difficult to go and lodge a report at police station due to shame and fear of defamation in society – Testimony of prosecutrix cannot be discarded merely on basis of delayed FIR. [Dhokan @ Dhokal @ Gokul Vs. State of M.P.] (DB)…1541**

दण्ड संहिता (1860 का 45), धारा 376(2)(एफ) एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 154 – विलंबित प्रथम सूचना प्रतिवेदन – अभिनिर्धारित – घटना के तीन दिनों के पश्चात् प्रथम सूचना प्रतिवेदन दर्ज किया गया – अभियोक्त्री गांव की एक बालिका है तथा ऐसे प्रकरणों में, पीड़िता तथा उसके परिवार के सदस्यों को शर्म और समाज में बदनामी के भय के कारण पुलिस थाने जाना एवं प्रतिवेदन दर्ज कराना कठिन लगता है – अभियोक्त्री के परिसाक्ष्य को मात्र विलंबित प्रथम सूचना प्रतिवेदन के आधार पर अस्वीकार नहीं किया जा सकता। (ढोकन उर्फ ढोकल उर्फ गोकुल वि. म.प्र. राज्य) **(DB)…1541**

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सेवा विधि – विभागीय जांच – प्रास्थगन की अवधि – अभिनिर्धारित – एक अंतरिम आदेश के रूप में इस न्यायालय ने कार्यवाहियाँ प्रास्थगित रखने हेतु निदेशित किया है – दोनों विभागीय जांचों में आगे की कार्यवाहियों को असीमित अवधि तक प्रास्थगन में नहीं रखा जा सकता तथा चूंकि उक्त को दो वर्ष की अवधि से प्रास्थगन में रखा गया है परंतु अभी भी दाण्डिक अभियोजन समाप्त नहीं हुआ है – अंतरिम आदेश रद्द किया गया – याचिकाएँ खारिज। (बलबीर सिंह गुर्जर वि. म.प्र. राज्य) **…*47**

***Service Law – Departmental Enquiry – Second Charge Sheet – Maintainability* – Held – Subsequent charge sheet has not been issued on allegations similar to those which are part of first charge sheet, thus cannot be quashed on the ground of issuance of second chargesheet on similar allegations. [Balbeer Singh Gurjar Vs. State of M.P.] …*47**

सेवा विधि – विभागीय जांच – द्वितीय आरोप–पत्र – पोषणीयता – अभिनिर्धारित – पश्चात्वर्ती आरोप–पत्र उन समान अभिकथनों पर जारी नहीं किया गया है जो प्रथम आरोप–पत्र का भाग हैं, इसलिए द्वितीय आरोप–पत्र, समान अभिकथनों पर जारी किये जाने के आधार पर अभिखंडित नहीं किया जा सकता। (बलबीर सिंह गुर्जर वि. म.प्र. राज्य) **…*47**

***Service Law – Fundamental Rules, 54 & 54-A(2)(i) – Suspension Period – Major & Minor Penalty* – Held – This Court earlier opined that where departmental proceedings against suspended employee for imposition of major penalty finally ends with imposition of minor penalty, the intervening period must be treated as "spent on duty". [K.K. Bajpai Vs. Union of India] (DB)…1407**

सेवा विधि – मूलभूत नियम, 54 व 54–ए(2)(i) – निलंबन अवधि – गुरूतर शास्ति व गौण शास्ति – अभिनिर्धारित – इस न्यायालय ने पूर्व में राय दी थी कि जहां निलंबित कर्मचारी के विरूद्ध गुरूतर शास्ति अधिरोपण हेतु विभागीय कार्यवाहियॉं, गौण शास्ति अधिरोपण के साथ अंतिम रूप से समाप्त होती है, मध्यवर्ती अवधि को ''कार्य पर बितायी गई'' समझा जाना चाहिए। (के.के. बाजपेयी वि. यूनियन ऑफ इंडिया) **(DB)…1407**

***Service Law – Fundamental Rule, 54-B – Suspension – Salary & Allowances – Opportunity of Hearing* – Held – As per GAD Circular of State, if suspended employee is imposed a minor penalty, then suspension was not warranted and employee is entitled to receive full pay and allowances for suspension period – In instant case, minor penalty was imposed while**

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THE INDIAN LAW REPORTS M.P. SERIES, 2019

(Vol.-3)

JOURNAL SECTION

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

THE MADHYA PRADESH BHU-RAJASV SANHITA (BHU-ABHILEKHON MEIN NAMANTARAN) NIYAM, 2018.

[Published in Madhya Pradesh Gazette, Part 4 (Ga), dated 4 January, 2019, page Nos. 36 to 62]

No. F 2-14/2018/VII/Se.6 - In exercise of the powers conferred by clause (xxiii) of sub-section (2) of Section 258 of the Madhya Pradesh Land Revenue Code, 1959 (No 20 of 1959) read with Section 109 and Section 110 of the said Code and in supersession of this Department's Notification no. 2498-VII-N-1 dated 10th June, 1965, published in the Madhya Pradesh Rajpatra, dated 2nd July, 1965, the State Government, hereby, makes the Madhya Pradesh Bhu-Rajasv Sanhita (Bhu-Abhilekhon Mein Namantaran) Niyam, 2018, the same having been previously published, as required by sub-section (3) of Section 258 of the said Code:-

RULES

1. Short title and commencement-

(1) These rules may be called The Madhya Pradesh Bhu-Rajasv Sanhita (Bhu-Abhilekhon Mein Namantaran) Niyam, 2018.

(2) They shall come into force from the date of publication in the Madhya Pradesh Gazette.

2. Definitions–

(1) In these rules, unless the context otherwise requires-

(a) 'Code means Madhya Pradesh Land Revenue Code, 1959 (No. 20 of 1959);

(b) 'Form' means Forms appended to these rules;

(c) 'Section' means a section of the code.

(2) The words and expressions used in these rules but not defined in these rules and defined in the Code, shall have the same meaning respectively as assigned to them in the code.

Part-A

Report of acquisition of rights and payment of fee

3. (1) Report of a right or interest acquired in land by a person under sub-section (1) of Section 109 shall be made in-

(a) **Form I,** in case of acquisition of Bhumiswami right or interest;

(b) **Form II,** in case of acquisition of leasehold right or interest;

(c) **Form III,** in case of a minor Bhumiswami or minor lessee attaining majority;

(d) **Form IV,** in case of acquisition of any right or interest other than (a) to (c); and

(e) **Form V,** in case of application for common proceeding for mutation and partition of holding in case of land assessed for the purpose of agriculture.

(2) The report under sub-rule (1) may be made by any one of the means specified in the Explanation III under sub-section (1) of section 109 or by an electronic system whenever such system is introduced.

(3) Where such right or interest in land is acquired on a part of a survey number or block number or plot number, a pre-mutation sketch shall be prepared in accordance with the directions issued by the state Government from time to time and attached with the report in sub-rule (1).

(4) The party acquiring a right or an interest shall pay fees for the mutation in land records as may be notified by the State Government:

Provided that no fee shall be payable till such notification is issued:

Provided further that any fee or penalty required to be paid under Section 109 or 110 or these rules, if not paid shall be recoverable as an arrear of land revenue.

(5) A written acknowledgement of the report made in sub-rule (1) shall be given.

4. The intimation under sub-section (2) of section 109 shall be sent by the Registering Officer to the Tahsildar in **Form VI** along with a pre-mutation sketch prepared in accordance with the directions issued by the State Government from time to time within a period of ten days of registration of a document. The Registering Officer shall cause the fee payable under sub-rule (4) of rule 3 deposited from the person acquiring a title or interest in land for mutation in land records and give the details thereof in **Form VI**. Copy of the intimation made in **Form VI** shall also be given to the parties to the deed.

5. The register to be maintained under sub-section (1) of Section 110 for reporting acquisition of rights or interests shall be in **Form VII**.

6. The intimation regarding acquisition of right shall be submitted to the Tahsildar under sub-section (2) of section 110 in **Form VIII**.

Part – B

Proceedings in cases for mutation in land records

7. (1) The Tahsildar shall issue notice under clause (b) of sub-section (3) of Section 110 in **Form IX** to all persons interested including the following persons and authorities-

(a) in case the land has been given on lease or on licence by the Government – to the district head of the concerned department or where there is no such district head – to the Secretary of the Department;

(b) in case the land has been given on lease or on licence by any Local Body – to the chief executive officer of the concerned Local Body;

(c) in case the land has been given on lease or licence by an authority established or controlled by the State Government – to the District Head of such authority or where there is no such district head – to the chief executive officer of such authority.

(2) The Tahsildar shall display a public notice relating to the proposed mutation in Form X on the notice board of his office and of the concerned Gram Panchayat or urban local body, as the case may be, and publish it in the concerned village or sector.

(3) During the enquiry if existence of any interested person other than those to whom notices have been issued under aforesaid sub-rule (1) comes to the knowledge of the Tahsildar, he shall issue notice to such interested person also.

8. (1) After the date of passing order under sub-section (4) of section 110, the Tahsildar shall fix a date not later than thirty days for the delivery of certified copies of the order and updated land records free of cost as provided under sub-section (5) of section 110.

(2) On the date so fixed certified copies of the order and updated Khasra and maps shall be delivered to the parties. The Tahsildar shall make necessary entries in the Bhu-Adhikar Pustika or, if required, issue new Bhu-Adhikar Pustika to the parties.

(3) If any party so desires or if any party does not appear on the date fixed under sub-rule (1) the certified copies of the order and updated Khasra and map shall be sent to the party by registered post or by such other means as may be directed by the State Government.

9. Quarterly report of pending cases under sub-section (7) of section 110 shall be sent to the Collector in **Form XI** by the tenth day of the next quarter. The State Government may set up an electronic system for monitoring to generate such reports automatically.

Part- C

Common proceedings for mutation and partition of holding in case of land assessed for the purpose of agriculture

10. A party acquiring a right or interest in land assessed for the purpose of agriculture under section 59 may apply for effecting the mutation of a right or interest in land records under section 110 and partition of holding under section 178 in a common proceedings.

11. (1) If an application is made under rule 10, the Tahsildar shall register a case for mutation of rights in land records under section 110 and partition of holding under section 178 and proceed to hear and pass common order.

(2) The provisions of these rules and of section 178 and rules made thereunder shall be followed in the proceedings under sub-rule (1).

(3) Where any objection relating to partition is raised, the Tahsildar shall pass an order for mutation in land records and direct the parties, who wish to partition the holding, to apply under section 178 separately.

FORM-I

(See Rule 3)

REPORT OF ACQUISITION OF BHUMISWAMI RIGHT OR INTEREST

To,

Tahsildar/Additional Tahsildar/Naib Tahsildar ……..
Tahsil……
District …….M.P.

PART-I

I/We, ……(Name),……hereby, report acquisition of Bhumiswami right or interest in land and request for mutation in land records under Section 110 of the Madhya Pradesh Land Revenue Code, (No 20 of 1959).

1. Particulars of persons acquiring right or interest:-

S. No.	Name and Address	Name of Father/Mother/ Husband / Guardian	Gender	Age	Mobile phone number	Scheduled Tribe / Other	Description and No. of identity document	Remarks
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
1								
2								

2. Particulars of persons by whom right/interest/claim is transferred/ assigned/renounced:-

S. No.	Name and Address	Name of Father/Mother/ Husband/ Guardian	Gender	Age	Mobile phone number	Scheduled Tribe / Other	Description and No. of identity document	Remarks
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
1								
2								
3								

3. Particulars of land and right/interest:-

Patwari Halka No/ Sector No.	Name of Village/ Urban area	Survey No./ Block No. / Plot No.	Area (in hectare/ sq. mtr.)	Area of land over which Bhumiswami right/interest has been acquired	Names of Persons acquiring right/ interest	Particulars of right/interest	
						Share	Area (in hectare/ sq. mtr.)
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)

4. Mode of acquisition of Bhumiswami right/ interest:-

S. No.	Mode	Required Document (Self attested copies to be attached)	Please tick (√) if attached
(1)	(2)	(3)	(4)
1	By inheritance	1. Death Certificate or suitable proof of death of the deceased Bhumiswami 2. Family tree/List of heirs and their shares	
2	By will	Will	
3	By purchase	Registered sale deed	
4	By gift	Registered Gift deed	
5	By exchange of land	Registered deed of exchange	
6	By decree of Court	Decree of the Court	
7	By land acquisition	Award passed	
8	By land allotment	Order of the land allotment	
9	By renouncing claims in land	Release deed	
10	By any other mode (not mentioned above)	Relevant document	

5. Details of fee deposited-

(in Rupees)

Amount in figures	Amount in words	Details of the receipt of the fee deposited
(1)	(2)	(3)

DECLARATION

1. I/we……son/daughter/wife of ……address (full mailing address)……., mobile No……. hereby, declare (s) that the information given by me/us is true and correct to the best of my/our knowledge and belief and nothing has been concealed by me/us. I/we also understand that in case of incorrect information submitted by me/us, legal action may be taken against me/us.

2. I/we request that mutation in land records be made as per the information provided by me/us in this report.

Date…….
Place……

Signature
Name……
(Person making report)

Essential Enclosures:-

(1) Copy of khasra

(2) Copy of pre-mutation sketch (where applicable)

(3) Copy of proof of address of persons acquiring right or interest

(4) Copy of proof of identity of persons acquiring right or interest

(5) If person making report is other than the person acquiring right or interest, a letter of authority signed by the person acquiring right or interest along with proof of address and proof of identity of the person making report shall be furnished.

(6) In case of juristic person-

(1) a document establishing the identity of the juristic person such as PAN card, GST registration number, CIN number issued by the Registrar of Companies, Registration certificate issued by the registering authority such as Registrar of Firms and Societies, Registrar Public Trusts etc. or Bank Account passbook etc.; and

(2) a letter of authorization to act on behalf of such juristic person issued by competent body or person shall be attached.

(7) Copy of the documents specified in para 4 of the report above

(8) Copy of receipt of fee

Notes: (1) Self attested copies of the documents shall be attached with this Form.

(2) Proof of identity may be self attested copy of Aadhar Card or its equivalent, PAN Card, Voter ID, Passport, Driving License, Passbook of any Bank, or any Photo ID issued or certified by any Gazetted Officer of the State Government or the Central Government.

PART-II
ACKNOWLEDGMENT

To,

Shri/Smt./Ku…….
Son/Daughter/Wife of ……...
Address……

The report submitted in Part-I above is hereby acknowledged.

Date……
Place……

Seal

Name and designation of
Receiving Authority

Tahsil……
District…….

FORM-II

(See Rule 3)

REPORT OF ACQUISITION OF LEASEHOLD RIGHT OR INTEREST

To,

Tahsildar/Additional Tahsildar/ Naib Tahsildar…….
Tahsil……
District ……M.P.

PART-I

I/We ……. (Name),…… hereby, report acquisition of leasehold rights or interests in land and request for mutation in land records under Section 110 of the Madhya Pradesh Land Revenue Code, 1959 (No 20 of 1959).

1. Particulars of persons acquiring right or interest:-

S. No.	Name and Address	Name of Father/Mother/ Husband / Guardian	Gender	Age	Mobile phone number	Scheduled Tribe / Other	Description and No. of identity document	Remarks
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
1								
2								

2. Particulars of persons by whom right/interest/claim is transferred/ assigned/renounced:-

S. No.	Name & Address	Name of Father/Mother/ Husband / Guardian	Gender	Age	Mobile phone number	Scheduled Tribe / Other	Description and No. of identity document	Remarks
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
1								
2								

3. Particulars of land and right/interest:-

Patwari halka No/ sector No.	Name of Village/ Urban area	Survey No./ Block No. / Plot No.	Area (in hectare/ sq. mtr.)	Area of land over which leasehold rights/interests has been acquired	Names of persons acquiring rights/ interests	Particulars of right/interest	
						Share	Area (in hectare/ sq. mtr.)
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)

4. Mode of acquisition of leasehold right/ interest-

S. No.	Mode	Required Document (Self attested copies to be attached)	Please tick (✓) if attached
(1)	(2)	(3)	(4)
1	By inheritance	1. Death Certificate or suitable proof of death of the deceased lessee 2. Family tree/List of heirs and their share	
2	By will	Will	
3	By purchase	Registered sale deed	
4	By gift	Registered Gift deed	
5	By exchange of land	Registered deed of exchange	
6	By decree of Court	Decree of the Court	
7	By land allotment	Order of the land allotment	
8	By renouncing claims in land	Release deed	
9	By any other mode (not mentioned above)	Relevant document	

5. Details of fee deposited-

(in rupees)

Amount in figures	Amount in words	Details of the receipt of the fee deposited
(1)	(2)	(3)

DECLARATION

1. I/we……son/daughter/wife of ……address (full mailing address)……, mobile No…….hereby, declare (s) that the information given by me/us is true and correct to the best of my/our knowledge and belief and nothing has been concealed by me/us. I/we also understand that in case of incorrect information submitted by me/us, legal action may be taken against me/us.

2. I/we request that mutation in land records be made as per the information provided by me/us in this report.

Date…….
Place……

Signature
Name……
(Person making report)

Essential Enclosures:-

(1) Copy of khasra

(2) Copy of pre-mutation sketch (where applicable)

(3) Copy of proof of address of persons acquiring right or interest

(4) Copy of proof of identity of persons acquiring right or interest

(5) If person making report is other than the person acquiring right or interest, a letter of authority signed by the person acquiring right or interest along with proof of address and proof of identity of the person making report shall be furnished.

(6) In case of juristic person-

(1) a document establishing the identity of the juristic person such as PAN Card, GST registration number, CIN number issued by the Registrar of Companies, Registration certificate issued by the registering authority such as Registrar of Firms and Societies, Registrar Public Trusts etc. or Bank Account passbook etc.; and

(2) a letter of authorization to act on behalf of such juristic person issued by competent body or person shall be attached.

(7) Copy of the documents specified in para 4 of the report above

(8) Copy of receipt of fee

Notes: (1) Self attested copies of the documents shall be attached with this Form.

(2) Proof of identity may be self attested copy of Aadhar Card or its equivalent, PAN Card, Voter ID, Passport, Driving License, Passbook of any Bank, or any Photo ID issued or certified by any Gazetted Officer of the State Government or the Central Government.

PART-II

ACKNOWLEDGMENT

To,

Shri/Smt./Ku…….
Son/Daughter/Wife of ……...
Address……

The report submitted in Part-I above is hereby acknowledged.

Date……
Place……

Seal

Name and designation of
Receiving Authority

Tahsil……
District…….

FORM-III

(See Rule 3)

REPORT OF A MINOR BHUMISWAMI OR MINOR LESSEE ATTAINING MAJORITY

To,

Tahsildar/Additional Tahsildar/Naib Tahsildar……..
Tahsil……..
District……..M.P.

PART-I

I/We…….....(name),…….....hereby, report attainment of majority by the following minor Bhumiswami/minor lessee and request for mutation in land records under Section 110 of the Madhya Pradesh Land Revenue Code, 1959 (No 20 of 1959).

1. Particulars of persons who have attained majority:-

S. No.	Name and Address	Name of Father/Mother/ Husband / Guardian	Gender	Date of birth and Age	Mobile phone number	Scheduled Tribe / Other	Description and No. of identity document	Remarks
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
1								
2								
…								

2. Particulars of land:-

Patwari halka No./sector No.	Name of Village/ Urban area	Survey No. / Block No./Plot No.	Area (in hectare /sq. mtr.)
(1)	(2)	(3)	(4)

3. Details of fee deposited:-

(in rupees)

Amount in figures	Amount in words	Details of the receipt of the fee deposited
(1)	(2)	(3)

DECLARATION

1. I/we……son/daughter/wife of ……address (full mailing address)……, mobile No…….hereby, declare (s) that the information given by me/us is true and correct to the best of my/our knowledge and belief and nothing has been

concealed by me/us. I/we also understand that in case of incorrect information submitted by me/us, legal action may be taken against me/us.

2. I/we request that mutation in land records be made as per the information provided by me/us in this report.

Date…….
Place……

Signature
Name……
(Persons making report)

Essential Enclosures:-

(1) Copy of khasra

(2) Proof of address of persons attaining majority

(3) Proof of identity of persons attaining majority

(4) If person making report is other than the person attaining majority a letter of authority signed by the person attaining majority along with proof of address and proof of identity of the person making report shall be furnished.

(5) Proof of date of birth

(6) Copy of receipt of fee

Notes: (1) Self-attested copies of the documents shall be attached with this Form.

(2) Proof of identity may be self attested copy of Aadhar Card or its equivalent, PAN Card, Voter ID, Passport, Driving License, Passbook of any Bank, or any Photo ID issued or certified by any Gazetted Officer of the State Government or the Central Government.

PART-II

ACKNOWLEDGMENT

To,

Shri/Smt./Ku…….
Son/daughter/husband of ……...
Address……

The report submitted in Part-I above is hereby acknowledged.

Date…… Seal
Place……

Name and designation of
Receiving Authority

Tahsil……
District……

FORM-IV

(See Rule 3)

REPORT OF ACQUISITION OF RIGHT OR INTEREST
(OTHER THAN THOSE CASES REQUIRED TO BE REPORTED IN FORM-I, FORM-II OR FORM-III)

To,

Tahsildar/Additional Tahsildar/Naib Tahsildar ……..
Tahsil……
District ……M.P.

PART-I

I/We, …… (name),…… hereby, report acquisition of following right or interest in land and request for mutation in land records under Section 110 of the Madhya Pradesh Land Revenue Code, 1959 (No 20 of 1959).

1. Particulars of persons acquiring right or interest:-

S. No.	Name and Address	Name of Father/Mother/ Husband / Guardian	Gender	Age	Mobile phone number	Scheduled Tribe / Other	Description and No. of identity document	Remarks
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
1								
2								

2. Particulars of persons by whom right/interest/claim is transferred/ assigned/renounced:-

S. No.	Name and Address	Name of Father/Mother/ Husband / Guardian	Gender	Age	Mobile phone number	Scheduled Tribe / Other	Description and No. of identity document	Remarks
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
1								
2								

3. Particulars of land and right/interest:-

Patwari halka No/ sector No.	Name of Village/ Urban area	Survey No./ Block No. / Plot No.	Area (in hectare /sq. mtr.)	Area of land over which right/interest has been acquired	Nature of right or interest acquired	Names of persons acquiring rights/ interests	Particulars of right/interest	
							Share	Area (in hectare / sq. mtr.)
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)

4. Mode of acquisition of right/ interest:-

S. No.	Nature of right/interest	Relevant Documents (self attested copies to be attached)	Please tick (√) if attached
(1)	(2)	(3)	(4)
1			
2			

5. Details of fee deposited-

(in rupees)

Amount in figures	Amount in words	Details of the receipt of the fee deposited
(1)	(2)	(3)

DECLARATION

1. I/we……son/daughter/wife of .... address (full mailing address)……..... ……..... mobile no……..….hereby, declare that the information given by me/us is true and correct to the best of my/our knowledge and belief and nothing has been concealed by me/us. I/we also understand that in case of incorrect information submitted by me/us, legal action may be taken against me/us.

2. I/we request that mutation in land records be made as per the information provided by me/us in this report.

Date…….
Place……

Signature
Name……
(Persons making report)

Essential Enclosures:-

(1) Copy of khasra

(2) Copy of pre-mutation sketch (where applicable)

(3) Copy of proof of address of persons acquiring right or interest

(4) Copy of proof of identity of persons acquiring right or interest

(5) If person making report is other than the person acquiring right or interest, a letter of authority signed by the person acquiring right or interest along with proof of address and proof of identity of the person making report shall be furnished.

(6) In case of juristic person-

(1) a document establishing the identity of the juristic person such as PAN Card, GST registration number, CIN number issued by the Registrar of Companies, Registration certificate issued by the registering authority such as Registrar of Firms and Societies, Registrar Public Trusts etc. or Bank Account passbook etc.; and

(2) a letter of authorization to act on behalf of such juristic person issued by competent body or person shall be attached.

(7) Copy of the documents specified in para 4 of the report above

(8) Copy of receipt of fee

Notes: (1) Self attested copies of the documents shall be attached with this Form.

(2) Proof of identity may be self attested copy of Aadhar Card or its equivalent, PAN Card, Voter ID, Passport, Driving License, Passbook of any Bank, or any Photo ID issued or certified by any Gazetted Officer of the State Government or the Central Government.

PART-II
ACKNOWLEDGMENT

To,

Shri/Smt./Ku…….
Son/Daughter/Wife of ……...
Address……

The report submitted in Part-I above is hereby acknowledged.

Date…… Seal
Place……

Name and designation of
Receiving Authority

Tahsil……
District……

J/100

FORM-V

(See Rule 3)

REPORT FOR MUTATION AND APPLICATION FOR PARTITION OF HOLDING FOR COMMON PROCEEDING IN CASES OF LAND ASSESSED FOR THE PURPOSE OF AGRICULTURE

To,

Tahsildar/Additional Tahsildar/Naib Tahsildar ……..
Tahsil……
District ……M.P.

PART-I

I/We, ……(name),……hereby, report acquisition of Bhumiswami right or interest in land and request for mutation in land records under Section 110 and partition of holding under section 178 of the Madhya Pradesh Land Revenue Code, 1959 (No 20 of 1959).

1. Particulars of persons acquiring right or interest:-

S. No.	Name and Address	Name of Father/Mother/ Husband / Guardian	Gender	Age	Mobile phone number	Scheduled Tribe / Other	Description and No. of identity document	Remarks
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
1								
2								

2. Particulars of persons by whom right/interest/claim is transferred/ assigned/renounced:-

S. No.	Name and Address	Name of Father/Mother/ Husband / Guardian	Gender	Age	Mobile phone number	Scheduled Tribe / Other	Description and No. of identity document	Remarks
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
1								
2								

3(A). Particulars of land according to existing land records:-

Patwari halka No/ sector No.	Name of Village/ Urban area	Holding no.	Name of Bhumiswami/ Bhumiswamies	Share in holding	Survey no.	Area (in hectare)	Land revenue (in rupees)
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)

***3(B). Proposal for partition after mutation :-**

Patwari halka No./ Sector No.	Name of Village/ Urban area	Name of Bhumiswami/ Bhumiswamis for proposed holdings after partition	Share in holding	Survey no.	Area (in hectare)	Apportioned land revenue (in rupees)
(1)	(2)	(3)	(4)	(5)	(6)	(7)

***Note – It is not mandatory to give proposal for partition in this para. The applicant, if he so desires, may mention in the aforesaid Table his share in the holding, and survey numbers and their areas and apportioned land revenue and show the rest of the holding as a joint holding.**

4. Mode of acquisition of Bhumiswami right/ interest:-

S. No.	Mode	Required Document (Self attested copies to be attached)	Please tick (√) if attached
(1)	(2)	(3)	(4)
1	By inheritance	1. Death Certificate or suitable proof of death of the deceased Bhumiswami. 2. Family tree/List of heirs and their share.	
2	By will	Will	
3	By purchase	Registered sale deed	
4	By gift	Registered Gift deed	
5	By decree of Court	Decree of the Court	
6	By land acquisition	Award passed	
7	By land allotment	Order of the land allotment	
8	By renouncing claims in land	Release deed	
9	By any other mode (not mentioned above)	Relevant document	

5. Details of fee deposited-

(in Rupees)

Amount in figures	Amount in words	Details of the receipt of the fee deposited
(1)	(2)	(3)

DECLARATION

1. I/we……son/daughter/wife of …….address (full mailing address)…….....……....., mobile No.....……. hereby, declare (s) that the information given by me/us is true and correct to the best of my/our knowledge and belief and nothing has been concealed by me/us. I/we also understand that in case of incorrect information submitted by me/us, legal action may be taken against me/us.

2. I/we request that mutation in land records and partition of holding for the purpose of agriculture be made as per the information provided by me/us in this report and application.

Date…….
Place……

Signature
Name……
(Applicant/ Person making report)

Essential Enclosures:-

(1) Copy of khasra

(2) Copy of pre-mutation sketch (where applicable)

(3) Copy of proof of address of persons acquiring right or interest

(4) Copy of proof of identity of persons acquiring right or interest

(5) If applicant/person making report is other than the person acquiring right or interest, a letter of authority signed by the person acquiring right or interest along with proof of address and proof of identity of the applicant/person making report shall be furnished.

(6) In case of juristic person-

(1) a document establishing the identity of the juristic person such as PAN Card, GST registration number, CIN number issued by

the Registrar of Companies, Registration certificate issued by the registering authority such as Registrar of Firms and Societies, Registrar Public Trusts etc. or Bank Account passbook etc.; and

(2) a letter of authorization to act on behalf of such juristic person issued by competent body or person shall be attached.

(7) Copy of the documents specified in para 4 of the report above

(8) Copy of receipt of fee

(9) Particulars given in para 3(B) of the report above and consent signed by co-sharers.

Notes: (1) Self attested copies of the documents shall be attached with this Form.

(2) Proof of identity may be self attested copy of Aadhar Card or its equivalent, PAN Card, Voter ID, Passport, Driving License, Passbook of any Bank, or any Photo ID issued or certified by any Gazetted Officer of the State Government or the Central Government.

PART-II

ACKNOWLEDGMENT

To,

Shri/Smt./Ku…….
Son/Daughter/Wife of ……...
Address……

The report and application submitted in Part-I above is hereby acknowledged.

Date…… Seal
Place……

Name and designation of
Receiving Authority

Tahsil……
District……

FORM VI
(See rule 4)
Registering Officer's intimation of registered transactions, affecting land in Tahsil……District ……
period from …… to …….

S.No. in registration	Patwari halka No. / Sector No.	Name of village/ urban area in which the land is situate	Survey No./ block No./ plot No. affected by the transaction	Area affected by transaction (in hectare/ sq.mtr.)	Name, address and mobile phone number of the executor of the document	Name, address and mobile phone number of the person in whose favour the document is executed	Date of execution of the document	Nature of the document	Details of fee paid for mutation in land records	Remarks
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)

Place……
Date……

Seal

Signature
Registering Officer.....
Tahsil……..
District……..

FORM VII
(See Rule 5)

Register of reports of acquisition of rights or interests

Village/Urban area……..…..Patwari halka No/Sector No……..Tahsil……..District…….……

S. No.	Date of receipt of report under sub-section (1) of Section 109	Name and Father's/Mother's Husband's name, address and mobile phone number of the person reporting	Name and Father's/ Mother's/ Husband's/ Guardian's name, address and mobile phone number of the person acquiring right/interest	Particulars of land over which right/interest has been acquired/ renounced		Nature of acquisition of right / interest in land	Form I, II, III, IV or V (as the case may be)	Date on which intimation on sent to Tahsildar	Remarks
				Survey No./ Block No./Plot No.	Area (in hectare/ sq. mt.				
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)

FORM VIII

(See Rule 6)

Intimation by Patwari / Nagar Sarvekshak to Tahsildar under sub-section (2) of section 110 of the Code

Date…….

To,

Tahsildar/Additional Tahsildar/Naib Tahsildar……

Tahsil……..

District…….M.P.

Subject – Intimation of Acquisition of right / interest in land for mutation in land records under Sub-Section (2) of Section 110 of The Madhya Pradesh Land Revenue Code, 1959 (20 of 1959)

This is for your kind information the during the period from …… to ……. following reports have been made to me regarding acquisition of rights/ interests in land under sub-section (1) of Section 109 of the Code –

S. No.	Date of receipt of report under sub-section (1) of Section 109	Name and Father's/ Mother's/ Husband's name address and mobile phone number of the person reporting	Name and Father's/ Mother's/ Husband's/ Guardian's name, address and mobile phone number of the person acquiring right/interest	Particulars of land over which right/interest has been acquired/renounced			Nature of acquisition of right/ interest in land	Form I, II, III, IV or V (as the case may be)	Date on which intimation sent to Tahsildar	Remarks
				Name of village/ urban area	Survey No./ Block No./Plot No.	Area (in hectare/ sq. mt.				
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)

The forms and enclosures submitted by the person reporting are forwarded herewith for necessary action.

Date……..
Place…….
List of enclosures
1.

Name & Signature…….
Designation…….

FORM IX
(See Rule 7)
Notice in Revenue Cases

In the Court of
…….Tahsil……..District……..
Case no…….
…...……Applicant
Versus
…….Non applicant

To
Shri/Smt./Ku…….son/daughter/husband of ……...
Resident of ……Tahsil…… District……..

You are hereby informed that the aforesaid case shall be heard on (date) …..... at (time)……a.m./p.m. at (place)…… you may appear in this Court in person or by legal representative or by an advocate duly instructed and present your case. In case you fail to appear on the above mentioned day, the case will be heard and determined in your absence.

Enclosures:- Copy of report /applicant.

Date…… Seal Revenue Officer……..
Place……
Designation……

Endorsement no.1

Signature of Receiver……..
Name ……..
Mobile Phone Number……
(Relation if other than the addressee)

Endorsement no.2

Endorsement regarding service

Notice is served on the ……day of …… year …….. by me.

……..
Name and signature of process server

FORM X
(See Rule 7)

In the Court of
…….Tahsil……..District……..

Public Notice

Case no…….

It is hereby informed to all persons that the proceedings for mutation in land records as mentioned in the Schedule below is under consideration before this Court. Any person interested may appear on (date)…… at (time) ……...at (place) …….. before this Court either personally or through an advocate duly instructed or through a legal representative and state his objections in respect of the mutation under consideration. Objections received after the due date shall not be considered.

Schedule

Patwari halka no./sector no	Name of Village/ urban area	Survey No./Block No./Plot No.	Area (in hectare/ sq.mtr.)	Name and Father's/ Mother's/ Husband's name and full address of holder(s) as recorded in existing land records	Name and Father's/ Mother's/ Husband's name and full address of person(s), in whose favour the mutation is under consideration
(1)	(2)	(3)	(4)	(5)	(6)

Given under my hand and the seal of the Court, this ……day of ……..

Date…… Name of presiding officer……
Place…….. Seal Signature…….

FORM XI

(See Rule 9)

Quarterly report of the mutation cases specified in sub-section (7) of Section 110 of the Madhya Pradesh Land Revenue Code, 1959 (No 20 of 1959)
Position as on …….. (date)

Name of Court ……..
Tahsil…….. District ……..

Part-I: List of undisputed mutation cases pending beyond two months

S.No	Case number	Date of registration of the case	Names of the parties	Current status of the case	Period of pendency of case (in years & months)	Reasons for pendency
(1)	(2)	(3)	(4)	(5)	(6)	(7)
1						
2						

Part-II: List of disputed mutation cases pending beyond six months

S.No	Case number	Date of registration of the case	Names of the parties	Current status of the case	Period of pendency of case (in years & months)	Reasons for pendency
(1)	(2)	(3)	(4)	(5)	(6)	(7)
1						
2						

Date……
Place……..

Seal

Name of presiding officer……
Signature…….

By order and in the name of the Governor of Madhya Pradesh,
MUJEEBUR REHMAN KHAN, Dy. Secy.

NOTES OF CASES SECTION

Short Note
****(47)***
Before Mr. Justice G.S. Ahluwalia
W.P. No. 910/2017 (Gwalior) decided on 21 January, 2019

BALBEER SINGH GURJAR …Petitioner

Vs.

STATE OF M.P. & anr. …Respondents

(Alongwith W.P. No. 19653/2017)

A. Service Law – Departmental Enquiry – Second Charge Sheet – Maintainability **– Held – Subsequent charge sheet has not been issued on allegations similar to those which are part of first charge sheet, thus cannot be quashed on the ground of issuance of second chargesheet on similar allegations.**

क. सेवा विधि – विभागीय जांच – द्वितीय आरोप–पत्र – पोषणीयता – अभिनिर्धारित – पश्चात्वर्ती आरोप–पत्र उन समान अभिकथनों पर जारी नहीं किया गया है जो प्रथम आरोप–पत्र का भाग हैं, इसलिए द्वितीय आरोप–पत्र, समान अभिकथनों पर जारी किये जाने के आधार पर अभिखंडित नहीं किया जा सकता।

B. Service Law – Departmental Enquiry – Period of Abeyance **– Held – As an interim order this Court has directed proceedings to remain in abeyance – Further proceedings in both departmental enquiries cannot be kept in abeyance for an unlimited period and since the same has been kept in abeyance for a period two years but still criminal prosecution has not come to an end – Interim order vacated – Petitions dismissed.**

ख. सेवा विधि – विभागीय जांच – प्रास्थगन की अवधि – अभिनिर्धारित – एक अंतरिम आदेश के रूप में इस न्यायालय ने कार्यवाहियाँ प्रास्थगित रखने हेतु निदेशित किया है – दोनों विभागीय जांचों में आगे की कार्यवाहियों को असीमित अवधि तक प्रास्थगन में नहीं रखा जा सकता तथा चूंकि उक्त को दो वर्ष की अवधि से प्रास्थगन में रखा गया है परंतु अभी भी दाण्डिक अभियोजन समाप्त नहीं हुआ है – अंतरिम आदेश रद्द किया गया – याचिकाएँ खारिज।

Cases referred:

AIR 1999 SC 1416, (1987) 3 SCC 513, (2004) 7 SCC 442, (2005) 10 SCC 471, (2012) 13 SCC 142, (2014) 3 SCC 363, (2016) 9 SCC 491.

Anil Mishra, for the petitioner in both writ petitions.
Vivek Jain, G.A. for the State.

NOTES OF CASES SECTION

Short Note
****(48)***
Before Mr. Justice G.S. Ahluwalia
W.P. No. 5503/2015 (Gwalior) decided on 17 January, 2019

GLR REAL ESTATE PVT. LTD. …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

Mutation – Necessary Party **– Held – R-6 maintained a long and beautiful silence for 16 yrs. after partition proceedings had taken place, as a result of which third party rights have been created in favour of petitioner company who purchased the land and raised a residential colony and sold to various persons – R-6 filing appeal without impleading the petitioner company is not sustainable – Petitioner company (subsequent purchaser) is a necessary party – Impugned orders set aside – Petition disposed.**

नामांतरण – आवश्यक पक्षकार – अभिनिर्धारित – प्रत्यर्थी–6 ने विभाजन कार्यवाहियों के पश्चात् 16 वर्षों के लिए एक लंबा एवं सुंदर मौन बनाए रखा जिसके परिणामस्वरूप, याची कंपनी के पक्ष में तृतीय पक्षकार के अधिकार सृजित हो गये जिसने भूमि क्रय की और आवासीय कालोनी खड़ी कर विभिन्न व्यक्तियों को विक्रय की थी – प्रत्यर्थी–6 द्वारा याची कंपनी को पक्षकार बनाए बिना प्रस्तुत की गई अपील कायम रखने योग्य नहीं – याची कंपनी (पश्चात्वर्ती क्रेता) एक आवश्यक पक्षकार है – आक्षेपित आदेश अपास्त किये गये – याचिका निराकृत।

Cases referred:

(2009) 14 SCC 338, (2007) 10 SCC 88, (1962) 1 SCR 753, (2003) 2 SCC 107, (2007) 9 SCC 593, (2009) 2 SCC 630, (2012) 11 SCC 651, (1998) 8 SCC 1.

Anoop Chaudhary with *Deepak Chandna*, for the petitioner.
Harish Dixit, G.A. for the respondent Nos. 1 to 4/State.
Arvind Dudawat, for the respondent No. 5.
Prashant Sharma, for the respondent No. 6.
None, for the other respondents.

Short Note
****(49)***
Before Mr. Justice Vivek Rusia
W.P. No. 13075/2018 (s) (Indore) decided on 15 April, 2019

HARIDAS BAIRAGI …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

Service Law – Fundamental Rule, 54-B – Suspension – Salary & Allowances – Opportunity of Hearing **– Held – As per GAD Circular of State,**

if suspended employee is imposed a minor penalty, then suspension was not warranted and employee is entitled to receive full pay and allowances for suspension period – In instant case, minor penalty was imposed while concluding departmental enquiry against petitioner – Suspension was found to be wholly unjustified in terms of FR-54-B – No opportunity for making representation was given to petitioner before passing impugned order – Respondent directed to pay full salary and allowances to petitioner for suspension period – Petition partly allowed.

सेवा विधि – मूलभूत नियम, 54–बी – निलंबन – वेतन/सम्बलम व भत्ते – सुनवाई का अवसर – अभिनिर्धारित – राज्य के सामान्य प्रशासन विभाग के परिपत्र के अनुसार, यदि निलंबित कर्मचारी पर लघु शास्ति अधिरोपित की गई है, तब निलंबन अनावश्यक था तथा कर्मचारी, निलंबन अवधि के पूर्ण वेतन और भत्ते प्राप्त करने के लिए हकदार है – वर्तमान प्रकरण में, याची के विरूद्ध विभागीय जांच समाप्त करते हुए लघु शास्ति अधिरोपित की गई थी – मूलभूत नियम–54–बी के निबंधनों में, निलंबन संपूर्णतः अन्यायपूर्ण पाया गया – आक्षेपित आदेश पारित करने से पूर्व याची को अभ्यावेदन करने का कोई अवसर नहीं दिया गया था – प्रत्यर्थी को याची की निलंबन अवधि के पूर्ण सम्बलम एवं भत्तों का भुगतान करने के लिए निदेशित किया गया – याचिका अंशतः मंजूर।

Cases referred:

2004 (2) MPLJ Pg.11, 2004 (1) MPHT 22.

L.C. Patne, for the petitioner.
Amit Pal, G.A. for the respondents/State.

Short Note
****(50)***
Before Mr. Justice Rajendra Kumar Srivastava
Cr.R. No. 1006/2019 (Jabalpur) decided on 1 May, 2019

MANISH BARKHANE …Applicant

Vs.

STATE OF M.P. …Non-applicant

Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016), Section 94 and Juvenile Justice (Care and Protection of Children) Model Rules, 2016, Rule 19 – Determination of Age – Considerations **– Held – Age or date of birth of a child as per the School Admission Register will prevail over the matriculation or equivalent certificate.**

किशोर न्याय (बालकों की देखरेख और संरक्षण) अधिनियम, 2015 (2016 का 2), धारा 94 एवं किशोर न्याय (बालकों की देखरेख और संरक्षण) आदर्श नियम, 2016, नियम 19 – आयु का अवधारण – विचार किया जाना – अभिनिर्धारित – शाला प्रवेश रजिस्टर के अनुसार बालक की आयु अथवा जन्म तिथि, मैट्रिकुलेशन या उसके समतुल्य प्रमाण–पत्र पर अभिभावी होगी।

Cases referred:

AIR 2013 SC 553, AIR 2013 SC 1020, 2012 CRLJ (NOC) 118.

A.D. Mishra, for the applicant.
Arpit Tiwari, G.A. for the non-applicant/State.

Short Note
****(51)***
Before Mr. Justice Vivek Rusia
W.P. No. 14968/2018 (Indore) decided on 1 May, 2019

SANJAY KUMAR JOSHI …Petitioner

Vs.

THE COMMISSIONER, CUSTOMS,
CENTRAL EXCISE, INDORE …Respondent

***Customs Brokers Licensing Regulations, 2013, Regulation 6(1) & 7(1) and Customs House Agent Licensing Regulations, 2004, Regulation 8 – Grant of Licence – Eligibility & Procedur*e – Held – As per proviso to Regulation 6(1), applicant who already passed the examination under Regulation 2004 is not required to appear for any further examination – Petitioner already filed application and passed the examination under Regulation of 2004, he is not required to submit application for grant of licence under Regulation 7(1) of Regulation 2013 – No period of validity of examinations under Regulation of 2004 – Respondents wrongly interpreted that there is two months period for submitting application after declaration of result – Commissioner liable to grant licence within 2 months from date of deposit of fee by applicant who has already passed the examination – Respondent directed to issue Licence to petitioner – Impugned order quashed – Petition allowed.**

कस्टम्स ब्रोकर्स लाइसेंसिंग रेग्युलेशन्स, 2013, विनियम 6(1) व 7(1) एवं कस्टम्स हाउस एजेंट लाइसेंसिंग रेग्युलेशन्स, 2004, विनियम 8 – अनुज्ञप्ति प्रदान की जाना – पात्रता व प्रक्रिया – अभिनिर्धारित – विनियम 6(1) के परंतुक के अनुसार, आवेदक जो कि पहले ही 2004 विनियम के अंतर्गत परीक्षा उत्तीर्ण कर चुका है उससे आगे किसी परीक्षा के लिए उपस्थित होना अपेक्षित नहीं है – याची पहले ही आवेदन प्रस्तुत कर चुका है तथा 2004 के विनियम के अंतर्गत परीक्षा उत्तीर्ण कर चुका है, उससे विनियम 2013 के विनियमन 7(1) के अंतर्गत अनुज्ञप्ति प्रदान करने के लिए आवेदन जमा करना अपेक्षित नहीं है– 2004 के विनियम के अंतर्गत परीक्षाओं की विधिमान्यता की कोई अवधि नहीं – प्रत्यर्थीगण ने गलत रूप से यह निर्वचन किया कि परिणाम की घोषणा के पश्चात् आवेदन जमा करने हेतु दो माह की अवधि है – आयुक्त, आवेदक द्वारा जिसने पहले ही परीक्षा उत्तीर्ण कर ली है फीस जमा करने की तिथि से 2 माह के भीतर अनुज्ञप्ति प्रदान हेतु दायी है – प्रत्यर्थी को, याची को अनुज्ञप्ति जारी करने हेतु निदेशित किया गया – आक्षेपित आदेश अभिखंडित – याचिका मंजूर।

Alok Barthwal, for the petitioner.
Prasanna Prasad, for the respondents.

I.L.R. [2019] M.P. 1337 (SC)
SUPREME COURT OF INDIA

Before Mr. Justice L. Nageswara Rao & Ms. Justice Indu Malhotra

Cr.A. No. 1190/2009 decided on 19 February, 2019

STATE OF M.P. …Appellant

Vs.

HARJEET SINGH & anr. …Respondents

A. Penal Code (45 of 1860), Section 307 & 324 – Modification/ Reduction in Conviction & Sentence – Appreciation of Evidence – **Respondents convicted u/S 307 IPC by Trial Court which was further reduced by High Court in appeal to one u/S 324 IPC – Held – R-1 inflicted four injuries to victim by using knife, causing injury in his lungs which resulted in blood seeping into lungs – Such injury cannot be said to be made on "unimportant part" of body – The act of stabbing a person with sharp knife near his vital organs would ordinarily lead to death of victim – High Court erred in reducing the conviction and sentence of R-1 – Order of Trial Court convicting R-1 u/S 307 is restored – Appeal partly allowed.**

(Paras 5.1, 5.3, 5.4, 5.5 & 6)

क. दण्ड संहिता (1860 का 45), धारा 307 व 324 – दोषसिद्धि व दण्डादेश में उपांतरण/घटाया जाना – साक्ष्य का मूल्यांकन – प्रत्यर्थीगण को विचारण न्यायालय द्वारा भा.दं.सं. की धारा 307 के अंतर्गत दोषसिद्ध किया गया जिसे आगे अपील में उच्च न्यायालय द्वारा घटाकर भा.दं.सं. की धारा 324 में उपांतरित किया गया था – अभिनिर्धारित – प्रत्यर्थी क्र. 1 ने चाकू का प्रयोग करते हुए पीड़ित को चार चोटें पहुंचाई, जिससे उसके फेफड़ों में चोट कारित हुई जिसके परिणामस्वरूप फेफड़ों में रक्त रिसाव हुआ – उक्त चोट शरीर के ''महत्वहीन भाग'' पर पहुंचाई जाना नहीं कहा जा सकता – एक व्यक्ति के महत्वपूर्ण अंगों के पास धारदार चाकू भौंकने के कृत्य से साधारणतया पीड़ित की मृत्यु हो जाएगी – उच्च न्यायालय ने प्रत्यर्थी क्र.1 की दोषसिद्धि एवं दण्डादेश कम करके त्रुटि की है – धारा 307 के अंतर्गत प्रत्यर्थी क्र. 1 को दोषसिद्ध करने का विचारण न्यायालय का आदेश पुनः स्थापित किया गया – अपील अंशतः मंजूर।

B. Penal Code (45 of 1860), Section 307 – Ingredients – Motive & Intention **– Held – If assailant acts with intention or knowledge that such action might cause death and hurt is caused, then provisions of section 307 would be applicable – No requirement for injury to be on a "vital part" of body, merely causing "hurt" is sufficient to attract Section 307 IPC – In present case, multiple blows inflicted by R-1 proves his intention – Motive was also established – Ingredients of Section 307 made out – Prosecution successfully proved that R-1 attempted to murder complainant.**

(Paras 5.6 to 5.9)

ख. दण्ड संहिता (1860 का 45), धारा 307 – घटक – हेतु व आशय – अभिनिर्धारित – यदि हमलावर इस आशय अथवा ज्ञान के साथ कार्य करता है कि उक्त कार्य से मृत्यु एवं उपहति कारित हो सकती है, तो धारा 307 के उपबंध लागू होंगे – चोट का शरीर के ''महत्वपूर्ण अंग'' पर होने की आवश्यकता नहीं, भा.दं.सं. की धारा 307 को आकर्षित करने हेतु मात्र ''उपहति'' कारित होना पर्याप्त है – वर्तमान प्रकरण में, प्रत्यर्थी क्र. 1 द्वारा पहुंचाये गये अनेक वार उसका आशय साबित करते हैं – हेतु भी स्थापित हुआ था – धारा 307 के घटक मौजूद – अभियोजन ने सफलतापूर्वक साबित किया कि प्रत्यर्थी क्र. 1 ने परिवादी की हत्या करने का प्रयत्न किया।

Cases referred:

(2004) 9 SCC 27, (2013) 14 SCC 116, (2015) 11 SCC 366, Cr. A. No. 1589/2018 decided on 04.02.2019.

J U D G M E N T

The Judgment of the Court was delivered by :
INDU MALHOTRA, J. :- The present Criminal Appeal has been filed by the State of Madhya Pradesh against the judgment and order dated 03.01.2006 passed by the Gwalior Bench of the Madhya Pradesh High Court, in Criminal Appeal No. 657/1998. The Criminal Appeal was filed by the Respondents against their conviction under Section 307 of the Indian Penal Code (hereinafter referred to as "Section 307"). The High Court reduced the conviction of the Respondents from Section 307 to Section 324 of the Indian Penal Code (hereinafter referred to as "Section 324").

2. The facts of the case, briefly stated, are as under:

2.1 The case of the Complainant - Sukhdev, as recorded in the F.I.R., is that on 12.11.1997 the Complainant-Sukhdev along with his brothers - Balveer Yadav and Deshraj Yadav, had gone to the District Court, Ashok Nagar to attend the hearing of their case against Accused/Respondent No.1 - Harjeet Singh. After the hearing, at around noon, the Complainant - Sukhdev and his brothers crossed the road, and were standing in front of the Jail, when Ramji Lal - Accused/Respondent No. 2 alongwith an unidentified assailant called Sardar caught hold of Balveer Yadav and Deshraj Yadav. The Accused /Respondent No. 1 - Harjeet Singh grabbed the Complainant - Sukhdev, and stabbed him several times with a knife, inflicting blows on the chest, scapula, back, and hips. Accused/Respondent Nos. 1 and 2, alongwith Sardar ran away from the spot. The Complainant - Sukhdev further stated that he would be able to identify Harjeet Singh, and the two assailants once he sees them.

2.2 Immediately after the assault on 12.11.1997, the Complainant - Sukhdev was admitted to the Civil Hospital, Ashok Nagar for treatment.

2.3 The medical examination of the Complainant - Sukhdev was conducted by Dr. M. Bhagat -P.W.6 at the Civil Hospital, Ashok Nagar, which recorded the following injuries :

(i) Stab Wound - 3.5 x 1 cm - deep in the chest cavity, over the left side of the chest.

(ii) Spindle shaped incised wound - 3 x 2 cm - muscle deep, present on the upper region of the right buttocks.

(iii) Stab Wound - 2 x 1 cm - over sub-scapula region, left side. Bleeding was present.

(iv) Stab Wound - 1 x 1 cm - over illeal region of hip, left side. Bleeding was present.

The medical report further stated that the injuries were caused by a sharp-edged, pointed object.

2.4 The Complainant - Sukhdev was referred to the District Hospital, Guna wherein X-Ray of his chest region was conducted by P.W. 8 - Dr. Raghuvanshi. The Report states that there was *"haziness in lungs, left side of chest, present due to trauma of chest"*.

Dr. Raghuvanshi - P.W. 8 stated in his deposition that the lungs of the Complainant - Sukhdev suffered injury, which resulted in blood seeping in the lungs, leading to haziness in the X-Ray image.

2.5 On 24.11.1997, the Accused /Respondent Nos. 1 and 2 were arrested by the Police. The weapon of offence i.e. the knife allegedly used by Accused /Respondent No. 1 was recovered from the bushes next to the bridge, on the statement given by Accused /Respondent No. 1.

2.6 The Spot Map of the crime scene was prepared, samples of blood-stained soil, and ordinary soil, were recovered from the scene of the crime.

2.7 The Accused /Respondent No. 1 was charged under Section 307, while Accused /Respondent No. 2 was charged under Section 307 read with Section 34 of the I.P.C.

2.8 The case was registered as Case No. 10/98 before the First Addl. Sessions Judge, Ashok Nagar, Guna District, Madhya Pradesh (Sessions Court).

2.9 The Sessions Court *vide* Judgment dated 30.11.1998, found Accused /Respondent Nos. 1 and 2 guilty of the offence of 'attempt to murder'. The findings of the Sessions Court were as follows:

i. The Complainant - Sukhdev, and his brothers - Deshraj Yadav and Balveer Yadav who were eye-witnesses of the crime, and were present at the scene of occurrence, and were examined by the Court as P.W.s 2, 4, and 5 respectively. Their evidence was held to be reliable, and was corroborated by the examination of P.W. 3 - an independent witness who was an Advocate. P.W. 3 appeared before the Court, and deposed that on 12.11.1997 he heard a commotion outside the Court. On reaching the spot, he found the Complainant - Sukhdev (P.W. 2) lying in a pool of blood. On further inquiry, he was told that the Accused/ Respondent No.1 -Harjeet Singh had stabbed the Complainant - Sukhdev (P.W. 2) multiple times.

ii. The medical evidence was held to be sufficient to prove that the injuries inflicted by Accused/Respondent No. 1 upon the Complainant - Sukhdev (P.W. 2) could be fatal.

iii. With respect to Accused /Respondent No. 2 - Ramji Lal, the F.I.R. stated that the Accused /Respondent No. 2 along with an unidentified Sardar held the brothers of the Complainant (P.W.s 4 and 5), while the Accused /Respondent No. 1 stabbed the Complainant - Sukhdev (P.W. 2) multiple times.

iv. During the trial, the Complainant - Sukhdev (P.W. 2) deposed that Accused/Respondent No. 2 - Ramji Lal grabbed him when Accused/Respondent No. 1 - Harjeet Singh stabbed him multiple times.

v. The Sessions Court held the prosecution had proved the case beyond reasonable doubt.

It was held that the Accused/ Respondent No. 2 would be equally guilty. The common intention of Accused/Respondent No. 2 was proved by the assistance provided by him to Accused /Respondent No. 1, in committing the offence.

vi. The Sessions Court convicted the Accused /Respondent No. 1

under Section 307, sentencing him to 5 years R.I. along with a Fine of Rs. 1000/-.

Accused /Respondent No. 2 was convicted under Section 307 read with Section 34 I.P.C. and sentenced to 5 years R.I. along with a fine of Rs. 1000/-.

2.10 Both the Accused /Respondents filed a common appeal to challenge their conviction by the judgment dated 30.11.1998 before the Madhya Pradesh High Court being Criminal Appeal No. 657/1998.

2.11 The Madhya Pradesh High Court *vide* Impugned Judgment dated 03.01.2006 partly allowed the Appeal filed by the Accused / Respondents. It was held that the Complainant Sukhdev (P.W. 2) had nowhere stated in his deposition/evidence that the intention of the Accused/ Respondents was to commit murder.

The High Court held that the Complainant - Sukhdev (P.W. 2) suffered four injuries. One of the injuries was on the left side of the chest. The depth of this injury was upto the cavity over the left side of the chest, but the lung was not affected. The other three injuries sustained by the Complainant - Sukhdev, are on the back, and the hips. The Accused /Respondents having an intention to commit murder would never cause injuries over such "unimportant" parts of the body.

It was also noted that the knife by which the injuries were allegedly inflicted had a blade of five fingers which could not be more than four inches.

With regard to the liability of the Accused /Respondent No. 2 - Ramji Lal, the High Court held that there appears to be lack of consistency in the statements of the Complainant - Sukhdev and his two brothers who were eye-witnesses :

a. The first version of the Complainant - Sukhdev (P.W. 2) which has been written in the *Dehati Nalsi*, is that the Accused /Respondent No. 2 - Ramji Lal, and one unknown Sardar both caught hold of his two brothers. It is not mentioned in this document that Accused /Respondent No. 2 - Ramji Lal or the other unknown Sardar, caught hold of him at the time of the incident. Conversely, in paragraph 2 of his statement, the Complainant - Sukhdev has stated that he was held

by Accused /Respondent No. 2 - Ramji Lal at the time of the incident, and in paragraph 5 he has stated that after sustaining the injuries of the knife, Accused/ Respondent No. 2 caught hold of his brother Deshraj (P.W. 4).

b. On the other hand, Deshraj Yadav (P.W. 4) - the first brother of the Complainant - Sukhdev, has stated that he was being held by one unknown Sardar and not by Accused /Respondent No. 2.

c. Balveer Yadav (P.W. 5) - the second brother of the Complainant - Sukhdev, has stated that he was being held by Accused/Respondent No. 2 - Ramji Lal and his brother was held by one unknown Sardar.

The High Court found that there was no consistency in the deposition of P.Ws 2, 4, and 5 read with the F.I.R. Considering these circumstances, it was held that there could be no presumption that Accused/ Respondent No. 2 - Ramji Lal had committed any act having a common intention with the Accused/ Respondent No. 1 - Harjeet Singh, in causing the injuries to the Complainant - Sukhdev (P.W. 2).

The mere fact that Accused /Respondent No. 2 had accompanied Accused/Respondent No.1 cannot raise the presumption of having common intention.

It was further held that it was not justifiable to conclude that the Accused/Respondents had any intention to commit murder, or cause such injury which could have been deemed as sufficient to cause death in the ordinary course of nature. At most, the act of causing the injuries could be held punishable under Section 324, I.P.C. as punishment for voluntarily causing simple hurt.

The High Court converted the conviction of Accused /Respondent No. 1 from Section 307 to Section 324 I.P.C. and reduced the sentence to one year R.I. and a Fine of Rs. 1,000. The period already undergone would be adjusted in the sentence awarded to him.

Accused /Respondent No. 2 was acquitted and his conviction from the charge of Section 307 was set-aside.

3. The State filed the present Special Leave Petition, against the Judgment and Order of the Madhya Pradesh High Court dated 03.01.2006. Special leave to appeal was granted *vide* Order dated 08.07.2009.

4. We have heard learned Counsel for both the parties, considered the submissions, and perused the evidence record.

5. FINDINGS AND ANALYSIS

5.1 In the present case, a perusal of the facts and the record clearly indicate that the prosecution has proved beyond reasonable doubt that Accused/Respondent No. 1 - Harjeet Singh had inflicted four injuries, on the Complainant by using a knife.

The oral testimonies of Deshraj Yadav (P.W. 4) and Balveer Yadav (P.W. 5) - the brothers of the Complainant - Sukhdev who were eye witnesses, stood corroborated by the medical evidence.

5.2 The prosecution also examined an independent witness - Advocate (P.W. 3), who had come to the Court, and after hearing the commotion, reached the site of occurrence, where he found the Complainant - Sukhdev lying in a pool of blood along with his brothers - P.W.s 4 and 5. The independent witness - Advocate (P.W. 3) deposed that on enquiring further about the matter, he was informed by P.W.s 4 and 5 - the brothers of the complainant - Sukhdev, that Accused /Respondent No. 1 - Harjeet Singh had attacked and stabbed the Complainant.

5.3 Dr. Raghuvanshi - the Radiologist (P.W. 8) has stated in his deposition that the injury caused to the Complainant - Sukhdev in the chest had resulted in blood seeping into the lungs. The Medical Report records that the first stab wound was inflicted on the chest of the Complainant, which injured his lung, and caused bleeding. Hence, the finding of the High Court

that the stab wound on the chest remained upto the depth of the cavity over left side of the chest and the lungs were not affected, is factually incorrect, and contrary to the medical record.

5.4 The Accused /Respondent No. 1 inflicted other stab wounds on the scapula, which were bleeding even at the time when the Complainant -Sukhdev (P.W. 2) was examined at the Hospital. There was also a stab wound present on the upper region of the right buttock, and another one over the illeal region of the left hip which was bleeding at the time of the medical examination.

The injuries inflicted on the Complainant - Sukhdev (P.W. 2) have been corroborated by the medical evidence on the basis of the medical reports and the depositions of Dr. Bhagat (P.W. 6) and Dr. Raghuvanshi (P.W. 8).

Dr. Raghuvanshi (P.W. 8) has stated that the blood seeping in the left lung of the Complainant - Sukhdev (P.W. 2), was due to the injury sustained on the chest. Such an injury could not be considered to be an injury on an "unimportant part" of the body.

The findings of the High Court that the injuries inflicted were on "unimportant parts" of the Complainant's body, is erroneous.

5.5 The act of stabbing a person with a sharp knife, which is a dangerous weapon, near his vital organs, would ordinarily lead to the death of the victim.

The weapon of offence was a 4-inch long knife which is a dangerous weapon. The Accused / Respondent No. 1 had assaulted the Complainant with the said knife, and inflicted multiple injuries on his chest, scapula, back, and buttocks. The multiple blows inflicted by the Accused /Respondent No. 1 would prove the intention of causing bodily injury likely to cause the death of the victim. Stabbing a person with a knife, near his vital organs would in most circumstances lead to the death of the victim, thereby falling squarely within the meaning of Section 307.

5.6 Section 307 uses the term "hurt" which has been explained in Section 319, I.P.C.; and not "grievous hurt" within the meaning of Section 320 I.P.C.

If a person causes hurt with the intention or knowledge that he may cause death, it would attract Section 307.

This Court in *R. Prakash v. State of Karnataka*[1], held that :

> *"...The first blow was on a vital part, that is on the temporal region. Even though other blows were on non-vital parts, that does not take away the rigor of Section 307 IPC..... It is sufficient to justify a conviction under Section 307 if there is present an intent coupled with some overt act in execution thereof. It is not essential that bodily injury capable of causing death should have been inflicted. Although the nature of injury actually caused may often give considerable assistance in coming to a finding as to the intention of the accused, such intention may also be deduced from other circumstances, and may even, in some cases, be ascertained without any reference at all to actual wounds. The Sections makes a distinction between the act of the accused and its result, if any. The Court has to see whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the Section."*
>
> (emphasis supplied)

If the assailant acts with the intention or knowledge that such action might cause death, and hurt is caused, then the provisions of Section 307 I.P.C. would be applicable. There is no requirement for the injury to be on a "vital part" of the body, merely causing 'hurt' is sufficient to attract S. 307 I.P.C.[2]

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[1](2004) 9 SCC 27

[2] *State of Madhya Pradesh v. Mohan & Ors,* (2013) 14 SCC 116

This Court in *Jage Ram v. State of Haryana*[3] held that:

> *"12. For the purpose of conviction under Section 307 IPC, prosecution has to establish (i) the intention to commit murder and (ii) the act done by the accused. The burden is on the prosecution that accused had attempted to commit the murder of the prosecution witness. Whether the accused person intended to commit murder of another person would depend upon the facts and circumstances of each case. To justify a conviction under Section 307 IPC, it is not essential that fatal injury capable of causing death should have been caused. Although the nature of injury actually caused may be of assistance in coming to a finding as to the intention of the accused, such intention may also be adduced from other circumstances. The intention of the accused is to be gathered from the circumstances like the nature of the weapon used, words used by the accused at the time of the incident, motive of the accused, parts of the body where the injury was caused and the nature of injury and severity of the blows given etc."*
>
> (emphasis supplied)

This Court in the recent decision of *State of M.P. v. Kanha @ Omprakash*[4] held that:

> *"The above judgements of this Court lead us to the conclusion that proof of grievous or life-threatening hurt is not a sine qua non for the offence under Section 307 of the Penal Code. The intention of the accused can be ascertained from the actual injury, if any, as well as from surrounding circumstances. Among other things, the nature of the weapon used and*

[3](2015) 11 SCC 366
[4]Criminal Appeal No. 1589/2018, decided on 04.02.2019.

the severity of the blows inflicted can be considered to infer intent."

(emphasis supplied)

5.7 In view of the above-mentioned findings, it is evident that the ingredients of Section 307 have been made out, as the intention of the Accused /Respondent No. 1 can be ascertained clearly from his conduct, and the circumstances surrounding the offence.

5.8 In the Impugned Judgment, the High Court incorrectly held that the Prosecution has been unable to prove that the Accused /Respondent No. 1 had the intention to commit murder of the Complainant. The motive of assault by the Accused/ Respondent No. 1 on the Complainant - Sukhdev (P.W. 2) was clearly established by the Prosecution, since there was an existing dispute which was the subject matter of a court case.

5.9 It is evident from the evidence adduced before the Court, and the circumstances surrounding the case, that the prosecution has been able to prove the case against Accused/Respondent No. 1 beyond reasonable doubt. We find that the prosecution has successfully proved that the Accused /Respondent No. 1 - Harjeet Singh had attempted to murder the Complainant - Sukhdeo and the requirements of Section 307 are made out from the ocular evidence which are corroborated by the medical evidence.

5.10 In view of the above-mentioned discussion, the High Court was in error in reducing the sentence of Accused/ Respondent No. 1 - Harjeet Singh from Section 307 I.P.C. to Section 324 I.P.C., and sentencing him to 1 year R.I. along with Fine of Rs. 1,000.

6. The present Criminal Appeal is partially allowed. The judgment of the High Court *qua* Accused /Respondent No. 1, is set-aside, and the sentence awarded to him by the Sessions Judge *vide* Judgment dated 30.11.1998 is restored. The Accused /Respondent No. 1 is directed to undergo the remainder of the 5 year Sentence awarded by the Sessions Court, and surrender before the Sessions Court, Ashok Nagar, Guna, M.P. within 2 weeks from the date of this Judgment.

7. In so far as the case against Accused /Respondent No. 2 - Ramji Lal is concerned; the prosecution has not been able to prove beyond reasonable doubt the charge under Section 307 r. w. Section 34 I.P.C. The High Court has rightly held that there is lack of consistency in the deposition of the Prosecution witnesses with respect to the role of the Accused /Respondent No. 2 - Ramji Lal.

We affirm the judgment of the High Court *qua* Accused No. 2, and confirm the Order of acquittal passed in his favour on 03.01.2006.

The Criminal Appeal along with all pending Applications, if any, are disposed of in the above terms.

Ordered accordingly.

Order accordingly

I.L.R. [2019] M.P. 1348 (SC)
SUPREME COURT OF INDIA
Before Mr. Justice Abhay Manohar Sapre &
Mr. Justice Dinesh Maheshwari
Cr.A. No. 319/2019 decided on 20 February, 2019

STATE OF M.P. …Appellant

Vs.

SURESH …Respondent

***A. Penal Code (45 of 1860), Section 304 Part II – Quantum of Sentence* – Trial Court convicted appellant u/S 304 Part II IPC and sentenced 3 years RI for assaulting and killing his own father – High Court in appeal confirmed the conviction but modified the sentence to period already undergone i.e. 3 months and 21 days – Held – In such a case, there was no further scope for leniency on question of punishment that what had already been shown by trial Court – High Court was not justified in reducing sentence to an abysmally inadequate period of less than 4 months – Impugned judgment of High Court is set aside and that of trial Court is restored. (Para 19 & 22)**

क. दण्ड संहिता (1860 का 45), धारा 304 भाग II – दण्डादेश की मात्रा – विचारण न्यायालय ने अपीलार्थी को उसके स्वयं के पिता पर हमला करने एवं हत्या करने हेतु धारा 304 भाग II भा.दं.सं. के अंतर्गत दोषसिद्ध किया तथा 3 वर्ष सश्रम कारावास से दण्डादिष्ट किया – उच्च न्यायालय ने अपील में दोषसिद्धि की संपुष्टि की किंतु पहले ही भुगताई गई अवधि अर्थात् 3 माह 21 दिन, के लिए दण्डादेश उपांतरित किया – अभिनिर्धारित – ऐसे प्रकरण में, दण्ड के प्रश्न पर उदारता की कोई अतिरिक्त गुंजाईश नहीं जो कि पहले ही विचारण न्यायालय द्वारा दर्शाई गई थी – दण्डादेश को 4 माह से कम की अत्याधिक रूप से अपर्याप्त अवधि तक घटाना उच्च न्यायालय के लिए न्यायोचित नहीं

था – उच्च न्यायालय का आक्षेपित निर्णय अपास्त एवं विचारण न्यायालय के निर्णय को पुरःस्थापित किया गया।

B. Criminal Practice – Quantum of Sentence – Duty of Court – **Held – Awarding of just and adequate punishment to wrong doer in case of proven crime remains a part of duty of Court – Punishment to be awarded, has to be commensurate with gravity of crime as also with relevant facts and attending circumstances. (Para 14)**

ख. दाण्डिक पद्धति – दण्डादेश की मात्रा – न्यायालय का कर्तव्य – अभिनिर्धारित – अपराध सिद्ध होने के प्रकरण में दोषी को न्यायसंगत एवं पर्याप्त दण्ड प्रदान करना, न्यायालय के कर्तव्य का हिस्सा रहता है – प्रदान किया गया दण्ड, अपराध की गंभीरता के साथ सुसंगत तथ्यों एवं उपस्थित परिस्थितियों के साथ अनुरूप होना चाहिए।

Cases referred:

AIR 1953 SC 131, (2012) 2 SCC 648, (1998) 9 SCC 319, (2003) 8 SCC 13, (2004) 4 SCC 75, (2000) 5 SCC 82, (2005) 5 SCC 554, (1996) 2 SCC 175.

J U D G M E N T

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

2. In this appeal, the appellant-State of Madhya Pradesh has called in question the judgment and order dated 27.11.2012 in Criminal Appeal No. 260 of 1998 whereby, the High Court of Madhya Pradesh, even while upholding the conviction of accused (respondent herein) for the offence punishable under Section 304 Part II of the Indian Penal Code ('IPC'), has modified the sentence of 3 years' rigours imprisonment as awarded by the Trial Court to that of the period already undergone i.e., 3 months and 21 days.

3. The only question calling for determination in this appeal is: As to whether, in the given set of facts and circumstances, the High Court was justified in interfering with the punishment awarded by the Trial Court by reducing the same to the period of imprisonment already undergone?

4. The background aspects of the case, so far relevant for the question at hand could be noticed as follows: The prosecution case had been that on 13.05.1996, at about 4:30 p.m., the respondent assaulted his father Tulsiram with a blunt object causing fracture on the parietal region of skull; and the same night, victim succumbed to the injury at Betual Hospital. On the basis of the information received from the hospital that the deceased Tulsiram was brought to the hospital by the respondent Suresh in unconscious condition, Marg Information No. 0/30/96 was registered under section 174 Cr.P.C. However, when it was noticed from the statements of PW-3 Sawalbai, PW-6 Basanti Bai and PW-10 Sarpach Sukhlal that the respondent was seen hitting his father, he was arrested on

20.05.1996 and FIR in Crime No. 120/1996 (Ex. P-19) came to be registered at police station, Amla. After due investigation, the respondent was charge-sheeted for the offences under Sections 201 and 302 IPC.

5. In trial, the prosecution, *inter alia*, relied on the testimony of PW-3 Smt. Sawalbai who stated that while working in a field near the place of incident, she had seen the respondent assaulting his father with a lathi (wooden log). PW-2 Babulal stated that upon hearing the cries of PW-3, he saw the accused assaulting someone; he reached the spot and found that the injured person was the father of accused; and he prevented the accused from further assaulting his father. PW-4 Dinesh alias Mathu corroborated the testimonies of PW-2 and PW-3. On the other hand, the accused-respondent attempted to suggest that his father sustained injury when he fell from the roof while putting up *khapra*.

6. On appreciation of evidence, the Trial Court rejected the defence version and found it proved beyond reasonable doubt that the respondent did cause the fatal injury in question. However, the Trial Court proceeded to hold that the act of the accused-respondent had been of culpable homicide not amounting to murder and he was guilty of the offence punishable under Section 304 Part II IPC. The Trial Court was of the view that while causing injury to the head of the deceased, the accused-respondent knew that his act was likely to cause death but he had no such criminal intention as defined in Section 300 IPC and hence, he was not guilty of the offence of murder under Section 302 IPC. The Trial Court further found that the accused furnished a wrong information about accidental injury to the victim so as to save himself from legal punishment and hence, he was also guilty of the offence under Section 201 IPC. However, for the reason that the accused stood convicted for the main offence, the Trial Court chose not to convict him for the offence under Section 201 IPC with reference to the decision of this Court in *Kalawati v. State of Himachal Pradesh*: AIR 1953 SC 131.

7. Having thus convicted the accused-respondent for the offence under Section 304 Part II IPC, the Trial Court found it just and proper to award him the punishment of 3 years' rigorous imprisonment while also observing that the period of detention already undergone (from 20.05.1996 to 09.09.1996) would be set off against the term of imprisonment imposed on him.

8. In appeal by the accused, the High Court of Madhya Pradesh, in its impugned judgment and order dated 27.11.2012, found no reason to consider interference in the findings recorded by the Trial Court as regards conviction for the offence under Section 304 Part II IPC but, on the question of punishment, proceeded to reduce the sentence of rigorous imprisonment from the period of 3 years to that of the period already undergone i.e., 3 months and 21 days. The relevant part of the order passed by the High Court, carrying the reasons for reduction of sentence, reads as under:

> *"5. The incident had taken place on 13.5.1996. From the perusal of the statement of eye-witnesses Babulal (PW-2), Sawla Bai (PW-3), Dinesh (PW-4) it seems that the incident had taken place at the spur of the moment. The appellant at the time of the incident was a young man aged 26 years. The appellant himself took his father namely Tulsiram to the hospital. The appellant has remained in jail for a period of three months and twenty one days i.e. from 20.05.1996. In the facts and circumstances of the case and taking into account the period which has elapsed, no useful purpose would be served in sending appellant back to jail, I therefore set aside the jail sentence awarded to the appellant under Section 304 Part II of the Indian Penal Code and instead award the sentence to the appellant for a period of imprisonment already undergone by him."*

9. Assailing the order aforesaid, learned counsel for the appellant-State has strenuously argued that the High Court has modified and reduced the sentence awarded by the Trial Court without any cogent reason and without any justification. The learned counsel would submit that the High Court has failed to appreciate the nature and gravity of the offence committed by the respondent that resulted in the death of his father and has argued for restoration of the order of the Trial Court, while relying on the decision in *Alister Anthony Pareira v. State of Maharashtra*: (2012) 2 SCC 648 wherein, this Court has re-emphasised on the principle of proportionality in the determination of sentence for an offence. *Per contra*, the learned counsel appearing for the respondent-accused has supported the impugned order with the submissions that the same meets the ends of justice, particularly when the respondent was only 26 years of age at the time of the incident in question that occurred at the spur of moment and without any intention on the part of the respondent to cause the death of his father. Learned counsel would submit that the High Court exercising its appellate powers has reduced the sentence to the period already undergone after due consideration of all the relevant factors; and while relying on the decision of this Court in *Jinnat Mia v. State of Assam*: (1998) 9 SCC 319, has urged that the present matter does not call for interference by this Court.

10. Having heard the respective learned counsel and having examined the record with reference to the law applicable, we are clearly of the view that in this case, the High Court has interfered with and reduced the sentence awarded by the Trial Court on rather irrelevant considerations, while ignoring the relevant factors and the governing principles for the award of punishment and hence, the order impugned cannot be sustained.

11. The respondent was tried for offence under Sections 302 and 201 IPC. With the evidence on record, it was clearly established that the respondent was author of the fatal injury in question. The Trial Court, with reference to the nature of the act of respondent and the attending circumstances, convicted him for culpable homicide not amounting to murder under Section 304 Part II IPC and let him off for the offence under Section 201 IPC because he had been convicted for the main offence. This part of the order of the Trial Court having attained finality and having not been questioned even in this appeal, we would leave the matter as regards conviction at that only. However, the question remains as to whether all the facts and circumstances of case taken together justify such indulgence that the punishment of rigorous imprisonment for a period of 3 years, as awarded by the Trial Court, be reduced to that of 3 months and 21 days? In our view, the answer to this question could only be in the negative.

12. In the case of *State of M.P. v. Ganshyam* : (2003) 8 SCC 13, relating to the offence punishable under Section 304 Part I IPC , this Court found sentencing for a period of 2 years to be to inadequate and even on the liberal approach, found the custodial sentence of 6 years serving the ends of justice. This Court underscored the principle of proportionality in prescribing liability according to the culpability; and while also indicating the societal angle of sentencing, cautioned that undue sympathy leading to inadequate sentencing would do more harm to the justice system and undermine public confidence in the efficacy of law. This Court observed, *inter alia*, as under:

> *"***12**. *Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc. This position was illuminatingly stated by this Court in Sevaka Perumal v. State of Tamil Nadu*: *(1991) 3 SCC 471.*
>
> **13**. *Criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It ordinarily allows some significant discretion to the Judge in arriving at a sentence in each case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case. Judges, in essence, affirm that punishment ought always to fit the crime; yet in practice sentences are determined largely by other*

considerations. Sometimes it is the correctional needs of the perpetrator that are offered to justify a sentence, sometimes the desirability of keeping him out of circulation, and sometimes even the tragic results of his crime. Inevitably, these considerations cause a departure from just deserts as the basis of punishment and create cases of apparent injustice that are serious and widespread.

14. *Proportion between crime and punishment is a goal respected in principle, and in spite of errant notions, it remains a strong influence in the determination of sentences. The practice of punishing all serious crimes with equal severity is now unknown in civilized societies, but such a radical departure from the principle of proportionality has disappeared from the law only in recent times. Even now for a single grave infraction drastic sentences are imposed. Anything less than a penalty of greatest severity for any serious crime is thought then to be a measure of toleration that is unwarranted and unwise. But in fact, quite apart from those considerations that make punishment unjustifiable when it is out of proportion to the crime, uniformly disproportionate punishment has some very undesirable practical consequences.*

15. *After giving due consideration to the facts and circumstances of each case, for deciding just and appropriate sentence to be awarded for an offence, the aggravating and mitigating factors and circumstances in which a crime has been committed are to be delicately balanced on the basis of really relevant circumstances in a dispassionate manner by the court. Such act of balancing is indeed a difficult task. It has been very aptly indicated in Dennis Councle MCGautha v. State of California: 402 US 183: 28 L Ed 2d 711 (1071) that no formula of a foolproof nature is possible that would provide a reasonable criterion in determining a just and appropriate punishment in the infinite variety of circumstances that may affect the gravity of the crime. In the absence of any foolproof formula which may provide any basis for reasonable criteria to correctly assess various circumstances germane to the consideration of gravity of crime, the*

discretionary judgment in the facts of each case is the only way in which such judgment may be equitably distinguished.

*** *** ***

17. *Imposition of sentence without considering its effect on the social order in many cases may be in reality a futile exercise. The social impact of the crime e.g. where it relates to offences against women, dacoity, kidnapping, misappropriation of public money, treason and other offences involving moral turpitude or moral delinquency which have great impact on social order and public interest cannot be lost sight of and per se require exemplary treatment. Any liberal attitude by imposing meagre sentences or taking too sympathetic a view merely on account of lapse of time in respect of such offences will be result-wise counterproductive in the long run and against societal interest which needs to be cared for and strengthened by a string of deterrence inbuilt in the sentencing system.*

*** *** ***

19. *Similar view has also been expressed in Ravji v. State of Rajasthan: (1996) 2 SCC 175. It has been held in the said case that it is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial. The court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should "respond to the society's cry for justice against the criminal". .....*"

(underlining supplied for emphasis)

13. In the Case of *Alister Anthony Pareira* (supra), the allegations against the appellant had been that while driving a car in drunken condition, he ran over the pavement, killing 7 persons and causing injuries to 8. He was charged for the offences under Sections 304 Part II and 338 IPC; was ultimately convicted by the High Court under Sections 304 Part II, 338 and 337 IPC; and was sentenced to 3

years' rigorous imprisonment with a fine of Rs. 5 lakhs for the offence under Section 304 Part II IPC and to rigorous imprisonment for 1 year and for 6 months respectively for the offences under Section 338 and 337 IPC . Apart from other contentions, one of the pleas before this Court was that in view of fine and compensation already paid and willingness to make further payment as also his age and family circumstances, the appellant may be released on probation or his sentence may be reduced to that already undergone. As regards this plea for modification of sentence, this Court traversed through the principles of penology, as enunciated in several of the past decisions[1] and, while observing that the facts and circumstances of the case show *'a despicable aggravated offence warranting punishment proportionate to the crime'*, this Court found no justification for extending the benefit of probation or for reduction of sentence. On the question of sentencing, this Court re-emphasised as follows:-

> *"**84**. Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straitjacket formula for sentencing an accused on proof of crime. The courts have evolved certain principles: the twin objective of the sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances.*
>
> ***85**. The principle of proportionality in sentencing a crime-doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime-doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.*
>
> *(underlining supplied for emphasis)*

14. Therefore, awarding of just and adequate punishment to the wrong doer in case of proven crime remains a part of duty of the Court. The punishment to be awarded in a case has to be commensurate with the gravity of crime as also with

[1]This Court referred, amongst others, to the decisions in State of Karnataka v. Krishnappa: (2004) 4 SCC 75; Dalbir Singh v. State of Haryana: (2000) 5 SCC 82; State of M.P. v. Saleem (2005) 5 SCC 554; Ravji v. State of Rajasthan (1996) 2 SCC 175; and State of M.P. v. Ghanshyam Singh (supra).

the relevant facts and attending circumstances. Of course, the task is of striking a delicate balance between the mitigating and aggravating circumstances. At the same time, the avowed objects of law, of protection of society and responding to the society's call for justice, need to be kept in mind while taking up the question of sentencing in any given case. In the ultimate analysis, the proportion between the crime and punishment has to be maintained while further balancing the rights of the wrong doer as also of the victim of the crime and the society at large. No strait jacket formula for sentencing is available but the requirement of taking a holistic view of the matter cannot be forgotten.

15. In the process of sentencing, any one factor, whether of extenuating circumstance or aggravating, cannot, by itself, be decisive of the matter. In the same sequence, we may observe that mere passage of time, by itself, cannot be a clinching factor though, in an appropriate case, it may be of some bearing, along with other relevant factors. Moreover, when certain extenuating or mitigating circumstances are suggested on behalf of the convict, the other factors relating to the nature of crime and its impact on the social order and public interest cannot be lost sight of.

16. Keeping in view the principles aforesaid, when the present matter is examined, we find that the respondent is convicted of the offence under Section 304 Part II IPC. Section 304 IPC reads as under:-

> ***"Punishment for culpable homicide not amounting to murder****.—Whoever commits culpable homicide not amounting to murder, shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death;*
>
> *or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death."*

17. Therefore, when an accused is convicted for the offence under Part II of Section 304 *ibid*., he could be sentenced to imprisonment for a term which may extend to a period of 10 years, or with fine, or both. In this case, the Trial Court chose to award the punishment of 3 years' rigorous imprisonment to the respondent. The punishment so awarded by the Trial Court had itself been leaning towards leniency, essentially in view of the fact that the respondent was 26 years of age at the time of the incident in question. However, the High Court further proceeded to reduce the punishment to the period already undergone (i.e., 3 months and 21 days) on consideration of the factors: (i) that the incident had taken

place at spur of the moment; (ii) that the respondent was 26 years of age at the time of incident; and (iii) that the respondent himself took his father to hospital. On these considerations and after finding that the respondent had spent 3 months and 21 days in custody, the High Court concluded that *"no useful purpose would be served in sending appellant back to jail"*. We are clearly of the view that, further indulgence by the High Court, over and above the leniency already shown by the Trial Court, was totally uncalled for.

18. So far the mitigating factors, as taken into consideration by the High Court are concerned, noticeable it is that the same had already gone into consideration when the Trial Court awarded a comparatively lesser punishment of 3 years' imprisonment for the offence punishable with imprisonment for a term that may extend to 10 years, or with fine, or with both. In fact, the factor that the incident had happened at the 'spur of moment' had been the basic reason for the respondent having been convicted for the offence of culpable homicide not amounting to murder under Section 304 Part II IPC though he was charged for the offence of murder under Section 302 IPC. This factor could not have resulted in awarding just a symbolic punishment. Then, the factor that the respondent was 26 years of age had been the basic reason for awarding comparatively lower punishment of 3 years' imprisonment. This factor has no further impelling characteristics which would justify yet further reduction of the punishment than that awarded by the Trial Court. Moreover, the third factor, of the respondent himself taking his father to hospital, carries with it the elements of pretence as also deception on the part of the respondent, particularly when he falsely stated that the victim sustained injury due to the fall. Therefore, all the aforementioned factors could not have resulted in further reduction of the sentence as awarded by the Trial Court.

19. The High Court also appears to have omitted to consider the requirement of balancing the mitigating and aggravating factors while dealing with the question of awarding just and adequate punishment. The facts and the surrounding factors of this case make it clear that, the offending act in question had been of respondent assaulting his father with a blunt object which resulted in the fracture of skull of the victim at parietal region. Then, the respondent attempted to cover up the crime by taking his father to hospital and suggesting as if the victim sustained injury because of fall from the roof. Thus, the acts and deeds of the respondent had been of killing his own father and then, of furnishing false information. The homicidal act of the respondent had, in fact, been of patricide; killing of one's own father. In such a case, there was no further scope for leniency on the question of punishment than what had already been shown by the Trial Court; and the High Court was not justified in reducing the sentence to an abysmally inadequate period of less than 4 months. The observations of the High Court that no useful purpose would be served by detention of the accused cannot be approved in this case for

the reason that the objects of deterrence as also protection of society are not lost with mere passage of time.

20. In the given set of facts and circumstances, the observations in *Jinnat Mia* (supra) on the powers of the High Court to review the entire matter in appeal and to come to its own conclusion or that the practice of this Court not to interfere on questions of facts except in exceptional cases shall have no application to the present case, particularly when we find that the High Court has erred in law and has not been justified in reducing the sentence to a grossly inadequate level while ignoring the relevant considerations.

21. To sum up, after taking into account all the circumstances of this case, we are of the considered view that the High Court had been in error in extending undue sympathy and in awarding the punishment of the rigorous imprisonment for the period already undergone i.e., 3 months and 21 days for the offence under Section 304 Part II IPC. In our view, there was absolutely no reason for the High Court to interfere with the punishment awarded by the Trial Court, being that of rigorous imprisonment for 3 years.

22. For what has been discussed hereinabove, this appeal succeeds and is allowed; the impugned judgment and order of the High Court dated 27.11.2012 is set aside and that of the Trial Court dated 06.01.1998 is restored. The respondent shall surrender before the Court concerned within a period of 4 weeks from today and shall undergo the remaining part of the sentence. In case he fails to surrender within the period aforesaid, the Trial Court will take necessary steps to ensure that he serves out the remaining part of sentence, of course, after due adjustment of the period already undergone.

Appeal allowed

I.L.R. [2019] M.P. 1358 (SC)
SUPREME COURT OF INDIA

Before Mr. Justice N.V. Ramana, Mr. Justice Deepak Gupta & Ms. Justice Indira Banerjee

R.P. (Cr.) No. 591/2014 decided on 21 February, 2019

JAGDISH …Petitioner

Vs.

STATE OF M.P. …Respondent

(Alongwith W.P. (Cr.) No. 197/2014)

Penal Code (45 of 1860), Section 302 – Death Sentence – Mercy Petition – Delay in Disposal – Effect – Murder of wife and five children **– Held – Where death sentence has to be executed, the same should be done as early as**

possible and if mercy petition has not been forwarded by State for 4 years and no explanation is submitted, such delay is inordinate and unexplained – Petitioner is behind bars for almost 14 yrs., this factor is also to be considered – Regardless of brutal nature of crime, not a fit case for execution of death sentence and accordingly commuted to that of life which shall mean entire remaining life – Review Petition and Writ Petition partly allowed.

(Paras 8 to 12)

दण्ड संहिता (1860 का 45), धारा 302 – मृत्यु दण्डादेश – दया याचिका – निपटान में विलंब – प्रभाव – पत्नी एवं पांच बच्चों की हत्या – अभिनिर्धारित – जहां मृत्यु दण्डादेश निष्पादित किया जाना होता है, उक्त को यथासंभव शीघ्र किया जाना चाहिए और यदि राज्य द्वारा 4 वर्षों तक दया याचिका को अग्रेषित नहीं किया गया है एवं कोई स्पष्टीकरण प्रस्तुत नहीं किया गया है, ऐसा विलंब असाधारण व अस्पष्टीकृत है – याची लगभग 14 वर्षों से सलाखों के पीछे है, इस कारक को भी विचार में लिया जाना चाहिए – अपराध के पाशविक स्वरूप के बावजूद भी, मृत्यु दण्डादेश के निष्पादन हेतु एक उपयुक्त प्रकरण नहीं है और तद्नुसार लघुकरण करते हुए आजीवन दण्डादेश किया गया, जिसका अर्थ होगा संपूर्ण शेष जीवन – पुनर्विलोकन याचिका तथा रिट याचिका अंशतः मंजूर।

Cases referred:

(2014) 4 SCC 242, (2015) 2 SCC 478.

J U D G M E N T

The Judgment of the Court was delivered by :

DEEPAK GUPTA, J. :- Petitioner Jagdish was tried for the murder of his wife and five children. He was convicted by the trial court vide judgment dated 24.04.2006 and sentenced to death. He filed an appeal which was dismissed by the High Court on 27.06.2006 and the death sentence was confirmed. Thereafter, he filed Criminal Appeal in this Court which was dismissed and again death sentence was confirmed vide judgment dated 18.09.2009.

2. The petitioner filed mercy petition before the jail authorities on 13.10.2009, which came to be rejected by the President of India on 16.07.2014. The petitioner has filed Writ petition (Crl.)No.197 of 2014 challenging the rejection of his mercy petition and the main ground is that there is a delay of almost 5 years in deciding the mercy petition and this itself is a ground to commute the death sentence to life imprisonment. Thereafter, the petitioner also filed Review Petition No. 591 of 2014 in which review of the judgment of this Court dated 18.09.2009 is sought both on merits and the question of sentence in Criminal Appeal No. 338 of 2007. Hence this matter is before this Bench.

3. At the outset we may note that we are not inclined to entertain the Review Petition on the merits of the case. Three courts have come to a concurrent finding of fact that it was the petitioner who murdered his wife and five children. We have

gone through the written submissions filed by the learned counsel appearing on behalf of the petitioner and find no reason to take a view different from the one taken earlier.

4. We are only dealing with the issue whether the sentence of death should be upheld or not? In the Writ Petition it has been urged that delay in deciding the mercy petition and the delay in legal proceedings is sufficient to recall the sentence of death. In the Review Petition some other arguments have been raised. It has been urged that this case does not fall in the category of the rarest of rare cases; this is a case based on circumstantial evidence; that the petitioner Jagdish was suffering from mental illness; the petitioner has been incarcerated for almost 14 years and execution of the death sentence at this stage would virtually mean imposing two sentences upon him - a sentence of life imprisonment and then a sentence of death.

5. **Delay in dealing with mercy petition:**

This Court in *V. Sriharan alias Murugan vs. Union of India and Others*[1] held that one of the circumstances recognized by this Court for commutation of death sentence into life imprisonment is the undue, inordinate and unreasonable delay in the execution of death sentence. The Court, however, held that whether the delay is unreasonable or not, it has to be appreciated in the facts of each case. In *Sriharan's* case, there was a delay of 5 years and one month in disposing of the mercy petition and this Court held as follows :-

> "**17.** Exorbitant delay in disposal of mercy petition renders the process of execution of death sentence arbitrary, whimsical and capricious and, therefore, inexecutable. Furthermore, such imprisonment, occasioned by inordinate delay in disposal of mercy petitions, is beyond the sentence accorded by the court and to that extent is extra-legal and excessive. Therefore, the apex constitutional authorities must exercise the power under Articles 72/161 within the bounds of constitutional discipline and should dispose of the mercy petitions filed before them in an expeditious manner.
>
> **18.** .....
>
> **19.** Before we advert to respond the aforesaid contention, it is relevant to comprehend the primary ground on the basis of which the relief was granted in cases of delayed disposal of the mercy petition and that is, such delay violates the requirement of a fair, just and reasonable procedure. Regardless and independent of the suffering it

[1] (2014) 4 SCC 242.

> causes, delay makes the process of execution of death sentence unfair, unreasonable, arbitrary and capricious and thereby, violates procedural due process guaranteed under Article 21 of the Constitution and the dehumanising effect is presumed in such cases. It is in this context, this Court, in the past, has recognised that incarceration, in addition to the reasonable time necessary for adjudication of mercy petitions and preparation for execution, flouts the due process guaranteed to the convict under Article 21 which inheres in every prisoner till his last breath."

Consequently, the Court commuted the death sentence to life.

6. In *Ajay Kumar Pal vs. Union of India and Another*[2] this Court was dealing with a case where there was a delay of 3 years and 10 months in dealing with the mercy petition. In this case it was also admitted that the petitioner had been kept in solitary confinement after the death sentence was confirmed by this Court. This Court held that the combined effect of the inordinate delay in disposal of the mercy petition and solitary confinement for such a long period caused deprivation of the cherished right to liberty of the petitioner and, therefore, the death sentence was converted to life imprisonment.

7. As far as the present case is concerned the occurrence took place on the intervening night of 19/20.08.2005. The trial court completed the trial swiftly and delivered its judgment on 24.04.2006. The High Court confirmed the sentence within 2 months on 27.06.2006, and this Court dismissed the appeal on 18.09.2009. The petitioner filed a mercy petition addressed to the President of India and the Governor of Madhya Pradesh through the jail authorities on 13.10.2009. This application was forwarded by the Madhya Pradesh authorities to the Ministry of Home Affairs after more than 4 years on 15.10.2013. Thereafter, the Ministry of Home Affairs called for some records from the State of Madhya Pradesh on 20.11.2013. These documents were supplied by the State of Madhya Pradesh on 12.12.2013. The file was forwarded to the President of India on 02.04.2014. The file was returned to the Ministry of Home Affairs for reconsideration. It was re-submitted to the President of India on 07.07.2014 and finally the mercy petition was rejected on 16.07.2014.

8. As far as the Government of India or the Secretariat of the President of India is concerned, there is no delay in dealing with the mercy petition and the same has been dealt with expeditiously. However, the State of Madhya Pradesh has given no explanation for the delay of more than 4 years in forwarding the mercy petition.

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[2] (2015) 2 SCC 478

9. We are constrained to observe that not only was there a long, inordinate and un-explained delay on the part of the State of Madhya Pradesh but to make matters worse, the State of Madhya Pradesh has not even cared to file any counter affidavit in the Writ Petition even though notice was issued 4 years back on 18.11.2014 and service was effected within a month of issuance of notice.

10. The delay in forwarding the petition is totally un-explained and this Court cannot countenance an un-explained delay of more than 4 years. We are dealing here with the case of a person who has been sentenced to death. The mercy petition is the last hope of a person on death row. Every dawn will give rise to a new hope that his mercy petition may be accepted. By night fall this hope also dies. Inordinate and unexplained delay in deciding the mercy petition and the consequent delay in execution of death sentence for years on end is another form of punishment which was awarded by the Court. This Court has repeatedly held that in cases where death sentence has to be executed the same should be done as early as possible and if mercy petitions are not forwarded for 4 years and no explanation is submitted we cannot but hold that the delay is inordinate and un-explained.

11. We are not only dealing with the issue of delay in disposal of the mercy petition. The petitioner has now been behind bars for almost about 14 years. This is also a factor which will have to be taken into consideration.

12. Death sentence is the exception and has to be awarded in the rarest of rare cases. Keeping in view all the circumstances of the case, including the un-explained delay of 4 years in forwarding the mercy petition by the State of Madhya Pradesh leading to delay of almost 5 years in deciding the mercy petition and the fact that the petitioner has been incarcerated for almost 14 years, we are of view that regardless of the brutal nature of crime this is not a fit case where death sentence should be executed and we, accordingly commute the death sentence to that of life. However, keeping in view the nature of crime and the fact that 6 innocent lives were lost, we direct that life imprisonment in this case shall mean the entire remaining life of the petitioner and he shall not be released till his death. The Review Petition as well as the Writ Petition are partly allowed in the aforesaid terms and, accordingly, disposed of. Pending application(s) if any shall stand disposed of.

Order accordingly

I.L.R. [2019] M.P. 1363 (SC)
SUPREME COURT OF INDIA
Before Ms. Justice R. Banumathi & Mr. Justice R. Subhash Reddy
C.A. No. 5043/2009 decided on 27 February, 2019

SHRI RAM MANDIR INDORE …Appellant

Vs.

STATE OF M.P. & ors. …Respondents

***A. Civil Procedure Code (5 of 1908), Order 39 – Suit for Declaration & Permanent Injunction – Public/Private Temple – Ownership – Documentary Evidence* – Held – The fact that appellant having taken the Mandir lands on lease from government clearly shows that properties were never owned by *pujaris* in individual capacity – Appellant is estopped from denying that temple properties are under management and control of Government – Suit lands have been given for arrangement of *pooja, archana, naivedya etc, pujari* has no right to interfere in management of suit lands as his status is only that of *pujari* – Collector was recorded as manager for suit lands since 1975 and same was never challenged – Shri Ram Mandir has been recorded as "*Bhumiswami*" – Even *pujari* has been appointed by SDO – Further, agricultural lands were given to Deity and not to *Pujaris* – Upon appreciation of oral and documentary evidence, first appellate Court and High Court rightly held that Shri Ram Mandir is a public temple and not a private one – Appeal dismissed. (Paras 18, 21, 23, 25 & 26)**

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 – घोषणा व स्थायी व्यादेश हेतु वाद – सार्वजनिक/निजी मंदिर – स्वामित्व – दस्तावेजी साक्ष्य – अभिनिर्धारित – यह तथ्य कि अपीलार्थी ने सरकार से पट्टे पर मंदिर की भूमियां ले ली है स्पष्ट रूप से दर्शाता है कि संपत्तियां व्यक्तिगत क्षमता में कभी भी पुजारियों के स्वामित्व में नहीं थी – अपीलार्थी को यह इंकार करने से विबंधित किया जाता है कि मंदिर संपत्तियां सरकार के प्रबंध और नियंत्रण के अधीन हैं – वाद भूमियां पूजा, अर्चना, नैवेद्य इत्यादि, के इंतजाम के लिए दी गई थीं, पुजारी को वाद भूमियों के प्रबंध में हस्तक्षेप करने का कोई अधिकार नहीं है, क्योंकि उसकी हैसियत केवल पुजारी की है – 1975 से कलेक्टर को वाद भूमियों के लिए प्रबंधक के रूप में अभिलिखित किया गया था तथा उक्त को कभी भी चुनौती नहीं दी गई थी – श्री राम मंदिर को ''भूमिस्वामी'' के रूप में अभिलिखित किया गया – यहां तक कि पुजारी भी एस.डी.ओ. द्वारा नियुक्त किया गया – इसके अतिरिक्त, कृषि भूमियां देवता को दी गई थी तथा न कि पुजारियों को – मौखिक और दस्तावेजी साक्ष्य का मूल्यांकन करने पर, प्रथम अपीली न्यायालय एवं उच्च न्यायालय ने उचित रूप से यह अभिनिर्धारित किया कि श्री राम मंदिर एक सार्वजनिक मंदिर है तथा न कि एक निजी मंदिर – अपील खारिज।

***B. Public/Private Temple – Ownership – Pujaris – Hereditary Succession* – Held – If temple was a private temple, succession would have**

hereditary and would be governed by hindu succession i.e. by blood, marriage and adoption – Each *pujari* in present case is not having blood relation with his predecessor *pujari* – When *pujarishipp* is not hereditary, temple cannot be a private temple. (Para 16)

ख. सार्वजनिक/निजी मंदिर – स्वामित्व – पुजारी – आनुवंशिक उत्तराधिकार – अभिनिर्धारित – यदि मंदिर एक निजी मंदिर था, उत्तराधिकार आनुवंशिक होता तथा हिन्दू उत्तराधिकार अर्थात् रक्त, विवाह एवं दत्तक ग्रहण द्वारा शासित होता – वर्तमान प्रकरण में प्रत्येक पुजारी का अपने पूर्ववर्ती पुजारी के साथ रक्त संबंध नहीं है – जब पुजारी बनना आनुवंशिक नहीं है तो मंदिर एक निजी मंदिर नहीं हो सकता।

Cases referred:

(2017) 9 SCC 579, (1969) 2 SCC 853, [1964] 1 SCR 561, 1985 RN 371.

J U D G M E N T

The Judgment of the Court was delivered by :

R. BANUMATHI, J.:- This appeal arises out of the judgment dated 06.08.2002 passed by the High Court of Madhya Pradesh at Indore in and by which the High Court dismissed the Second Appeal No.266 of 2002 thereby affirming the findings of the First Appellate Court that Shri Ram Mandir, Indoukh is a public temple and that the suit property is vested in the Deity; and Ram Das and then Bajrang Das are only *pujaris* and not Mahant-Manager of the temple.

2. Briefly stated case of the appellant is as follows:-

Shri Ram Mandir is a private temple of which Mahant and Manager is Ram Das and that he has been continuing to perform *pooja-archana* and management of the temple since the time of his guru. Earlier to him, his Guru Shri Shiromani Das Ji and still earlier to him, his ancestor guru used to offer *pooja-archana* and has been in management of the temple. Case of the appellant is that the temple is the private temple of which succession is by descendance according to the rules of Guru Parampara. The suit property/agricultural land has been allotted for Shri Ram Mandir in Inam and in its name and the land is in possession of Shri Ram Mandir. The temple is a private temple and government has no right in the temple and no aid was given by the Government in the construction, maintenance and repair of the temple. The respondents through an administrative order recorded the name of respondent No.3-District Collector as Manager of the temple without giving any notice to the appellant which is in violation of principles of Natural Justice and contrary to the provisions of law. According to the plaintiff, Shri Ram Mandir is a private temple and the government has no right to interfere in the administration of the temple and the possession and management of the suit lands. On 15.07.1988, respondents No.3 and 4-officers of Madhya Pradesh Government initiated proceedings for leasing out the disputed lands (Revenue Case

No.28B/121-87-88) and fixed 06.10.1988 as the date for auction for leasing of the temple properties and the same is without any right. The plaintiff has therefore filed the suit for a declaration that:- (i) Shri Ram Mandir at Indoukh is a private mandir and the State has no right to interfere in the management, *pooja-archana* and in the possession of the agricultural land; (ii) for grant of permanent injunction restraining the respondent-officials from interfering with the possession of the suit property by the plaintiff.

3. The respondent-State has filed the written statement contending that Shri Ram Mandir is not a private temple but is a public temple and that the status of the plaintiff is merely of a *pujari*. The Deity of the temple is owner of agricultural land which has been given by the government for the purpose of performance of *pooja-archana* etc. and taking proper care and meeting the expenses of the temple. The status of the *pujari* is like a servant of the temple appointed by the government and he does not acquire any right in the property owned by the Deity of the temple. District Collector, Ujjain was recorded as Manager in the revenue records in 1975-76, in accordance with law. That a *"Bbu (sic : Bhu) Adhikar* and *Rina Patrika*" was issued to the appellant/plaintiff. According to respondents since the management of the temple was not being properly and rightfully done and the income from the land was not being suitably utilised for the betterment of the temple, the State Government decided to auction the land in question so as to have resources and raise income for upkeep of the temple. The appellant himself got this land in 1985-86 on lease for Rs.860/- from the government and in this respect has also signed in the order sheet in Case No.93B/121-85-86. An amount of Rs.600/- was deposited on 31.07.1986 in this account. Thereafter, again in 1986-87 appellant got lease of said land for Rs.860/- out of which he deposited Rs.460/- on 11.11.1987 with the government. The appellant has thus treated the suit property as the property of the temple which is under the control and management of the government. Having agreed to take the same on lease, the appellant/plaintiff cannot turn around and contend that he is in management of the suit property and challenge the control and management of the suit property by the government.

4. On the above pleadings, relevant issues were framed by the trial court. Upon consideration of oral and documentary evidence, the trial court decreed the suit holding that Shri Ram Mandir is a private temple and not a public temple. The trial court held that the temple was constructed by predecessor of Guru Ram Das and the temple is a private temple of the current Manager Bajrang Das who has succeeded as the Manager according to the Hindu Law. The trial court held that "*entry of Collector as Manager in the revenue records was without notice to the Manager of the temple and the changes made in the revenue records for a private temple without hearing the Manager of the temple, cannot be sustained*." The trial court further held that no evidence has been adduced by the State to establish their plea that the appointment of *pujari* was done by the State. On those findings, the

trial court granted permanent injunction in favour of the appellant/plaintiff by holding that the State has no authority to auction the land vested in the appellant/plaintiff in his capacity as Mahant of the temple and the same is without authority of law.

5. Being aggrieved, the respondents preferred appeal before the appellate court. The first appellate court allowed the appeal holding that Shri Ram Mandir is a public temple and not a private temple. The appellate court held that all the lands are *inam* lands of Shri Ram Mandir and that the title in the disputed lands vests in the Deity. The first appellate court further held that the Collector has been rightly recorded as Manager and the status of the *pujari* is only to perform *pooja-archana* and he has no further right in the temple. It was held that the possession of the land by the *pujari* is only on behalf of the Deity/temple and *pujari* has no right over the suit lands. Upon consideration of oral and documentary evidence, the first appellate court set aside the judgment of the trial court and allowed the appeal by holding that the *pujaris* of Shri Ram Mandir have been continuing according to the Guru-Shishya tradition of Naga Babas who have no family of their own.

6. Assailing the correctness of the judgment of the first appellate court, the appellant preferred the second appeal. The High Court affirmed the findings of the first appellate court holding that the suit property is recorded in the name of Deity and Ram Das and Bajrang Das were recorded only as *pujaris* and the name of *pujari* kept on changing and these *pujaris* do not belong to one family and there is no blood relation between those persons. The High Court held that the findings of the first appellate court that Shri Ram Mandir is a public temple is based on the facts and evidence adduced by the parties and no substantial question of law arose for consideration and accordingly, dismissed the second appeal.

7. Contention of the appellant is that Ram Mandir is a private temple established by predecessor Gurus and that the properties had been given to the suit temple as Inam and Ram Das was not a mere *pujari* but the Mahant of the said temple entitled to manage and administer the temple and the suit properties. According to the appellant, the entry recorded in the revenue records in the year 1975 inserting the name of the Collector, Ujjain as Manager was without notice to the plaintiff and hence, illegal. It was urged that mere recording of the name of the Collector in the revenue records as Manager does not confer any right upon the State. It was submitted that since temple was constructed by late Shri Gulab Das, Guru Sewa Das ji and the appellant and their Gurus are in administration of the temple and are in possession of the properties of the temple, the respondents are not justified in interfering with the possession of the suit properties and administration of Shri Ram Mandir.

8. Refuting the abovesaid contention, the learned counsel for the State submitted that Ram Mandir is a public temple and not a private temple as

contended by the appellant. It was contended that several documents filed by the appellant/plaintiff indicates that the suit property is recorded in the name of the Deity whereas the name of the person was recorded as *pujari* and the rights were passed from one *pujari* to another on the basis of Guru-Disciple relationship. It was urged that the documents clearly show *Inam* rights of Ram Mandir and the status of the appellant continued to be the *pujari* and his rights as *pujari* have not been affected in any manner whatsoever by the appointment of the Collector as the Manager. It was submitted that Shri Ram Mandir is a public temple and not a private one and in fact even the appellant Bajrang Das was appointed as *pujari* only by the Sub-Divisional Officer. It was submitted that the lease of the suit properties was auctioned and the appellant himself participated in such auction in 1985-1986 and 1986-87 and the appellant deposited the lease amount with the authorities and therefore, the appellant cannot turn around and claim that he is in administration of the temple. It was submitted that the concurrent findings of the High Court and the first appellate court are based upon evidence adduced by the parties and the same warrant no interference.

9. We have heard Mr. Puneet Jain, learned counsel for the appellant and Mr. Vaibhav Srivastava, learned counsel for the State and perused the impugned judgment and the judgment of the First Appellate Court and the evidence and other materials on record.

10. The question falling for consideration is whether Shri Ram Mandir is a public temple or a private temple as claimed by the appellant. Further question falling for consideration is whether the appellant is the Mahant of Shri Ram Mandir and whether he is in control and administration of the temple and the suit properties as claimed by him.

11. Even at the outset, it is to be pointed out that the very cause title of the plaint is misleading. The description of the appellant temple Shri Ram Mandir is couched in such a manner as if Shri Ram Mandir is represented by its Manager Ram Das. The respondent-State claims that Shri Ram Mandir is a public temple and Ram Das and then Bajrang Das are only *pujaris* performing *pooja-archana* in the temple. It is in this context and the auction conducted by the State for leasing the temple properties, the appellant-plaintiff filed the suit seeking declaration that Shri Ram Mandir is a private temple and permanent injunction restraining the respondents/defendants from interfering with the appellant's possession of the temple properties.

12. **Shri Ram Mandir is a public temple:-** The onus of proving that the appellant-Shri Ram Mandir falls within the description of private temple is on the appellant who is asserting that the temple is a private temple and that he is the Mahant of the temple. In *State of Uttarakhand and another v. Mandir Sri Laxman Sidh Maharaj* (2017) 9 SCC 579, it was held that "*the necessary material*

pleadings ought to have been made to show as to how and on what basis, the plaintiff claimed his ownership over such a famous heritage temple and the land surrounding the temple. Thus, in the absence of any pleadings in the plaint that the pujari built the temple, they cannot claim the temple to be a private temple." In the case in hand, plaint lacks pleadings regarding who constructed the temple and how he raised the funds. The name of Gulab Das who allegedly constructed the temple is not mentioned in the plaint. No evidence was adduced by the appellant to show as to how Gulab Das constructed the temple and whether personal funds were used by Gulab Das to establish the temple or whether there was contribution from the public. In his evidence, Bajrang Das (PW-1) has stated that the temple was constructed by Gulab Das. On the other hand, Bheru Lal (PW-2) has stated that the temple was constructed by Sewa Das and Gulab Das. In the absence of pleadings and evidence that the temple was constructed by Gulab Das, the First Appellate Court rightly held that based on the evidence of PW-1, it cannot be held that Shri Ram Mandir is a private temple.

13. According to the respondent-State, Shri Ram Mandir has always been a part of the list of public temples. In 2013, Madhya Pradesh Government published a Directory containing names of all public temples in District Ujjain updating till 31.12.2012. Shri Ram Mandir is mentioned therein in the List as Entry 135 which clearly shows that the temple has been recognized as a public temple. Though, this document - List of public temples is subsequent to the suit, the entry of Shri Ram Mandir as the public temple in the register is a strong piece of evidence to hold that Shri Ram Mandir is a public temple. Be it noted that Bajrang Das and Ram Das are only shown to be the *pujaris*.

14. In *Goswami Shri Mahalaxmi Vahuji v. Ranchhoddas Kalidas and others* (1969) 2 SCC 853, the Supreme Court held that "*the origin of the temple, the manner in which its affairs are managed, the nature and extent of gifts received by it, rights exercised by the devotees in regard to worship therein, are relevant factors to establish whether a temple is a public temple or a private temple*." Likewise, as held in *Tilkayat Shri Govindlalji Maharaj Etc. v. State of Rajasthan and others* [1964] 1 SCR 561, the participation of the members of the public in the Darshan in the temple and in the daily acts of worship or in the celebrations may be a very important factor to consider in determining the character of the temple. In the present case, the appellant has not adduced any evidence to show that there is restricted participation of the public for *darshan*.

15. It is to be pointed out that in the same premises, apart from, Shri Ram Mandir, there is a Ganesh temple which has a different *pujari* and there is also a Maruthi Mandir. In their evidence, Bheru Lal (PW-2) and Poor Singh (PW-3) have stated that the *pooja* at Ganesh Mandir is performed by Satyanarayan-brother of Bheru Lal (PW-2). There are thus two different *pujaris* who perform

pooja for two separate idols situated in the same premises and they have been so performing *pooja* for generations. Contention of PW-1 that no outsider can come and perform *pooja* and *archana* in the premises of Shri Ram Mandir was rightly rejected by the first appellate court as the very premises has three Deities.

16. Another important aspect which indicates the public character of the temple is that there is no blood-relationship between the successive *pujaris*. In the present case, no evidence has been adduced to show that the temple belonged to one family and that there was blood-relations between the successive *pujaris*. If the temple was a private temple, the succession would have been hereditary and would be governed by the principles of Hindu succession i.e. by blood, marriage and adoption. In the case in hand, succession is admittedly governed by Guru-shishya relationship. Each *pujari* is not having blood relation with his predecessor *pujari*. When the *pujariship* is not hereditary, as rightly held by the High Court, Shri Ram Mandir cannot be held to be a private temple.

17. PW-1 has admitted that the *pujaris* have been continuing according to Guru-shishya tradition of Naga Babas. Admittedly, Naga Babas followed different tradition from family persons i.e. they followed the tradition that during the period of management of the temple, they did not have any *grihashtha*-household life. Admittedly, the tradition of Naga Babas of not having a household life has been broken by Bajrang Das (PW-1). In his evidence, PW-1 admitted that the temple is a seat of Nagas; but he is a married person and a householder. The first appellate court has rightly held that the temple established by Naga Babas cannot be treated as a private temple as there was no interest of a particular person in the temple.

18. Even the appointment of Bajrang Das (PW-1) as *pujari* of Shri Ram Mandir was done by the Sub-Divisional Officer, Tehsil Mahidpur, on the application filed by Bajrang Das. In his application before the Sub-Divisional Officer, Tehsil Mahidpur, Bajrang Das (PW-1) stated that Guru Ram Das is aged about eighty years and suffering from paralysis and Bajrang Das has been performing the *pooja* since last ten years and therefore, prayed for entering him as *pujari* of Shri Ram Mandir. Ram Das had also given statement before the Sub-Divisional Officer stating that he is suffering from the ailment of paralysis and that he is not in a position to continue the work of *pujari* and that Bajrang Das may be appointed as *pujari*. The said application was registered as 10/98-99 *Pujari* Nomination and after calling for objection from the public, Sub-Divisional Officer, Tehsil Mahidpur had passed a detailed order on 01.06.1999 appointing Bajrang Das as the *pujari* of Shri Ram Mandir. In the said order of Sub-Divisional Officer dated 01.06.1999, it is made clear that the Collector is the administrator in respect of lands entered in the name of Shri Ram Mandir situated in villages Indokh, Mundla Sodhya, Pipaliya Bhooma, Rajdhani and Bolkheda Dhar. The

said order contains the *Khata* numbers of the lands and the extent of the lands. The Sub-Divisional Officer had passed further order dated 08.06.1999 mutating the name of Ram Das and entering the name of Bajrang Das as *pujari*. Ex.-D4 and Ex.-D5 - statements of Bajrang Das and Ram Das and the order passed by the Sub-Divisional Officer clearly show that Shri Ram Mandir is a public temple and that the Mandir and the properties are under the control and administration of the State through District Collector. Having been appointed the *pujari* of the temple by the Government, Bajrang Das and Ram Das are estopped from contending that Shri Ram Mandir is a private temple. Considering the evidence and the fact that Bajrang Das himself has been appointed as *pujari* by the State, the first appellate court and the High Court rightly held that Shri Ram Mandir is a public temple. We found no ground to interfere with the said concurrent finding.

19. ***Pujaris* were never Inamdars of the temple properties:-** PW-1 relies upon Ex.-P20 - a document through which Raja Bagh bestowed the land in favour of the temple for *Nevaidya* etc. Ex.-P20 is of the year 1797 wherein it is mentioned that the land was bestowed by the Government upon the temple for *Nevaidya* etc. of the temple. The document reads as under:-

> "Gulab Das Baba, Shir Setaram. You have been gifted village land by the government for the Nevaidya and oil for lamp (Deepak) etc. for the deity (... not readable) therefore, by accepting bhog etc. .... (not readable)."

Referring to Ex.-P20, the first appellate court held that the land was bestowed on the temple for *Nevaidya* etc. There is nothing to indicate that Gulab Das has established the temple from out of his personal funds and that he has become Inamdar of the property.

20. Number of documents produced by the appellant clearly show that the Inam rights have been conferred on Shri Ram Mandir and not on the *pujaris*. According to Ex.-P29, 30 and 31, lands of village Rabdamiya, Mundala Sondhiya, Pipalya Dhuma are recorded as Inam lands of Devsthan. In respect of the land in village Mundala Sondhiya, Ex.-P24 mentions Inam land of Shri Ram Mandir. In Ex.-P23, settlement patta relates to the land of village Mundala Sondhiya and the name of tenant is recorded as Shri Ram Mandir through Tulasi Das Guru Bhawa Das and the type of right "*Inam Devsthan*" has been written. As Per Ex.-P21, patta of village Rabdaniya which was issued by settlement holder state reveals that this land was given to tenant Shri Ram Mandir through the then *pujari* Tulasi Das and its right has been shown as "Shri Ram Mandir Devsthan". As per Ex.-P19, land of Mundala Sondhiya has been given to the *pujari* of Shri Ram Mandir Devsthan. As per Ex.-P18, the land of Pipalya Dhuma is the land of Inam Devsthan Shri Ram Mandir. As per Ex.-P17, the land of village Rabaniya has been given to Devsthan Shri Ram Mandir as Inam right. According to Ex.-

P16, the land of Bolkheda has been given to Devsthan as Inam right. As per Ex.-P15, the land of village Kankalkhdea has been given to Shri Ram Mandir Inam Devsthan. As per Ex.-P14, the land of Indoukh has been given to tenant Shri Ram Mandir *Pujari* Kanvsidas on the rights of Inam Shri Ram Mandir.

21. The First Appellate Court referred to various documents in particular pattas and held that all the lands have been given to Shri Ram Mandir Devsthan by way of Inam. The number of documents produced by the appellant clearly show that the lands are Inam lands of Shri Ram Mandir and that the status of Ram Das and Bajrang Das were only *pujaris*. In number of other documents also, Shri Ram Mandir is recorded as "Bhumiswami" for the suit property and the names of specific individuals are recorded only as *pujaris*. In the light of various documents and the formidable entries made thereon, there is no merit in the contention of the appellant that they have become Mahant of Shri Ram Mandir and that they are entitled to manage the affairs of the temple and the Mandir's properties.

22. Ex.-P2 is the copy of Kishtbandi Khatauni of the year 1971-72 in which, rights of land of Indoukh are recorded as "Shri Ram Mandir as Bhumiswami". *Pujari* Ram Bali Das, Guru Ganga Das Bairagi resident of Deh Bhumi Swami have been described only as *pujaris*. Likewise, in Ex.-P4 relating to the land of village Bolkheda Ghat, Shri Ram Mandir has been recorded as "Bhumiswami" and Ram Bali Das has been mentioned only as a priest. For the land of village Pipalya Dhuna, Bhumiswami rights are recorded in favour of Shri Ram Mandir and Ganpati Mandir of which Ram Bali Das has been recorded as *pujari*. Likewise, as per Ex.-P7, Shri Ram Mandir, Indoukh has been recorded as "Bhumiswami" for the land of village Mundala Sondhiya. Though, the appellant got certified copies of these documents on various dates viz. 12.08.1972, 16.09.1970 and 27.09.1970 and in spite of knowledge of the entry "Ram Mandir as Bhumiswami", it was not challenged till the filing of suit. For the land of Pipalya Dhuma, Ganpati Maruti Mandir has been recorded as "Bhumiswami" along with Shri Ram Mandir and Collector, Ujjain has been recorded as Manager. The appellant did not challenge the rights of Ganpati Maruti Mandir which was recorded as "Bhumiswami" for the lands of the village Pipalya Dhuma. Be it noted that, Ganpati Maruti Mandir has not even been impleaded as a party.

23. The Collector was recorded as Manager for the lands of Shri Ram Mandir since the year 1975 and the same was not challenged. According to the respondent-State, the entry of the name of the District Collector as Manager of the temple properties dated 12.04.1974 has been done to curb the mismanagement of the temple properties at the hands of the *pujaris*. The learned counsel appearing for the State submitted that the circular dated 12.04.1974 was upheld by the High Court of Madhya Pradesh in *Sadashiv Giri and others v. Commissioner, Ujjain and others* 1985 RN 371 insofar as it applied to public temples.

24. The First Appellate Court has referred to the order of the High Court in LPA No.36/94 (27.07.1995) in and by which the High Court has directed to cancel the executive orders dated 18.11.1992 by which the names of the priests were removed from revenue records. As pointed out by the First Appellate Court, pendency of such matters would not in any way affect the rights of Deity of Shri Ram Mandir in the suit properties as Shri Ram Mandir has been recorded as "Bhumiswami" for the suit properties. As discussed earlier, appellant Ram Bali Das was continued to be recorded only as *pujari* of Shri Ram Mandir. As discussed infra, on the application filed by *pujari* Ram Das, Bajrang Das has been appointed as *pujari* by SDO.

25. Plaintiff Ram Das himself got the land in the year 1985-86 on lease for Rs.860/- from the Government and in this respect, he has signed on the order sheet in case No.93B/121-85-86. An amount of Rs.600/- was deposited on 31.07.1986. Thereafter, in the year 1986-87, *pujari* Ram Das got the lease renewed for one year at Rs.860/- out of which he has deposited Rs.460/- on 11.11.1987 for which a receipt has been issued to *pujari* Ram Das. The fact that the appellant having taken the Mandir lands on lease from the Government clearly shows that the properties were never owned by the *pujaris* in their individual capacity. Having taken the Mandir property on lease from the Government, the appellant is estopped from denying that the temple properties are under the management and control of the Government. The suit lands have been given in the name of Shri Ram Mandir and few other lands in the name of Ganesh Mandir for the arrangement of *pooja*, *archana*, *naivedya*, etc. for the public temple and the *pujari* has no right to interfere in the management of these lands as his status is only that of *pujari*.

26. The finding of the first appellate court and the High Court that Shri Ram Mandir is a public temple and not a private one is based upon the appreciation of oral and documentary evidence. Bajrang Das (PW-1) himself has been appointed as *pujari* by the Government and the appellant/plaintiff has not adduced any evidence showing that the temple belonged to one particular family. By oral and documentary evidence, it is clearly established that the suit lands are recorded in the name of Shri Ram Mandir. Having regard to the findings of the First Appellate Court, the High Court rightly held that no substantial question of law arose in the Second Appeal. Based upon oral and documentary evidence, the First Appellate Court and the High Court have recorded the concurrent findings of fact that Shri Ram Mandir is a public temple and not a private temple and that the agricultural lands were given to the Deity and not to the *pujaris*. The impugned judgment does not suffer from any infirmity warranting interference and this appeal is liable to be dismissed.

27. In the result, the appeal is dismissed. No costs.

Appeal dismissed

I.L.R. [2019] M.P. 1373 (DB)
WRIT APPEAL

Before Mr. Justice Prakash Shrivastava & Mr. Justice Vivek Rusia

W.A. No. 601/2019 (Indore) decided on 3 May, 2019

STATE OF M.P. & anr. …Appellants

Vs.

SONU JATAV …Respondent

***Service Law – Compassionate Appointment – Relevant Policy & Circular* – Held – Circular dated 31.08.16 is not a new policy but a circular by which existing policy of 2014 has been amended – Policy dated 29.09.14 as amended vide Circular dated 31.08.16 ought to have been applied which was in vogue at the time of death of petitioner's father on 04.07.2016 and also at the time of consideration of his application for compassionate appointment – No ground for interference – Appeal dismissed. (Paras 15 to 18)**

सेवा विधि – अनुकंपा नियुक्ति – सुसंगत नीति व परिपत्र – अभिनिर्धारित – परिपत्र दिनांक 31.08.2016 एक नई नीति नहीं है बल्कि एक परिपत्र है जिसके द्वारा 2014 की विद्यमान् नीति को संशोधित किया गया है – परिपत्र दिनांक 31.08.2016 के माध्यम से संशोधित नीति दिनांक 29.09.2014 को लागू किया जाना चाहिए जो कि दिनांक 04.07.2016 को याची के पिता की मृत्यु के समय तथा अनुकंपा नियुक्ति के लिए उसके आवेदन पर विचार करते समय भी प्रचलन में थी – हस्तक्षेप के लिए कोई आधार नहीं – अपील खारिज।

Cases referred:

2015 (7) SCC 417, W.P. No. 2692/2017 decided on 21.03.2018.

Rahul Vijaywargiya, for the appellant/State.

O R D E R

The Order of the Court was passed by :

VIVEK RUSIA, J.:- Heard on I.A. No.1736/2019 an application for condonation of delay.

2. As per office objection, the appeal is barred by 269 days.

3. According to the appellant, against the impugned order dated 11.04.2018, Review Petition was filed which has been dismissed vide order dated 29.08.2018. Thereafter, legal opinion was sought from the Govt. Advocate which was received on 09.10.2018 and sent to the Law Department. Vide order dated 04.12.2018, the Law Department granted the permission to file writ appeal which was received by the OIC on 27.12.2018, thereafter, writ appeal was prepared and filed before this Court.

4. Considering the aforesaid procedure delay and contents of application as supported by an affidavit of Office-in-Charge of the Case , the delay in filing of this appeal is hereby condoned.

5. Also heard on the question of admission.

6. The appellant/State of Madhya Pradesh and others (respondents in the writ petition) have filed the present appeal being aggrieved by order dated 11.04.2018 passed in WP No.1273/2017 whereby the writ petition was allowed by giving direction to the respondent to consider the claim of the petitioner for compensate (sic : compassionate) appointment in view of the policy dated 31.08.2016.

7. The facts of the case in short are that father of the respondent (hereinafter referred to as the 'petitioner') was appointed as linemen in Public Health Engineering Department, Ujjain in the year 1985. Vide order dated 24.06.2013, he was given appointment in contingency establishment. While working in the department, he died on 04.07.2016. The petitioner, being one of the dependent, filed a representation for grant of compassionate appointment to him. By order dated 25.10.2016, the respondent has rejected his claim on the ground that in the policy dated 31.08.2016, the dependent of deceased employee died while working in the work charge and contingency establishment have been held entitle for compassionate appointment w.e.f. 31.08.2016 since his father i.e. Punamchand Jatav died on 04.07.2016, therefore, he is not entitle for compassionate appointment.

8. Being aggrieved by the aforesaid order, the petitioner filed writ petition before this Court. The petitioner/ respondent filed detailed reply in the writ petition by submitting that the claim of the petitioner was rightly considered in view of the policy dated 29.09.2014 which was in vogue at the time of death of his father in which there is no provision for grant of compassionate appointment to the dependent of deceased employee worked in the work charged & contingency establishment. The policy dated 31.08.2016 is prospective in nature, hence, the respondents have rightly rejected his claim.

9. In support of his contention, the respondents have placed reliance on the judgement passed in the case of *Canara Bank and Anr. vs. M. Mahesh Kumar* reported in 2015 (7) SCC 417.

10. By order dated 11.04.2018, the writ Court has allowed the writ petition by placing reliance over the judgment passed by the Co-ordinate bench of this Court in the Case of *Dilip More vs. State of M.P. And Anr.* Passed in WP No.2692/2017 decided on 21.03.2018 and directed the respondents to consider the case of the petitioner in view of the policy dated 31.08.2016 and will not reject on the ground that his father was the employee of work charge contingency paid establishment.

11. Being aggrieved by the aforesaid order, the respondents have preferred this appeal before this court.

12. We have heard the learned government advocate appearing for the appellants and also perused the record.

13. The main contention of the learned counsel for the appellants/ State is that the case of the petitioner has rightly been considered in view of the policy dated 31.08.2016 in which first time the dependents of employee who died while working in the work charge & contingency establishment has been held entitle for the compassionate appointment and under the policy dated 29.09.2014 they were entitled only for the ex-gratia amount of compensation in lieu of compassionate appointment. Since father of the petitioner died on 04.07.2016 i.e. prior to the policy dated 31.08.2016 came into force, the respondents have rejected his claim.

14. We are not agreeing to the above submission because the General Administration Department of State of M.P. came up with a comprehensive policy dated 29.09.2014 for grant of compassionate appointment to one of the dependent of deceased government employee by superseding all earlier policies issued time to time . Clause 11.1 provides that on account of death of employee working in work charge and contingency establishment and daily wager during service, the one of the dependent of the family member will be entitled for one time compensation of Rs.2,00,000/- . By Circular dated 31.08.2016, the General Administration Department of State Government has only amended the aforesaid clause 11.1 and directed that one of the dependent of deceased of contingency paid employee shall be entitled for compassionate appointment.

15. The core question for consideration before us is that whether the circular dated 31.08.2016 can be termed as a new policy of compassionate appointment or not? The State Government framed the new policy for compassionate appointment dated 29.09.2014 but by circular dated 31.08.2016 and only one Clause 11.1 has been amended,which reads as under:-

> "11.1 कार्यभारिता/आकस्मिकता निधि से वेतन पाने वाले एवं दैनिक वेतनभोगी कर्मचारियों के दिवंगत होने पर अनुकंपा नियुक्ति की पात्रता नही होगी परन्तु उनके परिवार के आश्रित नामांकित सदस्य को एकमुश्त रूपये 2. 00 लाख (रूपये दो लाख) की राशि अनुकंपा अनुदान के नाम से दी जाएगी। उसमें ग्रेजयूटी की राशि सम्मिलित नहीं होगी। इस राशि का भुगतान संबंधित के कार्यभारित/आकस्मिकता के मद के अंतर्गत वेतन मद से किया जावेगा।''

16. The circular dated 31.08.2016 is not a new policy, but a circular by which the existing policy dated 29.9.2014 has been amended. The other conditions of policy dated 29.09.2014 are intact and all are still in force till today despite

issuance of circular dated 31.08.2016 . Clause 11.1 provides for payment of compensation of Rs.2,00,000/- in lieu of compassionate appointment for the dependents of deceased employee who died while working under the work charged & contingency establishment. Vide circular dated 31.08.2016, respondents have only omitted Clause 11.1 and provided a new clause by which the dependent of the deceased employee has been held entitled for compassionate appointment subject to fulfilment of other condition of the policy dated 29.09.2014.

17. Hence it would be detrimental in the interst of dependents if it is held that new policy dated 31.08.2016 has come into force in which the dependent of the deceased employee working under the work charged and contingency establishment is not entitled for compassionate appointment.

18. Therefore, in the case of the petitioner, the policy dated 29.09.2014 as amended by circular dated 31.08.2016 ought to have been applied, which was in vogue at the time of death of his father on 04.07.2016 and also at the time of consideration .Therefore, in view of the above, we do not find any ground to interfere with the impugned order. The appeal is accordingly **dismissed**.

Appeal dismissed

I.L.R. [2019] M.P. 1376 (DB)
WRIT APPEAL

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

W.A. No. 1795/2018 (Indore) decided on 3 July, 2019

SURENDRA SINGH …Appellant

Vs.

SAGARBAI & ors. …Respondents

***A. Constitution – Article 227 – Religious Endowment – Public/Private Temples – Rights of Manager* – Held – It is established from revenue records that title holder of property is the deity – Once a property is dedicated to temple in favour of established idol, disposal/sale of such property by its Manager is illegal and same is to be protected by Courts as deity is a perpetual minor – Respondent (*original petitioner*) is simply a Manager and not the title holder – Impugned order quashed – Writ Appeal allowed. (Para 15 & 16)**

क. संविधान – अनुच्छेद 227 – धार्मिक विन्यास – सार्वजनिक/निजी मंदिर – प्रबंधक के अधिकार – अभिनिर्धारित – राजस्व अभिलेखों से यह स्थापित है कि देवता, संपत्ति के हक धारक हैं – एक बार जब कोई संपत्ति स्थापित प्रतिमा के पक्ष में मंदिर को समर्पित कर दी जाती है, उक्त संपत्ति का उसके प्रबंधक द्वारा व्ययन/विक्रय किया जाना अवैध है तथा न्यायालयों द्वारा उक्त को संरक्षित किया जाना चाहिए क्योंकि देवता एक

स्थायी/शाश्वत अवयस्क है – प्रत्यर्थी (मूल याची) केवल एक प्रबंधक है तथा न कि हक धारक – आक्षेपित आदेश अभिखंडित – रिट अपील मंजूर।

***B. Religious Endowment – Temples – Title holders* – Held – Dedicated property vests in the established idol as a juristic/legal person, deemed capable in law for holding property in same way as a natural person, carrying a juridical status with power of suing and being sued. (Para 16)**

ख. धार्मिक विन्यास – मंदिर – हक धारक – अभिनिर्धारित – समर्पित संपत्ति, स्थापित प्रतिमा में एक विधिक व्यक्ति के रूप में निहित है, जिसे, संपत्ति धारण करने हेतु, विधि में एक प्रकृत व्यक्ति के समान समर्थ समझा जाएगा, जो कि एक विधिक हैसियत के साथ दावा करने की शक्ति रखता है तथा जिसके विरूद्ध दावा किया जा सकता है।

Cases referred:

2016 SCC OnLine Cal 4476, (2007) 7 SCC 482, 2008 SCC OnLine Raj. 839, 2017 (3) MPLJ 377, 2009 RN 347.

Rohit Mangal, for the appellant.
Mangesh Bhachawat, for the respondents.

J U D G M E N T

The Judgment of the Court was delivered by :
S. C. SHARMA, J. :- The appellant before this Court has filed this Writ Appeal being aggrieved by the judgment dated 31/10/2018 passed in W.P.No. 3428/2017 (Sagar Bai and others Vs. State of Madhya Pradesh and another).

2. Facts of the case reveal that the respondents before this Court were claiming themselves to be the owners of Temples and the land appurtenant thereto. The agricultural land situated at Gram Bawal Nai, Tehsil Javad, District Neemuch was recorded in the revenue record in the name of Lord Shri Girdharnath Ji. The details of the land attached to the temples and recorded in the name of deity are as under :

Survey No.	Area in Hectares
423/1	0.575
115	0.177
116	0.355
117	0.329
118/1	0.052
118/2	0.052
120	0.533
121	1.859

3. The respondent in the present appeal, (respondent No.4) who was the petitioner before the learned Single Judge, has filed a Civil Suit seeking declaration of title and permanent injunction with regard to the disputed temples / land attached to it. The necessity arose to file a Civil Suit only because the name of the petitioner / respondent No.4 / was deleted from the revenue record as a Manager and the name of the Collector was mutated in place of respondent No.4. The Collector was going to auction the land attached to the temple and in those circumstances a necessity arose to file a Civil Suit. The relevant paragraphs in the plaint preferred by the respondent No.4 against the State Government, are as under :

> यह कि, ग्राम नई बाबल में वादी के पैतृक वंश परम्परागत गृह देवता के निम्नांकित व्यक्तिगत मंदिर है –
>
> 01. मंदिर भगवान श्री गिरधारीनाथजी
>
> 02. मंदिर भगवान श्री पिताम्बराजी
>
> 03. मंदिर भगवान श्री अम्बेश्वर महादेवजी
>
> यह मंदिर सदैव से वंश परम्परा अनुसार कुलदेवता के नाते व्यक्तिगत जागीरदार सा. के जमाने से वादी के वंश द्वारा पूजित होते है इन मंदिरों की पूजा की व्यवस्था पुजारी की नियुक्ति पुजारी की निरस्ती का स्वत्व हमेशा से आज दिन तक वादी के परिवार द्वारा होता चला आ रहा है। जागीरदार सा. श्री हिरेन्द्रसिंहजी के स्वर्गवासी होने के बाद वादिया ही अपने पारिवारिक देव मंदिर की समस्त व्यवस्था पुजारी की नियुक्ति निरस्तगी करती है। इन मंदिरों पर वादिया ही करती है व पुजारी को उसका पारिश्रमिक देती है। यह मंदिर प्रायवेट है पब्लिक नही है। इन मंदिरों से जन साधारण का पब्लिक का कोई स्वत्व सुखाधिकार व्यवस्था आज तक नही रही है। आज भी वादिया की समस्त व्यवस्था कर रही है। इन मंदिरों को वादपत्र में आगे की चरणो में सुविधा हेतु वादग्रस्त मंदिर के नाम से संबोधित किये गये है।
>
> अतः प्रार्थना है कि वादी के हित में प्रतिवादी के विरूद्ध निम्नानुसार जयपत्र प्रदान किया जावे :–
>
> अ. यह स्वत्व घोषित किया जावे कि वादग्रस्त मंदिर प्रायवेट व्यक्तिगत वादिया के वंश के है और पब्लिक नही है व इनकी व्यवस्था वादिया की है प्रतिवादी जिलाध्यक्ष मंदसौर इसके व्यवस्थापक नही है।
>
> ब. यह घोषित किया जावे कि शासकीय रेवेन्यु रिकार्ड में वादग्रस्त मंदिर के पुजारी के स्थान पर जो सितारामदास व

गब्बू ब्राहम्ण का इन्द्राज है वह गलत है और व्यवस्थापक देवस्थान पर जो जिलाध्यक्ष मंदसौर का नाम दर्ज है वह अवैध है गलत है व इनकी रेवेन्यु रिकार्ड खाता व खसरो से कम कराने की व व्यवस्थापक के स्थान पर वादिया का नाम लिखाने की वादिया पात्र है।

स. जर्ये सीाई निषेधाज्ञा प्रतिवादी को सदैव के लिये रोका जावे कि वह स्वयं व अपने अधीनस्थ जिलाध्यक्षक तहसीलदार सा. जावद व पटवारी हल्का नं. 36 व 47 द्वारा या अन्य द्वारा वादग्रस्त आराजी की कृषि हेतु निलाम नही करे।

द. इस वाद का समस्त व्यय वादी को प्रतिवादी से दिलाया हो।

इ. अन्य न्यायोचित सहायता पात्रतानुसार वादिया को प्रदान हो।

4. By a judgment dated 3/4/1991, the trial Court has granted a decree for declaration and permanent injunction and paragraph 28 of the judgment dated 3/4/1991 reads as under :

फलस्वरूप वादिया का वाद प्रतिवादी के विरूद्ध डिक्री किया जाता है तथा घोषित किया जाता है कि ग्राम नई बावल स्थित मंदिर भगवान श्री गोरधननाथजी, मंदिर भगवान श्री पीताम्बरजी, मंदिर भगवान श्री अम्रेश्वर महादेवजी, वादिया के व्यक्तिगत है, जिनकी व्यवस्था वादिया की है जिलाधीश मंदसौर उनके व्यवस्थापक नही है। रेवेन्यु रिकार्ड में उपरोक्त मंदिर के पुजारी के स्थान पर सीतारामदास व गब्बू के इन्द्राज तथा व्यवस्थापक के स्थान पर जिलाधीश मंदसौर का इन्द्राज गलत है, जिन्हें कमकराकर वादिया अपना नाम लिखाने की पात्र हे। प्रतिवादी के विरूद्ध सीाई निषेधाज्ञा जारी की जाती है कि वह स्वयं अथवा अन्य द्वारा उपरोक्त मंदिरो की भूमि की कृषि हेतु निलाम नही करे। प्रतिवादी अपना तथा वादी का वाद व्यय वहन करेगा। अभिभाषक शुल्क तदनुसार जयपत्र बनाया जावे।

5. Thereafter a First Appeal was preferred against the judgment dated 3/4/1991 by the respondent Collector / State and the First Appeal was also dismissed on 23/12/1997, meaning thereby, in place of Collector, Mandsaur, the name of plaintiff / respondent No.4 / petitioner was to be mutated. The revenue record, in the present case, categorically reveals that the land in question is in the name of deity and Column No.2 of the Revenue Record, which was annexed as Annexure P/1 with the Writ Petition, categorically mentions the owner of the land / title holder of the land as Mandir Shri Girdharnath Ji, through Manager Mohini Kunwar. Thus, undisputedly, the property was in the name of deity.

6. Inspite of the fact that the property was in the name of deity, the respondent No.4 before this Court - Mohini Kunwar has executed a sale deed of agricultural land exclusively belonging to the temple to respondent Nos. 1, 2 and 3 on 31/3/2004, 5/5/2004 and 10/11/2003.

7. The Gram Panchayat passed a resolution on 7/6/2004 for mutating the name of respondent No.1, 2 and 3 in the revenue records. Mutation of name in the revenue record is always done by the Tehsildar and there is a prescribed procedure provided under the M. P. Land Revenue Code, 1959 and in those circumstances a complaint was made before the Sub Divisional Officer and the Sub Divisional Officer by order dated 23/2/2011 has cancelled the resolution passed by the Gram Panchayat and liberty was also granted to the present appellant to take appropriate action in accordance with law for challenging the sale deed.

8. An appeal was preferred against the order passed by the Sub Divisional Officer and the appellate authority by order dated 3/8/2011 has dismissed the appeal for want of maintainability.

9. Thereafter a Second Appeal was preferred against the order dated 3/8/2011 and the same was also dismissed by the Addl. Commissioner, Ujjain Division, Ujjain by order dated 23/4/2011. The respondent No.1 to 4 thereafter preferred a revision before the Board of Revenue and the Board of Revenue has also dismissed by revision by order dated 8/2/2017. The respondent No.1 to 4 thereafter filed a Writ Petition under Article 226 / 227 of the Constitution of India and the learned Single Judge has allowed the Writ Petition. The learned Single Judge has arrived at a conclusion that the temples in question were the private property of respondent No.4 and there is a difference between private temples and the temples open for public. It has also been observed that the authorities have wrongly concluded that the suit property is deity's property and, therefore, the mutation done on the basis of sale deed executed by respondent No.4 was in order. The learned Single Judge has arrived at a conclusion that respondent No.4 was competent to execute sale deed in favour of respondent Nos. 1, 2 and 3 and respondent No. 1, 2 and 3 are entitled to get their name mutated in the revenue records, pursuant to the resolution passed by the Gram Panchayat dated 7/6/2004.

10. In the present case, the undisputed facts as established from the record makes it very clear that the temples in question and the lands attached to the temple were recorded in the revenue records in the name of Mandir Shri Girdharnath Ji and respondent No.4 is the Manager. It is not a case where the land is recorded in the name of respondent No.4 or her ancestors showing existence of a temple. The property in question was dedicated to the deity and the deity is perpetual minor and by no stretch of imagination, the property could have been sold by sale deed as the deity is the title holder of the property.

11. A similar view has been taken by the Division Bench of the Calcutta High Court in the case of *Bijoy Krishna Mishra Vs. Chittaranjan Das Bera* reported in 2016 SCC OnLine Cal 4476. The Hon'ble Supreme Court in the case of *A. A. Gopalkrishnan Vs. Cochin Devaswom Board and others* reported in (2007) 7 SCC 482 in paragraph 10 has held as under:

> 10. The properties of deities, temples and Devaswom Boards, require to be protected and safeguarded by their Trustees/Archaks/ Sebaits/employees. Instances are many where persons entrusted with the duty of managing and safeguarding the properties of temples, deities and Devaswom Boards have usurped and misappropriated such properties by setting up false claims of ownership or tenancy, or adverse possession. This is possible only with the passive or active collusion of the concerned authorities. Such acts of 'fences eating the crops' should be dealt with sternly. The Government, members or trustees of Boards/ Trusts, and devotees should be vigilant to prevent any such usurpation or encroachment. It is also the duty of courts to protect and safeguard the properties of religious and charitable institutions from wrongful claims or misappropriation.

12. In the light of the aforesaid judgment, as the deity is a perpetual minor and rights of the deity are to be protected by the Courts, no sale of land could have taken place in the manner and method it has been done and, therefore, the subsequent resolution passed by the Gram Panchayat for mutation of name is bad in law.

13. The Division Bench of Rajasthan High Court in the case of *Kailash Chand and others Vs. Board of Revenue for Rajasthan Ajmer and others* reported in 2008 SCC OnLine Raj. 839 has taken a similar view.

14. The Division Bench of this Court in the case of *State of Madhya Pradesh Vs. Pujari Utthan Avam Kalyan Samit* reported in 2017 (3) MPLJ 377 has taken a similar view. It has been held in the aforesaid that the name of the Pujari mutated in the revenue record, cannot be replaced by the Collector, however, the fact remains that the Pujari will continue to be a Manager, he does not become the title holder and it is the deity who is the title holder of the property.

15. In another case decided by this Court ie., *Gayaprasad and another Vs. State of MP* reported in 2009 RN 347, this Court after taking into account Sec. 158, 185 and 57 of the MP Trusts Act, 1951 has held that the Pujari cannot claim right of Bhumiswami or even right of a tenant and the deity being a juristic person can hold the same. It has been further stated that in respect of the property owned

by the deity, it being a religious property, no right can be claimed by the Trustee or the Manager. Thus, in short, once it is an established fact that the title holder of the property is a deity, as in the present case, which is established from the revenue record (Annexure P/1) filed with the Writ Petition. The respondent No.4 is simply a Manager and not the title holder. The title holder is Mandir Shri Girdharnath Ji (the deity) and, therefore, this Court is of the considered opinion that the order passed by the revenue authorities does not warrant any interference and the order passed by the learned Single Judge deserves to be set aside.

16. It is a well settled proposition of law that dedicated property vests in the idol as a juristic person. When a property is given absolutely by a pious Hindu for worship of an idol, the property vests in the idol itself as a juristic person. There are various judgments delivered from time to time on this issue. The Hindu idol is a juridical subject and the pious idea that it embodies is given the status of a legal person and is deemed capable in law for holding property in the same way as a natural person. It has a juridical status, with the power of suing and being sued. Its interest are attended to by the person who has the deity in his charge and who is in law its Manager, with all the powers which would, in such circumstances, on analogy, be given to the Manager of the estate of an infant heir and, therefore, once the property has been given to a temple, which is known as debutter or endowment in favour of the established idol, the question of its disposal by the Manager is illegal. Once the property is dedicated to the deity which is a juristic person holding the title, cannot be sold by the Manager, as has been done in the present case and, therefore, the order of the Board of Revenue by which the resolution of the Gram Panchayat has been set aside in respect of the mutation, are certainly valid orders and, therefore, the order passed by the learned Single Judge which affirms the sale and mutation of the property belonging to the deity, deserves to be set aside and is accordingly hereby set aside.

17. The Writ Appeal stands allowed and disposed of.

Appeal allowed

I.L.R. [2019] M.P. 1383
WRIT PETITION
Before Mr. Justice G.S. Ahluwalia
W.P. No. 3256/2010 (Gwalior) decided on 24 January, 2019

SUNIL RAGHUVANSHI …Petitioner

Vs.

STATE OF M.P. & anr. …Respondents

***A. Service Law – Compassionate Appointment – Relevant Policy – Consideration* – Held – Although this Court in first round of litigation might have directed respondents to consider petitioner's application as per policy existing on date of death of father/employee, but as per subsequent interpretation of law by Full Bench, it is held that policy which was in existence on date of consideration of application would be applicable, according to which, petitioner was rightly held ineligible for appointment as his elder brother was already in government job – Petition dismissed.**
(Para 21 & 22)

क. सेवा विधि – अनुकंपा नियुक्ति – सुसंगत नीति – विचार किया जाना – अभिनिर्धारित – यद्यपि इस न्यायालय ने मुकदमेबाजी के प्रथम दौर में प्रत्यर्थीगण को पिता/कर्मचारी की मृत्यु की तिथि को विद्यमान नीति के अनुसार याची के आवेदन पर विचार करने हेतु निदेशित किया होगा, परंतु पूर्ण न्यायपीठ द्वारा पश्चात्वर्ती कानून के निर्वचन अनुसार, यह अभिनिर्धारित किया गया है कि आवेदन को विचार में लेने की तिथि को जो नीति विद्यमान थी, वह प्रयोज्य होगी, जिसके अनुसार, याची को उचित रूप से नियुक्ति के लिए अपात्र ठहराया गया क्योंकि उसका बड़ा भाई पहले से ही सरकारी नौकरी में था – याचिका खारिज।

***B. Principles of Res-Judicata and Prospective Overruling – Applicability* – Held – In earlier round of litigation, respondents were only directed to consider application of petitioner, however there was no determination of right of petitioner nor was declared entitled for appointment – Process of consideration was in progress and there was no final adjudication of right of petitioner, thus principle of *res-judicata* would not apply in light of non-application of principle of prospective overruling – In order to apply principle of *res-judicata*, there should be a finding of fact either in favour or against petitioner.** **(Para 19 & 20)**

ख. पूर्व न्याय तथा भविष्यलक्षी विनिर्णय के सिद्धांत – प्रयोज्यता – अभिनिर्धारित – मुकदमेबाजी के पूर्ववर्ती दौर में, प्रत्यर्थीगण को केवल याची के आवेदन को विचार में लेने हेतु निदेशित किया गया था, तथापि याची के अधिकार का अवधारण नहीं किया गया था, न ही उसे नियुक्ति के लिए हकदार घोषित किया गया – विचार किये जाने की प्रक्रिया चल रही थी तथा याची के अधिकार का कोई अंतिम न्यायनिर्णयन नहीं हुआ था, इसलिए पूर्व न्याय का सिद्धांत भविष्यलक्षी विनिर्णय के सिद्धांत के अप्रयोजन के आलोक में

लागू नहीं होगा – पूर्व न्याय के सिद्धांत को लागू करने हेतु, या तो याची के पक्ष में अथवा उसके विरूद्ध तथ्य का निष्कर्ष होना चाहिए।

***C. Principles of Prospective Overruling – Applicability* – Held – Principle of prospective overruling would not apply in respect of a judgment unless and until it is expressly so mentioned in the judgment – Further held – Where rights of party has been considered and declared, then the said proceedings cannot be re-opened on the ground that judgment on the basis of which rights were declared, has been overruled. (Para 15 & 18)**

ग. भविष्यलक्षी विनिर्णय का सिद्धांत – प्रयोज्यता – अभिनिर्धारित – भविष्यलक्षी विनिर्णय का सिद्धांत एक निर्णय के संबंध में तब तक लागू नहीं होगा जब तक कि यह अभिव्यक्त रूप से निर्णय में उल्लिखित न हो – आगे अभिनिर्धारित – जहां पक्षकार के अधिकारों पर विचार किया गया है तथा घोषित किया गया है, तब उक्त कार्यवाहियों को इस आधार पर पुनः प्रारंभ नहीं किया जा सकता कि वह निर्णय जिसके आधार पर अधिकार घोषित किये गये थे, उलट दिया गया है।

Cases referred :

(2014) 5 SCC 75, 2010 (3) MPLJ 213, (2015) 7 SCC 412, 2018 (4) MPLJ 657, (2003) 4 SCC 147, (2003) 7 SCC 517, (2014) 6 SCC 537, (2015) 4 SCC 515, (2007) 3 SCC 557, 1994 Supp (1) SCC 310, (2006) 8 SCC 662.

K.B. Chaturvedi with *G.P. Chaurasiya*, for the petitioner.
Vivek Jain, G.A. for the respondents/State.

(Supplied: Paragraph numbers)

O R D E R

G.S. AHLUAWLIA, J. :- This petition under Article 226 of the Constitution of India has been filed against the order dated 5/4/2010 passed by the Collector, Guna in file No.462/EST/6-2/48/2005, by which the application filed by the petitioner for appointment on compassionate ground has been rejected on the ground that the elder brother of the petitioner is already in Government job, therefore, in the light of the policy dated 18/8/2008, the petitioner is not eligible for appointment on compassionate ground.

2. The necessary facts for disposal of the present petition in short are that the father of the petitioner, namely, Arjun Singh Raghuvanshi was working on the post of Assistant Grade-II, who died in harness on 20/5/2005. The petitioner filed an application for appointment on compassionate ground on 6/6/2005 and at the time of death of the father of the petitioner, policy dated 1/5/2000 was in vogue. The claim of the petitioner is that as the application for appointment on compassionate ground was rejected by respondent no.2 ignoring the policy dated 1/5/2000, therefore, the petitioner filed a writ petition before this Court, which

was registered as Writ Petition No.3774/2007 (s) and the said writ petition was allowed by order dated 22/7/2009 and order dated 13/7/2007 passed by respondent no.2 was quashed and the following order was passed:-

> "Resultantly, without commenting upon the merits of the case, as this Court is of the considered opinion that the policy issued in the year 2007 has wrongly been applied in the case of petitioner, the impugned order dated 13/07/2007 passed by the respondent/Collector is hereby set aside. The matter is remitted back to the respondent/Collector to consider the case of the petitioner afresh taking into consideration the earlier policy issued by the State Government dated 01/05/2000 enclosed as Annexure P/26. The aforesaid exercise of considering the case of the petitioner and passing a fresh order as per policy dated 01/05/2000 shall be concluded within a period of 90 days from the date of receipt of a certified copy of this order.
>
> With aforesaid the writ petition stands allowed. No order as to costs."

3. It is submitted that thereafter the matter was reconsidered by the respondents. The claim of the petitioner has been once again rejected by considering the policy dated 22/1/2007 and 18/8/2008, whereas the direction given by this Court was to consider the policy, which was in force on the date of death of the father of the petitioner. It is submitted by the counsel for the petitioner that the order under challenge is bad in the light of the earlier order passed by this Court. It is further submitted that once the matter was finally adjudicated by this Court by holding that the policy, which was in vogue on the date of death of the father of the petitioner would be applicable, therefore, the principle of *res judicata* would apply and the respondents cannot travel beyond the directions given by this Court. To buttress his contentions, the counsel for the petitioner has relied upon the judgment passed by the Supreme Court in the case of *Subramanian Swamy Vs. State of Tamil Nadu* reported in (2014) 5 SCC 75.

4. *Per contra*, it is submitted by the counsel for the State that it is well established principle of law that the policy which was in vogue at the time of consideration of the application for compassionate appointment would be relevant and thus, the respondents have not committed any mistake in rejecting the claim of the petitioner on the ground that he is not eligible for appointment on compassionate ground, as his elder brother is already in Government job. It is further submitted that earlier there were two views; according to one view, the policy which was in vogue on the date of death of a Government employee was

crucial for determining the claim of the dependent for appointment on compassionate ground and another view was that the policy which is in vogue at the time of consideration of the application, would be material, and accordingly, the matter was referred to the Full Bench of this Court, which by judgment passed in the case of *Bank of Maharashtra and another Vs. Manoj K. Deharia and another* reported in 2010 (3) MPLJ 213 had held that the policy which was in vogue on the date of consideration of application for compassionate appointment would be applicable. However, thereafter, there were some diversant views in the light of the judgment passed by the Supreme Court in the case of *Canara Bank and another Vs. M. Mahesh Kumar* reported in (2015) 7 SCC 412 and accordingly, the matter was considered by the Full Bench of this Court and the controversy has been rest to peace by judgment passed by this Court in the case of *State of M.P. and others Vs. Laxman Prasad Raikwar* reported in 2018 (4) MPLJ 657.

5. Heard learned counsel for the parties.

6. The question that whether the policy in existence on the date of death of a Government employee or the policy which is in existence on the date of consideration of the application for compassionate ground would be applicable, is no more res *integra*. The Full Bench of this Court by judgment passed in the case of *Laxman Prasad Raikwar* (supra) has held as under:-

> "8. In the case of *Canera Bank Vs. M. Mahesh Kumar* (Supra), the Bank has challenged the order passed by the High Court directing for consideration on the application for compassionate appointment as per scheme dying in "harness scheme, 1993". The Apex Court has taken note of the facts that initially there was a scheme of compassionate appointment under "dying in harness scheme" issued by Circular No. 154/1993 w.e.f. 01.05.1993. The claim was resisted by the Bank on the ground that the financial condition of family members of the deceased employee was good and the said scheme was replaced with the scheme dated 14.02.2015 (HO Circular No. 35/2005) whereby the scheme of compassionate appointment was scrapped and in lieu of the same a new scheme of ex-gratia payment was introduced. However, the scheme of 2005 was also superseded by Scheme of 2014 which has revived the scheme providing for compassionate appointment. In para -14 of the judgment in *Canara Bank* (Supra) it was noted that the scheme of compassionate appointment was revived and therefore, it was held that the Bank was not justified in contending that the application for compassionate appointment of

> the respondent cannot be considered in view of passage of time. Thus the judgment passed by the Apex Court in the case of *Canara Bank* (Supra) is on consideration of the fact that the scheme for compassionate appointment was again introduced and revived.
>
> 9. In view of the aforesaid, we follow the ratio laid down by the Full Bench of this Court in the case of *Bank of Maharasthra Vs. Manoj Kumar Dehria* (Supra) and the reference is answered that compassionate appointment can not be claimed as a matter of right as it is not a vested right and the policy prevailing at the time of consideration of the application for compassionate appointment would be applicable."

7. Now the next question for consideration in the present case is that - "what would be the effect of the order dated 22/7/2009 passed by this Court in W.P. No.3774/2007 (s), by which the respondents were directed to consider the case of the petitioner in the light of the policy, which was in force on the date of death of the father of the petitioner?"

8. It is submitted by the counsel for the petitioner that the principle of *res judicata* would apply and since the controversy between the parties has been put to rest by directing the respondents to consider the policy which was in vogue on the date of death of the father of the petitioner, therefore, the judgment passed by the Full Bench of this Court in the case of *Laxman Prasad Raikwar* (supra) would not make the situation different and still the respondents are under an obligation to consider the application of the petitioner in the light of the policy which was in vogue on the date of death of the father of the petitioner. It is further submitted the principle of *res judicata* is applicable to Writ Petitions filed under Article 32 or 226 of the Constitution of India also and once it was already directed by the Court in the first round of litigation that the policy which was in vogue on the date of death of the Government employee would prevail and the application for grant of compassionate appointment should be considered on the basis of the said policy, therefore, the said judgment would apply as *res judicata*.

9. It is well established principle of law that the principle of prospective overruling of judgment, does not apply except where, it is specifically mentioned.

10. The Supreme Court in the case of *Sarwan Kumar and Another Vs. Madan Lal Aggarwal* reported in (2003) 4 SCC 147 has held as under:-

> "**15**. For the first time this Court in *Golak Nath v. State of Punjab* accepted the doctrine of "prospective overruling". It was held: (AIR p. 1669, para 51)

> "*51*. As this Court for the first time has been called upon to apply the doctrine evolved in a different country under different circumstances, we would like to move warily in the beginning. We would lay down the following propositions: *(1)* The doctrine of prospective overruling can be invoked only in matters arising under our Constitution; *(2)* it can be applied only by the highest court of the country i.e. the Supreme Court as it has the constitutional jurisdiction to declare law binding on all the courts in India; *(3)* the scope of the retroactive operation of the law declared by the Supreme Court superseding its 'earlier decisions' is left to its discretion to be moulded in accordance with the justice of the cause or matter before it.

"The doctrine of "prospective overruling" was initially made applicable to the matters arising under the Constitution but we understand the same has since been made applicable to the matters arising under the statutes as well. Under the doctrine of "prospective overruling" the law declared by the Court applies to the cases arising in future only and its applicability to the cases which have attained finality is saved because the repeal would otherwise work hardship on those who had trusted to its existence. Invocation of the doctrine of "prospective overruling" is left to the discretion of the Court to mould with the justice of the cause or the matter before the Court. This Court while deciding *Gian Devi Anand* case did not hold that the law declared by it would be prospective in operation. It was not for the High Court to say that the law laid down by this Court in *Gian Devi Anand* case would be prospective in operation. If this is to be accepted then conflicting rules can supposedly be laid down by different High Courts regarding the applicability of the law laid down by this Court in *Gian Devi Anand* case or any other case. Such a situation cannot be permitted to arise. In the absence of any direction by this Court that the rule laid down by this Court would be prospective in operation, the finding recorded by the High Court that the rule laid down in *Gian Devi Anand* case by this Court would be applicable to the cases arising from the date of the judgment of this Court cannot be accepted being erroneous."

11. The Supreme Court in the case of *M.A. Murthy Vs. State of Karnataka and Others* reported in (2003) 7 SCC 517 has held as under:-

> "**8**. The learned counsel for the appellant submitted that the approach of the High Court is erroneous as the law declared by this Court is presumed to be the law at all times. Normally, the decision of this Court enunciating a principle of law is applicable to all cases irrespective of its stage of pendency because it is assumed that what is enunciated by the Supreme Court is, in fact, the law from inception. The doctrine of prospective overruling which is a feature of American jurisprudence is an exception to the normal principle of law, was imported and applied for the first time in *L.C. Golak Nath v. State of Punjab*. In *Managing Director, ECIL v. B. Karunakar* the view was adopted. Prospective overruling is a part of the principles of constitutional canon of interpretation and can be resorted to by this Court while superseding the law declared by it earlier. It is a device innovated to avoid reopening of settled issues, to prevent multiplicity of proceedings, and to avoid uncertainty and avoidable litigation. In other words, actions taken contrary to the law declared prior to the date of declaration are validated in larger public interest. The law as declared applies to future cases. (See *Ashok Kumar Gupta v. State of U.P.* and *Baburam v. C.C. Jacob*.) It is for this Court to indicate as to whether the decision in question will operate prospectively. In other words, there shall be no prospective overruling, unless it is so indicated in the particular decision. It is not open to be held that the decision in a particular case will be prospective in its application by application of the doctrine of prospective overruling. The doctrine of binding precedent helps in promoting certainty and consistency in judicial decisions and enables an organic development of the law besides providing assurance to the individual as to the consequences of transactions forming part of the daily affairs. That being the position, the High Court was in error by holding that the judgment which operated on the date of selection was operative and not the review judgment in *Ashok Kumar Sharma case No. II*. All the more so when the subsequent judgment is by way of review of the first judgment in which case there are no judgments at all and the subsequent judgment rendered on review

petitions is the one and only judgment rendered, effectively and for all purposes, the earlier decision having been erased by countenancing the review applications. The impugned judgments of the High Court are, therefore, set aside."

12. The Supreme Court in the case of *K. Madhava Reddy and Others Vs. State of Andhra Pradesh and Others* reported in (2014) 6 SCC 537 has held as under:-

"**10**. We have heard the learned counsel for the parties at length. The doctrine of prospective overruling has its origin in American jurisprudence. It was first invoked in this country in *Golak Nath v. State of Punjab*, with this Court proceeding rather cautiously in applying the doctrine, was conscious of the fact that the doctrine had its origin in another country and had been invoked in different circumstances. The Court sounded a note of caution in the application of the doctrine to the Indian conditions as is evident from the following passage appearing in *Golak Nath* case wherein this Court laid down the parameters within which the power could be exercised. This Court said: (AIR p. 1669, para 51)

"*51*. As this Court for the first time has been called upon to apply the doctrine evolved in a different country under different circumstances, we would like to move warily in the beginning. We would lay down the following propositions: (1) The doctrine of prospective overruling can be invoked only in matters arising under our Constitution; (2) it can be applied only by the highest court of the country i.e. the Supreme Court as it has the constitutional jurisdiction to declare law binding on all the courts in India; (3) the scope of the retroactive operation of the law declared by the Supreme Court superseding its 'earlier decisions' is left to its discretion to be moulded in accordance with the justice of the cause or matter before it."

11. It is interesting to note that the doctrine has not remained confined to overruling of earlier judicial decision on the same issue as was understood in *Golak Nath* case. In several later decisions, this Court has invoked the doctrine in different situations including in cases where an issue has been examined and determined for the first time. For instance in *India Cement Ltd. v. State of T.N.*, this Court not only held that the levy of the cess was ultra vires the power of the State

Legislature brought about by an amendment to the Madras Village Panchayat Amendment Act, 1964 but also directed that the State would not be liable for any refund of the amount of that cess which has been paid or already collected. In *Orissa Cement Ltd. v. State of Orissa*, this Court drew a distinction between a declaration regarding the invalidity of a provision and the determination of the relief that should be granted in consequence thereof. This Court held that it was open to the Court to grant, mould or restrict the relief in a manner most appropriate to the situation before it in such a way so as to advance the interest of justice.

12. Reference may also be made to the decision of this Court in *Union of India v. Mohd. Ramzan Khan* where non-furnishing of a copy of the enquiry report was taken as violative of the principles of natural justice and any disciplinary action based on any such report was held liable to be set aside. The declaration of law as to the effect of non-supply of a copy of the report was, however, made prospective so that no punishment already imposed upon a delinquent employee would be open to challenge on that account.

13. In *Ashok Kumar Gupta v. State of U.P.*, a three-Judge Bench of this Court held that although *Golak Nath* case regarding unamendability of fundamental rights under Article 368 of the Constitution had been overruled in *Kesavananda Bharati v. State of Kerala* yet the doctrine of prospective overruling was upheld and followed in several later decisions. This Court further held that the Constitution does not expressly or by necessary implication provide against the doctrine of prospective overruling. As a matter of fact Articles 32(4) and 142 are designed with words of width to enable the Supreme Court to declare the law and to give such directions or pass such orders as are necessary to do complete justice. This Court observed: (*Ashok Kumar Gupta* case, SCC pp. 246-47, para 54)

"*54*. ... So, there is no acceptable reason as to why the Court in dealing with the law in supersession of the law declared by it earlier could not restrict the operation of law, as declared, to the future and save the transactions, whether statutory or otherwise, that were effected on the basis of the earlier law. This Court is, therefore, not impotent to adjust the competing rights of parties by

prospective overruling of the previous decision in *Rangachari* ratio. The decision in *Mandal* case postponing the operation for five years from the date of the judgment is an instance of, and an extension to the principle of prospective overruling following the principle evolved in *Golak Nath* case."

14. Dealing with the nature of the power exercised by the Supreme Court under Article 142, this Court held that the expression "*complete justice*" are words meant to meet myriad situations created by human ingenuity or because of the operation of statute or law declared under Articles 32, 136 or 141 of the Constitution. This Court observed: (*Ashok Kumar Gupta* case, SCC pp. 250-51, para 60)

"*60*. ... The power under Article 142 is a constituent power transcendental to statutory prohibition. Before exercise of the power under Article 142(2), the Court would take that prohibition (sic provision) into consideration before taking steps under Article 142(2) and we find no limiting words to mould the relief or when this Court takes appropriate decision to mete out justice or to remove injustice. The phrase 'complete justice' engrafted in Article 142(1) is the word of width couched with elasticity to meet myriad situations created by human ingenuity or cause or result of operation of statute law or law declared under Articles 32, 136 and 141 of the Constitution and cannot be cribbed or cabined within any limitations or phraseology. Each case needs examination in the light of its backdrop and the indelible effect of the decision. In the ultimate analysis, it is for this Court to exercise its power to do complete justice or prevent injustice arising from the exigencies of the cause or matter before it. The question of lack of jurisdiction or nullity of the order of this Court does not arise. As held earlier, the power under Article 142 is a constituent power within the jurisdiction of this Court. So, the question of a law being void ab initio or nullity or voidable does not arise."

15. In *Somaiya Organics (India) Ltd. v. State of U.P.*, this Court held that the doctrine of prospective overruling was in essence a recognition of the principle that the court moulds the relief claimed to meet the justice of the case and that the Apex Court in this

country expressly enjoys that power under Article 142 of the Constitution which allows this Court to pass such decree or make such order as is necessary for doing complete justice in any case or matter pending before this Court. This Court observed: (SCC p. 532, para 27)

"*27*. In the ultimate analysis, prospective overruling, despite the terminology, is only a recognition of the principle that the court moulds the reliefs claimed to meet the justice of the case — justice not in its logical but in its equitable sense. As far as this country is concerned, the power has been expressly conferred by Article 142 of the Constitution which allows this Court to 'pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it'. In exercise of this power, this Court has often denied the relief claimed despite holding in the claimants' favour in order to do 'complete justice'.

"**16**. The "doctrine of prospective overruling" was, observed by this Court as a rule of judicial craftsmanship laced with pragmatism and judicial statesmanship as a useful tool to bring about smooth transition of the operation of law without unduly affecting the rights of the people who acted upon the law that operated prior to the date of the judgment overruling the previous law."

13. The Supreme Court in the case of *B.A. Linga Reddy and others Vs. Karnataka State Transport Authority and others* reported in (2015) 4 SCC 515 has held as under:-

34. The view of the High Court in *Ashrafulla* has been reversed by this Court. The decision is of retrospective operation, as it has not been laid down that it would operate prospectively; more so, in the case of reversal of the judgment. This Court in *P.V. George v. State of Kerala* held that the law declared by a court will have a retrospective effect if not declared so specifically. Referring to *Golak Nath v. State of Punjab* it had also been observed that the power of prospective overruling is vested only in the Supreme Court and that too in constitutional matters. It was observed: (*P.V. George* case, SCC pp. 565 & 569, paras 19 & 29)

"*19*. It may be true that when the doctrine of stare decisis is not adhered to, a change in the law may adversely affect the interest of the citizens. The doctrine of prospective overruling although is applied to

overcome such a situation, but then it must be stated expressly. The power must be exercised in the clearest possible term. The decisions of this Court are clear pointer thereto.

29. Moreover, the judgment of the Full Bench has attained finality. The special leave petition has been dismissed. The subsequent Division Bench, therefore, could not have said as to whether the law declared by the Full Bench would have a prospective operation or not. The law declared by a court will have a retrospective effect if not otherwise stated to be so specifically. The Full Bench having not said so, the subsequent Division Bench did not have the jurisdiction in that behalf."

35. In *Ravi S. Naik v. Union of India*, it has been laid down that there is retrospective operation of the decision of this Court. The interpretation of the provision becomes effective from the date of enactment of the provision. In *M.A. Murthy v. State of Karnataka*, it was held that the law declared by the Supreme Court is normally assumed to be the law from inception. Prospective operation is only exception to this normal rule. It was held thus: (*M.A. Murthy* case, SCC pp. 520-21, para 8)

"*8*. The learned counsel for the appellant submitted that the approach of the High Court is erroneous as the law declared by this Court is presumed to be the law at all times. Normally, the decision of this Court enunciating a principle of law is applicable to all cases irrespective of its stage of pendency because it is assumed that what is enunciated by the Supreme Court is, in fact, the law from inception. The doctrine of prospective overruling which is a feature of American jurisprudence is an exception to the normal principle of law, was imported and applied for the first time in *Golak Nath v. State of Punjab*. *In ECIL v. B. Karunakar* the view was adopted. Prospective overruling is a part of the principles of constitutional canon of interpretation and can be resorted to by this Court while superseding the law declared by it earlier. It is a device innovated to avoid reopening of settled issues, to prevent multiplicity of proceedings, and to avoid uncertainty and avoidable litigation. In other words, actions taken contrary to the law declared prior to the date of declaration are

> validated in larger public interest. The law as declared applies to future cases. (See *Ashok Kumar Gupta v. State of U.P.* and *Baburam v. C.C. Jacob*.) It is for this Court to indicate as to whether the decision in question will operate prospectively. In other words, there shall be no prospective overruling, unless it is so indicated in the particular decision. It is not open to be held that the decision in a particular case will be prospective in its application by application of the doctrine of prospective overruling. The doctrine of binding precedent helps in promoting certainty and consistency in judicial decisions and enables an organic development of the law besides providing assurance to the individual as to the consequences of transactions forming part of the daily affairs. That being the position, the High Court was in error by holding that the judgment which operated on the date of selection was operative and not the review judgment in *Ashok Kumar Sharma* case. All the more so when the subsequent judgment is by way of review of the first judgment in which case there are no judgments at all and the subsequent judgment rendered on review petitions is the one and only judgment rendered, effectively and for all purposes, the earlier decision having been erased by countenancing the review applications. The impugned judgments of the High Court are, therefore, set aside."

14. The Supreme Court in the case of *P.V. George Vs. State of Kerala* reported in (2007) 3 SCC 557 has held as under :

> "27. The rights of the appellants were not determined in the earlier proceedings. According to them, merely a law was declared which was prevailing at that point of time; but the appellants were not parties therein. Thus, no decision was rendered in their favour nor any right accrued thereby."

15. Thus, it is clear that the principle of prospective overruling would not apply in respect of the judgment passed by the Supreme Court unless and until it is expressly so mentioned in the judgment. Furthermore, there cannot be an estoppel against the statute.

16. The Supreme Court in the case of *Bengal Iron Corpn. v. CTO* reported in 1994 Supp (1) SCC 310 has held as under:-

> "**18**. ..... There can be no estoppel against the statute.....Law is what is declared by this Court

> and the High Court — to wit, it is for this Court and the High Court to declare what does a particular provision of statute say, and not for the executive. Of course, the Parliament/Legislature never speaks or explains what does a provision enacted by it mean. (See *Sanjeev Coke Mfg. Co. v. Bharat Coking Coal Ltd.*)"

17. Thus, where the question of law has been settled by the Courts, then it has to be held that the said question of law was in existence right from day one.

18. However, where the rights of a party has been considered and declared, then the said proceedings cannot be reopened on the ground that the judgment on the basis of which, the rights were declared, has been overruled. The Supreme Court in the case of *Union of India Vs. Madras Telephone SC & ST Social Welfare Assn.* reported in (2006) 8 SCC 662 has held as under :

> "**21**. Having regard to the above observations and clarification we have no doubt that such of the applicants whose claim to seniority and consequent promotion on the basis of the principles laid down in the Allahabad High Court's judgment in *Parmanand Lal* case have been upheld or recognised by the Court or the Tribunal by judgment and order which have attained finality will not be adversely affected by the contrary view now taken in the judgment in *Madras Telephones*. Since the rights of such applicants were determined in a duly constituted proceeding, which determination has attained finality, a subsequent judgment of a court or tribunal taking a contrary view will not adversely affect the applicants in whose cases the orders have attained finality. We order accordingly."

19. Thus, the question for consideration is that whether this Court by order dated 22/7/2009 passed in W.P.3774/2007 (s) had determined the rights of the petitioner, or the right of the petitioner was yet to be decided by the respondents. In order to apply the principle of Res Judicata, there should be a finding of fact either in favor or against the petitioner.

20. As already observed, this Court had held that since, the policy which was in vogue on the date of the death of the Govt. employee would be applicable, therefore, the respondents were directed to reconsider the case of the petitioner in the light of the said policy. However, there was no determination of the right of the petitioner. The petitioner was not declared entitled for appointment on compassionate ground. Thus, this Court is of the view that the process for

consideration of the application for appointment on compassionate was still in progress and there was no final adjudication of the right of the petitioner, and under this circumstance, the principle of *Res Judicata* would not apply in the light of non-application of the principle of prospective overruling. The law declared in the subsequent judgment, thereby overruling the earlier judgment, has to be considered as a law, to be in force from the very inception.

21. Therefore, this Court is of the considered opinion that although this Court in the first round of litigation might have directed the respondents to consider the application of the petitioner for appointment on compassionate ground in the light of the policy existing on the date of death of the father of the petitioner, but in the light of the subsequent interpretation of law, as held by the Full Bench of this Court in the case of *Manoj Kumar Deharia* (supra) and in the case of *Laxman Prasad Raikwar* (supra), it is held that the policy which was in existence on the date of consideration of the application would be applicable.

22. Considering the facts and circumstances of the case, this Court is of the considered opinion that the respondents did not commit any mistake by rejecting the claim of the petitioner by considering the policy which was in vogue on the date of consideration of the application, and the petitioner was rightly held ineligible for appointment on compassionate ground, as his elder brother was already in the Government job.

The petition fails and is hereby **dismissed.**

Petition dismissed

I.L.R. [2019] M.P. 1397
WRIT PETITION
Before Mr. Justice Atul Sreedharan
W.P. No. 3945/2019 (Jabalpur) decided on 17 June, 2019

SHASHIMANI MISHRA & anr. …Petitioners

Vs.

STATE OF M.P. & anr. …Respondents

***A. Constitution – Article 21 and Universal Declaration of Human Rights, 1948, Article 12 – Right to Privacy* – Held – Act of petitioner No. 2, even assuming that his father is no more and he has kept the human remains/body in his residential premises, by itself does not become an illegality warranting intrusive action by State – State cannot curtail actions and thoughts of individual nor can intervene and disturb the right of privacy as long as such action is not violative of any existing law, being an offence or illegality –**

Further, there is no complaint before any authorities by any neighbours – Impugned direction quashed – Petition allowed. (Paras 21 to 23)

क. संविधान – अनुच्छेद 21 एवं मानव अधिकारों की सार्वभौम घोषणा, 1948, अनुच्छेद 12 – एकांतता का अधिकार – अभिनिर्धारित – याची क्र. 2 का कृत्य, यहां तक कि यह धारणा करते हुए भी कि उसके पिता अब नहीं रहे और उसने उसके निवासीय परिसर में मानव अवशेष/शरीर रखा है, अपने आप में कोई अवैधता नही बनता जिससे कि राज्य द्वारा हस्तक्षेप की कार्रवाई आवश्यक हो जाये – राज्य, व्यक्ति के कृत्यों एवं विचारों को कांट–छांट नहीं सकता न ही एकांतता के अधिकार के साथ हस्तक्षेप एवं बाधित कर सकता है जब तक कि उक्त कृत्य, एक अपराध या अवैधता होने के नाते किसी विद्यमान विधि का उल्लंघन नहीं करता है – इसके अतिरिक्त, किसी प्राधिकारी के समक्ष किसी पड़ोसी द्वारा कोई शिकायत नहीं की गई है – आक्षेपित निदेश अभिखंडित – याचिका मंजूर।

***B. Penal Code (45 of 1860), Section 43 & 268 – Term "Illegal"* – Held – It is not sufficient that an act must be right or wrong applying standards of contemporary social morality – Act must be wrong in the eyes of law – Term 'Unlawful' and 'Illegal' – Discussed and explained.**

(Para 13 to 16)

ख. दण्ड संहिता (1860 का 45), धारा 43 व 268 – शब्द ''अवैध'' – अभिनिर्धारित – यह पर्याप्त नहीं कि समसामयिक सामाजिक नैतिकता के मानकों को लागू करते हुए किसी कृत्य को सही या गलत ही होना चाहिए – विधि की दृष्टि में कृत्य गलत होना चाहिए – शब्द 'विधिविरूद्ध' एवं 'अवैध' – विवेचित एवं स्पष्ट किया गया।

Cases referred :

(1995) 3 SCC 248, (2017) 10 SCC 1.

Ajay Mishra with *Amit Mishra*, for the petitioners.
Praveen Dubey, Dy. A.G. for the respondent State.
V.S. Shroti with *Saurabh Soni*, for the respondent No. 2.

O R D E R

ATUL SREEDHARAN, J. :- "The only way to deal with an unfree world is to become so absolutely free that your very existence is an act of rebellion". These words of Albert Camus, a French Philosopher, Author, and a Nobel Laureate in Literature, rings true in the facts of this case. The State Human Rights Commission, the Respondent No.2 herein, has impliedly alleged rebellion on the part of the Petitioner for not conforming to the social mores of the community by refusing to subject the mortal remains of his father to final rites and for not allowing the police and other authorities of the State to enter his residential premises in order to ascertain whether the father of the Petitioner No.2 is dead or alive. The Petitioner on the other hand has questioned the impugned order passed by the Respondent No.2 on the ground that, the Respondent No.2 has attempted to

impinge upon the Petitioner's freedom to act as he wishes and seeks to curtail the Petitioner's free will by insisting that the Petitioner allow free ingress to the police into his residential premises to ascertain the truth relating to the Petitioner's father. The Petitioner insists that his father is alive and well and is under treatment at his residence. He does not wish the authorities of the State to intrude upon his privacy by entering his house to ascertain whether the father of the Petitioner is dead or alive.

2. The present case seeks an answer to the question as to what is the meaning of legal/lawful and whether, the impugned order passed by the Respondent No.2 violates the right to privacy of the Petitioner. The Petitioner No.1 is Mrs. Shashimani Mishra, W/o. Mr. Kulamani Mishra. The Petitioner No.2 is Dr. Rajendra Kumar Mishra. The Petitioner No.2 is the son of the Petitioner No.1. The Petitioner No.2 is an officer serving in the Indian Police Service and is presently posted as Additional Director General of Police (Recruitment). Both the Petitioners are resident of D-7, 74 - Bungalows, Bhopal. The Petitioners are aggrieved by the letter dated 14/02/19 issued by the State Human Rights Commission, the Respondent No.2 herein, addressed to the Director General of Police, Madhya Pradesh (hereinafter referred to as "DGP"). Also aggrieved are the Petitioners, by the letter dated 20/02/19 addressed by the DGP to the Respondent No.2.

3. The case arises from a report in the newspaper "Hari Bhoomi"dated 14/02/19 in which one of the head line story was ''बदबू से बीमार जवानों ने बताया.....मृत पिता को जीवित करने झाड फूँक, एडीजी बोले.....उनमें तो 14 जनवरी को ही प्राण लौट आए थे''. The report disclosed that the father of the Petitioner No.2 passed away after treatment on 14/02/19 and thereafter, the Petitioners have been keeping the lifeless body of Mr. Kulamani Mishra at their residence on account of which two of the guards on duty fell ill allegedly due to the stench emanating from the decomposing body.

4. On the basis of the newspaper report, The Respondent No.2 noted on the copy of the report *"Call for the report from (1) DGP Bhopal -whether it is a natural death of (*sic : *or) unnatural ? - whether dead body has been cremated or not? - what scientific measures have been adopted to preserve the dead body and to stop the bad smell? Within three days "*. The Registrar (Law), on the afore stated directions of the Respondent No.2, addressed the letter dated 14/02/19 to the DGP seeking answers to the queries raised by the Respondent No.2 as already mentioned hereinabove.

5. In response to the said letter, the Police Head Quarters (hereinafter referred to as "PHQ") vide letter dated 18/02/19 replied that Mr. Kulamani Mishra was admitted at Bansal Hospital on 13/01/19 with a serious respiratory condition and that he passed away at 4.30 pm on 14/01/19. The death was natural on account

of the illness and the death certificate was enclosed. The letter further revealed that the last rites have not been performed. It also informed the Respondent No.2 that the Station House Officer of Police Station TT Nagar went to the residence of the Petitioners in order to enquire about the death of Mr. Kulamani Mishra. Respondent No.2 was also informed that the Petitioner No.2 did not give a clear answer to the SHO and neither did he permit the officer to enter the Petitioners residence. Lastly, it informed the Respondent No.2 that it was not possible for the police to give information regarding the scientific measures adopted by the Petitioners in order to prevent the decomposition of the corpse.

6. Upon receiving the letter dated 18/02/19 from the PHQ, the Respondent No. 2, vide letter dated 19/02/19 issued certain directions to the DGP. These directions were to depute a Senior Police Officer, not below the rank of s Superintendent of Police who was to contact the Dean of the Gandhi Medical College, Bhopal or the Chief Medical and Health Officer, Bhopal to constitute a committee of three Medical Specialists, belonging to the Allopathic System of medical science. He was also to contact the officer concerned of the Department of Ayurvedic Medicine to constitute a committee of three Government Ayurvedic Doctors/Specialists. These Committees, assisted with a police force, headed by a Superintendent of Police, were to visit the residence of the Petitioners at 74 Bungalow and respectfully enter the premises after informing the Petitioners the purpose of their visit and after obtaining permission. Lastly, this letter directed, that if the Petitioners resist the team members or interfere with the inquiry as directed by the Respondent No.2, the police officers and the team members are authorised under section 13(3) of the Protection of Human Rights Act, 1993 and under Regulation 12 of the Regulations to take necessary action.

7. Thereafter, the Petitioners have filed the Writ Petition on 22/02/19. The pleadings are complete and with the consent of parties, the petition was heard on 11/04/19 and reserved for orders.

8. Mr. Ajay Mishra, Ld. Sr. Counsel appearing for the Petitioners has submitted with much vehemence, that the husband of the Petitioner No.1 and the father of the Petitioner No.2 is still alive and that he is undergoing treatment under the Ayurvedic System of medicine and that Mr. Kulamani Mishra is not dead. The Ld. Counsel has conceded to the fact that Mr. Kulamani Mishra was admitted to Bansal Hospital on 13/01/19 with respiratory distress. He however does not agree with the death certificate issued by Bansal Hospital which declared Mr. Kulamani Mishra dead on 14/01/19. According to the Ld. Counsel for the Petitioners, signs of life existed, though feeble, in Mr. Kulamani Mishra and that he was being treated at the residence of the Petitioners by a Vaid named Radheshyam Shukla. Ld. Counsel for the Petitioners drew the attention of this Court to documents filed along with I.A No. 3127/19 which is an application for taking additional

documents on record. For the reasons stated therein, I.A No. 3127/19 is allowed and the documents filed therewith are taken on record and considered by this Court. Annexure P/6 is a certificate issued by Vaid Radheshyam Shukla dated 05/03/19 according to which, the Vaid is treating Mr. Kulamani Mishra regularly from 15/01/19. Annexure P/7 is record of the treatment being given to Mr. Kulamani Mishra, by the Vaid since 15/01/19.

9. It has further been submitted by the Ld. Sr. Counsel for the Petitioners that their privacy is being targeted by the Respondent No.2 on the basis of baseless newspaper reports. He has drawn the attention of this Court to the reportage in the newspaper Hari Bhoomi dated 14/01/19, on the basis of which the Respondent No.2 took *suo motu* cognizance of the case. He has questioned the very basis on which the newspaper report is based, which is the alleged information given by two of the guards posted at the house of the Petitioners who reportedly fell ill on account of the foul smell emanating from corpse. He states that it is undisputed that statements of the two guards have never been recorded by anyone. It is also undisputed that the identity of the said guards is not known. He has further submitted that if Mr. Kulamani Mishra actually died on 14/01/19, then nothing could have prevented the decomposition of the body and the stench of death would have permeated all over the immediate neighbourhood. He has also stated at bar that the immediate neighbours of the Petitioners are Senior Bureaucrats of the rank of Principal Secretaries to the Government of Madhya Pradesh and such persons would have been the first ones to complain about foul smell if indeed Mr. Kulamani Mishra was dead and the body was decomposing. However, there has not been a single complaint from any of the neighbours of the Petitioners to the police or any other authority to that effect. Thus, the case of the Petitioners is that Mr. Kulamani Mishra is very much alive and is undergoing Ayurvedic treatment for his illness and that he is not dead, as claimed by the Respondent No.2, Ld. Sr. Counsel has also referred to certain articles from the Universal Declaration of Human Rights which emphasise on the right to privacy of an individual. They shall be dealt with by this Court in due course.

10. Mr. V.K. Shroti, Ld. Sr. Counsel appearing on behalf of the Respondent No.2 has proceeded on the premise that Mr. Kulamani Mishra is dead and his corpse is being kept in the residence of the Petitioners unlawfully. He further states that the decomposing body of Mr. Kulamani Mishra poses a health hazard to people in vicinity and that the remains of Mr. Kulamani Mishra should be subjected to last rites as per the rites and rituals of the Petitioners and that would be the way in which a dignified quietus is given to the entire episode. The letters written by the Respondent No.2 to the DGP indicates that to begin with, the Respondent No.2 believes that Mr. Kulamani Mishra is no longer alive. However, the letter dated 19/02/19 written by the Respondent No.2 to the DGP giving directions to constitute two committees of doctors, one each of Allopathic and

Ayurvedic systems of medicine, reveals a lingering doubt in the mind of the Respondent No.2 with regard to the actual status relating to the life of Mr. Kulamani Mishra. The Ld. Sr. Counsel for the Respondent No.2 has referred to the judgment of the Supreme Court in *Pt. Parmanand Katara Vs. UOI* (1995) 3 SCC 248, and also a judgement of Madras High Court in *S. Sethuraja Vs. The Chief Secretary, Government of Tamil Nadu and Ors* - W.P (MD) No. 3888 of 2007. The Judgement of the Madras High Court dealt with an instance where an Indian national had died abroad and his next of kin wanted his body to be brought to India for last rites. In that case, the relatives of the deceased themselves were interested in performing the last rites in accordance with Hindu rituals and therefore approached the High Court to issue directions to the Central Government to assist the Petitioner in that case to bring the human remains to India. The main thrust of the Ld. Sr. Counsel's argument is that the body of Mr. Kulamani Mishra deserves a dignified disposal in accordance with the rites and rituals of the Petitioners community and that the retention of the remains by the Petitioners violates the human rights of Mr. Kulamani Mishra, which continues even after his demise till the dignified disposal of the body.

11. Heard the Ld. Counsels for the parties, perused the pleadings and the documents filed therewith. In this case, the stand taken by the parties are conflicting. The Petitioners state that Mr. Kulamani Mishra is alive and undergoing treatment and that they don't want to allow any kind of inquiry that would challenge their right to privacy and so, they would not allow any investigative team, free ingress into their residence in order to ascertain whether Mr. Kulamani Mishra is alive or dead. If the contention of the Respondent No.2 is correct, then the natural fallout of death would have been the decomposition of the body, in which case, the stench would have been so overpowering that it would be impossible for any neighbour in a radius of fifty-metre from the residence of the Petitioners, to have been unaffected. On the contrary, it is undisputed that there have been no complaints from any of the neighbours. Besides, the Petitioners are living in the same house in which the corpse (as per the Respondent No.2) of Mr. Kulamani Mishra is kept. On the other hand, even if it is assumed that Mr. Kulamani Mishra is no more, there is a possibility of the body having undergone a process of natural mummification which though rare, is not unknown and therefore, decomposition of the body may have been halted. The Ld. Sr. Counsel for the Petitioners has also stated that the Petitioners have not committed any offence or any illegality, that there have been no complaints by any of the neighbours to any authority relating to any stench of decomposition emanating from the house of the Petitioners. The Ld. Sr. Counsel has also submitted that the Respondent No.2 has ironically acted in violation of Article 12 of the Universal Declaration of Human Rights which provides for the protection of an individuals right to privacy as human right. Article 12 read as follows; **"No one shall be**

subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks". The Ld. Sr. Counsel for the Petitioners has argued that the impugned order of the Respondent No.2 arbitrarily interferes with the right to privacy without there being any rational or legal basis for the same.

12. In order to ascertain the legality of the Petitioners act or the lack of it, this Court proceeds to examine the issue from the standpoint of the Respondent No.2 that Mr. Kulamani Mishra is dead. According to the Ld. Sr. Advocate appearing on behalf of the Respondent No.2, even a corpse has the right to a respectable disposal in accordance with the rites and rituals of the religion or community from which the person hailed. The Respondent No.2's basic argument is based upon the judgement of the Supreme Court in *Parmanand Katara's* case supra. In that case, the Supreme Court held that post execution, there was no requirement to keep the body of a condemned prisoner hanging even after the doctor has declared him dead.

13. The question here is if the act of the Petitioners in retaining the body of the deceased and not subjecting it to last rites is unlawful or illegal? It goes without saying that where a body retained in a residential premises by the inmates in a similar situation, starts putrefying, the health-related hazard to the public at large would make the continued retention of the cadaver unlawful and illegal, the same being an offence u/s. 268 (public nuisance) and 278 (fouling the air) of the Indian Penal Code, and in such a situation, the State would be empowered, if need be, to forcefully enter such a premise to remove the body in the interest of public health and wellbeing. However, the facts in this case do not disclose either public nuisance or fouling of the air. At the risk of repetition, admittedly, there are no complaints. No one who has come forward before any authority, empowered to take cognisance (sic : cognizance) , that the stench of death emanates from the residence of the Petitioners. In such a situation, assuming *arguendo* that Mr. Kulamani Mishra is no more and the Petitioners are retaining his lifeless body instead of disposing it with dignity, would that be an unlawful or an illegal act on the part of the Petitioners? If yes, then the State would be authorised to use such necessary force to remove the body in question and if no, then the right to privacy of the Petitioners cannot be interfered with under the guise of wanting to unravel the truth.

14. The Court proceeds to examine as to what makes an act lawful or legal? and in the converse, what is unlawful or illegal? Where the law permits a certain act, there is no doubt that doing of that act would be legal. Similarly, where the law prohibits a particular act, the doing of that act would be illegal. However, where the law does not explicitly permit an act and neither prohibit it, or in other words,

where the law of the land is completely silent about the legality or illegality of the act, would the doing of that act be unlawful, only because it is at conflict with the contemporary mores of the society and an overwhelmingly preponderant public perception of what is right? The liberty of an individual to act in any manner where such act is not prohibited under the law, is unfettered and unquestionable.

15. The law dictionary defines **"Lawful"** as **"Not contrary to law; permitted or recognised by law"**[1]. A **"Legal Act"** is defined as **"1. Any act not condemned as illegal"**[2]. Thus, it is not sufficient that an act must be right or wrong applying the standards of contemporary social morality. The act must be wrong in the eyes of law. **"A legal wrong is an act which is legally wrong, being contrary to the rule of legal justice and a violation of the law. It is an act which is authoritatively determined to be wrong by a rule of law, and is therefore treated as a wrong in and for the purpose of the administration of justice by the state. It may or may not be a moral wrong, and conversely a moral wrong may or may not be a wrong in law"**[3].

16. Perhaps the most succinct and precise definition to the term "Illegal" and "Legally bound to do" is give in section 43 of the Indian Penal Code;

> **43. "Illegal", "Legally bound to do".—The word "illegal" is applicable to everything which is an offence or which is prohibited by law, or which furnishes ground for a civil action; and a person is said to be "legally bound to do" whatever it is illegal in him to omit.**

Thus, an illegal act is one which is an offence or prohibited by law and gives rise to a cause for civil action. A man is also legally bound to do an act, the non-performance of which, would be illegal.

17. The Ld. Counsel for the Respondent No.2 has argued that, dealing with human remains in a manner contrary to social norms is violative of the human rights of the deceased. The reliance by the Ld. Counsel for the Respondent No.2 on *Parmanand Katara's* case supra is misplaced in the facts and circumstances of the case. As already discussed, the Supreme Court in *Parmanand Katara's* case was dealing with the necessity to keep the body of an executed prisoner hanging for thirty minutes even after the doctor had declared the convict dead. In that context, the Supreme Court held that fair treatment under Article 21 was not restricted to the living alone but the right to dignity and fair treatment extends to the human remains of the condemned convict.

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[1] **Black's Law Dictionary - 10th Edition.**
[2] **Black's Law Dictionary - 10th Edition.**
[3] **Salmond on Jurisprudence - Eleventh Edition by Glanville Wiiliams - Chapter 10, Page 259.**

18. Societal norms cannot compel individual behaviour to be in consonance with social expectations unless, the same is mandated through the *jus scriptum*. It may be the norm to consign human remains to the corresponding last rites of the deceased. However, it cannot be held, as is submitted by the Ld. Counsel for the Respondent No.2, that failure to consign the human remains to last rites would result in the violation of the law laid down in *Parmanand Katara's* case and thus, violate the human rights of the deceased. If the said contention is taken to be correct, what happens in the cases of organ donation? Or, in such cases were the body of the deceased is donated to Medical Colleges for the purpose of introducing fledgling medical students to the subject of Human Anatomy? In the first instance, the human remains are subjected to partial mutilation to remove such vital organs that may give a new lease of life to the ailing after which the remains may be subjected to final rites. In the second instance, there is complete mutilation of the cadaver in the process of teaching medical students. As far as the society is concerned, both these instances are not in consonance with the preponderant public opinion on how human remains may be disposed of but the importance of both these instances to the society cannot be underscored enough.

19. Next, this Court examines the issue whether the Petitioner's right to privacy extends to preventing the authority of the State from entering his residential premises in order to ascertain the truth about his father's condition. A man's home is his castle and within its precincts, he is the undisputed master of his will. What he does within is beyond the scrutiny of the State unless, there is reasonable cause to believe that the residential premise is a scene of crime or of unlawful activity whereby the law of the land empowers the relevant functionaries of the State to compel the occupier to give ingress to them.

20. The preamble of our Constitution has at it focal point, the liberty of the individual. In this regard, it would relevant to briefly refer to the judgment of the Supreme Court in what is popularly known as the "Right to Privacy" case where the Supreme Court held "..... **The individual lies at the core of constitutional focus and the ideals of justice, liberty, equality and fraternity animate the vision of securing a dignified existence to the individual. The Preamble envisions a social ordering in which fundamental constitutional values are regarded as indispensable to the pursuit of happiness. Such fundamental values have also found reflection in the foundational document of totalitarian regimes in other parts of the world. What distinguishes India is the adoption of a democratic way of life, founded on the Rule of Law. Democracy accepts differences of perception, acknowledges divergence in ways of life, and respects dissent**"[4] (Emphasis by the Court). The Judgement of

[4] **Justice K.S. Puttaswamy (Retd) and Anr Vs. Union of India and Others - (2017) 10 SCC 1, paragraph 107 at page 402 to 403.**

the Constitution Bench of the Supreme Court makes it clear that in a democracy like ours there is no expectation from the citizens to act and behave like clones having the same perception and way of life. On the contrary, the Supreme Court has held that a democratic way of life accepts and respects dissent and allows the individual to think and act in a manner that may be at complete divergence with the thoughts and expectations of the society.

21. The Conduct of the Petitioners may be at divergence from the established social norm. It may be based upon a perception which may not find the approval of many yet, the Petitioners have the right to be different in thought, perception and action. Keeping the dead body of Mr. Kulamani Mishra (as is perceived and so stated on behalf of the Respondent No.2) at their residence may be revolting and abhorrent, bringing the bile to the mouth of many, viewed as bohemian by those who are conventional and conformist and yet, under no circumstances can the State intervene and disturb the right to privacy of the Petitioners if the said act does not come within the ambit and scope of an offence or an illegality. Morality may be a source of law, but it is not law and neither does it have the force of law. Today's morality may become law tomorrow either by way of legislation or common law pronouncement but till then, moral indignation of the society or the State, acting at behest of the society, cannot curtail the actions and thoughts of an individual as long as such action is not violative of any existing law.

22. Thus, the act of the Petitioner No.2, even assuming *arguendo* that his father is no more and he has kept the human remains in his residential premises, by itself does not become an illegality warranting intrusive action by the State. **"A regime, which forbids everything save only those things that are expressly allowed, would be regarded as a bullying power-structure, while a regime which permits everything save only those things that are expressly forbidden, would be counted liberal by contrast"**[5]. India falls in the latter category being a liberal democracy where a man is permitted to act in any manner he pleases, where such act is not prohibited under the law, irrespective of the fact that his act might be seen as galling by the majority. In view of what has been observed and held by this Court hereinabove, the queries raised by this Court in paragraph 13 and 14 of this judgement stands answered accordingly.

23. Thus, the Petition succeeds, the impugned direction given by the Respondent No. 2 to the State is held to be violative of the right to privacy of the Petitioners and thereby violative of the fundamental right to life of the Petitioner as enshrined under Article 21 of the Constitution. Therefore, the same is quashed.

Order accordingly

[5]**Jurisprudence by R.W.M. Dias, 5th Edition - Chapter 6, page 109.**

I.L.R. [2019] M.P. 1407 (DB)
WRIT PETITION

Before Mr. Justice Sujoy Paul & Mr. Justice B.K. Shrivastava

W.P. No. 7550/2008(s) (Jabalpur) decided on 28 June, 2019

K.K. BAJPAI …Petitioner

Vs.

UNION OF INDIA & ors. …Respondents

***A. Service Law – Departmental Enquiry – Fundamental Rules, 53, 54(4), 54(7) & 54-A(2)(i) – Suspension Period – Calculation of Pay & Allowances* – Held – Punishment of compulsory retirement was set aside by Tribunal on violation of natural justice and directed further inquiry, which could not be done despite liberty granted and because of which enquiry stood abated – Petitioner cannot be said at fault for this – Case of petitioner is covered under FR-54-A(2)(i) r/w 54(4), where exoneration of employee is not on merits, subject to FR-54(7), competent authority needs to determine the pay and allowances which shall be above the subsistence allowance and other allowances admissible under FR-53 but cannot be equivalent to full pay and allowances otherwise payable for intervening period – Impugned orders set aside – Matter remitted back to authority for decision afresh – Petition allowed. (Paras 15, 18 to 21 & 27)**

क. सेवा विधि – विभागीय जांच – मूलभूत नियम, 53, 54(4), 54(7) व 54–ए(2)(i) – निलंबन अवधि – वेतन व भत्तों की संगणना – अभिनिर्धारित – अधिकरण द्वारा, अनिवार्य सेवानिवृत्ति के दण्ड को नैसर्गिक न्याय का उल्लंघन होने के आधार पर अपास्त किया गया था और अतिरिक्त जांच निदेशित की गई थी जिसे, स्वतंत्रता प्रदान किये जाने के बावजूद नहीं किया जा सका और जिसके कारण जांच का उपशमन हो गया – इसके लिए याची को दोषी नहीं कहा जा सकता – याची का प्रकरण मूलभूत नियम–54–ए(2)(i) सहपठित 54(4) के अंतर्गत आच्छादित है, जहां कर्मचारी की विमुक्ति गुणदोषों पर नहीं है, मूलभूत नियम 54(7) के अध्यधीन सक्षम प्राधिकारी को वेतन एवं भत्तों का अवधारण करने की आवश्यकता है, जो कि जीवन–निर्वाह भत्ता तथा मूलभूत नियम–53 के अंतर्गत अनुज्ञेय अन्य भत्तों से ऊपर होगा किंतु मध्यवर्ती अवधि हेतु अन्यथा देय पूर्ण वेतन व भत्तों के समतुल्य नहीं हो सकता है – आक्षेपित आदेश अपास्त किये गये – नये सिरे से विनिश्चय हेतु मामला प्राधिकारी को प्रतिप्रेषित किया गया – याचिका मंजूर।

***B. Service Law – Fundamental Rules, 54 & 54-A(2)(i) – Suspension Period – Major & Minor Penalty* – Held – This Court earlier opined that where departmental proceedings against suspended employee for imposition of major penalty finally ends with imposition of minor penalty, the intervening period must be treated as "spent on duty".**

(Para 24 & 25)

ख. सेवा विधि – मूलभूत नियम, 54 व 54–ए(2)(i) – निलंबन अवधि – गुरूतर शास्ति व गौण शास्ति – अभिनिर्धारित – इस न्यायालय ने पूर्व में राय दी थी कि जहां निलंबित कर्मचारी के विरूद्ध गुरूतर शास्ति अधिरोपण हेतु विभागीय कार्यवाहियॉं, गौण शास्ति अधिरोपण के साथ अंतिम रूप से समाप्त होती है, मध्यवर्ती अवधि को ''कार्य पर बितायी गई'' समझा जाना चाहिए।

Cases referred:

AIR 1987 S.C. 2257, 2004 (1) MPLJ-48, 2012 (2) MPLJ-347, 2005 (3) MPHT-125.

Rajnish Gupta and *Manjeet Chuckal*, *Amicus Curiae* for the petitioner.
A.P. Khare, for the respondents.

O R D E R

The Order of the Court was passed by :
SUJOY PAUL, J. :- This petition filed under Article 227 of the Constitution takes exception to the order of Central Administrative Tribunal passed in O.A. No. 555/2006 dated 30th April, 2008 (Annexure P-1).

2. The parties have fought a long drawn battle in the corridors of the Tribunal. The matter has a chequered history.

3. The Petitioner, an employee of the postal department faced a departmental enquiry which ended with imposition of punishment of compulsory retirement dated 23rd June, 1994. After availing the departmental remedies, petitioner assailed the said punishment before the Tribunal in O.A. No. 79/1996. The Tribunal by order dated 14.12.2001 disposed of the Original application with certain directions. The Tribunal set aside the punishment of compulsory retirement and permitted the department to conduct further enquiry. When the department did not comply with the directions, petitioner filed C.C.P. No. 59/2002 and O.A. No. 859/2002 which were disposed of by a common order dated 25/03/2003. The respondents preferred M.A. No. 233/2003 seeking extension of time to comply with the judgment dated 14/12/2001 passed in O.A. No. 79/1996.

4. The Tribunal granted six months time to comply with the said order. Since, the order was not complied with within the aforesaid period, the department filed another M.A. No. 1368/2003 which was disposed of on 13/10/2003 by giving four months further time to comply with the previous order of Tribunal with a clear stipulation that if the enquiry is not finalized by passing a final order, the disciplinary proceedings shall abate and no further prayer for extension shall be entertained. This order of Tribunal was unsuccessfully challenged by the department before this Court in a writ petition and before the Supreme Court.

5. Since, the departmental enquiry stood abated, the Tribunal in O.A. No. 858/2004 and O.A. No. 1004/2004 Annexure P-8 decided on 19th October, 2005 issued a direction to regularize the period of suspension of the applicant in terms of Fundamental Rule 54.

6. Shri Rajneesh Gupta, learned counsel for the petitioner submits that in furtherance of the Tribunal's order Annexure P-8, respondents served three show-cause notices to the petitioner for inviting his response in relation to three different suspension periods which have taken place during the pendency of aforesaid disciplinary proceedings which stood abated. In turn, petitioner filed his replies against the said show-cause notices.

7. The respondents passed three orders and opined that petitioner will get only subsistence allowance which is already paid during the period of suspension and the said period cannot be treated as 'spent on duty'. These orders were assailed by filing three appeals which were rejected by the department. These orders became subject matter of challenge in O.A. No. 555/2006 decided on 30th April, 2008 Annexure P-1.

8. Shri Rajneesh Gupta and Ms. Manjeet Chuckal, learned *Amicus Curiae* criticized this order of the Tribunal by contending that the Tribunal has misread Fundamental Rule 54-A and erred in holding that :-

> (i). Petitioner is not entitled to treat the suspension period as 'spent on duty'.
>
> (ii). Petitioner is not entitled to get full pay and allowances for the periods he remained under suspension.

9. Shri Rajneesh Gupta placed heavy reliance on the findings of the Tribunal wherein it was held that the disciplinary proceedings stood 'abated' against the petitioner. He urged that 'abatement' would mean that no disciplinary proceedings were ever initiated or pending against the petitioner since its inception. Thus, petitioner cannot be treated to be held guilty on merits and in that case, petitioner is entitled to treat the said period as 'spent on duty' with full monetary benefits including pay and allowances.

10. Learned *Amicus Curiae* contended that petitioner's case is better than the case of *O.P. Gupta Vs. Union of India and others* A.I.R. 1987 S.C. 2257 and in view of ratio of this judgment, the department has erred in passing the impugned orders. The Tribunal has also acted contrary to the principle laid down in the case of *O.P. Gupta* (supra).

11. *Per contra,* Shri A.P. Khare, learned counsel for the respondents supported the impugned order of the Tribunal and action of the department. He

submits that exoneration of the petitioner by no stretch of imagination can be treated to be on merits. Fundamental Rule 54-A (2) will hold the field. No other point is pressed by the parties.

12. We have heard the parties at length and perused the record.

13. Before dealing with the rival contentions of the parties, it is apposite to refer to the relevant provisions :-

> F.R. 54-A. (1) Where the dismissal, removal or compulsory retirement of a Government servant is set aside by a Court of Law and such Government servant is reinstated without holding any further inquiry, the period of absence from duty shall be regularized and the Government servant shall be paid pay and allowances in accordance with the provisions of sub-rule (2) or (3) subject to the directions, if any, of the Court.
>
> (2) (i). Where the dismissal, removal or compulsory retirement of a Government servant is set aside by the Court solely on the ground of non-compliance with the requirements of Clause (1) or Clause (2) of Article 311 of the Constitution, and where he is not exonerated on merits, the Government servant shall, subject to the provisions of sub-rule (7) of Rule 54, be paid such amount (not being the whole) of the pay and allowances to which he would have been entitled had he not been dismissed, removed or compulsorily retired, or suspended prior to such dismissal, removal or compulsory retirement, as the case may be, as the competent authority may determine, after giving notice to the Government servant of the quantum proposed and after considering the representation, if any, submitted by him, in that connection within such period (which in no case shall exceed sixty days from the date on which the notice has been served) as may be specified in the notice:
>
> (ii). The period intervening between the date of dismissal, removal or compulsory retirement including the period of suspension preceding such dismissal, removal or compulsory retirement, as the case may be, and the date of judgment of the Court shall be regularized in accordance with the provisions contained in sub-rule (5) of Rule 54.

F.R. 54 (4). In cases other than those covered by sub-rule (2) (including cases where the order of dismissal, removal or compulsory retirement from service is set aside by the appellate or reviewing authority solely on the ground of non-compliance with the requirements of Clause (1) or Clause (2) of Article 311 of the Constitution and no further inquiry is proposed to be held) the Government servant shall, subject to the provisions of sub-rules (5) and (7), be paid such amount (not being the whole) of the pay and allowances to which he would have been entitled, had he not been dismissed, removed or compulsorily retired or suspended prior to such dismissal, removal or compulsory retirement, as the case may be, as the competent authority may determine, after giving, notice to the Government servant of the quantum proposed and after considering the representation, if any, submitted by him in that connection within such period (which in no case shall exceed sixty days from the date on which the notice has been served) as may be specified in the notice.

(5). In a case falling under sub-rule (4), the period of absence from duty including the period of suspension preceding his dismissal, removal or compulsory retirement, as the case may be, shall not be treated as a period spent on duty, unless the competent authority specifically directs that it shall be treated so for any specified purpose:

Provided that, if the Government servant so desires, such authority may direct that the period of absence from duty including the period of suspension preceding his dismissal, removal or compulsory retirement, as the case may be, shall be converted into leave of any kind due and admissible to the Government servant.

(7). The amount determined under the proviso to sub-rule (2) or under sub-rule (4) shall not be less than the subsistence allowance and other allowances admissible under Rule 53.

(emphasis supplied)

14. Shri Rajnish Gupta argued that once departmental inquiry is abated, the consequence would be as if no disciplinary proceedings was pending against the petitioner since inception. Shri Gupta has not supported his argument by any

authority, provision or judgment. The tribunal while deciding O.A.No.858/04 and O.A.No.1004/04 by common order dated 19.10.2005 made it clear that disciplinary proceedings stood abated on 13.02.2004. Thus, we are unable to persuade ourself with the argument of Mr. Gupta that effect of abatement of inquiry is that the departmental inquiry vanished in thin air from its inception.

15. Indisputably, the punishment of compulsory retirement dated 23.6.1994 was interfered with by the tribunal because of violation of principles of natural justice and said punishment was not interfered with on merits. In other words, the petitioner was not exonerated on merits by the tribunal while quashing the punishment order dated 23.6.1994. This is equally an admitted fact that matter was remitted by tribunal to conduct further inquiry. The department could not take the liberty of further inquiry and, in turn, department could not complete the inquiry within the initial stipulated period and within extended period. For this reason, the inquiry was declared as abated from a particular date.

16. During the course of hearing, learned counsel for the parties jointly and fairly urged that in order to decide the intervening period during which petitioner remained under suspension, governing principle flows from F.R.54-A. As per this provision, where an employee is reinstated without holding any further inquiry when his punishment was set aside by the court of law, the competent authority needs to take a decision regarding (i) the period intervening between the date of punishment of dismissal, removal or compulsory retirement including the period of suspension before such punishment ; (ii) regarding pay and allowances for the said intervening periods.

17. F.R.54-A(2)(i) provides methodology regarding determination of payment during the intervening period whereas F.R.54A(2)(ii) provides as to how intervening period is to be regularized.

18. F.R.54-A(2)(i) shows that in a case of this nature where exoneration of an employee is not on merits, subject to sub rule 7 of rule 54, an employee needs to be paid such amount (not being whole) of the pay and allowances to which he would have been entitled had he not been punished with dismissal, removal or compulsory retirement or suspension period before imposition of such punishment. This period and amount needs to be regularized/determined after putting the employee to notice.

19. Sub rule 7 of rule 54 makes it clear that the amount so determined under sub rule 4 of F.R.54 shall not be less than the subsistence allowance and other allowances admissible under rule 53. A conjoint reading of F.R.54-A (2)(i) and F.R.54(7) makes it clear that while determining the payment in cases falling within these provisions, the competent authority needs to determine the pay and allowances which shall be above the subsistence allowance and other allowances

admissible under rule 53 but cannot be equivalent to full pay and allowances payable for the intervening period.

20. F.R.54(4) needs to be read carefully. This provision deals with such cases where punishment order is set aside on the ground of non-compliance with requirement of Article 311 of the Constitution and is applicable *when no further inquiry is proposed to be held*. Pausing here for a moment, technically speaking in the peculiar factual matrix of this case although further inquiry was permitted to be held, such inquiry despite liberty being granted by the tribunal, could not be conducted and inquiry stood abated. Thus, we are constraint to hold that case of present petitioner is covered under F.R.54-A(2)(i) read with F.R.54(4). Sub rule 4 of F.R.54 envisages that in the cases covered under sub rule 4, the payment shall be of such amount (not being whole) of pay and allowances to which a government employee was entitled, had he not been punished with the punishment stipulated in the said provision. This includes suspension prior to such punishment. In that event, the payment needs to be determined after giving notice of the *quantum proposed* as per discretion of the competent authority. At the cost of repetition, it is worth noting that the competent authority was required to issue notice by proposing the quantum which shall not be less than subsistence allowance and other allowances under rule 53 and shall not be equivalent to the full pay and allowance otherwise payable. We have noticed that the show cause notices issued to the petitioner and the final and appellate orders are silent on this aspect.

21. Similarly, in a case of this nature, which in our opinion falls under sub rule 4 of F.R.54, the period of absence is to be treated as spent on duty or not needs to be decided by the competent authority. The proviso to sub rule 5 of F.R.54 makes it clear that intervening period can be converted to any kind of leave due and admissible to the government servant.

22. The respondents have not considered the question of regularization of intervening period in the light of F.R.54 and 54-A which is evident from aforesaid analysis. Indeed, they decided to limit the payments made during the intervening period to the extent already paid i.e subsistence allowance @ of fifty percent of pay and allowances. This clearly runs contrary to F.R.54-A(2)(i) read with F.R.54(4) and 54(7). Thus, the matter needs to be remitted back to the respondents to issue specific notices proposing quantum of amount to be paid to the petitioner, seek his response and take a fresh decision regarding regularization of intervening period by taking into account the observations made hereinabove.

23. So far the question as to whether intervening period can be treated as qualifying service/ spent on duty is concerned, the matter may be viewed from another angle. The nodal Ministry/ Department of Personnel and Training issued O.M. dated 03.12.1985 which reads as under :-

"(3) Reference is invited to O.M. No. 43/56/64-AVD, dated 22.10.1964 (*not printed*), containing the guidelines for placing Government servants under suspension and to say that these instructions lay down, *inter alia*, that Government servant could be placed under suspension if a *prima facie* case is made out justifying his prosecution or disciplinary proceedings which are likely to end in his dismissal, removal or compulsory retirement. These instructions thus make it clear that suspension should be resorted to only in those cases where a major penalty is likely to be imposed on conclusion of the proceedings and not a minor penalty. The Staff Side of the Committee of the National Council set up to review the CCS (CCA) Rules,1965, had suggested that in cases where a Government servant, against whom an inquiry has been held for the imposition of the major penalty, is finally awarded only a minor penalty, the suspension should be considered unjustified and full pay and allowances paid for suspension period. Government have accepted this suggestion of the Staff Side. Accordingly, where departmental proceedings against a suspended employee for the period of a major penalty finally end with the imposition of a minor penalty, the suspension can be said to be wholly unjustified in terms of FR-54-B and the employee concerned should, therefore, be paid full pay and allowances for the period of suspension by passing a suitable order under FR 54-B.

2. These orders will become effective from the date of issue. Past cases already decided need not be reopened."

(Emphasis supplied)

24. This O.M. was considered by this court in *Deena Nath Tiwari Vs. Dr. Hari Singh Gour Vishwavidyalaya, Sagar*- 2004(1) MPLJ- 48. This court opined that where departmental proceedings against a suspended employee for imposition of a major penalty finally ends with the imposition of minor penalty, the intervening period must be treated as spent on duty. It must be remembered that in the instant case, the original punishment of compulsory retirement was set aside by the tribunal and respondent could not complete the inquiry despite liberty reserved to them. The petitioner cannot be said to be at fault for this. A division Bench of this court in *Prakash Kumar Sahu Vs. Union of India and others*-2012(2) MPLJ-347 opined that in view of pension rules, specific order is required to be passed treating the intervening period as break in service, the non duty period cannot be excluded from counting the said period of suspension for the purpose of

qualifying service and payment of pension.

25. The division Bench in *Munnalal Mishra Vs. Union of India and others*-2005(3) MPHT-125 directed to count the intervening period as spent on duty despite the fact that employee was suspended during conviction and appeal against conviction was later-on allowed.

26. In view of aforesaid discussion, the tribunal has erred in not considering the matter in its correct perspective and has not correctly considered the governing provisions, namely, F.R.54-A and F.R.54. Thus, we are unable to countenance the judgment of the tribunal and the impugned orders of the department which were affirmed by the tribunal.

27. As analyzed above, the impugned orders of the tribunal passed in O.A.No.555/2006 dated 30.04.2008, is set aside. The orders of the department dated 21.2.2006, 05.01.2006 and appellate orders dated 8/9.8.2006 (Annx.P/5, P/6 and P/7) are set aside. The matter is remitted back before the original/ controlling authority with a further direction to issue fresh show cause notices to the petitioner with the quantum proposed in view of discussion mentioned hereinabove. Such notices be issued within 45 days from the date of production of copy of this order. In turn, the petitioner may file his response within 15 days therefrom. The competent authority shall take a fresh decision on such response without getting influenced by its earlier decision within thirty days therefrom. The said decision must take care of the question of payment of regularization of the intervening period for pay and allowance and on the aspect whether it should be treated as spent on duty

28. The petition is allowed to the extent indicated above.

Petition allowed

I.L.R. [2019] M.P. 1415
WRIT PETITION
Before Mr. Justice Vishal Dhagat

W.P. No. 12098/2019 (Jabalpur) decided on 3 July, 2019

RAISA BI …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

***A. Medical Termination of Pregnancy Act (34 of 1971), Section 3 & 5 and Constitution – Article 21 – Permissibility* – Held – As per Section 3(2), pregnancy may be terminated when length of pregnancy do not exceed 20 weeks whereas in instant case, fetus of a 13 years old rape victim is of 26 weeks (more than 7 months) – Further, Medical Board opined to continue**

pregnancy as there was no danger to life of victim or fetus – Psychiatrist also opined that victim is not suffering from any mental disease – Matter outside the scope of Section 5(1) of the Act – Termination cannot be directed – Petition dismissed. (Para 14 & 15)

क. गर्भ का चिकित्सीय समापन अधिनियम (1971 का 34), धारा 3 व 5 एवं संविधान – अनुच्छेद 21 – अनुज्ञेयता – अभिनिर्धारित – धारा 3(2) के अनुसार, गर्भपात किया जा सकता है जब गर्भावस्था की अवधि 20 सप्ताह से अधिक की नहीं है जबकि वर्तमान प्रकरण में, 13 वर्षीय बलात्संग पीड़िता का भ्रूण, 26 सप्ताह (7 माह से अधिक) का है – इसके अतिरिक्त, चिकित्सीय बोर्ड की राय थी कि गर्भावस्था जारी रखे क्योंकि पीड़िता अथवा भ्रूण के जीवन को कोई खतरा नहीं था – मनोचिकित्सक ने भी राय दी थी कि पीड़िता किसी मानसिक रोग से ग्रसित नहीं है – मामला, अधिनियम की धारा 5(1) की व्याप्ति से बाहर है – गर्भपात निदेशित नहीं किया जा सकता – याचिका खारिज।

***B. Penal Code (45 of 1860), Section 312 & 315 – Termination of Pregnancy* – Discussed and explained. (Para 13 & 14)**

ख. दण्ड संहिता (1860 का 45), धारा 312 व 315 – गर्भ का समापन – विवेचित एवं स्पष्ट किया गया।

Cases referred:

2016 Vol. 14 SCC 382, (2017) 3 SCC Page 458, W.P. No. 20961/2017 decided on 06.12.2017.

Bhavil Pandey, for the petitioner.
Rohit Sohgaura, G.A. for the respondents-State.

(Supplied: Paragraph numbers)

J U D G M E N T

VISHAL DHAGAT, J.:- Petitioner has filed the present writ petition before this Court to seek directions for termination of pregnancy of petitioner's daughter. Petitioner's daughter is a girl of 13 years and is victim of horrific rape, which has been committed on her for several months. Petitioner's daughter hereinafter referred to as "X".

2. X is at present having pregnancy of 26 weeks.

3. Petitioner has made a submission that she belonged to a low income household in the city of Bhopal. Her daughter X was subjected to rape resultantly she has become pregnant. Petitioner took her daughter for Sonography and pregnancy was confirmed. It is submitted by the petitioner that she being a natural guardian of X wants to terminate pregnancy but the same is barred under Section 3 of the Medical Termination of Pregnancy Act, 1971. Continuation of pregnancy and enforcement of Act will lead X to undergo severe psychological, physical and

mental emotional trauma. X physical and mental health will be in serious risk and therefore, a prayer is made before this Court to issue direction for termination of pregnancy of X. Victim/Guardian has a valuable right under Article 21 of the Constitution of India to take decision regarding termination of pregnancy. Victim is a minor girl being 13 years of age and therefore, natural guardian has decided to terminate the pregnancy. It was further argued that under Medical Termination of Pregnancy Act, 1971, pregnancy can be terminated on the health grounds where there is danger to life or risk to physical or mental health of a woman. Petitioner has also relied on explanation No.1 to Section 3 (2) of the Medical Termination of Pregnancy, 1971 hereinafter referred to as "MTP Act". As per the explanation, pregnancy alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to grave injury to mental health of the woman.

4. Learned counsel for the petitioner has relied on various judgments passed by the Apex Court, in which the Hon'ble Apex Court has allowed the termination of pregnancy in case of minor girl, who was subjected to rape in advance stage of pregnancy. Learned counsel for the petitioner also placed reliance on the judgment of this Court.

5. This Court on 01.07.2019 passed an order to keep X present before the Gandhi Medical College, Bhopal to be examined by the Committee of 4 senior doctors and also a Psychiatrist to assist the physical and mental health of the victim for the purpose of MTP.

6. Learned Government Advocate appearing for the respondents State submitted a report of examination by team of doctors consisting of:-

1. Dr. Shabana Sultana, Professor, Department of Obstetrics and Gynecology Department.

2. Dr. Rajesh Tikkas, Assistant Professor, Department of Pediatrician.

3. Dr. Vijay Kumar Verma, Assistant Professor, Department of Radio diagnosis.

4. Dr. J.P. Agrawal, Assistant Professor, Department of Psychiatry.

7. The Committee after examining X has giving findings that X is having a pregnancy of 26 weeks and opined for continuation of pregnancy. Specialist doctor's of Gynecology after examination and going through the Sonography report had given advise that her pregnancy shall be continued as X is having pregnancy of 26 weeks and 6 days. Dr. J.P. Agrawal, Assistant Professor in the Department of Psychiatry has also examined X. He had advised for counselling of her minor child. He had stated that X is not suffering from any mental disease and X has an average mind. X is feeling anxiety at times and uneasiness but she is

having normal sleep and appetite. She is also having insight and not suffering from any delusion and hallucination.

8. Learned counsel for the petitioner relied on the judgment reported in 2016 Vol.14 SCC 382, *X Vs. Union of India and others*. In this case, X was having pregnancy of 20 weeks. X was examined by the Committee constituted by specialist doctors. During examination of X, it was found that single alive fetus with gestational age of 23 weeks and 3 days with following malformations:-

1. Excencephaly i.e. evidence of no skull valut above orbit, with presence of brain tissue floating in amniotic fluid.

2. Omphalocele (presence of liver, intestines and stomach bubble outside the abdomen and in the amniotic cavity.

3. Heart is bulging into the omphalocele sac.

4. Kyphoscoliosis, which is an anomaly of the spine involving the thoracolumbar vertebrae with polyhydramnios (excessive amniotic fluid) with closed vertix.

9. It was also observed by the Medical Board that risk of termination of pregnancy is within acceptable limits. Medical Board opined that risk to mother of continuation of pregnancy can gravely endanger her physical and mental health. It was also opined that fetus is not compatible with extra- uterine life. As there was opinion of the Medical Board that the mother should not continue with the pregnancy. The Apex Court passed the orders for termination of pregnancy in the advance stage of pregnancy of X. Learned counsel for the petitioner relied on (2017) 3 SCC Page 458, *Mrs. X and others Vs. Union of India and others*. In this case, petitioner sought permission for MTP. She was a major, aged 22 years old. In this case, Medical Board was of the opinion that continuation of pregnancy involves risk of life of the petitioner and possible grave injury to his physical and mental health. There was a finding that the fetus suffers from medial condition known as renal agenesis and anhydroamnios. Wherein, looking to the condition of the fetus and health of woman, Hon'ble Supreme Court allowed the petition under Article 32 of the Constitution of India and allowed the termination of pregnancy. The third case is *Murugan Nayakkar Vs. Union of India and others*. In this case, petitioner is 13 years old and victim of rape and sexually abused. The Medical Board in this case has given the opinion that termination of pregnancy should be carried out. The Apex Court considered the age of the petitioner, trauma of sexual abuse and on the basis of report of the Medical Board constituted by the Apex Court, passed orders for termination of pregnancy.

10. Learned counsel for the petitioner has also relied on the judgment passed by this Court in the matter of *Chagan and another Vs. State of M.P. and others* in

W.P.No.13457/2018. In this case, the girl was having fetus of 25 weeks and 6 days. In this case, considering the opinion of the Medical Board, MTP was allowed. Learned counsel for the petitioner has relied on another judgment of this Court passed in W.P.No.20961/2017, *Sundarlal Vs. State of M.P.* dated 06.12.2017. This petition was disposed of with a direction as the victim of rape in this case was not examined by the Medical Committee of expert doctors, direction was given to the respondents to constitute a Committee of Three Registered Medical Practitioner as per the MTP Act, 1971 and they shall form a good faith for termination of pregnancy of the victim.

11. Considered the arguments of the petitioner as well as the respondents.

12. Article 21 of the Constitution of India protects life and personal liberty of persons. As per Article 21 of the Constitution of India, no person shall be deprived of his life or personal liberty except according to procedure established by law.

13. Section 312 of the IPC provides for penalty causing miscarriage of a woman. The offence is punishable with a term, which may extend to 3 years with fine. This Section deals with causing miscarriage even with the consent of the woman.

14. Section 315 of the IPC lays down that whoever before the birth of any child does an act with the intention of thereby preventing that child from being born alive or causing it to die after his birth is made punishable. But the penalty is to be imposed only in case if the act is not done in good faith and if the act is done in good faith for the purpose of saving the life of the mother and there is no penalty prescribed under the IPC. The fetus in the present case is of 26 weeks i.e. more than 7 months and as per the medical advice, fetus is quick. The fetus in movement in the pregnancy on which the first movement is felt by the mother usually in the 4th or 5th month, the fetus is alive and is having a life. As per Section 3 (2) of the Medical Termination of Pregnancy Act, 1971, pregnancy may be terminated by Registered Medical Practitioner when the length of the pregnancy does not exceed 20 weeks or in case where length of pregnancy exceed 12 weeks but it does not exceed 12 weeks then the Medical Termination of Pregnancy can be done if not less then 2 Registered Medical Practitioners are of opinion formed in good faith that continuation of pregnancy would involve to risk to life of pregnant woman or grave injury to her mental or physical health. In explanation no.1, it is provided that where pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy be presumed to constitute a grave injury to the mental health of the pregnant woman. Medical Termination of Pregnancy can also be done irrespective of the age of fetus if registered medical practitioner forms opinion in good faith that termination of such pregnancy is immediately necessary to save the life of pregnant woman.

15. Going through the aforesaid provisions of law and also the judgments passed by the Apex Court and by this Court, it is found that the Medical Termination of Pregnancy in advance stage was allowed by the Apex Court only when there was a opinion of Medical Committee constituted by Court that there is danger to life of a woman or where there is abnormal development of the fetus by giving birth to a child may not remain alive or it will cause danger to the life of the mother. In the present case, after going through the Medical report, there is no opinion of the Medical Board that there is danger to life of the mother or the fetus is abnormal and after giving birth, child will not survive. On the contrary, Medical Board has opined to continue the pregnancy. X was also examined by Psychiatrist and the opinion was given that she is not suffering from any mental disease and she is having an average mental health. X sometime feel uneasiness but X is having normal sleep and appetite. In such circumstances, it was opined that X may be given medical counselling. The opinion of the 4th expert doctor i.e. psychiatrist is that the pregnancy may be continued. This case is outside the scope of Section 5 (1) and there is no immediate danger to the life of X and on the contrary expert committee had opined for continuation of pregnancy.

16. It goes without saying that State Government will take care of all medical help such as Medicines, Food and Nutrition expert advice of doctors to petitioner and X.

17. In view of the aforesaid facts and circumstances of the case, Writ Petition filed by the petitioner is ***dismissed.***

Petition dismissed

I.L.R. [2019] M.P. 1420
ELECTION PETITION

Before Mr. Justice Anand Pathak

E.P. No. 20/2019 (Gwalior) order passed on 8 May, 2019

RASAL SINGH …Petitioner

Vs.

DR. GOVIND SINGH …Respondent

***A. Representation of the People Act (43 of 1951), Sections 67A, 81 & 86 and General Clauses Act (10 of 1897), Section 9 & 10 – Election Petition – Limitation* – Held – Date of declaration of result was 11.12.18 and the date of presentation of election petition was 25.01.19 – For the purpose of limitation of 45 days period, date of declaration of result has to be excluded and limitation has to be reckoned from next date i.e. 12.12.18 – Accordingly, the petition was presented on 45th day and is not barred by time – Application dismissed. (Para 21)**

क. लोक प्रतिनिधित्व अधिनियम (1951 का 43), धाराएँ 67ए, 81 व 86 एवं साधारण खण्ड अधिनियम (1897 का 10), धारा 9 व 10 – निर्वाचन अर्जी – परिसीमा – अभिनिर्धारित – परिणाम घोषित होने की तिथि दिनांक 11.12.2018 थी तथा निर्वाचन अर्जी के प्रस्तुतिकरण की तिथि 25.01.2019 थी – पैंतालीस दिनों की परिसीमा अवधि के प्रयोजन हेतु, परिणाम घोषित होने की तिथि का अपवर्जन किया जाना है तथा परिसीमा की गणना अगली तिथि अर्थात् 12.12.2018 से की जाना है – तद्नुसार, याचिका पैंतालीसवें दिन प्रस्तुत की गई थी तथा समय द्वारा वर्जित नहीं है – आवेदन खारिज।

***B. Representation of the People Act (43 of 1951) and Limitation Act (36 of 1963) – Applicability* – Held – It is an admitted position of law that Limitation Act has no application in election petitions under the Act of 1951. (Para 22)**

ख. लोक प्रतिनिधित्व अधिनियम (1951 का 43) एवं परिसीमा अधिनियम (1963 का 36) – प्रयोज्यता – अभिनिर्धारित – विधि की यह स्वीकृत स्थिति है कि परिसीमा अधिनियम, 1951 के अधिनियम के अंतर्गत निर्वाचन अर्जियों में लागू नहीं होता।

Cases referred :

(1974) 2 SCC 133, (1999) 8 SCC 532, (2007) 1 SCC 770, (2016) 14 SCC 314, AIR 1978 MP 112, 2009 (II) MPJR 126, AIR 2011 Patna 1, AIR 2011 Jhark 147, 2012 (2) MPLJ 456, 1994 Supp (1) SCC 449, (2000) 8 SCC 649, (1808) 33 ER 748, (1951) 2 ALL ER 613, AIR 1972 SC 1293, (1973) 1 ALL ER 617 (CA), JT 1999 (2) SC 67, AIR 1990 SC 487, AIR 1957 SC 271, AIR 1996 SC 796.

Jitendra Sharma, for the petitioner.
S.K. Shrivastava, for the respondent.

O R D E R

ANAND PATHAK, J. :- Heard on I.A.No. 1361/2019, an application moved on behalf of respondent under Section 81 read with Section 86 of the Representation of People Act, 1951 for dismissal of instant election petition.

2. Precisely stated facts of the case are that, petitioner by way of filing this petition under Section 80 read with Section 100 of the Representation of People Act, 1951 (for short "Act of 1951") challenged the election of respondent, who has been declared as returned candidate from 11 Lahar, Assembly Constituency, Madhya Pradesh, in the assembly election held on 28th November, 2018 under Section 100 (i) (b), (d) of the Act of 1951.

3. Returning Officer of the Assembly declared the Respondent as elected on 11/12/2018, vide Annexure P/4.

4. Petitioner is crestfallen because of declaration of respondent as elected candidate and therefore, preferred instant election petition taking exception of

such election on various grounds as contained in the election petition.

5. After causing appearance, respondent preferred the instant application for dismissal of petition as referred above mainly on the ground that election result was declared under Section 66 of the Act of 1951 on 11/12/2018; whereas, as per the office record, instant election petition has been filed on 25/1/2019. Since as per Section 81(1) of the Act of 1951, election petition on any of the grounds specified in sub-section 1 of Section 100 and Section 101 of the Act of 1951 is required to be filed by any candidate or any elector within 45 days "From" the date of election of the returned candidate, therefore, as per the submissions of counsel appearing for the respondent, the election petition has not been filed within prescribed period of 45 days as per the Act of 1951 and therefore, liable to be dismissed accordingly.

6. While elaborating the arguments, it is submitted that Section 86(1) of the Act of 1951 mandates the High Courts to dismiss an election petition which does not comply with the provisions of Section 81 or 82 or 117 of the Act of 1951. Section 81 of the Act of 1951 prescribes presentation of election petition within 45 days "From" the date of election of the returned candidate. The date of election of candidate is being prescribed in Section 67(A) of the Act of 1951 which is the date when the candidate is declared by the returning Officer as elected under the provisions of Section 53 or Section 66 of the Act of 1951, as the case may be. In the present case, while relying upon the decision of Hon'ble Apex Court in the case of *Hukumdev Narain Yadav Vs. Lalit Narain Mishra*, (1974) 2 SCC 133, it is submitted that the provisions of Limitation Act are not applicable. Once the provisions of Limitation Act as specified under Section 5 do not govern filing of election petition or their trial, no extension can be given except of limitation prescribed by the Act of 1951. In the present case, admittedly, the petition is preferred on 46th day because date of declaration of result i.e. 11/12/2018, which is ought to be included and is to be counted as first day. Since limitation starts from 11/12/2018 and petition is preferred on 25/1/2019, therefore, it is apparently barred by limitation.

7. Learned counsel for the respondent relied upon the decisions of Hon'ble Apex Court in the case of *Lachhman Das Arora Vs. Ganeshi Lal and Ors.*, (1999) 8 SCC 532,*Youaraj Rai and Ors. Vs. Chander Bahadur Karki*, (2007) 1 SCC 770, *Ajay Gupta Vs. Raju alias Rajendra Singh Yadav*, (2016) 14 SCC 314 as well as decisions of this Court in the matter of *Abhimanyu Rath Vs. Virendra Pandey*, AIR 1978 MP 112, *Anokhilal and Anr. Vs. Sajjan Singh and Ors.*, 2009 (II) MPJR 126, of Patna High Court in the case of *Anil Kumar Jha Vs. State of Bihar*, AIR 2011 Patna 1 and that of Jharkhand High Court in the matter of AIR 2011 Jhark 147 to bring home the analogy that law of limitation can only be applied with all its vigours when the statute prescribes and in absence of any prescription, this Court

cannot extend the period of limitation on the basis of equitable grounds specified in the matter of filing of election petition. The Act of 1951 insofar as it relates to presentation of petition and trial of election disputes, is a complete code and a special law. The scheme of the special law shows that the provisions of Sections 4 to 24 of the Indian Limitation Act do not apply. If an election petition is not filed within the prescribed period of 45 days, Section 86(1) of the Act of 1951, which provides that the High Court shall dismiss an election petition which does not comply with the provisions of Section 81 or 82 or 117, is straightaway attracted and therefore, the limitation cannot be extended. Learned counsel for the respondent also relied upon the decision of coordinate Bench of this Court in the case of *Mumbi Bai Vs. State of M.P.*, 2012 (2) MPLJ 456 to submit that delay cannot be condoned. He prayed for dismissal of the election petition on the ground that election petition is barred by limitation.

8. *Per contra*, learned counsel for the petitioner filed the reply to said application and contested the case with equal vehemence. It is the submission of learned counsel for the petitioner that instant election petition has been filed on 25/1/2019; whereas, the result was declared on 11/12/2018, therefore, the date on which the result has been declared would not be treated as the date for commencement of the limitation for filing election petition and limitation starts from next date i.e. 12/12/2018. Election petition was filed on 25/1/2019, therefore, as per the computation of limitation, election petition is being filed on 45th day, therefore, is within limitation. On 25/1/2019 i.e. 45th day he reached the Registry of Principal Seat of Madhya Pradesh High Court at Jabalpur at 10.30 am and as certain defects were pointed out, the same were cured and thereafter the election petition had been filed and since it was the last day for filing election petition (more or less results of all constituencies of M.P. Vidhan Sabha were declared on same date i.e. 11/12/2018, therefore, long queue was apparently existed and therefore, election petition was filed at 4.45 pm). He relied upon the decision of Hon'ble Apex Court in the matter of *Simhadri Satya Narayana Rao Vs. M.Budda Prasad and Ors.*, 1994 Supp (1) SCC 449 and *Tarun Prasad Chatterjee Vs. Dinanath Sharma*, (2000) 8 SCC 649 and submits that election petition is within limitation. While relying upon Section 9 and 10 of General Clauses Act,1897 (for short "Act of 1897"), learned counsel for the petitioner submits that election petition cannot be dismissed on the point of limitation. Word "From" is required to be interpreted in a manner; wherein, date of declaration of result shall be excluded. He prayed for rejection of the application and submits that election petition be proceeded as per law for hearing on admission.

9. Heard learned counsel for the parties at length and perused the documents brought on record by respective parties.

10. Elections are the festivals of democracy and being celebrated with full vigour. Election petition is the aftermath of the festival with wider ramifications.

Process and mechanism of election and disputes arising out of it are provided in the statute, "The Representation of the People Act, 1951" and Rules and Regulations made in pursuance thereof.

11. Section 86 (1) of the Act of 1951 is reproduced hereinbelow for ready reference:-

> *"**86. Trial of election petitions.**-(l) The High Court shall dismiss an election petition which does not comply with the provisions of Section 81 or Section 82 or Section 117 of the Act of 1951.*
>
> *Explanation.- An order of the High Court dismissing an election petition under this sub-section shall be deemed to be an order made under clause (a) of Section 98.*
>
> *(2) xxx xxx xxx*
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> *(3) xxx xxx xxx*
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> *(4) xxx xxx xxx*
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> *(5) xxx xxx xxx*
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> *(6) xxx xxx xxx*
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> *(7) xxx xxx xxx"*

12. Perusal of above mentioned provision,makes it clear that High Court is having no option but to dismiss the election petition which does not comply with Section 81 of the Act of 1951. Section 81 of the Act of 1951 is reproduced hereinbelow for ready reference:-

> *"**81. Presentation of petitions.**- (1) An election petition calling in question any election may be presented on one or more of the grounds specified in 1[sub-section (1)] of section 100 and section 101 to the 2[High Court] by any candidate at such election or any elector 3[within forty-five days from, but not earlier than the date of election of the returned candidate or if there are more than one returned candidate at the election and dates of their election are different, the later of those two dates]. Explanation.—In this sub-section, "elector" means a person who was entitled to vote at the election to which the election petition relates, whether he has voted at such election or not.*
>
> *[(33) xxx xxx xxx]"*

13. Perusal of above provision makes it clear that 45 days period is provided to any disgruntled candidate / elector from the date of election of the returned candidate to file election petition.

14. Date of election of candidate has been defined under Section 67(A) of the Act of 1951. Section 67 (A) of the Act of 1951 is reproduced hereinbelow for

ready reference.

> ***"[67A. Date of election of candidate.***—*For the purposes of this Act, the date on which candidate is declared by the returning officer under the provisions of section 53, 2[***], 3[***] or section 66, to be elected to a House of Parliament or of the Legislature of a State 4[***] shall be the date of election of that candidate.] "*

15. From the scheme of the Act of 1951 and the provisions referred above, it is beyond doubt that election petition shall have to be filed within 45 days "From" the date of the election of the returned candidate and therefore, word "From" assumes much significance in the present context. Plain reading of the provisions as referred above gives an impression that date of declaration of result is to be included or in other words counting starts from the first date to begin with for the purpose of counting days of limitation.

16. The decisions in the early period were not quite uniform but ever since 1808 when *Lester vs. Garland*, (1808) 33 ER 748 was decided, the rule is well established that where an act is to be done within a specified time from a certain date, the day of that date is to be excluded. {See: *Stewart Vs. Chapman*, (1951) 2 ALL ER 613, *Hari Das Gupta Vs. State of West Bengal*, AIR 1972 SC 1293, *Pritam Kaur Vs. S. Russel and Sons.*, (1973) 1 ALL ER 617 (CA), *Saketh India Limited Vs. India Securities Ltd.*, JT 1999 (2) SC 67}.

17. Similarly when an act has to be done within so many days after a certain event, the day of such event is not to be counted. {See:-*Jitendra Tyagi Vs. Delhi Administration*, AIR 1990 SC 487}.

18. The Principle that the law in general neglects fractions of a day has given rise to two general principles for calculation of time. When a statute or a rule is concerned in fixing a terminus a *quo* of a new state of things which is to continue for an indefinite period (i.e. there is no terminus as quem), the new state of things comes into existence at midnight of the day preceding the day at which or on which or from which or from and after which the new state of things is directed to begin. As an illustration of this general rule one may refer to section 5(3) of the General Clauses Act, which relates to the coming into operation of a Central Act or Regulation. The other principle is that when a period is delimited by a statute or rule which has both a beginning and an end, the word "from" excludes the opening day and any words fixing the closing day include that day. In other words when a period is delimited marked by a terminus a *quo* and terminus *ad quem* the former is to be excluded and the latter to be included in the reckoning. This second principle has been given statutory recognition in Section 9 of the Act of 1897. (See: Commentary contained in book "Principles of Statutory Interpretation" 14th Edition by Justice G.P.Singh and revised by Justice A.K.Patnaik)

19. Hon'ble Apex Court in the case of (*H.H.Raja*) *Harinder Singh Vs. S.Karnail Singh and Ors.*, AIR 1957 SC 271 has interpreted Section 10 of General Clauses Act, 1897 vis-a-vis provisions of Act of 1951 vis-a-vis election disputes. Later on in the case of *Hukumdev Narain Yadav* (supra), it has been held that Section 10 of the Act of 1897 will apply to election petitions to be filed under the Act of 1951. Thereafter, in the case of *Manohar Joshi Vs. Nitin Bhaurao Patil and Anr.*, AIR 1996 SC 796, the applicability of Section 10 of Act of 1897 vis-a-vis election petition was reiterated by the Hon'ble Apex Court. Thereafter, came *Tarun Prasad Chatterjee* (supra), in which Hon'ble Apex Court in categorical terms held that for presentation of petitions under Act of 1951, same attracts Section 9 of Act of 1897 and while interpreting the Section 81, 67(A) of the Act of 1951 vis-a-vis Section 9 of the Act of 1897 as well as interpreting the impact of word **"From"** it has been held that the date of declaration of result is to be excluded. While relying upon Section 9 of the Act, Halsbury's Laws of England, 37th Edition, Volume 3 and other judgments rendered by Hon'ble Apex Court held that Section 9 of the Act of 1897 gives statutory recognition to the well established principle applicable to the construction of statues that ordinarily in computing the period of time prescribed, the rule observed is to exclude the first and include the last day.

20. To augment the discussion and to lead it to conclusion, it is apposite to reproduce para 12 to 14 of the aforesaid decision:-

> *"12. Section 9 says that in any Central Act or Regulation made after the commencement of the General Clause Act, 1897, it shall be sufficient for the purpose of excluding the first in a series of days or any other period of time, to use the word "from", and, for the purpose of including the last in a series of days or any period of time, to use the word "to". The principle is that when a period is delimited by statute or rule, which has both a beginning and an end and the word "from" is used indicating the beginning, the opening day is to be excluded and if the last day is to be excluded the word "to" is to be used. In order to exclude the first day of the period, the crucial thing to be noted is whether the period of limitation is delimited by a series of days or by any fixed period. This is intended to obviate the difficulties or inconvenience that may be caused to some parties. For instance, if a policy of insurance has to be good for one day from the 1st January, it might be valid only for a few hours after its execution and the party or the beneficiary in the insurance policy would not get reasonable time to lay claim, unless the 1st January is excluded from the period of computation.*

13.It was argued that the language used in Section 81(1) that "within forty-five days from, but not earlier than the date of election of the returned candidate" expresses a different intention and Section 9 of the General Clauses Act has no application. We do not find any force in this contention. In order to apply Section 9, the first condition to be fulfilled is whether a prescribed period is fixed "from" a particular point. When the period is marked by terminus a quo and terminus ad quem, the canon of interpretation envisaged and Section 9 of the General Clauses Act, 1897 require to exclude the first day. The words "from" and "within" used in Section 81(1) of the R.P. Act, 1951 do not express any contrary intention.

14. By Section 81(1), the legislation fixes the period for filing election petition and at the same time states that no elector or candidate shall file election petition before the date of election of the returned candidate and if there are more than one returned candidates at the election and dates of their election are different, the later of those two dates. The learned senior Counsel for the appellant contended that if the date of election of the candidate is excluded from computing the period of limitation of 45 days, the period of limitation would be extended by one day and, therefore, it is against the mandate of the statute. It was also contended that the filing of the application on the date of election of the returned candidate cannot be considered as a valid presentation of petition as envisaged in the section. We do not think that any such interpretation is possible by a conjoint reading of Section 81(1) of the R.P. Act, 1951 and Section 9 of the General Clauses Act, 1897. The first day for the period of limitation is required to be excluded for the convenience of the parties and if the declaration of the result is delayed or is done late in the night, the candidate or elector would hardly get any time for presentation of the election petition. Law comes to the rescue of such parties to give full forty-five days period for filing the election petition. Nevertheless, any petition presented on the date of election of the returned candidate would be certainly within the period of limitation as it is a presentation on the date of election of the returned candidate."

21. In the present case, date of declaration of result is 11/12/2018 and the date of presentation of election petition is 25/1/2019. If the date of declaration of result i.e. 11/12/2018 is excluded and the limitation is reckoned from next date i.e. 12/12/2018 then 25th January, 2019 falls on 45th day. Therefore, election petition is filed within limitation. Therefore, in the considered opinion of this Court, election petition filed by the petitioner is within limitation and is not barred by time.

22. Although, it is an admitted postiion (sic : position) of law that Limitation Act has no application in election petitions under Act of 1951, but here the controversy is to be seen from different perspective, i.e. with the aid of Section 9 of the Act of 1897. Therefore, ground raised by the respondent regarding Limitation act has no relevance.

23. Resultantly, I.A.No. 1361/2019 stands rejected and objection raised by the respondent regarding maintainability of election petition on the ground of limitation is overruled.

24. Respondent to file reply.

25. List the matter in the **week commencing 24th June, 2019** for reply and further orders.

Order accordingly

I.L.R. [2019] M.P. 1428
APPELLATE CIVIL
Before Mr. Justice G.S. Ahluwalia
S.A. No. 70/2014 (Gwalior) decided on 22 January, 2019

PREM NARAIN …Appellant

Vs.

STATE OF M.P. & anr. …Respondents

***A. Registration Act (16 of 1908), Section 49 and Civil Procedure Code (5 of 1908), Section 100 – Unregistered Document – Admissibility in Evidence* – Suit for specific performance of contract – Held – Although question regarding admissibility of document is a substantial question of law, but in view of Section 49 of Act of 1908, merely because agreement to sell was an unregistered document, but the same can be admitted in evidence in suit for specific performance of contract and would not be sufficient to dislodge the case of plaintiff, who has always expressed his readiness and willingness to perform his part of contract – Appeal dismissed. (Para 19)**

क. रजिस्ट्रीकरण अधिनियम (1908 का 16), धारा 49 एवं सिविल प्रक्रिया संहिता (1908 का 5), धारा 100 – अरजिस्ट्रीकृत दस्तावेज – साक्ष्य में ग्राह्यता – संविदा के विनिर्दिष्ट पालन हेतु वाद – अभिनिर्धारित – यद्यपि दस्तावेज की ग्राह्यता से संबंधित प्रश्न विधि का एक सारवान् प्रश्न है, परंतु 1908 के अधिनियम की धारा 49 को दृष्टिगत रखते हुए, मात्र क्योंकि विक्रय का करार अजिस्ट्रीकृत दस्तावेज था, परंतु उक्त संविदा के विनिर्दिष्ट पालन हेतु वाद में साक्ष्य में ग्राह्य हो सकता है तथा ऐसे वादी के प्रकरण को खारिज करने हेतु पर्याप्त नहीं होगा जिसने संविदा के अपने भाग का पालन करने के लिए सदैव तैयारी और रजामंदी अभिव्यक्त की है – अपील खारिज।

***B. Civil Procedure Code (5 of 1908), Section 100 – Substantial Question of Law – Findings of Fact* – Held – Question of readiness and willingness is a question of fact and until and unless findings recorded by Courts below are perverse and *de hors* the record, the findings of fact, may be erroneous but cannot be interfered with u/S 100 CPC – Apex Court concluded that findings of fact may be erroneous findings of fact but it would not give rise to substantial question of law and concurrent findings of fact should not be interfered in exercise of powers u/S 100 CPC. (Para 13 & 16)**

ख. सिविल प्रक्रिया संहिता (1908 का 5), धारा 100 – विधि का सारवान् प्रश्न – तथ्य के निष्कर्ष – अभिनिर्धारित – तैयारी एवं रजामंदी का प्रश्न, तथ्य का एक प्रश्न है एवं जब तक कि निचले न्यायालयों द्वारा अभिलिखित किये गये निष्कर्ष विपर्यस्त है एवं अभिलेख से असंबद्ध हैं, तथ्य के निष्कर्ष त्रुटिपूर्ण हो सकते हैं परंतु सि.प्र.सं. की धारा 100 के अंतर्गत हस्तक्षेप नहीं किया जा सकता – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि तथ्य के निष्कर्ष, तथ्य के त्रुटिपूर्ण निष्कर्ष हो सकते हैं परंतु यह विधि के सारवान् प्रश्न को उत्पन्न नहीं करेगा तथा सिविल प्रक्रिया संहिता की धारा 100 के अंतर्गत शक्तियों के प्रयोग में तथ्य के समवर्ती निष्कर्षों के साथ हस्तक्षेप नहीं किया जाना चाहिए।

Cases referred:

2010 (3) MPLJ (SC) 500, (2015) 2 MPLJ 645, (2002) 1 SCC 134, (2011) 1 SCC 158, (2012) 8 SCC 148, (2001) 9 SCC 521.

K.N. Gupta with *Kumar Gaurav Sharma*, for the appellant.
N.K. Gupta with *F.A. Shah*, for the respondent No. 2.

(Supplied: Paragraph numbers)

J U D G M E N T

G.S. AHLUWALIA, J.:- This Second Appeal under Section 100 of CPC has been filed against the judgment and decree dated 06/01/2014 passed by Additional Judge to the Court of Additional District Judge, Sironj, District Vidisha in Civil Appeal No.32-A/2013, thereby affirming the judgment and decree dated 24/01/2013 passed by Civil Judge, Class-I, Sironj, District Vidisha in Civil Suit No.27-A/2012, by which the suit filed by the respondent No.2 for specific performance of contract was decreed.

2. The necessary facts for the disposal of the present appeal in short are that the respondent No.2 filed a suit against the appellant on the pleadings that on 02/06/2010, the appellant had entered into an agreement to sell the disputed land, bearing survey no.215/1, area 0.759 hectare for a consideration of Rs.3 lac and out

of which, an amount of Rs.2 lac was paid on the date of execution of agreement to sell and it was agreed that the sale deed shall be executed by 30th April, 2011. Thereafter, the respondent No.2 made verbal request to the appellant to execute the sale deed on various occasions prior to 30th April, 2011 but the appellant did not execute the sale deed and accordingly, the respondent No.2 issued a written notice to the appellant on 11/05/2011 to execute the sale deed after receiving the remaining amount of Rs.1 lac. The notice was sent by registered post, however, the appellant refused to accept the same. Accordingly, the suit was filed for specific performance of contract as well as for possession.

3. The appellant filed his written statement and submitted that he had never executed an agreement of sale in favour of the respondent No.2. The boundaries mentioned in the agreement are also incorrect. In additional pleadings, it was stated by the appellant that one Raghunath Singh, whose mother was the President of Krishi Upaj Mandi Samiti, had approached the father of the appellant and persuaded him that as the Krishi Upaj Mandi Samiti is likely to be shifted to Siroj-Lateri Road, resulting in escalation in price of lands, therefore, the father of the appellant may sell 3 bighas of land. Relying on the persuasion made by Raghunath Singh, the appellant had executed the document at the instance of his father in favour of respondent No.2, however, he was not informed that in whose favour the said document is being executed and even not a single paisa was paid to him. Later on, even the Mandi did not shift as per the promise made by Raghunath Singh. When the appellant demanded his document back, then the respondent No.2 demanded an amount of Rs.2 lac and as the appellant had refused to pay the said amount, therefore, the suit has been filed.

4. The trial Court after framing the issues, recording the evidence of the parties, decreed the suit and came to a conclusion that an agreement to sell was executed by the appellant in favour of the respondent No.2 after receiving an amount of Rs.2 lac by way of advance. It was also held that the appellant has failed to prove that the agreement to sell was executed by keeping him in dark and playing fraud on him. The readiness and willingness of the respondent No.2 was also answered in affirmative.

5. Challenging the judgment and decree dated 24/01/2013 passed by the Trial Court, the appellant filed an appeal, which too has suffered dismissal by the judgment and decree dated 06/01/2014 passed by the Appellate Court in Civil Appeal No.32-A/2013.

6. Challenging the judgment and decree passed by the Courts below, it is submitted by learned Senior Counsel for the appellant that the respondent No.2 is, admittedly, an advocate and is also in the business of Real Estate and he has admitted in para 23 of his cross-examination that he is the Director of Real Estate Company. The respondent No.2 had a close friendship with Raghunath Singh,

whose mother was the President of Krishi Upaj Mandi Samiti and Raghunath Singh by misrepresenting the father of the appellant, had persuaded the father of the appellant as well as the appellant to execute the document in favour of respondent No.2. The appellant had also moved a complaint Ex.P1 before the SDO with regard to misrepresentation, which was denied by Raghunath Singh vide his statement Ex.P11. The respondent No.2 has failed to prove his readiness and willingness. It is further submitted that the agreement to sell is an unregistered document and was not admissible in evidence for want of registration.

7. *Per contra*, it is submitted by learned Senior counsel for the respondent No.2 that merely because the respondent No.2 has accepted that he is also an Advocate by profession, would not mean that he was disqualified to enter into an agreement to sell. Whether the respondent No.2 can pursue his profession as an Advocate along with his independent work of Real Estate or not, is a question which falls within the jurisdiction of Bar Council and has no bearing on the facts of the case. So far as the admissibility of the agreement to sell is concerned, it is submitted that at the time when the said document was being executed before the trial Court, no objection was raised by the appellant and furthermore, in the light of Section 49 of the Registration Act, the unregistered document for the purpose of specific performance of contract is admissible. It is further submitted that the respondent No.2 has specifically stated in his plaint as well as in his notice Ex.P2 (which was refused by appellant vide Ex.P4) as well as in his evidence, that he was ever ready and willing to perform his part of contract and further, he is still ready and willing to perform his part of contract. It is submitted that when concurrent findings have been recorded by the Courts below with regard to readiness and willingness of the plaintiff, then unless and until any perversity is pointed out by the appellant, this Court while entertaining the Second Appeal under Section 100 of CPC, should not interfere with the concurrent findings of fact.

8. Heard the learned Senior Counsel appearing for the parties.

9. Section 49 of the Registration Act, 1908 reads as under:-

> **"49. Effect of non-registration of documents required to be registered.-** No document required by section 17 (or by any provision of the Transfer of Property Act, 1882 (4 of 1882), to be registered shall-
>
> (a) affect any immovable property comprised therein, or
>
> (b) confer any power to adopt, or
>
> (c) be received as evidence of any transaction affecting such property or unless it has been registered.
>
> [Provided that an unregistered document affecting immovable property and required by this Court or the Transfer of Property Act,

> 1882 (4 of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 (3 of 1877), [or as evidence or any collateral transaction not required to be effected by registered instrument]"

10. From plain reading of Section 49 of the Registration Act, it is clear that the unregistered document can be admitted in evidence and merely because the agreement to sell was an unregistered document, the same cannot be a ground to dislodge the case of the respondent No.2. My view is fortified by the judgment passed by the Supreme Court in the case of *S. Kaladevi vs V. R. Somasundaram & Others*, reported in 2010(3) MPLJ (SC) 500, which reads as under:-

> "**11**. The main provision in Section 49 provides that any document which is required to be registered, if not registered, shall not affect any immovable property comprised therein nor such document shall be received as evidence of any transaction affecting such property. Proviso, however, would show that an unregistered document affecting immovable property and required by 1908 Act or the Transfer of Property Act, 1882 to be registered may be received as an evidence to the contract in a suit for specific performance or as evidence of any collateral transaction not required to be effected by registered instrument. By virtue of proviso, therefore, an unregistered sale deed of an immovable property of the value of Rs. 100/- and more could be admitted in evidence as evidence of a contract in a suit for specific performance of the contract. Such an unregistered sale deed can also be admitted in evidence as an evidence of any collateral transaction not required to be effected by registered document. When an unregistered sale deed is tendered in evidence, not as evidence of a completed sale, but as proof of an oral agreement of sale, the deed can be received in evidence making an endorsement that it is received only as evidence of an oral agreement of sale under the proviso to Section 49 of 1908 Act.
>
> **12.** Recently in the case of *K.B. Saha and Sons Private Limited v. Development Consultant Limited*, (2008) 8 SCC 564, this Court noticed the following statement of Mulla in his Indian Registration Act, 7th Edition, at page 189:-
>
> > ".....The High Courts of Calcutta, Bombay, Allahabad, Madras, Patna, Lahore, Assam, Nagpur, Pepsu, Rajasthan, Orissa, Rangoon and Jammu & Kashmir; the former Chief Court of Oudh; the Judicial Commissioner's Court at Peshawar, Ajmer and Himachal Pradesh and the Supreme Court have held that a document which requires registration under Section 17 and which is not admissible for want of registration to prove a gift or mortgage or sale or lease is nevertheless admissible to

prove the character of the possession of the person who holds under it....."

This Court then culled out the following principles:-

"1. A document required to be registered, if unregistered is not admissible into evidence under Section 49of the Registration Act.

2. Such unregistered document can however be used as an evidence of collateral purpose as provided in the proviso to Section 49 of the Registration Act.

3. A collateral transaction must be independent of, or divisible from, the transaction to effect which the law required registration.

4. A collateral transaction must be a transaction not itself required to be effected by a registered document, that is, a transaction creating, etc. any right, title or interest in immovable property of the value of one hundred rupees and upwards.

5. If a document is inadmissible in evidence for want of registration, none of its terms can be admitted in evidence and that to use a document for the purpose of proving an important clause would not be using it as a collateral purpose."

To the aforesaid principles, one more principle may be added, namely, that a document required to be registered, if unregistered, can be admitted in evidence as evidence of a contract in a suit for specific performance."

11. This Court in the case of *Manish and Another vs. Anil Kumar S/o. Kaluramji Patidar and Others*, reported in (2015) 2 MPLJ 645 has held as under:-

"15. In the present case, there is no such direct irreconcilable inconsistency between section 17(1)(b) and proviso to Section 49 of the Registration Act. The scope of proviso to section 49 of Act is very limited to the extent of receiving such document as evidence of a contract in a suit for specific performance or as evidence of any collateral transaction not required to be effected by registered instrument."

12. So far as the question of readiness and willingness is concerned, the Supreme Court in the case of *Veerayee Ammal vs. Seeni Ammal* reported in (2002) 1 SCC 134 has held as under:-

"**3.**On the pleadings of the parties, the trial Court framed the following issues:-

"1. Whether the plaintiff was always ready and willing to perform his part of contract? .....

"7. Section 100 of the Code of Civil Procedure (hereinafter referred to as "the Code") was amended by the Amending Act 104 of 1976 making it obligatory upon the High Court to entertain the second appeal only if it was satisfied that the case involved a substantial question of law. Such question of law has to be precisely stated in the Memorandum of Appeal and formulated by the High Court in its judgment, for decision. The appeal can be heard only on the question, so formulated, giving liberty to the respondent to argue that the case before the High Court did not involve any such question. The Amending Act was introduced on the basis of various Law Commission Reports recommending for making appropriate provisions in the Code of Civil Procedure which were intended to minimise the litigation, to give the litigant fair trial in accordance with the accepted principles of natural justice, to expedite the disposal of civil suits and proceedings so that justice is not delayed, to avoid complicated procedure, to ensure fair deal to the poor sections of the community and restrict the second appeals only on such questions which are certified by the courts to be substantial question of law. We have noticed with distress that despite amendment, the provisions of Section 100 of the Code have been liberally construed and generously applied by some judges of the High Courts with the result that objective intended to be achieved by the amendment of Section 100 appears to have been frustrated. Even before the amendment of Section 100 of the Code, the concurrent finding of facts could not be disturbed in the second appeal. This Court in Paras Nath Thakur v. Smt.Mohani Dasi (Deceased) & Ors. [AIR 1959 SC 1204] held: (AIR p. 1205, para 3)

> "It is a well settled by a long series of decisions of the Judicial Committee of the Privy Council and of this Court, that a High Court, on second appeal, cannot go into questions of fact, however, erroneous the findings of fact recorded by the courts of fact may be. It is not necessary to cite those decisions. Indeed, the learned counsel for the plaintiff-respondents did not and could not contend that the High Court was competent to go behind the findings of fact concurrently recorded by the two courts of fact."

8. To the same effect are the judgments reported in Sri Sinha Ramanuja Jeer Swamigal v. Sri Ranga Ramanuja Jeer alias Emberumanar Jeer & Ors. [AIR 1961SC 1720] V.Ramachandra Ayyar & Anr. v. Ramalingam Chettiar & Anr.[AIR 1963 SC 302] and Madamanchi Ramappa & Anr. v. Muthaluru Bojjappa [AIR 1963 SC 1633]. After its amendment, this Court in various judgments held that

the existence of the substantial question of law is a condition precedent for the High Court to assume jurisdiction of entertaining the second appeal. The conditions specified in Section 100 of the Code are required to be strictly fulfilled and that the second appeal cannot be decided on merely equitable grounds. As to what is the substantial question of law, this Court in Sir Chunilal v. Mehta & Sons Ltd. v. Century Spinning & Manufacturing Co.Ltd. [AIR 1962 SC 1314] held that: (AIR p.1318, para 6)

> "The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion or alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law."

9. In Kondiba Dagadu Kadam v. Savitribai Sopan Gujar & Ors. [JT1999 (3) SC 163] this Court again considered this aspect of the matter and held: (SCC pp. 725-26, para 6)

> "6. If the question of law termed as substantial question stands already decided by a large bench of the High Court concerned or by the Privy Council or by the Federal Court or by the Supreme Court, its merely wrong application on facts of the case would not be termed to be a substantial question of law. Where a point of law has not been pleaded or is found to be arising between the parties in the absence of any factual format, a litigant should not be allowed to raise that question as substantial question of law in second appeal. The mere appreciation of the facts, the documentary evidence or the meaning of entries and the contents of the document cannot be held to be raising a substantial question of law. But where it is found that the appellate court has assumed jurisdiction which did not vest in it, the same can be adjudicated in the second appeal, treating it as substantial question of law. Where the first appellate court is shown to have exercised its discretion in a judicial manner, it cannot be termed to be an error either of law or of procedure requiring interference in second appeal. This Court in Reserve Bank of India & Anr. v. Ramakrishna Govind Morey (AIR 1976 SC830) held that whether trial court should

not have exercised its jurisdiction differently is not a question of law justifying interference."

10. The question of law formulated as substantial question of law in the instant case cannot, in any way, be termed to be a question of law much less as substantial question of law. The question formulated in fact is a question of fact. Merely because of appreciation of evidence another view is also possible would not clothe the High Court to assume the jurisdiction by terming the question as substantial question of law. In this case Issue NO.1, as framed by the Trial Court, was, admittedly, an issue of fact which was concurrently held in favour of the appellant-plaintiff and did not justify the High Court to disturb the same by substituting its own finding for the findings of the courts below, arrived at on appreciation of evidence. "

13. Thus, it is clear that the question of readiness and willingness is a question of fact and until and unless the findings recorded by the Courts below are pointed out to be perverse and *de hors* the record, this Court is of the considered opinion that under Section 100 of CPC the findings of fact, may be erroneous but cannot be interfered with.

14. The Supreme Court in the case of *D.R.Rathna Murthy vs. Ramappa,* reported in (2011) 1 SCC 158, has held as under:-

"**9.** Undoubtedly, the High Court can interfere with the findings of fact even in the Second Appeal, provided the findings recorded by the courts below are found to be perverse i.e. not being based on the evidence or contrary to the evidence on record or reasoning is based on surmises and misreading of the evidence on record or where the core issue is not decided. There is no absolute bar on the re-appreciation of evidence in those proceedings, however, such a course is permissible in exceptional circumstances. (Vide *Rajappa Hanamantha Ranoji v. Mahadev Channabasappa* (2000) 6 SCC 120, *Hafazat Hussain vs. Abdul Majeed* (2001) 7 SCC 189 and *Bharatha Matha vs. R. Vijaya Renganathan*, (2010) 11 SCC 483)"

15. The Supreme Court in the case of *Union of India vs. Ibrahim Uddin and Another*, reported in (2012) 8 SCC 148 has held as under:-

"**59.** Section 100 CPC provides for a second appeal only on the substantial question of law. Generally, a Second Appeal does not lie on question of facts or of law. In State Bank of India & Ors. v. S.N.Goyal, AIR 2008 SC 2594, this Court explained the terms "substantial question of law" and observed as under : (SCC p.103, para 13)

"13 ..... The word 'substantial' prefixed to 'question of law' does not refer to the stakes involved in the case, nor intended to refer only to questions of law of general importance, but refers to

impact or effect of the question of law on the decision in the lis between the parties. 'Substantial questions of law' means not only substantial questions of law of general importance, but also substantial question of law arising in a case as between the parties..... any question of law which affects the final decision in a case is a substantial question of law as between the parties. A question of law which arises incidentally or collaterally, having no bearing on the final outcome, will not be a substantial question of law. There cannot, therefore, be a straitjacket definition as to when a substantial question of law arises in a case." (Emphasis added).

60. Similarly, in Sir Chunilal V. Mehta & Sons Ltd. v. Century Spinning and Manufacturing Co. Ltd., AIR 1962 SC 1314, this Court for the purpose of determining the issue held:- (AIR P. 1318, para 6)

"6. .....The proper test for determining whether a question of law raises in the case is substantial, would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties"

(Emphasis added)

61. In Vijay Kumar Talwar v. Commissioner of Income Tax, New Delhi, (2011) 1 SCC 673, this Court held that:(SCC pp.679-80, para 21)

"21..... 14. A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be 'substantial' a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law 'involving in the case' there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. It will, therefore, depend on the facts and circumstance of each case, whether a question of law is a substantial one or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis." (See also: Rajeshwari v. Puran Indoria, (2005) 7 SCC 60).

62. The Court, for the reasons to be recorded, may also entertain a second appeal even on any other substantial question of law, not

formulated by it, if the Court is satisfied that the case involves such a question. Therefore, the existence of a substantial question of law is a *sine-qua-non* for the exercise of jurisdiction under the provisions of Section 100 CPC. The second appeal does not lie on the ground of erroneous findings of facts based on appreciation of the relevant evidence.

63. There may be a question, which may be a "question of fact", "question of law", "mixed question of fact and law" and "substantial question of law." Question means anything inquired; an issue to be decided. The "question of fact" is whether a particular factual situation exists or not. A question of fact, in the Realm of Jurisprudence, has been explained as under:-

> "A question of fact is one capable of being answered by way of demonstration. A question of opinion is one that cannot be so answered. An answer to it is a matter of speculation which cannot be proved by any available evidence to be right or wrong."
>
> (Vide: Salmond, on Jurisprudence, 12th Edn. page 69, cited in Gadakh Yashwantrao Kankarrao v. E.V. alias Balasaheb Vikhe Patil & ors., AIR 1994 SC 678).

64. In Smt. Bibhabati Devi v. Ramendra Narayan Roy & Ors., AIR 1947 PC 19, the Privy Council has provided the guidelines as in what cases the second appeal can be entertained, explaining the provisions existing prior to the amendment of 1976, observing as under: (IA p.259.)

> ".(4)..... that miscarriage of justice means such a departure from the rules which permeate all judicial procedure as to make that which happen not in the proper sense of the word 'judicial procedure' at all. That the violation of some principles of law or procedure must be such erroneous proposition of law that if that proposition to be corrected, the finding cannot stand, or it may be the neglect of some principle of law or procedure, whose application will have the same effect. The question whether there is evidence on which the Courts could arrive at their finding, is such a question of law.
>
> (5).That the question of admissibility of evidence is a proposition of law but it must be such as to affect materially the finding. The question of the value of evidence is not sufficient reason for departure from the practice. ....."

65. In Suwalal Chhogalal v. Commissioner of Income Tax, (1949) 17 ITR 269, this Court held as under:-

> "..... A fact is a fact irrespective of evidence, by which it is proved. The only time a question of law can arise in such a case is when it is alleged that there is no material on which the conclusion can be based or no sufficient evidence."

66. In Oriental Investment Company Ltd. v.Commissioner of Income Tax, Bombay, AIR 1957 SC 852, this Court considered a large number of its earlier judgments, including Sree Meenakshi Mills Ltd., Madurai v.Commissioner of Income Tax, Madras, AIR 1957 SC 49, and held that where the question of decision is whether certain profit is made and shown in the name of certain intermediaries, were, in fact, profit actually earned by the assessee or the intermediaries, is a mixed question of fact and law. The Court further held that (Oriental Investment case, AIR p.856, para 29)

> "29..... inference from facts would be a question of fact or of law according as the point for determination is one of pure fact or a "mixed question of law and fact" and that a finding of fact without evidence to support it or if based on relevant or irrelevant matters, is not unassailable."

67. There is no prohibition to entertain a second appeal even on question of fact provided the Court is satisfied that the findings of the courts below were vitiated by non-consideration of relevant evidence or by showing erroneous approach to the matter and findings recorded in the court below are perverse. (Vide: *Jagdish Singh v. Nathu Singh*, AIR 1992 SC 1604; *Smt. Prativa Devi (Smt.) v. T.V. Krishnan,* (1996) 5 SCC 353; *Satya Gupta (Smt.) @ Madhu Gupta v. Brijesh Kumar,* (1998) 6 SCC 423;*Ragavendra Kumar v. Firm Prem Machinary & Co.*, AIR 2000 SC 534; *Molar Mal (dead) through Lrs. v. M/s. Kay Iron Works Pvt. Ltd.*, AIR 2000 SC 1261;*Bharatha Matha & Anr. v. R. Vijaya Renganathan & Ors.*, AIR 2010 SC 2685; and *Dinesh Kumar v. Yusuf Ali*, (2010) 12 SCC 740)."

16. The Supreme Court in the aforesaid judgments has held that even if the findings of fact may be erroneous findings of fact, then it would not give rise to substantial question of law and the High Court while exercising the power under Section 100 of CPC should not interfere with the concurrent findings of fact.

17. The Supreme Court in the case of *Pakeerappa Rai vs. Seethamma Hengsu dead by LRs. and Others* reported in (2001) 9 SCC 521 has held as under:-

> **"2.** Learned Counsel appearing on behalf of the appellant urged that the finding recorded by the first Appellate Court that auction purchaser was not a stranger to the suit is based on no evidence on record and inasmuch as the conclusion arrived at is erroneous and the High Court committed serious mistake of law in not interfering with the said finding. Plaintiff Seethamma in her evidence stated about the

> nearness of the auction purchaser with other defendants. It was brought on record that auction purchaser was near to the husband of Laxmi who was one of the defendants in O.S. No. 133/1963 which was tried along with the suit out of which the present appeal arises. The first Appellate Court, on the basis of the said evidence, came to the conclusion that the auction purchaser was not a stranger to the suit. Under such circumstances, it cannot be urged that the conclusion arrived it by the court below was erroneous. The position would be different if the High Court has the jurisdiction to reappraise the evidence. In such a situation the High Court might have come to a different conclusion. But the High Court in exercise of power under Section 100 CPC cannot interfere with the erroneous finding of fact howsoever the gross error seeing to be. We. therefore, do not find any merit in the contention of the learned Counsel for the appellant. "

18. Further, the appellant has not examined his father to whom Raghunath Singh was alleged to have misrepresented. Thus, the pleading of misrepresentation was not proved and the execution of the agreement to sell was not disputed by the appellant.

19. Considering the facts and circumstances of the case, this Court is of the considered opinion that although the question regarding the admissibility of document is a substantial question of law but in view of Section 49 of the Registration Act merely because the agreement to sell was an unregistered document, but the same can be admitted in evidence in a suit for specific performance of contract and would not be sufficient to dislodge the case of the plaintiff. The plaintiff/respondent No.2 has always expressed his readiness and willingness to perform his part of contract. Furthermore, according to the agreement to sell, only an amount of Rs.1 lac was required to be paid by the plaintiff apart from bearing the registration charges and in view of the admission by the respondent No.2/plaintiff in his cross-examination that he is in the business of Real Estate and is also an Advocate by profession, therefore, it is clear that the financial position of the respondent was such where he can easily bear the expenses of registration as well as the remaining amount of Rs.1 lac, therefore, this Court is of the considered opinion that no substantial question of law arises in the present appeal.

20. Accordingly, the judgment and decree dated 06/01/2014 passed by Additional Judge to the Court of Additional District Judge, Sironj, District Vidisha in Civil Appeal No.32-A/2013 and the judgment and decree dated 24/01/2013 passed by Civil Judge, Class-I, Sironj, District Vidisha in Civil Suit No.27-A/2012 are hereby affirmed.

Appeal fails and is hereby **dismissed** *in limine*.

Appeal dismissed

I.L.R. [2019] M.P. 1441
APPELLATE CIVIL
Before Mr. Justice Sanjay Dwivedi
M.A. No. 904/2019 (Jabalpur) decided on 24 June, 2019

SUDESH KOHLI (SMT.) …Appellant

Vs.

SMT. CHANDARANI MISHRA & anr. …Respondents

***A. Civil Procedure Code (5 of 1908), Order 41 Rule 23-A – Remand for Re-trial – Scope & Jurisdiction – Grounds* – Held – Trial Court, very elaborately/categorically appreciated each and every evidence, oral/ documentary and left no issues unanswered or undecided – Appellate Court has not given any specific reason as to why findings of trial Court is not proper – Appellate Court, instead of remand, could have decided the same on merits and thus has not exercised its discretion as conferred under Order 41 Rule 23-A CPC – Impugned judgment and decree set aside – Matter remitted to Appellate Court to decide the same on merits – Appeal allowed.**
(Paras 14, 15, 17 & 18)

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 41 नियम 23–ए – पुनः विचारण के लिए प्रतिप्रेषण – विस्तार एवं अधिकारिता – आधार – अभिनिर्धारित – विचारण न्यायालय ने मौखिक/दस्तावेजी, हर एक साक्ष्य का अति विस्तारपूर्वक/स्पष्ट रूप से मूल्यांकन किया तथा कोई भी विवाद्यक अनुत्तरित या अविनिश्चित नहीं छोड़ा – अपीली न्यायालय ने कोई विनिर्दिष्ट कारण नहीं दिया है कि क्यों विचारण न्यायालय के निष्कर्ष उचित नहीं है – अपीली न्यायालय, प्रतिप्रेषण के बजाय, गुणदोषों के आधार पर उक्त का विनिश्चय कर सकता था एवं इस प्रकार सि.प्र.सं. के आदेश 41 नियम 23–ए के अंतर्गत प्रदत्त अनुसार अपने विवेकाधिकार का प्रयोग नहीं किया – आक्षेपित निर्णय एवं डिक्री अपास्त – मामला गुणदोषों के आधार पर, उक्त का विनिश्चय करने के लिए अपीली न्यायालय को प्रतिप्रेषित – अपील मंजूर।

***B. Civil Procedure Code (5 of 1908), Order 41 Rule 23-A – Exercise of Power* – Held – Apex Court concluded that order of remand should not be passed routinely – Scope is limited – This Court has also earlier concluded that power of remand cannot be exercised to fill up the lacuna of one or other party and can only be exercised for curing a radical defect in trial or hearing in appeal resulting in miscarriage of justice. (Para 16)**

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 41 नियम 23–ए – शक्ति का प्रयोग – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि प्रतिप्रेषण का आदेश सामान्यतया पारित नहीं किया जाना चाहिए – विस्तार सीमित है – इस न्यायालय ने पूर्व में भी निष्कर्षित किया है कि प्रतिप्रेषण की शक्ति का प्रयोग, एक अथवा अन्य पक्षकार की कमी को पूर्ण करने हेतु नहीं किया जा सकता तथा केवल विचारण अथवा अपील की सुनवाई में हुई आमूल त्रुटि जिसके परिणामस्वरूप न्यायहानि होती, को सुधारने हेतु किया जा सकता है।

Cases referred:

AIR 1993 Orrisa 59, 2012 (1) MPLJ 114, 2013 (4) MPLJ 135, (2007) 6 SCC 737, AIR 1954 Madras 783, AIR 1997 MP 62, AIR 1995 Delhi 73, AIR 1987 Orrisa 227, AIR 1985 Gujarat 27, AIR 2005 Punjab and Haryana 14, AIR 1999 SC 1441, 2002 AIR SCW 417, 2003 (4) MPLJ Note 27, 2012 (III) MPWN 15, 1999 AIR SCW 780, (2017) 11 SCC 392, (2008) 8 SCC 485, 2015 (1) MPLJ 243.

R.K. Sanghi, for the appellant/defendant No. 2.
L.M. Tripathi with *G.P. Tripathi*, for the respondent No. 1/plaintiff.
T.D. Lohana, for the respondent No. 2/Society.

ORDER

SANJAY DWIVEDI, J.:- Since pleadings are complete and learned counsel for the parties are ready to argue the matter finally, therefore, considering the issue involved in the case, it is heard finally.

2. The instant appeal is arising out of the judgment and decree dated 15.10.2018 passed by the Third Additional District Judge, Jabalpur in First Appeal No.07-A/2014 whereby, the First Appellate Court after setting aside the judgment of the trial Court, wholesale remitted the matter for retrial.

3. The challenge is basically made on the ground that remanding the case to the trial Court for fresh trial is bad in law and perverse. It is contended by the appellant that the First Appellate Court has failed to see that wholesale remand is permissible in a very exceptional circumstance and such power should be exercised sparingly and it should not be exercised merely because the trial Court in some aspect is wrong and also in circumstance when all evidence has been duly placed before the trial Court and the suit was decided on merits on several issues framed then such remand by the First Appellate Court is absolutely illegal. It is stated by the appellant that the trial Court has framed various issues and on the basis of material adduced by the parties, gave specific findings therein. It is also stated by the appellant that the First Appellate Court has remitted the matter taking note of the evidence which infact could not have been considered as good evidence. It is also contended by the appellant that before the Appellate Court, no such plea was taken by the respondents that the trial Court has not allowed any oral or documentary evidence or excluded any such evidence to be taken on record. In such a circumstance, the wholesale remand setting aside the well reasoned judgment is not permissible. It is also contended by the appellant that the very object of remand is being frustrated as the Appellate Court has given the plaintiff one more opportunity to fill-up the lacunae which they have left at the time of contesting the trial. Accordingly, the appellant has questioned the legality and validity of the judgment and decree passed by the First Appellate Court and claimed that the same be set aside because the First Appellate Court without

applying its mind exercised the power of wholesale remand in a very ordinary and casual manner.

4. *Per contra*, the learned counsel appearing for respondent No.1 has supported the order passed by the First Appellate Court and has contended that in the present facts and circumstances, there was no other option available with the First Appellate Court but to remit the matter for fresh trial and as such, the impugned judgment and decree does not call for any interference. The appeal being misconceived without any substance and, therefore, deserves to be dismissed.

5. To decide the controversy involved in the appeal certain important facts are required to be appreciated that the plaintiff/respondent No.1 filed a suit for permanent injunction against defendant No.2/present appellant claiming that the plaintiff has purchased a plot situated at Mouja Gorakhpur, Patwari Halka No.24/2, Bandobast No.605, Khasra Nos.773/6, 774/6, 775/5 and 776/9 total area admeasuring 3.822 hectares out of which, 25x50=1250 square feet bearing plot No.114-A (disputed plot) which has been marked in red in the map and the suit was filed on 06.11.2007. Defendant No. 1 herein was a registered Society bearing registration No.133/81 (hereinafter referred to as the 'Society') and the basic object of the Society was to provide the plots for constructing the house by its members. As per the plaintiff, the defendant No.l/Society has allotted the disputed plot vide registered sale authority letter dated 30.03.1990 in favour of the plaintiff and also handed over the possession of the same till then the said plot is owned and possessed by the plaintiff without any obstruction. The plaintiff has taken a membership of the Society after depositing the development cost and got the map sanctioned from the Competent Officer and constructed her house upto plinth level and plot was also fenced. As such, spent almost Rs.1,50,000/-.

The defendant No.1/Society has also allotted a plot in favour of one Smt. Krishna Devi Shrivastava W/o Late Shri Pannalal Shrivastava of Khasra Nos.531/1, 531/2, 531/4, 531/5 and 532/1 of New Bandobast No.599, Patwari Halka No.28 area admeasuring 1500 square feet and plot No.65/23 by registered sale and lateron, the defendant No.1/Society by amendment, allotted the plot to Smt. Krishna Devi Shrivastava situated over Khasra Nos.773/4, 774/4, 775/5 and 776/4 out of which, plot No.114 of 1500 square feet and accordingly, the amended deed was written on 30.10.1986. As per the plaintiff, the said amended deed was not registered and, therefore, Smt. Krishna Devi Shrivastava had not acquired any title over the said plot because for transfer of immovable property, the sale-deed must be registered. As per the plaintiff, she has valid title over the plot No.114-A and after getting all sanctions from the Competent Authority, the map got sanctioned. It is also alleged that Satyendra Shrivastava fraudulently sold the plot in favour of the defendant No.2/present appellant by showing the name of the

plaintiff. As such, the defendant No.2/appellant had no right over the property and as such, she was trying to raise unauthorized construction with the help of unwanted elements; force and hence, the plaintiff had to file a suit for permanent injunction.

6. The Society has not filed any written statement and has also not come forward to contest the suit. The written statement was filed by defendant No.2/present appellant taken a stand that the plot Nos.113 and 114 were sold by Smt. Krishna Devi Shrivastava through registered sale-deed dated 28.09.1985 and by amended deed dated 30.10.1986, the said plot were recorded in the name of Satyendra Shrivastava after the death of Smt. Krishna Devi Shrivastava and a letter was issued by the Society in favour of Satyendra Shrivastava showing the transfer of both the plots in his favour. Satyendra Shrivastava sold the plot No.113 to one Shri Deepak Kumar Pasi and Suraj Kumar Pasi vide registered sale-deed dated 27.06.2005 and plot No.114 to one Neetu Anandani and thereafter, Neetu Anandani vide registered sale-deed dated 22.12.2016 sold the plot to defendant No.2 namely Sudesh Kohli the present appellant. It is claimed by defendant No.2 that from the date of sale-deed dated 22.12.2006, she is in possession of the plot which is situated at APR Colony, Katanga.

Thereafter, a police report was also made to the Police Station, Cantt by the plaintiff and on her complaint, police conducted an enquiry and given the finding that plot No.114-A does exist in APR Colony, Katanga. As per the defendant No.2, the plot No.114-A is of 1500 square feet surrounded by plot No.113 and side road as per the sanctioned layout plan. It is also the stand of defendant No.2 that in a sanctioned layout plan of the Society, plot No.114-A does not exist. It is also stated that the Society sold the plot to the plaintiff but as per the sale-deed, the possession of plot No.114-A was neither handed over nor any construction was made by the plaintiff over there. As per the record available, plot Nos.113 and 114 were allotted and sold to Smt. Krishna Devi Shrivastava and correction deed was made in favour of Satyendra Shrivastava. The Society has also issued a letter to the plaintiff restraining her to raise any construction over plot No.114.

7. The trial Court framed as many as six issues and recorded evidence and finally dismissed the civil suit holding that the plaintiff has failed to prove her case. It is also opined by the trial Court that the plaintiff failed to prove as to when, the possession of the disputed plot was given to her. The trial Court has also found that when it was a specific stand taken by the defendant that the disputed plot No.114-A was not existing in the layout plan of the Society then the plaintiff had to prove that the said disputed plot is a part of layout plan of the Society but she failed to do so. The trial Court, after examining the documents produced by the parties, has arrived at a conclusion that the plaintiff has not shown as to on which date, the possession of the disputed plot was given to her. The document Ex.P-1 produced

by the plaintiff contained a clause that the possession of the plot would be given to her after delimitation of the boundaries of the Cantonment Board and Nagar Nigam and thereafter, no document was produced by the plaintiff to show that she acquired the possession of the plot and as such, the trial Court has arrived at a finding that the plaintiff was never put in possession of the disputed plot and, therefore, the suit was dismissed as the plaintiff was not found eligible to get the decree of mandatory injunction. The trial Court has observed that the plot of the plaintiff is 114-A whereas, the plot of defendant No.2 is 114 as such, both the plots are distinct and the defendant has proved the fact that on her plot i.e. plot No.114, boundary walls have been constructed whereas, the plaintiff has not produced any proof and evidence to demonstrate that she has secured her plot by constructing its boundaries and as such, it is found by the trial Court that she failed to prove her suit.

8. Thereafter, an appeal was preferred under Section 96 of the Code of Civil Procedure by the plaintiff/respondent No.1 assailing the judgment and decree passed by the trial Court. The First Appellate Court has observed that the document Ex.P-8, a letter of possession reveals that the plaintiff/respondent No.1 has been handed over the possession of plot No.114-A and further, observed that the plots i.e. Nos.114-A as also 114 are different as per their area and also of khasra numbers whereas, the trial Court has not given any decision in respect of their separate existence and, therefore, the dispute was not properly resolved and the same still exists between the parties. The First Appellate Court, therefore, observed that the trial Court has resolved the suit on the basis of presumptions ignoring the material evidence produced by the parties and accordingly, for proper adjudication, the case was remanded back for retrial.

9. As per the contentions made by the learned counsel for the appellant that the First Appellate Court has not properly exercised its discretion as provided under Order 41 Rule 23-A of the Code of Civil Procedure but it is arbitrarily and without considering the scope of the provision, remitted the matter back for trial afresh. As per the learned counsel for the appellant, the trial Court has left no issue answered but given the finding on the basis of material produced by the parties and after appreciating the evidence adduced, dismissed the suit. As per the contention of the learned counsel for the appellant that the First Appellate Court has committed illegality while remanding the case for fresh trial whereas, on the issue directly involved, the evidence was led by the parties in trial Court and on the basis of the same, the trial Court has answered the issues and given reasoned findings. As per the counsel for the appellant, on the basis of the evidence adduced by the parties and appreciation made by the trial Court on the same, there was no reason for the Appellate Court to say that the trial Court has proceeded on presumption and dismissed the suit but on the contrary, the plaintiff failed to adduce any material in support of her stand and, therefore, the suit was dismissed. As per the

counsel for the appellant the power of remand should not be ordinarily exercised only on the ground that the reasoning of the trial Court in some aspect is wrong. It is also contended that before the First Appellate Court no such ground was raised by the respondent that the trial Court has excluded any finding on oral or documentary evidence and under such a circumstance, the First Appellate Court instead of remitting the matter back for retrial, should have decided the appeal on merits. To bolster his submission, the learned counsel for the appellant has placed reliance upon the decisions reported in AIR 1993 Orrisa 59 parties being *Dulana Dei Vs. Bertram Sahu,* 2012 (1) MPLJ 114 parties being *Gangadhar Vs. Bhanwaribai,* 2013 (4) MPLJ 135 parties being *Pushpdevi Vs. Harvilas*, (2007) 6 SCC 737 parties being *Ramchandra Sakharam Mahajan Vs. Damodar,* AIR 1954 Madras 783 parties being *Ramkrishna Vs. Rangayya,* AIR 1997 MP 62 parties being *Umrao Bai Vs. Sardarilal Khatri,* AIR 1995 Delhi 73 parties being *Kartar Singh Vs. Rameshwari Kela,* AIR 1987 Orrisa 227 parties being *Nilamani Dibya Vs. Biswanath Mohpatra,* AIR 1985 Gujarat 27 parties being *Seth Madhavrao Vs. FCI* and AIR 2005 Punjab and Haryana 14 parties being *Hasham Vs. Jhangi Ram.*

10. On the other hand, the learned counsel for respondent No.1 has supported the order of the First Appellate Court and submitted that if the evidence adduced by the parties are seen then it is clear that the judgment and decree passed by the trial Court dismissing the suit of the plaintiff was not proper and it was liable to be set aside.

11. The respondents has also contended that the Competent Authorities have sanctioned the map of the plaintiff in respect of the suit plot No.114-A. The Society has also issued a possession letter i.e. Ex.P.-8. It is also contended by the respondent that from the sale-deed executed in favour of the present appellant in respect of plot No.114, it is clear that the same situates on different khasras. It is also contended that the Society, neither filed any written statement nor entered the witness-box and, therefore, an adverse inference should be drawn against the Society. It is also contended by the respondent that since there is no provision for partial remand, therefore, the First Appellate Court has not committed any illegality and thus rightly exercised the discretion remitting the matter for wholesale retrial directing the parties to face the same. The respondent has relied upon AIR 1999 SC 1441 parties being *Vidhyadhar Vs. Manik Rao and another*, 2002 AIR SCW 417 parties being *P. Purushottam Reddy and another Vs. M/s Pratap Steel Ltd.,* 2003 (4) MPLJ Note 27 *Shri Deo Raghunathji Bada Mandir, Bina Vs. Prahlad Singh and another*, 2012 (III) MPWN 15 parties being *Jagannathan Vs. Raju Singamani* and 1999 AIR SCW 780 parties being *Answani Kumar Patel Vs. Upendra J. Patel and others*.

12. I have heard the arguments advanced by the learned counsel for the parties and perused the record available.

13. Considering the arguments advanced by the learned counsel for the parties, the questions for determination which arise before this Court are as under:-

> (i) Whether the First Appellate Court has rightly exercised the discretion provided under Order 41 Rule 23-A of the Code of Civil Procedure?
>
> Or
>
> (ii) The First Appellate Court instead of remitting the matter to the trial Court for fresh trial ought to have decided the appeal on merits?

To answer the questions involved in this appeal, it is apt to see as to on what basis, the trial Court has dismissed the suit. The plaintiff/respondent No.1 filed a suit for permanent injunction claiming that she is in possession of plot No.114-A area measuring 1250 square feet but defendant No.2/appellant raising construction over her plot unauthorizedly and, therefore, decree of permanent injunction be passed against the defendant.

On the other hand, the defence of the defendant No.2/appellant was that she has purchased the plot i.e. plot No.114 area measuring 1500 square feet and is also in possession of the plot demarcated with boundaries and the construction till the plinth level has already been done by her. A specific stand was also taken by the defendant that as per the sanctioned layout plan of the Society i.e. defendant No.1/respondent No.2 herein, there was no plot like 114-A on which, the plaintiff is raising her claim. The trial Court framed as many as six issues and decided all of them giving specific finding thereof. The trial Court on the basis of the oral and documentary evidence produced by the parties has very categorically observed that the plaintiff failed to prove as to on what date, the possession of the disputed plot i.e. plot No.114-A was given to her. The trial Court has also examined the document i.e. Ex.P.-1, the sale-deed of the plot No. 114-A made in favour of the plaintiff and in the said document, Clause No.5 very categorically provides as under:-

> "5. केन्ट बोर्ड, नगर निगम का पर सीमन होने के पश्चात् ही कब्जा दिया जायेगा।''

and also considered the document Ex.P-8 that the possession letter issued on 30.06.1993 and simultaneously, in paragraph 22 of its judgment has considered the statement of the witness namely N.P. Mishra husband of the plaintiff who had stated that the possession was handed over on 30.03.1990 and has also stated in the evidence that a document Ex.P-8 only a possession letter does not contain any description about handing over the possession of the disputed plot and no

proceeding regarding handing over the possession was done. The trial Court, thereafter, comparing the statements of the plaintiff witnesses and recital of documents Ex.P-1 and Ex.P-8 and arrived at a finding that the plaintiff failed to prove by adducing oral and documentary evidence as to on what date, the possession of the disputed plot was handed over to her. The trial Court secondly very categorically dealt with the issue regarding existence of plot No.114-A and in paragraph 20 of the judgment, after considering the layout plan, has given finding that the plaintiff failed to prove that the disputed plot is a part of layout plan. The trial Court has also observed that the plaintiff further failed to prove that the disputed plot No.114-A is a part of sanctioned layout plan of defendant No. 1/respondent No.2 herein. Finally, in paragraph 23 of the judgment, the trial Court has very categorically observed that in view of Ex.P-1, the plaintiff was not given possession on the date of purchase and further, the plaintiff did not produce any oral and documentary evidence to substantiate that as to on what date, she got possession of the disputed plot and hence, the suit was dismissed.

14. This Court has examined the material available on record as also the finding given by the trial Court and found that the trial Court has very elaborately discussed each and every evidence oral and documentary adduced before the Court and then arrived at a finding. The trial Court has also dealt with the issue involved in the case and left no issue unanswered or undecided. At this stage, it is not proper for this Court to opine whether the findings given by the trial Court was correct or justified otherwise the same would be finding of this Court and would come in the way of the Appellate Court to decide the appeal fairly and with independent mind.

Now, this Court has to see whether the First Appellate Court has exercised its discretion as provided under Order 41 Rule 23-A of the Code of Civil Procedure properly or not.

15. On a bare perusal of the order of the First Appellate Court it is gathered that nowhere it is stated by the First Appellate Court that respondent No.1 herein who was appellant before the First Appellate Court has at any point of time raised issue before the First Appellate Court that the trial Court has left any oral and documentary evidence untouched or not allowed to be taken on record, otherwise, the reasoning would have been different. It was also not a ground that any issue left undecided but from the order of First Appellate Court, it reflects that the finding given by the First Appellate Court is wrong. However, the First Appellate Court in paragraph 12 of its judgment has observed that from document Ex.P-8, which is a possession letter, reveals that the plaintiff was given the possession of plot No.114-A but has not given any specific reason as to why, the finding of the trial Court, in this respect made in paragraph 22, is not proper though arrived after appreciating the statement of the witnesses adduced by the plaintiff and also

taking note of the documents including the document Ex.P-8 and thereafter, the First Appellate Court, in paragraph 13 of its judgment has observed that the trial Court has not resolved regarding dissimilarity of plot No.114-A and 114 whereas, the trial Court very categorically given finding in this regard holding that the plaintiff failed to prove that plot No.114-A existed in the sanctioned layout plan of Society from which, such plot has been purchased. The First Appellate Court has also observed that the finding of the trial Court is based upon the presumption and assumption but has not specified as to which finding is based upon the presumption. Accordingly, in my opinion, the First Appellate Court has acted beyond the scope of the provision which empowers the Appellate Court to remand the matter wholesale for retrial and without appreciating the jurisdiction conferred on it under Rule 23 and 23-A of Order 41 of the Code of Civil Procedure, instead of deciding the appeal on merits, directed the trial Court for conducting the fresh trial. The order passed by the First Appellate Court, therefore is not sustainable in the eye of law considering the scope of remand as laid down by the Supreme Court, this Court and other High Court as well discussed hereinbelow.

16. In case of *P. Purushottam Reddy* (supra), the Supreme Court has observed as under:-

> "..... In 1976, Rule 23A has been inserted in Order 41 which provides for a remand by an appellate court hearing an appeal against a decree if (i) the trial court disposed of the case otherwise than on a preliminary point, and (ii) the decree is reversed in appeal and a retrial is considered necessary. On twin conditions being satisfied, the appellate court can exercise the same power of remand under Rule 23A as it is under Rule 23. After the amendment all the cases of wholesale remand are covered by Rule 23 and 23A. In view of the express provisions of these rules, the High Court cannot have recourse to its inherent powers to make a remand because as held in *Mahendra v. Sushila* (AIR 1965 SC 365 at p. 399), it is well settled that inherent powers can be availed of *ex debito justitiae* only in the absence of express provisions in the Code. It is only in exceptional cases where the court may now exercise the power of remand *dehors* the Rules 23 and 23A. To wit the superior court, if it finds that the judgment under appeal has not disposed of the case satisfactorily in the manner required by Order 20 Rule 3 or Order 11 Rule 31 of the CPC and hence it is no judgment in the eye of law, it may set aside the same and send the matter back for re-writing the judgment so as to protect valuable rights of the parties. An appellate court should be circumspect in ordering a remand when the case is not covered either by Rule 23 or Rule 23A or Rule 25 of the CPC. An

> unwarranted order of remand gives the litigation an undeserved lease of life and, therefore, must be avoided."

The Supreme Court further in (2017) 11 SCC 392 parties being *A.A. Prakasan Vs. Anupama and others* has observed as under:-

> "2....We are of the view that even after the amendment was permitted, further question whether any fresh issue was required to be framed or fresh evidence was to be led was required to be gone into before setting aside the judgment. In case it becomes necessary to frame additional issue and permit the parties to lead further evidence, a report could be called for from the trial court on such additional issue. Remand could be ordered only if the judgment of the trial court was erroneous and the appeal court could not decide the matter and not merely on an amendment being allowed."

Further in case of *Municipal Corporation, Hyderabad Vs. Sunder Singh* reported in (2008) 8 SCC 485, the Apex Court has observed as under:-

> "The court should be loathe to exercise its power in terms of Order 41 Rule 23 and an order of remand should not be passed routinely. It is not to be exercised by the appellate court only because it finds it difficult to deal with the entire matter. If it does not agree with the decision of the trial court, it has to come with a proper finding of its own. The appellate court cannot shirk its duties.
>
> Thus, the scope of remand in terms of Order 41 Rule 23 is extremely limited. The suit in this case was not decided on a preliminary issue. Order 41 Rule 23 was therefore not available. On what basis, the secondary evidence was allowed to be led is not clear. The High Court did not set aside the orders refusing to adduce secondary evidence. No case has been made out for invoking the jurisdiction of the Court under Order 41 Rule 23 of the Code."
>
> [Emphasis Supplied]

This Court in case of *Shri Deo Raghunathji Bada Mandir, Bina* (supra) has also observed as under:-

> "The power of remand should be exercised sparingly. Endeavour of the appellate Court should be to dispose of the case itself. The power of remand should not be ordinarily exercised merely because in the view of the appellate Court reasoning of the trial Court in some aspects is wrong. Where all evidence has been duly placed before the trial Court and it has decided the suit on merits on several issues which were framed,

> the appellate Court has no power to remand. The order of remand retards the progress of the case and puts it in reverse gear. If the appellate Court finds the findings of the trial Court erroneous or faulty it has the power to give its own findings."

This Court in case of *Ashwinkumar K. Patel* (supra), has also observed as under:-

> "The High Court should not ordinarily remand a case under O. 41 R.23, C.P.C. to the lower Court merely it considered that the reasoning of the lower Court in some respect was wrong. Such remand orders lead to unnessary delays and cause prejudice to the parties to the case. When the material was available before the High Court, it should have itself decided the appeal one way or other."

This Court in case of *Murarilal Vs. Ram Kumar Ojha and another* reported in 2015 (1) MPLJ 243 has observed as under:-

> "The scope and nature of jurisdiction conferred on Appellate Court under Rules 23 and 23-A of Order 41 of Civil Procedure Code are well settled. The ingredients of Order 41, Rule 23-A are two fold, firstly; the Appellate Court upon consideration of the pleadings and material brought on record by way of oral and documentary evidence in the event reaches the conclusion to reverse the findings of the trial Court; only thereafter, and secondly; it has to apply its mind as to whether the circumstances warrant retrial. Upon fulfilment of these two requirements, the provisions of Order 41, Rule 23, Civil Procedure Code can be applied in the matter of remand of the case. In the present case, trial Court has considered the order passed by the Sub Divisional Officer dated 8-7-2009 passed in compliance of the order passed in Civil Suit along with other documentary evidence relating to revenue record to reach the conclusion that the appellants/defendants were not entitled to seek mutation over the suit land of plaintiff's ownership and possession, the first Appellate Court has not considered aforesaid documents. As a matter of fact, after consideration of the evidence on record first Appellate Court ought to have reached the conclusion for reversing the findings so recorded by the trial Court and thereafter, should have applied the mind as to whether the re-trial was necessary. Admittedly, the first Appellate Court has not dealt with the appeal on merits and made an observation that the aforesaid evidence was not dealt with by the trial Court while recording the aforesaid findings and that is the reason why the impugned judgment and decree suffers from perversity of approach. The first Appellate Court

> has in fact erroneously exercised the jurisdiction under Order 41, Rule 23, Civil Procedure Code while ordering remand of the case to the trial Court for fresh decision instead of deciding it on merits."

This Court in case of *Pushpadevi* (supra) had also an occasion to deal with the scope of the provision of Order 41 Rule 23 or Rule 23-A of the Code of Civil Procedure and observed as under:-

> "....To attract provisions of Order 41, Rule 23 or Rule 23-A, present appellant has to demonstrate that the Additional District Judge was considering validity or otherwise "decree" and, in that event only, present appeal against order can be held that to be maintainable. Moreover, perusal of the impugned order reveals that it is not only an order of remand but thereby set aside the impugned judgment and decree without consideration on merits. Thus, a retrial as required by Order 41, Rule 23-A is not warranted in the facts and circumstances of the case. Therefore, this Court finds that remedy of filing appeal against order is available to the appellant. Hence after analysing the principles underlying the object, the findings of the Appellate Court by setting aside the judgment and decree of the trial Court, while remanding back the case for fresh trail are not in consonance with the provisions of law mentioned above. The Appellate Court ought to have addressed itself to these vital points and was expected to proceed with the case on merits. Consequently, the appeals are hereby allowed and the findings of the Appellate Court in remanding the case back for fresh trial are set aside. It is directed that Appellate Court shall restore the appeals to their original numbers and after affording opportunity of hearing to the parties and the inter-pleader decide the appeals on their own merits, in accordance with law."

This Court in *Smt. Umrao Bai and others* (supra), has observed that it is well established that powers of remand cannot be exercised to fill up the lacuna of one or other party. They can be exercised for curing a radical defect in trial or hearing in the appeal resulting in miscarriage of justice.

Further in case of *Kartar Singh* (supra) has observed as under:-

> "9. Since I do agree with the learned counsel for the appellant that no issue had been left undecided by the learned Subordinate Judge, the order of remand falls on this ground alone.
>
> 10. Even otherwise, the order of remand cannot be sustained as it remits the case for retrial which was totally uncalled for.

> 11. To order retrial of a case is a serious matter and may mean considerable waste of public time. Such an order can be passed only in exceptional cases as, for example, where there had been no real trial of the dispute and no complete or effectual adjudication of the proceeding and the party complaining has suffered material prejudice on that account. Remand is not meant to provide fresh opportunity to a party to litigate."

In case of *Nilamani Dibya and another* (supra) has observed as under:-

> "9. Even if, R. 23A has been added by amendment, the principle behind remand by the appellate Court has not undergone any change as the power of remand can be exercised where the appellate Court while reversing the decision of the trial Court considers a retrial necessary. The power is no doubt wide. Yet, wider is the power greater should be the restraint keeping in mind that early finality of a litigation is the public policy."

In case of *Middi Ramakrishna Rao Vs. Middi Rangayya and ors* reported in AIR 1954 Madras 783, the Court has observed as under:-

> "4. This is not within the scope of remand under O. 41, R. 23. It is quite true that under the Madras Amendment of O. 41, R. 23 the discretion of the court is unfettered; but that discretion of the court is not arbitrary but sound and reasonable guided by judicial principles and capable of correction by a Court of Appeal. The appellate Court should not however rashly and without sufficient cause, order retrial in any case in which this can possibly be avoided; a remand order should not thus be made under this rule in a case which could efficiently be dealt with under R. 25; nor can a remand be ordered so as to enable a party to fill up the lacuna in his case. It has been repeatedly held by this court that a remand should not, generally speaking, be ordered when the defect in the proceeding has been made due to the negligence or default of the party who will benefit by the remand. It has been further held that the mere fact that the evidence on record is not sufficient to enable a court to come to a definite finding on the point in issue, is not sufficient to enable the court to remand the case, when there is no reason to think that the parties did not have an opportunity of producing all the evidence that they desired to produce before the trial court. There is a clear danger that in such cases a remand order may in effect be an invitation to perjury."

17. In view of the law laid down by the Hon'ble Supreme Court as also by the different High Courts as mentioned hereinabove, I am of the opinion that it is a fit case in which, it can be held that the First Appellate Court has not exercised its

discretion as conferred under the provisions of Order 41 Rule 23 or 23-A of the Code of Civil Procedure. The First Appellate Court instead of remitting the matter could have decided the same on merits. However, the respondents have also not contended that since the Society did not come forward to file any written statement nor entered into the witness-box, adverse inference can be drawn but failed to demonstrate as to against whom adverse inference would be drawn.

18. Accordingly, the cases relied by the respondent in any manner are not helpful for the respondent/plaintiff and infact are not applicable in the present case as has been discussed hereinabove. Accordingly, I allow the appeal, set aside the impugned judgment and decree passed by the First Appellate Court in RCA No.07-A/2014 and remit the matter to the First Appellate Court i.e. Third Additional District Judge, Jabalpur for deciding the appeal afresh on its own merits by giving opportunity of hearing to the parties concerned. The parties shall appear before the First Appellate Court on **05.08.2019** and the Appellate Court is further directed to decide the appeal within a further period of three months thereafter. The Appellate Court will decide the appeal in accordance with law on its own merits without being influenced by any of the observations made by this Court in relation to the merits of the case of the parties.

19. With the aforesaid observations, the appeal filed by the appellant stands ***allowed***. Parties shall bear their own cost.

Appeal allowed

I.L.R. [2019] M.P. 1454
APPELLATE CIVIL
Before Mr. Justice J.P. Gupta

S.A. No. 85/1996 (Jabalpur) decided on 22 July, 2019

HARDAS …Appellant

Vs.

DHARMOO (DIED) THROUGH LRs.
RAMPRASAD & ors. …Respondents

***A. Civil Procedure Code (5 of 1908), Order 2 Rule 2 – Second Suit – Grounds – Maintainability* – Second suit claiming possession on basis of decree passed in earlier suit – Held – Judgment of earlier suit shows that appellant/plaintiff was already in possession, thus there was no cause of action for seeking possession in earlier suit – Second suit for possession maintainable and not barred under Order 2 Rule 2 CPC – Appeal allowed.**
(Para 13 & 14)

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 2 नियम 2 – द्वितीय वाद – आधार – पोषणीयता – पूर्वतर वाद में पारित डिक्री के आधार पर कब्जे का दावा करते हुए

द्वितीय वाद – अभिनिर्धारित – पूर्वतर वाद का निर्णय यह दर्शाता है कि अपीलार्थी/वादी पहले से ही कब्जे में था, अतः पूर्वतर वाद में कब्जा चाहने हेतु कोई वाद हेतुक नहीं था – कब्जे हेतु द्वितीय वाद पोषणीय तथा सि.प्र.सं. के आदेश 2 नियम 2 के अंतर्गत वर्जित नहीं – अपील मंजूर।

B. ***Civil Procedure Code (5 of 1908), Order 2 Rule 2 – Second Suit* – Burden to prove necessary facts with regard to debarring plaintiff from filing second suit is on defendant and it is mandatory to prove such fact – Further, pleadings of earlier suit should be proved. (Para 12)**

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 2 नियम 2 – द्वितीय वाद – वादी को द्वितीय वाद प्रस्तुत करने से विवर्जित करने से संबंधित आवश्यक तथ्यों को साबित करने का भार प्रतिवादी पर है तथा उक्त तथ्य को साबित करना आज्ञापक है – इसके अतिरिक्त पूर्वतर वाद के अभिवचनों को साबित किया जाना चाहिए।

C. ***Civil Procedure Code (5 of 1908), Section 11 – Res-Judicata* – Findings of earlier suit regarding title and possession cannot be challenged in second suit by any party on basis of same cause of action, because as per principle of *Res-Judicata*, both parties are bound by findings of earlier litigation and ordinarily no party can avoid or take advantage of any contrary conduct or error of other party. (Para 14)**

ग. सिविल प्रक्रिया संहिता (1908 का 5), धारा 11 – पूर्व–न्याय – हक तथा कब्जे के संबंध में पूर्वतर वाद के निष्कर्षों को किसी पक्षकार द्वारा द्वितीय वाद में समान वाद हेतुक के आधार पर चुनौती नहीं दी जा सकती, क्योंकि पूर्व–न्याय के सिद्धांत के अनुसार, दोनों पक्षकार पूर्वतर मुकदमें के निष्कर्षों द्वारा आबद्ध हैं एवं साधारणतया कोई भी पक्षकार, दूसरे पक्षकार के किसी प्रतिकूल आचरण अथवा त्रुटि से बच नहीं सकता अथवा उसका लाभ नहीं उठा सकता।

D. ***Civil Practice – Pleadings – Contradictions – Effect* – Held – Ordinarily, party cannot go against its pleading and statement but when same are contrary to earlier findings of the Court and are binding on both parties, same cannot be ignored merely on wrong pleading and supporting statement – Thus when party otherwise is entitled to get the relief, cannot be deprived because of wrong pleading or supporting evidence of such plea. (Para 14)**

घ. सिविल पद्धति – अभिवचन – विरोधाभास – प्रभाव – अभिनिर्धारित – साधारणतया, पक्षकार अपने अभिवचन तथा कथन के विरूद्ध नहीं जा सकते परंतु जब उक्त, न्यायालय के पूर्वतर निष्कर्षों के प्रतिकूल हैं तथा दोनों पक्षकारों पर बाध्यकारी है, तो मात्र गलत अभिवचन एवं समर्थित कथन पर, उक्त को अनदेखा नहीं किया जा सकता – अतः, जब पक्षकार अन्यथा अनुतोष प्राप्त करने का हकदार है, तो गलत अभिवचन अथवा उक्त अभिवाक् के समर्थित साक्ष्य के कारण, उसे वंचित नहीं किया जा सकता।

Case referred:

AIR 1964 SC 1810.

Sanjeev Mishra, for the appellant.
Radheshyam Tiwari, for the respondent No. 1.

J U D G M E N T

J.P. GUPTA, J.:- This second appeal has been filed under Section 100 of the Code of Civil Procedure against the judgment and decree dated 18.12.1995 passed by the District Judge, Tikamgarh, in Civil Appeal No.3-A/1993, reversing the judgment and decree dated 7.9.1993 passed by the Civil Judge Class-I, Tikamgarh in Civil Suit No.5-A/1991 whereby the suit filed by the appellant/ plaintiff for eviction and handing over possession of the disputed land to the appellant was decreed.

2. In the present case, the admitted facts are that with regard to the disputed land bearing survey no.378, 390, 475, total area 4.13 acres situated in village Pander, Tahsil and District Tikamgarh. Earlier appellant plaintiff filed a Civil Suit No.47-A/1977 against the respondent/defendant which was decreed by judgment and decree dated 24.7.1979. In the appeal bearing No.26-A/1979, the District Judge, Tikamgarh vide judgment and decree dated 1.2.1982 set aside the judgment and decree dated 24.7.1979 passed by Civil Judge Class I. Thereafter, appellant/plaintiff filed appeal before the High Court which was registered as S.A.No.183/1982 and by judgment and decree dated 7.7.1987 decree passed by the first appellate court was set aside and the judgment and decree dated 24.7.1979 passed by trial court was restored.

3. By the judgment dated 24.7.1979 passed by Civil Judge Class I, Tikamgarh, the appellant/plaintiff was declared owner of the aforesaid land and also found in possession of the land and respondents claim with regard to having possession for last 20 years was rejected. In other words, by the aforesaid judgment and decree appellant's title and possession on the aforesaid land was declared. Thereafter, on 21.2.1989 the appellant/plaintiff filed the present suit for possession of the aforesaid land against the respondent/defendant in which it is pleaded that despite the aforesaid earlier judgment and decree in favour of the appellant, the respondent has not parted with possession to the appellant/plaintiff. Hence, the respondent/defendant be directed to hand over possession of the land.

4. The respondent/defendant filed his written statement in which he has raised legal question that in the earlier suit plaintiff/appellant did not claim the relief of possession and the respondent/defendant is in continuous possession of the land, therefore, as per the provisions of Order 2 Rule 2 C.P.C. further suit for the relief which should have been claimed in the earlier suit is not maintainable.

Apart from it, the appellant has sold out one half share to Ramprasad and Rambaksh, therefore, they are necessary parties in the case. In their absence, this suit is not maintainable. Further it is averred that the suit land was the joint property of the Hindu Family of the appellant and the respondent got it in partition. Therefore, the appellant has no right to claim possession of the land and the respondent is in possession since last 20 years, therefore, the suit is time barred. Hence, it be dismissed.

5. The learned trial court after the trial held that the objection raised by the respondent/defendant with regard to title on the basis of the disputed property belongs to the joint Hindu Family and with regard to having possession before passing of the decree in Civil Suit No.47-A/1977 are not maintainable as the same are hit by the principles of resjudicata and in the earlier suit it is categorically decided that the appellant/plaintiff is the owner of the land and also have possession of the land. Therefore, plea of the respondent/defendant that he is owner of the land also being in possession of the land for last 20 years was rejected and considering the prayer of the appellant based on title the suit for possession was decreed and the objection of necessary party was found immaterial as despite of the selling of some share to other persons the appellant/plaintiff being a co-sharer has a right to file suit for possession against third person, therefore, it cannot be said that the suit is not maintainable in their absence.

6. The aforesaid judgment and decree was challenged by the respondent/ defendant before the District Judge, Tikamgarh and by the impugned judgment and decree the District Judge, Tikamgarh set aside the judgment and decree of the trial court on the basis of the applicability of order 2 Rule 2(3) of C.P.C. as the appellant/plaintiff has filed his suit on the basis of judgment and decree passed in earlier suit while the relief for possession should have been claimed in the earlier suit, as, in the earlier suit, no such relief was claimed as per the aforesaid provision of the C.P.C. no second suit can be filed for the relief which was waived and further held that Rambaksh and Ramprasad are not necessary parties in the case and the defendant/respondent has failed to prove that on the basis of adverse possession he acquired title on the land.

7. In this appeal, the appellant/plaintiff has challenged the aforesaid finding of the first appellate court on the ground that the decree passed in earlier suit has an effect of *resjudicata* with regard to issue of title and possession on the date of passing the decree. Therefore, the learned first appellate court has committed legal error in reversing the finding of the trial court applying the provisions of Order 2 Rule 2 C.P.C. as in the earlier suit there was no need to make prayer for possession as the appellant/plaintiff was already in possession and learned appellate court has committed legal error in passing the impugned judgment and decree. Hence, the impugned judgment and decree be set aside and the decree of the trial court be affirmed.

8. This appeal has been admitted on the following substantial questions of law :

> "(i) Whether, the lower appellate court was right in reversing the decree passed by the trial court holding that the suit filed by the appellant was barred under Order II Rule 2 C.P.C. ?
>
> (ii) Whether the lower appellate court failed to see that the judgment and decree dated 24.7.1979 passed by Civil Judge Class I, Tikamgarh and was confirmed by the High Court in S.A.No.183/1982, decided on 7.7.1987, was *resjudicata* between the parties under the facts and circumstances of the case ?
>
> (iii) Whether the Court below ought to have held that the appellant was in possession of the suit premises until the decree was passed by the High Court on 7.7.1987 ?"
>
> (iv) Whether the respondent had perfected his title by adverse possession?

9. After notice, respondent/defendant has also filed cross objection under Order 41 Rule 22 C.P.C. challenging the finding of the learned first appellate court praying for setting aside the judgment and decree of the trial court with regard to not rejecting the judgment and decree of the trial court on the ground of limitation. In the impugned judgment it is held that the respondent was in possession of the suit land since the year 1967 or so; but, considering that since the proceeding from a suit for declaration was pending at the time, therefore, the suit cannot be treated as time barred, which is apparently illegal and the respondent/defendant has proved its plea with regard to adverse possession, therefore, suit should be held to be time barred and objection with regard to necessary party was also wrongly rejected.

10. Vide order dated 11.7.2019 this Court has observed that the question raised in the cross objection is covered in substantial questions of law no.3 and 4 with regard to possession and limitation and the objection with regard to necessary party is not a substantial question of law looking to the concurrent finding of both the courts below. Thereafter, both the parties were heard on the aforesaid substantial question of law.

11. Having heard learned counsel for both the parties and on perusal of the record, the earlier judgment passed in Civil Suit No.47-A/1977, Ex.P/1, which was confirmed by the High Court in S.A.No.183/1982, Ex.P/2, categorically and undoubtedly establishes that in the earlier suit appellant/plaintiff has been declared title holder of the suit land and also declared to be in possession of the land and claim of the respondent/defendant that he was in possession was rejected. In the circumstances, at the time of filing of earlier suit, there was no occasion for the appellant/plaintiff to make prayer for possession while he was

already in possession. The learned District Judge has completely ignored these aspects and categorical finding of the trial court.

12. The burden to prove the necessary facts with regard to debarring the plaintiff from filing the second suit as provided under Order 2 Rule 2 C.P.C. is on the defendant and it is mandatory to prove such fact, the pleadings of earlier suit should have been proved. In this regard the Constitution Bench of Hon'ble the Apex court in the case of *Gurbux Singh vs. Bhooralal* (AIR 1964 SC 1810) in para 6 & 7 has held that :-

> "In order that a plea of a Bar under Order 2 Rule 2(3) of the Civil Procedure Code should succeed the defendant who raises the plea must make out; *(i)* that the second suit was in respect of the same cause of action as that on which the previous suit was based; (2) that in respect of that cause of action the plaintiff was entitled to more than one relief; (3) that being thus entitled to more than one relief the plaintiff, without leave obtained from the Court omitted to sue for the relief for which the second suit had been filed. From this analysis it would be seen that the defendant would have to establish primarily and to start with, the precise cause of action upon which the previous suit was filed, for unless there is identity between the cause of action on which the earlier suit was filed and that on which the claim in the latter suit is based there would be no scope for the application of the bar. No doubt, a relief which is sought in a plaint could ordinarily be traceable to a particular cause of action but this might, by no means, be the universal rule. As the plea is a technical bar it has to be established satisfactorily and cannot be presumed merely on basis of inferential reasoning. It is for this reason that we consider that a plea of a bar under Order 2 Rule 2 of the Civil Procedure Code can be established only if the defendant files in evidence the pleadings in the previous suit and thereby proves to the Court the identity of the cause of action in the two suits. The cause of action in the previous suit would be the facts which the plaintiff had then alleged to support the right to the relief that he claimed. Without placing before the Court the plaint in which those facts were alleged, the defendant cannot invite the Court to speculate or infer by a process of deduction what those facts might be with reference to the reliefs which were then claimed. It is not impossible that reliefs were claimed without the necessary averments to justify their grant. From the mere use of the words 'mesne profits' therefore one need not necessarily infer that the possession of the defendant was alleged to be wrongful. It is also possible that the expression 'mesne profits' has been used in the present plaint without a proper appreciation of its significance in law. What

> matters is not the characterisation of the particular sum demanded but what in substance is the allegation on which the claim to the sum was based and as regards the legal relationship on the basis of which that relief was sought. It is because of these reasons that we consider that a plea based on the existence of a former pleading cannot be entertained when the pleading on which it rests has not been produced".

13. In the present case, admittedly on behalf of the respondent/defendant pleading of earlier suit has not been filed and proved and it is transpired from the judgment of earlier suit that the appellant/plaintiff was already in possession; therefore, there was no cause of action for seeking possession. In the circumstances, it cannot be said that the appellant/plaintiff should have claimed possession. Resultantly, it cannot be held that second suit for possession is barred under Order 2 Rule 2 C.P.C.

14. It appears and also argued by learned counsel for the respondent that plaintiff itself has pleaded in the present suit that his prayer is based on earlier judgment and decree on account of non-compliance of the judgment and decree with regard to leaving possession of the suit land. Therefore, no other evidence is required when the facts are already admitted by the plaintiff and the learned appellate court has considered the aforesaid aspect and has not committed any error in setting aside the judgment and decree of the trial court. On perusal of the plaint of the present case and the statement of the plaintiff it appears that he is claiming his prayer for possession on the basis of decree passed in earlier suit. Ordinarily, the party cannot go against its pleading and statement; but, whether the pleading and statements are apparently contrary to the earlier finding of the court of law and binding on both the parties, the same cannot be ignored merely on wrong pleading and supporting statement. Learned trial court has rightly expressed that on account of wrong advice or on account of illiteracy of the appellant/plaintiff such situation has arisen. Therefore, on the aforesaid ground when the party otherwise is entitled to get the relief cannot be deprived because of wrong pleading or supporting evidence of such plea. The finding of earlier suit with regard to title and possession of the appellant on the disputed land cannot be challenged in second suit by any party on the basis of same cause of action as according to the principle of *resjudicata* both the parties are bound by the finding of earlier litigation and ordinarily no party can avoid or take advantage of any contrary conduct or error of other party.

15. In view of the aforesaid discussions, in view of this Court, the learned appellate court has wrongly set aside the judgment and decree of the trial court holding that the suit filed by the appellant is barred under Order 2 Rule 2 C.P.C. and also failed to consider that the finding of earlier suit with regard to possession of the appellant till attaining the finality of the earlier suit was binding as

resjudicata and cannot be adjudicated subsequently. Therefore, there is also no question that the respondent/defendant has acquired title on the basis of adverse possession.

16. In view of aforesaid discussions, the aforesaid substantial questions of law are determined in favour of the appellant/plaintiff. Consequently, the judgment and decree passed by the appellate court is set aside and the judgment and decree passed by the trial court is restored and affirmed. The decree be framed in accordance with law.

17. In the facts and circumstances of this case, parties to appeal will bear their own cost.

Order accordingly

I.L.R. [2019] M.P. 1461
APPELLATE CIVIL
Before Mr. Justice J.P. Gupta
S.A. No. 1930/2006 (Jabalpur) decided on 29 July, 2019

SANJAY RAI & ors. …Appellants

Vs.

GOVIND RAO & ors. …Respondents

***A. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(a) & 12(1)(c) – Eviction Suit by Co-owners – Maintainability* – Held – Appellants, who were earlier tenants, purchased the property through co-owner and stepped into shoes of and acquired the status of co-owners – Fact of partition is established, thus suit for eviction by other co-owners on basis of relationship of landlord and tenant against the appellants is not maintainable – Suit dismissed – Appeal allowed. (Para 12)**

क. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(ए) व 12(1)(सी) – सह–स्वामीगण द्वारा बेदखली का वाद – पोषणीयता – अभिनिर्धारित – अपीलार्थीगण, जो कि पूर्व में किराएदार थे, उन्होनें सह–स्वामी द्वारा संपत्ति क्रय की तथा सह–स्वामीगण का स्थान ले लिया एवं उनकी स्थिति अर्जित कर ली – विभाजन का तथ्य स्थापित हुआ है, अतः अन्य सह–स्वामीगण द्वारा भूमिस्वामी और किराएदार के संबंध के आधार पर, अपीलार्थीगण के विरूद्ध बेदखली के लिए वाद पोषणीय नहीं है – वाद खारिज – अपील मंजूर।

***B. Civil Practice – Partition* – Held – Partition of self acquired property by family settlement by father is not prohibited. (Para 18)**

ख. सिविल पद्धति – विभाजन – अभिनिर्धारित – पिता द्वारा पारिवारिक व्यवस्थापन/बंदोबस्त द्वारा स्व–अर्जित संपत्ति का विभाजन प्रतिषिद्ध नहीं है।

***C. Civil Practice – Pleading & Evidence* – Held – Any admission in pleading by any party is binding and is an evidence against the party who has pleaded – Such admission cannot be considered as a piece of evidence against other party. (Para 14)**

ग. सिविल पद्धति – अभिवचन व साक्ष्य – अभिनिर्धारित – किसी भी पक्षकार द्वारा अभिकथन में कोई भी स्वीकृति बाध्यकारी है तथा उस पक्षकार के विरूद्ध एक साक्ष्य है जिसने अभिवाक् किया है – ऐसी स्वीकृति को दूसरे पक्षकार के विरूद्ध साक्ष्य के एक भाग के रूप में विचार में नहीं लिया जा सकता।

Cases referred:

2004 (1) MPLJ 50, (2009) 11 SCC 33, S.A. Nos. 146 & 147/2011 decided on 21.09.2016 (Madras High Court).

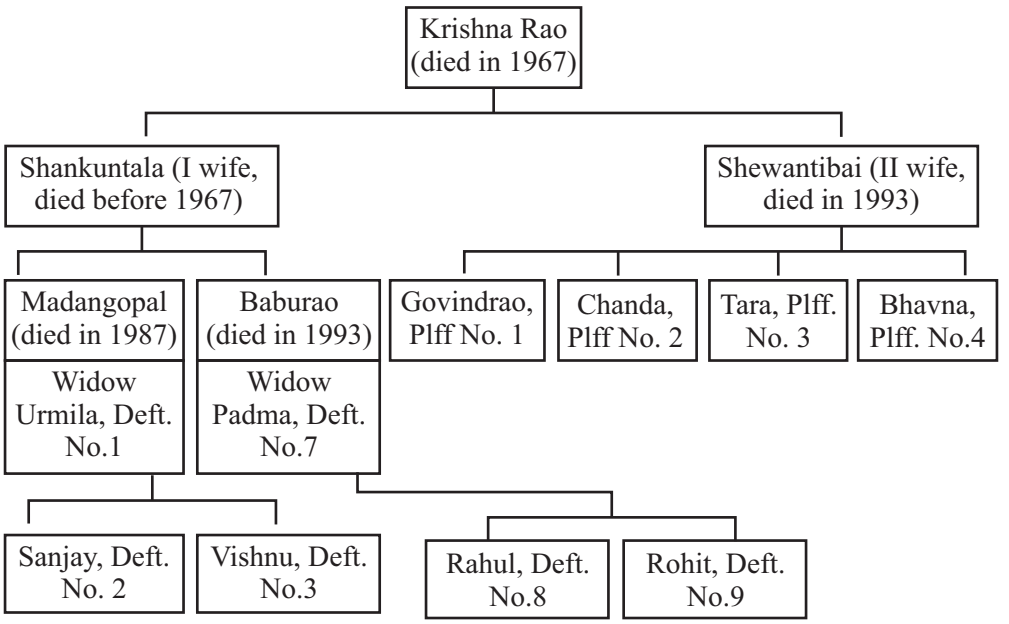
M.L. Jaiswal with *K.K. Gautam* and *R.K. Samaiya*, for the appellants.
A.P. Singh with *Tarun Sengar*, for the respondent No. 3.
None, for the other respondents though served.

J U D G M E N T

J.P. GUPTA, J.:- This second appeal has been filed under Section 100 of the Code of Civil Procedure against the judgment and decree dated 29.11.2006 passed by the First Addl. District Judge, Damoh, in Civil Appeal No.18-A/2006, confirming the judgment and decree dated 16.2.2005 passed by the Civil Judge Class II, Damoh in Civil Suit No.14 -A/2004 whereby it was declared that the suit property was self-acquired property of Krishna Rao and after his death his heirs are co-owners of the property and the appellants are occupying the suit premises as a tenant and they were directed to vacate the suit premises as against them, grounds of eviction under section 12(1)(a) and 12(1)(c) of the M.P. Accommodation Control Act have been found to be proved and further directed to pay arrears of rent and after delivering the possession, shall not make any interference in the possession except following the due process of law.

2. Facts giving rise to filing of present appeal, briefly stated, are that plaintiffs no.1 to 4 filed the suit for ejectment of the appellants from suit House bearing Nagar Palika No.180/07/185/08 for possession, arrears of rent, declaration and permanent injunction. It is averred that disputed house and the vacant land was in the ownership of Krishnarao along with other two houses. In this case, there is a dispute between heirs of Krishnarao and the appellants with regard to the suit premises. The appellants who have purchased the suit premises are claiming their title on the strength of the sale-deed executed by respondents no.5 to 7 as heirs of Madangopal, who was son of Krishnarao. The property in dispute was self-acquired property of Krishnarao who died in the year 1967.

3. It is not disputed that Krishnarao solemnized two marriages. His first wife was Shakuntala and out of the said wedlock two sons viz. Madangopal and Baburao, were born. Madangopal died in the year 1987 leaving behind his widow Urmila, defendant no.1, Sanjay defendant no.2 and Vishnu, defendant no.3. Baburao died in the year 1993 leaving behind his widow Padma, defendant no.7, and two sons namely Rohit, defendant no.8 and Rahul, defendant no.9. After the death of Shakuntala, Krishnarao married with Shewantibai and out of the said wedlock plaintiffs Govindrao, Chanda, Tarabai and Bhawna were born. Shewantibai expired in the year 1993. Genealogical tree of heirs of Krishnarao, is quoted hereinbelow :-



4. That, initially the suit was filed by plaintiffs no.1 to 4 namely Govindrao, Chanda, Tara, Bhawna and defendants no.7 to 9 namely Padma, Rohit and Rahul. But, during the pendency of the suit Padma sold her share to the appellants in the year 2001, therefore, during the trial they were transported as defendants no.7 to 9. Govindrao has also withdrawn his claim in the suit property; but, his name continues as the plaintiff. The case of the plaintiffs Tara, Chanda and Bhawna is that the suit premises was the self-acquired property of Krishnarao and appellant/defendant Leeladevi entered into the suit premises as tenant and paying rent at the rate of Rs.50/- per month to Shewantibai and after the death of Shewantibai she did not pay the rent. The appellant no.1 is son of appellant no.2 and appellant no.3 is her husband. On demand of notice no arrears of rent was paid and the suit premises are required bonafidely for use of the plaintiffs. Appellants/ defendants no.4 to 6 have started claiming that they have purchased the suit

premises from defendants no.1 to 3/respondents no.5, 6, and 7 Urmila, Sanjay and Vishnu, while defendants no.1, 2 and 3 have no right to sold out the suit premises as there was no partition of the property amongst the heirs of Krishnarao. Hence, it was prayed that the sale-deed be declared to be null and void and the appellants be evicted from the suit premises on the ground of non-payment of arrears of rent and of disclaiming of the title of the plaintiffs and bonafide need of the premises and also be directed to pay the arrears of rent and after delivering the possession do not interfere in the property.

5. Defendants no.1 to 3/respondents no.5 to 7 filed their written statement contending that the suit premises was the ancestral property and Krishnarao inherited it from his father Mullu Jadhav and after his death it was co-parcenery property of Krishnarao, Madangopal, Baburao and Govindrao who were the sons of Krishnarao and during the lifetime of Krishnarao, the co-parcenery property was partitioned in which the suit premises came into share of Madangopal and other property fallen into share of other heirs. The property which fallen into the share of Shewantibai has been sold by her in the year 1980 and the suit premises was given on rent by Madangopal. On 5.4.1995 defendants no.1 to 3/respondents no.5 to 7 being legal heirs of Madangopal sold out the aforesaid property to defendants no.4 and 5/appellants no.1 and 2 by sale-deed, Ex.D/1 and D/2. Therefore, the plaintiffs have no right, title and interest in the property and are not entitled to possession of the property from the appellants.

6. Appellants/defendants also filed separate written statements on the same footing. But, after transporting the names of Padma, Rohit, Rahul from the array of plaintiff to defendants no.7, 8 and 9, they have not filed any written statements.

7. In the trial court, on behalf of plaintiffs/respondents no.2 to 4 Chandabai (PW1) has given her statement and on behalf of the defendants, the defendants, the appellants, Urmila Jadhav, DW1, Padma Jadhav, DW2, Jeewanlal Chadhar, DW3, Dhanraj, DW4 and Sukhchain, DW5 have been examined. After appreciating the oral and documentary evidence the trial court arrived at the conclusion that the suit property is the self-acquired property of Krishnarao and no partition has taken place. Heirs of Madangopal, namely, Urmila, Sanjay and Vishnu have no right to sold out the specific portion of the property. The plaintiffs being the co-owner of the property have a right to get vacant possession from the appellants/tenant and against them grounds under sections 12(1)(a) and 12(1)(c) of the M.P. Accommodation Control Act have been found to be proved. Therefore, the suit was decreed as mentioned above. On appeal preferred by the appellants, the learned first appellate court also confirmed the aforesaid finding. Hence, this second appeal.

8. This appeal has been filed on the ground that execution of the sale-deed by Padma, Sanjay and Vishnu, defendants no.1 to 3 to appellants No.1 and 2 are not

challenged, therefore, they acquired status of co-owners with the plaintiffs and a co-owner cannot get the relief of eviction against another co-owner who earlier occupied the suit premises as a tenant and the learned court below have ignored the aforesaid legal aspects involved in the present dispute. Division Bench of this Court in the case of *Hameeda Begum V. Champa Bai Jain and others* 2004(1) MPLJ 50, has categorically held that such relief cannot be granted to the plaintiff. Apart from it, learned both the courts below have failed to appreciate the evidence on record in right perspective. Plaintiff Chandabai, PW1, herself has admitted that during the lifetime of Krishnarao partition had taken place amongst him and Madangopal, Baburao, and Govindrao and the properties was distributed in four parts. Plaintiffs Chanda, Tara and Bhawna after marriage were living in their matrimonial houses and much amount was spent on their marriage. Therefore, no share was given to them and Madangopal got the share in suit premises by partition and after the death of Madangopal being his heir, defendants no.1 to 3 were the owners of the property and they have right to sell the property which cannot be questioned by the plaintiffs. Therefore, the finding that the plaintiffs are the co-owners of the suit property is perverse. Therefore, judgment and decree passed by the courts below be set aside.

9. On hearing learned counsel for the appellants/defendants, this appeal has been admitted on 5.1.2007 on following substantial questions of law :-

i) Whether the appellants who have purchased the property through co-owner and stepped into the shoes of the co- owner could have been evicted by the respondents in a suit filed on the basis of the tenancy ?

ii) Whether after sale in favour of the appelaltns (sic : appellants), the suit as filed by the respondents/plaintiffs was maintainable in view of the law laid by this Court in *Hameeda Begam, Vs. Champa Bai Jain and others*, 2004(1) MPLJ 50?

iii) Whether the finding recorded by the Court below that the suit property is joint Hindu family property is perverse as plaintiff no.1 Govind Rao and other defendants who were co-owners of the property admitted that the property was partitioned and after partition it was sold to the appellants ?"

10. Having heard learned counsel for both the parties and on perusal of the record, in view of this Court, the aforesaid questions no.1 and 2 have been answered by the Division Bench of this Court in the case of *Hameeda Begam Vs. Champa Bai Jain and others*, 2004(1) MPLJ 50 in which following legal questions were framed inter alia :-

i) Whether the co-owner (co-landlord) can file a suit for eviction against the tenant if other co-owner objects to the eviction of the tenant ?

ii) Whether the tenant who has purchased the undivided share of one of the co-owner is liable to be evicted at the instance of other co-owners and then it is for him to bring a suit for partition and separate possession ?

11. In the aforesaid judgment, the Division Bench having considered various pronouncements of the Apex Court and other High Courts, after lengthy and laborious discussions, answered the aforesaid questions in following terms.

i) The co-owner/landlord cannot file a suit for eviction against the tenant if other co-owners objects.

ii) If the tenant who has purchased the property from a co-owner and gets into the shoes of the co-owner need not file a suit for partition and separate possession and there is no obligation on his part to handover possession and thereafter sue for partition and separate possession. Any co-owner who wants to have possession, by metes and bounds may file a suit for partition and claim separate possession and thereafter seek eviction of the tenant from the part of reversion falling to his share after partition.

12. In the present case, the appellants have purchased the property through co-owner and stepped into the shoes of the co-owner, therefore, they have acquired the status of co-owners with the plaintiffs/respondents and their status as tenant ceased and other co- owner cannot treat them as tenant and till the status of co-owner is not ceased by partition or any other legal transaction, cannot bring the suit for eviction on the basis of relationship of landlord and tenant. Therefore, in view of the law laid down in the case of *Hameeda Begam* (supra), this suit of the plaintiffs/respondents based on co- ownership against the tenant who purchased the premises from other co-owners is not maintainable for eviction on the basis of relationship of landlord and tenant. Accordingly, aforesaid questions no.1 and 2 are answered.

13. So far as question no.3 is concerned, it is a factual question. Ordinarily, in Second Appeal, the concurrent findings of both the courts below cannot be reappreciated or reconsidered except when the findings are perverse. In this case, it is argued that findings of both the courts below with regard to status of joint Hindu Family property among the plaintiffs and defendants except appellants is perverse as one of the plaintiff Govindrao and other defendants who were co-owners of the property admitted that the property was partitioned and after partition it was sold to the appellants.

14. In the present case, Govindrao joined as plaintiff no.1; but, during trial he withdrew himself from the litigation even though his name continued as plaintiff

no.1; but, he has not entered into the witness box to support or oppose the claim of any party. The submission of any application with affidavit and averments in favour of one co-owner or other co-owners cannot be considered as a piece of evidence. Similarly, so far as admission by other defendants with regard to partition of the property in their pleadings are concerned, the same cannot be considered as a piece of evidence to prove the fact of partition against the plaintiffs. Any admission in the pleading by any party is binding and evidence against the party who has pleaded. This admission cannot be considered as a piece of evidence against other party.

15. In this case, it is also argued on behalf of learned counsel for the appellants that plaintiff Chandabai, PW1, has categorically admitted the fact that during the lifetime of Krishnarao, the property was partitioned among Madangopal, Baburao, Govindrao and Krishnarao and after partition they have exclusive possession of their shares and all were satisfied with the partition and heirs of Madangopal and Baburao, who are defendants in this case, have sold out their shares to the appellants by registered sale-deed. She has also admitted that she herself and her mother have sold out their share to other persons. This evidence is sufficient to prove the fact that there was no status of joint Hindu family property. But, learned both the courts below have committed legal error in discarding the aforesaid best evidence. On this count also, the aforesaid finding is perverse.

16. Learned counsel appearing on behalf of the respondent no.3 plaintiffs have submitted that Chandabai, PW1, has categorically denied the fact that actual partition has taken place among Krishnarao and his sons Madangopal, Babalal and Govindrao. It is the pleading of defendants including the appellants that the property was the joint Hindu family property and partition was taken place during the lifetime of Krishnarao. Therefore, burden is on the plaintiffs/respondents and on behalf of them no reliable evidence has been adduced as discussed by both the courts below and both the courts below have rightly and legally held that there was no actual partition except family arrangement for peaceful and separate residence of the family members. Therefore, it cannot be said that partition took place by metes and bounds. Hence, in this second appeal, the aforesaid finding of both the courts below based on meticulous appreciation of evidence does not require any interference.

17. On perusal of the record, on behalf of the defendants including the appellants with a view to prove the fact of partition Urmila, DW1, wife of Madan Jadhav, Padma, DW2, wife of Baburao, Jeewanlal, DW3, Dhanraj, DW4 and Sukhchain, DW5, have given their statements. So far as statements of Padma, DW2, Jeewanlal, DW3, Dhanraj, DW4 and Sukhchain, DW5 are concerned, they have admitted that before them partition was not taken place. On the basis of information of other persons they have stated that the property was partitioned.

Therefore, the trial court and the first appellate court have not committed any legal error in discarding the aforesaid evidence. So far as Urmilabai, DW1, is concerned, she has stated that during the lifetime of Krishnarao, the property was partitioned amongst Krishnarao and his three sons namely Madangopal, Baburao and Govindrao; but, her statement has been discarded on the ground that she has stated in the cross examination that the partition was taken place in the year 1979 while death of Krishnarao had taken place in the year 1967. However, in her chief, she has categorically stated that during the lifetime of Krishnarao, the partition had taken place and at the time of giving statement she was 70 years old. Therefore, merely on the basis of aforesaid discrepancy with regard to the year of partition, it cannot be held that she has given incorrect statement. This statement of the witness is required to be appreciated in the light of the statement of Chandabai, PW1. Plaintiff Chandabai, PW1, in paragraphs 17, 20 and 21 of her statement, which has been referred by the learned trial court in paragraph 19 of the judgment has admitted that during the lifetime of Krishnarao the property was partitioned among Krishnarao and his sons Madangopal, Baburao and Govindrao and they all were in exclusive possession of their respective shares and all were satisfied with the partition. Thereafter, she also said that no complete partition was taken place and the learned trial court and the first appellate court have considered this statement that the aforesaid affair only show family settlement with regard to peaceful arrangement to reside in the property. It cannot be considered as partition by metes and bounds, which is necessary for partition. This approach of learned both the courts below for partition is contrary to law. If the family settlement is accepted then it would be deemed that the severance of the family has taken place and status of joint family will be deemed to be ceased. Apart from it, in this case, wife of Krishnarao, Shewantibai and Chanda, plaintiff/respondent have also sold out their shares in the property showing exclusive specific part of their share. This circumstance also establishes that there was partition of the property and aforesaid evidence corroborates the statement of defendant Urmila, DW1 and establishes that the property was partitioned.

18. Apart from it, in this case, it is undisputed that death of Krishnarao was taken place in the year 1967 and the aforesaid family settlement or agreement or arrangement had not been challenged by the plaintiffs before filing of this suit on 9.10.1995. This circumstance shows that the aforesaid family settlement was also acceptable by the plaintiffs. The partition of self-acquired property by family settlement by father is not prohibited. In some cases it is legal, as has been held by the Apex Court in the case of *Bhagwan Krishna Gupta Vs. Prabha Gupta and others*, reported in (2009)11 SCC 33, wherein it is held that when a property is self-acquired one, the doctrine of family settlement strict sensu may not be applicable but in a case of this nature where both the children declare each other to be the owners of the property having equal share therein, an arrangement between

them by way of family settlement is permissible in law. Such a family settlement was not only in relation to the title of the property; but, also in relation to the use and possession thereof. Similarly, Madras High Court in an unreported judgment dated 21.9.2016 in the case of *Ashokarajan Vs. Dr.Padmarajan*, passed in Second Appeal Nos.146 and 147/2011, has held that though law prohibits the brothers to claim share over the self-acquired property of the father as a matter of right during his life time, it should be borne in mind that no law prohibits a father from treating his self-acquired property as a joint family property, so as to divide the same among the members of joint family. For that matter, it is open to any of the members of joint family to throw their self-acquisition into common hotch pot. Needless to state that a self-acquired property need not necessarily be a selfishly acquired property. No morally responsible father would ever say its mine, you children keep away. Equally no responsible and dutiful children will ever drive their father to say so.

19. Accordingly, considering the statements of Urmila, PW1 and Chandabai, DW1 and conduct of the parties dealing with the properties came in their shares after family settlement, this Court has no hesitation in holding that findings of both the courts below that the suit property is a joint Hindu family property is perverse as the courts below have completely failed to appreciate the evidence in accordance with law by ignoring the aforesaid piece of evidence or mis-interpretation of the term of family settlement. Hence, it is held that the suit property was partitioned among Krishnarao and his three sons namely Madangopal, Baburao and Govindrao and thereafter it was sold to the appellants. Accordingly, the question no.3 is adjudicated.

20. In view of the aforesaid adjudication of substantial questions of law, the impugned judgment and decree passed by both the courts below deserves to be set aside as neither the plaintiffs are owner of the suit premises nor the appellants are their tenants. Hence, the judgment and decree dated 29.11.2006 passed by the First Addl. District Judge, Damoh, in Civil Appeal No.18-A/2006 so also the judgment and decree dated 16.2.2005 passed by the Civil Judge Class II, Damoh in Civil Suit No.14-A/2004 are set aside and the suit of the plaintiffs is dismissed.

21. In the facts and circumstances of this case, parties to appeal will bear their own cost.

Order accordingly

I.L.R. [2019] M.P. 1470 (DB)
APPELLATE CRIMINAL

Before Mr. Justice J.K. Maheshwari & Smt. Justice Anjuli Palo

Cr.A. No. 646/2019 (Jabalpur) decided on 17 May, 2019

ANAND KUSHWAHA …Appellant

Vs.

STATE OF M.P. …Respondent

(Alongwith Cr.Ref. No. 19/2018)

***A. Penal Code (45 of 1860), Sections 363, 366A, 376(2)(f)(i), 376-A, 376-AB, 302 & 201 – Circumstantial Evidence – DNA Test – Rape and murder of minor girl of 5 yrs.* – Held – Testimony of prosecution witnesses, memo of recovery of articles at instance of accused have been established by prosecution – Doctor opined signs of recent forceful vagina-anal penetration prior to death of deceased minor girl – DNA found on vaginal-anal swab matched with blood sample of accused – Offence by appellant established by prosecution beyond reasonable doubt – Conviction affirmed.**

(Paras 11, 12 & 13)

क. दण्ड संहिता (1860 का 45), धाराएँ 363, 366ए, 376(2)(एफ)(आई), 376–ए, 376–एबी, 302 व 201 – परिस्थितिजन्य साक्ष्य – डी एन ए परीक्षण – 5 वर्षीय अप्राप्तवय बालिका का बलात्संग एवं हत्या – अभिनिर्धारित – अभियोजन द्वारा अभियोजन साक्षीगण का परिसाक्ष्य, अभियुक्त की निशानदेही पर वस्तुओं की बरामदगी का ज्ञापन स्थापित किये गये है – चिकित्सक ने मृतिका, अप्राप्तवय बालिका की मृत्यु पूर्व बलपूर्वक योनि गुदा प्रवेशन के ताजा चिन्ह होने की राय दी – योनि गुदा स्वैब पर पाये गये डी एन ए का मिलान, अभियुक्त के रक्त नमूने से किया गया – अभियोजन द्वारा, अपीलार्थी का अपराध युक्तियुक्त संदेह से परे स्थापित किया गया – दोषसिद्धि अभिपुष्ट।

***B. Penal Code (45 of 1860), Sections 363, 366A, 376(2)(f)(i), 376-A, 376-AB, 302 & 201 – Death Sentence* – Held – It is a case of circumstantial evidence where principle of prudence applies – Age of accused (cousin brother of deceased) is 19 yrs., possibility of reformation and rehabilitation of his entire career cannot be ruled out – Prior and subsequent antecedents of accused in jail do not draw any negative inference – Considering the aggravating and mitigating circumstances, death sentence converted to life imprisonment of 30 yrs. – Appeal partly allowed and reference answered in negative.** **(Para 57 & 58)**

ख. दण्ड संहिता (1860 का 45), धाराएँ 363, 366ए, 376(2)(एफ)(आई), 376–ए, 376–एबी, 302 व 201 – मृत्यु दण्डादेश – अभिनिर्धारित – यह एक परिस्थितिजन्य साक्ष्य का प्रकरण है जहां प्रज्ञा का सिद्धांत लागू होता है – अभियुक्त (मृतिका का रिश्ते का भाई) की आयु 19 वर्ष है, उसके संपूर्ण जीवन क्रम के सुधार एवं

पुनर्वास की संभावना से इंकार नहीं किया जा सकता – कारागृह में अभियुक्त के पूर्वतर एवं पश्चात्वर्ती पूर्ववृत्त से कोई नकारात्मक निष्कर्ष नहीं निकलता – गंभीर बनाने वाली एवं कम करने वाली परिस्थितियों को विचार में लेते हुए, मृत्यु दण्डादेश को 30 वर्ष के आजीवन कारावास में संपरिवर्तित किया गया – अपील अंशतः मंजूर एवं निर्देश नकारात्मक उत्तरित किया गया।

***C. Criminal Procedure Code, 1973 (2 of 1974), Section 235 & 354 and 262nd Report of Law Commission, 2015 – Capital Punishment* – Amendments in Cr.P.C. and conclusions and recommendations of Commission, enumerated and explained. (Paras 16, 18, 24, 25 & 34)**

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 235 व 354 एवं विधि आयोग, 2015 का 262 वां प्रतिवेदन – मृत्यु दण्ड – दं.प्र.सं. में संशोधन व आयोग के निष्कर्षों एवं अनुशंसाओं को प्रगणित एवं स्पष्ट किया गया।

***D. Capital Punishment – Rarest of Rare Cases – Aggravating and Mitigating Circumstances*– Enumerated and explained – Reformative theory of punishment, social justice, propositions, weightage, determinations, exercise of judicial discretion, issue of assigning reasons in a death sentence, affording opportunity to accused, discussed and explained. (Paras 25, 26, 29, 31 & 38 to 43)**

घ. मृत्यु दण्ड – विरल से विरलतम प्रकरण – गंभीर बनाने वाली एवं कम करने वाली परिस्थितियां – प्रगणित एवं स्पष्ट की गई – दण्ड का सुधारात्मक (रीफारमेटिव) सिद्धांत, सामाजिक न्याय, प्रतिपादनाऐं, अधिमान, अवधारणाऐं, न्यायिक विवेकाधिकार का प्रयोग, मृत्यु दण्डादेश में कारण बताये जाने का मुद्दा, अभियुक्त को अवसर प्रदान किया जाना, विवेचित एवं स्पष्ट किये गये।

***E. Constitution – Article 21 – Capital Punishment – Constitutional Validity* – Held – Death penalty imposed after trial in accordance with established procedure of law, is not unconstitutional as per Article 21. (Paras 16, 19 & 29)**

ङ. संविधान – अनुच्छेद 21 – मृत्यु दण्ड – संवैधानिक विधिमान्यता – अभिनिर्धारित – विधि की स्थापित प्रक्रिया के अनुसरण में विचारण पश्चात् अधिरोपित मृत्यु दण्ड, अनुच्छेद 21 के अनुसार असंवैधानिक नहीं है।

Cases referred:

2018 SCC Online SC 2570, (2009) 6 SCC 498, (2012) 4 SCC 257, (1973) 1 SCC 20, (1976) 1 SCC 425, 1979 (3) SCR 646, AIR 1980 SC 898, AIR 1976 SC 2386, 408 US 238/1992 US Lexis 169, 428 US 153 (1976)/1976 US Lexis 82, (1974) 4 SCC 443, 428 U.S. 242 (1976), (1983) 3 SCC 470, (2017) 6 SCC 1, (2013) 5 SCC 546, (1991) 3 SCC 471, (1994) 2 SCC 220, (1994) 3 SCC 381, (1999) 5 SCC 1, (2004) 2 SCC 338, (2005) 3 SCC 114, (2005) 3 SCC 793, (2007) 3 SCC 1, (2007) 4 SCC 713, (2008) 4 SCC 434, (2008) 7 SCC 561, (2008)

11 SCC 113, (2009) 6 SCC 667, (2010) 9 SCC 567, (2010) 10 SCC 611, (2011) 5 SCC 317, (2012) 4 SCC 37, (2013) 3 SCC 215, (2013) 10 SCC 421, (2015) 1 SCC 67, (2015) 6 SCC 632, (2015) 6 SCC 652, (2017) 4 SCC 124, (1994) 4 SCC 353, (1999) 3 SCC 19, (2001) 2 SCC 28, (2002) 3 SCC 76, (2002) 9 SCC 168, (2003) 7 SCC 141, (2008) 13 SCC 767, (2010) 9 SCC 747, (2011) 3 SCC 685, (2011) 7 SCC 437, (2012) 5 SCC 766, (2013) 2 SCC 452, (2013) (2) SCC 713, (2014) 4 SCC 69, (2014) 5 SCC 353, (2016) 9 SCC 675, (2017) 4 SCC 393, (2019) 2 SCC 311, (2019) SCC Online SC 42, 2019 SCC Online SC 43, (2019) SCC Online SC 81, (2019) SCC Online SC 363, (1996) (6) SCC 250, Cr. Ref. No. 05/2015 and Cr. A. No. 2203/2015 decided on 03.03.2016 (DB), SLP (Crl.) Nos. 4821-4822/2018 with SLP (Crl.) Nos. 4865-4866/2018 order passed on 29.05.2018 (Supreme Court).

Premchand Batri, Anurag Sahu and *Dev Datt Bhave*, amicus curiae for the appellant in Cr.A. No. 646/2019.

Kuldeep Singh, G.A. for the respondent-State in Cr.A. No. 646/2019 and for the applicant in Cr.Ref. No. 19/2018.

Siddharth Sharma, amicus curiae for the non-applicant in Cr.Ref. No. 19/2018.

J U D G M E N T

The Judgment of the Court was delivered by :

J.K. MAHESHWARI, J. :- Being aggrieved by the judgment dated 17.12.2018 passed by XIV Additional Sessions Judge, Jabalpur in Sessions Trial No. 159/2018 convicting the appellant-accused under Sections 363, 366A, 376(2)(f)(i), 376-A read with Section 376-AB, 302 and 201 of IPC and sentencing him to undergo the rigorous imprisonment for two years, five years rigorous imprisonment, imprisonment for life, capital punishment, capital punishment and five years rigorous imprisonment respectively with default stipulation, he has preferred criminal appeal.

2. The Criminal Reference has been sent by the trial court under Section 366(1) of Cr.P.C. for confirmation of the death penalty, however, both the cases are arising out of the same judgment, therefore, they are being heard and decided by this common judgment.

3. The case of the prosecution in brief is that on the date of incident i.e. on 19.8.2018 at about 7.00 pm when father of the prosecutrix returned back to home after the labour work, he did not find the prosecutrix at home. On asking from the accused, he told that after giving chocolate to prosecutrix he took her for a round on the motorcycle and left her. After enquiry from the villagers, when the prosecutrix could not be traced out, a report was lodged in the Police Station, Katangi at about 10.30 in the morning on 20.8.2018. Thereupon police went to village Jatasi and enquired from the accused about the prosecutrix. The accused

on his memo under Section 27 of the Evidence Act disclosed to police that he took prosecutrix in a room of his house and committed rape with her due to which excessive bleeding from her private part was there. Due to excessive bleeding, she became unconscious, however, he killed her by gagging her mouth and thrown her dead body in the septic tank of his house. On the instance of the accused, the dead body of prosecutrix was taken out from the septic tank and the bloodstained undergarments, a bloodstained plastic bag, bloodstained mattress, quilt and blanket were seized from the room. The postmortem of the dead body was performed by a panel of three doctors in the Medical College Jabalpur on 21st August, 2018. The report of Forensic doctor has also been obtained and after taking blood sample of accused it was sent for DNA examination to which a report was received and after investigation, challan was filed against the accused in the competent court under Sections 363, 376 (2)(f)(i), 376-AB, 377, 302 and 201 of IPC and Section 3(a), 4, 5(m)/6 of the POCSO Act.

4. The said offences were triable by the court of session, however, it was committed to the competent court where the charges under Sections 363, 366-A, 376(2)(f)(i), 376-A read with Section 376-AB, 302 and 201 of IPC and Section 5(m)(i)/6 of the POCSO Act were framed against the accused. The appellant/accused abjured his guilt and demanded for trial. He has taken a defence under Section 313 of Cr.P.C. that he has not committed any offence and due to old enmity he has been falsely implicated.

5. The trial court formulated as many as nine questions, relating to age, the nature of death, commission of rape and murder of prosecutrix. It is concluded that the age of prosecutrix was below 12 years. It is further concluded that the nature and cause of death of deceased is homicidal, relying upon the testimony of the father of prosecutrix Sudarshan Prasad (PW-1), witnesses of the memorandum, seizure of articles and dead body Jitendra Singh Sengar (PW-4) and Guddu Prasad Jhariya (PW-9). The Court further relied upon the statement of the Dr. Adarsh Vishnoi (PW-2) and the investigating officer Rakesh Tiwari (PW-13) and other evidence of seizure of various articles and deposit in the Malkhana and also relying upon the testimony of Dr.Neeta Jain (PW-5), FSL Expert and the DNA report it is concluded that the accused committed rape with the prosecutrix aged 5 years and committed her murder by throttling in association with smothering, however, recording the findings of conviction, trial court directed to undergo sentence as described hereinabove.

6. Learned counsel appearing on behalf of the appellant as well as learned *amicus curiae* have argued with vehemence that looking to the prosecution allegation the accused enticed the prosecutrix by offering chocolate and took her for a round on the motorcycle, but the said fact has not been proved bringing any cogent evidence including the last seen of the prosecutrix with the accused with a recovery of motorcycle. The dead body of the deceased was found in the septic

tank which was on an open place and was not covered by lid in courtyard of the house, however, the dead body could be thrown by any one in the septic tank. The memorandum of the accused under Section 27 of the Evidence Act was recorded in front of Jitendra Singh Sengar (PW-4) and Guddu Prasad Jhariya (PW-9), who has not fully supported the case of the prosecution while other witness Sanjay Garg has not been examined by the prosecution in the case. It is further urged that the incident took place on 19.8.2018. The FIR was lodged on the next date on 20.8.2018 at about 10.30 am. Thereafter, the police reached on the spot. As per Sudarshan Prasad Kushwaha (PW-1), he informed the police in the night and police came in the village immediately, but no document is made available on record to show that any entry was made by the Police in the Rojnamcha Sanha regarding the information given by Sudarshan Prasad Kushwaha (PW-1) in the night about missing of his daughter or reaching to the village. Similarly, the entry in Rojnamcha regarding return of the police from the village is also not brought on record. In addition to the aforesaid, the seizure was made by the police regarding various articles of the victim on 20.8.2018 and 21.8.2018. No evidence is available on record regarding keeping of the those articles in safe custody. The seizure of the semen slide and other articles of the accused were made on 21.8.2018 while blood sample of accused for DNA test was taken by the Dr. Shilpi Jain (PW-6) on 23.8.2018. Nothing is available on record to show that from 20-21st of August, 2018 till sending the said articles and blood samples for DNA test where it were kept and the place to keep it prior to sending the same to FSL or DNA was safe or whether it were received intact with seal to which the evidence of the expert has not been recorded, therefore, the DNA report which is relied upon by the trial court is doubtful. It is further found that the testimony of the witnesses Sudarshan Prasad Kushwaha (PW-1), Jitendra Singh Sengar (PW-4) and Guddu Prasad Jhariya (PW-9) as well as of the Investigating Officer Rakesh Tiwari (PW-13) is full of omission and contradictions, therefore, in a case of circumstantial evidence the finding to convict the appellant-accused recorded by the trial court is unsustainable.

7. In addition to the aforesaid, in an alternative, it is urged that it is not a case in which the imprisonment of life is not the adequate punishment foreclosing other option. The trial court committed an error while pronouncing the judgment and for the adequate reasons sentence of death penalty without preparing the balance-sheet of aggravating and mitigating circumstances in the facts of the case, therefore, setting aside the death penalty, the sentence to the appellant-accused may be commuted to the life imprisonment.

8. On the other hand, learned Government Advocate has strenuously urged that it is a case in which a girl aged five years who was cousin sister of the appellant-accused was raped and killed by him and thereafter to disappear the evidence of commission of rape and murder, he dumped her dead body in a septic

tank constructed in the courtyard of the house. It is further argued that true it is a case of circumstantial evidence, but, looking to the evidence of Sudarshan Prasad Kushwaha (PW-1), Jitendra Singh Sengar (PW-4), Guddu Prasad Jhariya (PW-9) and Rakesh Tiwari (PW- 13) it has been proved that the appellant-accused was last seen with the deceased and at his instance the recovery of articles were made including the dead body of deceased. Those articles were sent for DNA test and the report of the DNA matched with the DNA of the appellant-accused, therefore, in such a case the trial court has rightly recorded the finding of conviction and the sentence of death penalty assigning special reason as contemplated under Section 354(3) of Cr.P.C.. However, in the facts of the case, interference in this appeal is not warranted and the reference sent by the trial court to affirm the death penalty to appellant-accused may be confirmed.

9. After having heard learned counsel for both the parties, first of all it is to observe that on the point of age of the deceased i.e. five years, there is no dispute and no argument has been advanced to say that the age of the girl was more than 12 years or it has not been proved, therefore the finding recorded by the trial court regarding the age of the deceased remained unchallenged, hence, on the point of age, interference is not warranted, and those findings are just.

10. So far as the issue regarding commission of rape and anal intercourse connecting the accused in commission of the crime and thereafter committing her murder is concerned, in this regard we have examined the testimony of Sudarshan Prasad Kushwaha (PW-1). As per his testimony on the date of incident i.e. on 19.8.2018 he and his wife had gone to Village Boriya to do the labour work leaving their kids at home. When they returned back at about 7.00 pm in the evening, he asked from his son about his daughter (deceased), who was not found at home. It is said that she would be playing some where, then father asked him to search her and bring at home. After search they returned back and said that she is not traceable anywhere. Thereafter he said to his wife for search, but, when the deceased could not be traced out she also came back with tears in her eyes. Then he went for searching of his daughter (deceased) to the colony of appellant-accused where it was informed that appellant-accused was roaming with the deceased and taking round on a motorcycle in the noon at day time. Then he came back and told the residents of the colony that his daughter (deceased) is missing. Thereafter, he alongwith residents of the colony and villagers started search of the deceased, but she could not be traced out, then he informed the police about the incident on phone. Thereafter, police came and asked him, you have suspicion on any one and with whom the deceased was last seen. He informed the police that the residents of colony saw the appellant-accused last with his daughter (deceased) roaming on the motorcycle taking round of the village. The FIR Ex.P/1 was lodged on the next day i.e. on 20.8.2018. In the cross-examination of Sudarshan Prasad Kushwaha (PW-1), the fact regarding information given by the neighbour has not been

established by any independent witness in the Court. The factum of intimation to the police in the night about the incident has also not been proved by cogent evidence available on record even by the statement of Investigating Officer Rakesh Tiwari (PW-13). The statement of the said witness is ocular on the point of interrogation of the accused, either in the police station or in the premises of Nahan Devi Temple. But, on the point of recovery, their testimony is inocular.

11. As per the statement of Jitendra Singh Sengar (PW-4), he went to search the victim in the evening alongwith Sanjay Garg, Nand Kishore Patel and Mahendra Parihar and other villagers, but, in the cross-examination he admitted that he is a resident of Kakrehta and the father of the deceased is a resident of Jatasi. The incident is also of village Jatasi. The Gram Panchayats of both the villages are different. It is further admitted by him that he had not gone to village Jatasi in the night on 19.8.2018, but he had gone to the said village on 20.8.2018 in the morning. On the point of recovery, except the place of septic tank, his testimony is inocular. It is to be noted here that the police has not recorded the statement of any villager i.e. Sanjay Garg, Nand Kishore and Mahendra Parihar and they have not deposed before the Court regarding the roaming of the deceased with accused or last seen or of the search of deceased. It is to be noted here that the police has also not brought any neighbour residing near the house of the complainant where the incident took place i.e. Munna, Umesh, Dashrath and Sushil in the witness box before the Court. The investigating officer in his statement has not given any explanation that why the statements of the neighbours or villagers have not been recorded on the issue that the accused and deceased were roaming in the motorcycle in the day time and the appellant allured the deceased by offering the chocolate to her. Therefore, the said circumstance though weak, but, the testimony of Sudarshan Prasad Kushwaha (PW-1), Jitendra Singh Sengar (PW-4) and Rakesh Tiwari (PW-13) and the memo of recovery regarding dead body from the septic tank and also the recovery of the articles that includes the clothes of the accused, mattress, quilt, blanket, clothes of the girls including undergarments on the instance of the accused and other clothes which cannot be doubted and have been proved beyond reasonable doubt connecting the appellant-accused with the crime. The seizures were made by the police on 20/21st August, 2018 that includes vaginal swab slide, anal swab slide and also the semen slide of the accused. The blood sample of the accused for DNA test had been taken by Dr. Shilpi Jain (PW-6) on 23.8.2018. She kept the same in the EDTA (ethylene diaminetetra acetic acid), sealed the same and after keeping the same in the ice box handed over the same to constable Shri Ram Kurmi (No.638), which was sent for DNA test by letter of the Superintendent of Police dated 23.8.2018 Ex.P/27 to the FSL Sagar. The postmortem of the deceased was conducted by a team Dr. Adarsh Vishnoi (PW-2) which included Dr. Nidhi Sachdeva and Dr. Mukesh Rai. The said postmortem report Ex. P/10 has been proved by him. Looking to the said report

ante-mortem injuries were found on the body of deceased, which are as under:-

> "(1) Multiple red contusion 4 in number present over the anti-lateral aspect of neck, at the level of thyroid cartilage size 2 x 1 cm to 0.5 x 0.5 cm deep cut underneath neck muscles and soft tissue contused. Thyroid cartilage is fractured in middle deep cut effusion of blood present.
>
> (2) Multiple red crescentric hair mark abrasion present over anterior aspect of neck size ranging from 0.5 x 0.1 cm to 0.3 x 0.2 cm.
>
> (3) Multiple redion contused abrasion 4 in number present over inner aspect of upper and lower lips size ranging from 1 x 1 cm to 0.5 x 0.5 cm. Swelling of both lips present.
>
> (4) One red crescentric nail mark abrasion present in the left side of face 4 cm lateral to left side of mouth.
>
> (5) Reddish contusion of size 0.5 x 0.5 cm present over medial aspect of thigh.
>
> (6) Reddish contusion of size 1.5 x 0.5 cm present over the medial aspect of left thigh upper side."

On internal and external examination of the private part of the deceased, the doctor found the following injuries:

> "Multiple laceration in vagino Anal Region resulting in severe mutilation of vagina and anus, effusion of blood with clotted blood present."

In the opinion of the doctor the death was due to asphyxia as a result of ante-mortem throttling in association with smothering. The death was homicidal. Doctor also opined that there were signs of recent forceful vagino-anal penetration, which were prior to death of the deceased.

12. The DNA report has been received on 6.9.2018 and as per the DNA report Ex.P/28, Y-chromosomes DNA profile found on EX-A & EX-J (Vaginal Swab) and on EX-D and Ex-L (Anal Swab) and the Y-chromosomes DNA profile of the accused blood sample EX-P were same. The Y-chromosome DNA profile of the sized quilt EX-W and Y-chromosome DNA profile of blood sample EX-P were same. Mixed male Autosomal STR DNA profile of the Vaginal swab and Anal swab, EX-A, J, D & L of the deceased and the Autosomal STR DNA profile of the blood sample of accused were same. In mixed Autosomal STR DNA profile of seized Vest Ex-U and underwear EX-V seized from the accused, Female Autosomal STR DNA profile has matched with the bone EX-F of the deceased. From the quilt EX-W and blanket EX-X and sack EX-Z1, Female Autosomal STR DNA profile was found, which matched with Female Autosomal STR DNA profile found in EX-F bone of the deceased.

13. In view of the foregoing evidence, though the same were circumstantial evidence, but the incriminating and cogent evidence implicating the accused in

commission of the offence by his disclosure about commission of offence in his memorandum and the recoveries made at his instance have been proved by inocular testimony of Jitendra Singh Sengar (PW-4) and Guddu Prasad Jhariya (PW-9) which is concurred with the statement of Rakesh Tiwari (PW-13). Therefore, in view of the aforesaid, the allegation of commission of offence under Section 363, 366-A, 376(2)(f)(i) alongwith Section 376-A and 376-AB and Section 302/201 of IPC have been proved by the prosecution beyond reasonable doubt. Even though there are some discrepancies in the statements of Sudarshan Prasad Kushwaha (PW-1), Jitendra Singh Sengar (PW-4) and Guddu Prasad Jhariya (PW-9), but looking to the cogent evidence, connecting the circumstances as discussed above in addition to the finding of guilt as recorded by the trial court, the prosecution proved the aforesaid charge beyond reasonable doubt.

14. Now coming to the point of sentence, the trial court recorded a finding in the facts of the case that the girl aged five year was raped by her cousin brother (accused) and committed her murder brutally, which was diabolic and cruel act due to which the mutual relations have been seriously prejudiced. The trial court further said that by the act of the appellant-accused the relation of brother and sister has been seriously affected. The said act has been done in a planned manner and there is no possibility of reformation and mental upgradation of the appellant-accused. The said offence was shocking and affect the collective conscience of the society, therefore, it falls within the purview of rarest of rare case. Consequently, the trial court directed for capital punishment.

15. In this regard learned counsel for the appellant-accused and the *amicus curiae* appearing in reference submitted that it is not a case in which the options of other punishment are unequivocally foreclosed. The trial court has not considered the mitigating circumstances preparing the balance-sheet of the aggravating and mitigating circumstances to record a finding of rarest of rare case. In absence thereto, the sentence of death penalty for some of the charges as directed is not in conformity to law.

16. After hearing learned counsel for the parties on the question of death sentence and on considering overall facts and circumstances of the case and also the evidence, it is apparent that this issue is of complex nature to which the preparation of balance sheet of aggravating and mitigating circumstances would be a relevant factor. The doctrine of rehabilitation is a paramount consideration looking to 262nd report of the Law Commission which has been considered by three Judges Bench in the case of *Chhannulal Verma vs. State of Chhattisgarh* reported in 2018 SCC Online SC 2570, which is also one of the relevant factor. The case at hand is a case of circumstantial evidence in which the doctrine of prudence is also one of the relevant factors to award the death penalty. As per the judgment of Apex Court in the case of *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra* reported in (2009) 6 SCC 498. Simultaneously the doctrine

of proportionality is also relevant factor as enunciated by the Apex Court in the case of *Ram Naresh vs. State of Chhattisgarh* reported in (2012) 4 SCC 257, therefore, all these factors require consideration. To reach on a concrete conclusion in the case at hand, we can take guidance from the judgments of the Apex Court. In such cases the sentencing policy as framed by the Apex Court by precedents would be referred. The life imprisonment is a normal sentence based on assigning the reasons while the death penalty must be based on assigning the special reasons as enumerated under Section 354(3) of Cr.P.C. in rarest of the rare cases, therefore, the said issue has been discussed in the succeeding paragraphs in the had (sic : head) of sentencing policy.

Sentencing Policy:

The validity of the death sentence alleging to be violative of freedom guaranteed under Article 19 and 14 of the Constitution of India because it suffers from excessive delegation of power and under Article 21 of the Constitution of India depriving a citizen of his life and personal liberty without following the procedure established by law was assailed in the case of *Jagmohan Singh vs. The State of U.P.* reported in (1973) 1 SCC 20. The Apex Court in the said judgment referring the provisions of Article 72(1)(c), and 134 of the Constitution of India and entries 1 and 2 in the list of the Seventh Schedule to the Constitution said that the death sentence has been recognized as a permissive punishment because the provision for appeal, reprieve, and the like have been enumerated by statute. In addition, under Article 21 of the Constitution of India it is specified that no person shall be deprived of his life and liberty except according to procedure established by law. However, the constitutional implication is very clear; the deprivation of life of citizen is constitutionally permissible if that is done according to procedure established by law. Therefore, the Court held that capital sentence is not violative of the constitutional provisions. It is also held that capital punishment cannot be said to be either unreasonable or not in the public interest. While upholding the constitutional validity of the death punishment, the Apex Court has emphasized that the Court while awarding the capital punishment must ascertain the facts and circumstances whether aggravating or mitigating have relevance with the particular crime under enquiry and trial. Thus, concluded that the death penalty imposed after trial in accordance with the procedure established by law and is not unconstitutional as per Article 21 of the Constitution of India.

17. In the said case, the Court while dealing with the constitutional validity of the capital punishment has considered the Thirty Fifth report of the Law Commission of India published in 1967. The said report was not in favour of the abolition of the death penalty. Simultaneously the Court has also considered the fact that initially the Bill for abolition of the capital punishment was introduced in the Lok Sabha in 1956, but the same was rejected in November, 1956. Thereafter,

a resolution was introduced in Rajya Sabha in 1958, but the same was withdrawn. Subsequently, in 1962, the Rajya Sabha negatived the said Bill. The Court also observed that the report of the Law Commission of India which was after deliberation and the Bill for abolition of the death penalty brought before the Lok Sabha and Rajya Sabha indicates that the law framers do not welcome the perspective of abolition of capital punishment. In view of the foregoing facts it was held that the Court is not inclined to conclude that the capital punishment is either unreasonable or not in the public interest. Thereafter, the issue regarding laying down the standard or guidelines on the judges to impose the penalty was considered because wide discretion has been conferred on them. The Apex Court said that looking to the facts and circumstances of the case to which trial is to be conducted by the judge in front of him in the Court following the procedure as contemplated under the Code of Criminal Procedure and the Evidence Act. The judge may have minutely understood the facts and circumstances and demeanor of the witnesses, victim and accused to impose the penalty, therefore wide discretion has been conferred under the Indian Penal Code giving a minimum and maximum penalty and for suitable sentence the power ought to be exercised by the judge looking to the circumstances of the individual case. The judges are discharging onerous duties since more than a century even after commencement of the IPC. Therefore, such discretion cannot be said to be unreasonable or requires any standard to be laid down.

18. After the judgment of *Jagmohan Singh* (supra), Section 354(3) of Cr.P.C. was amended on 1.4.1974. The issue regarding imposition of the death penalty in the context of Section 354(3) of Cr.P.C. first time came for consideration in the case of *Balwant Singh vs. State of Punjab* reported in (1976) 1 SCC 425 in which the Court sum up the scope of Section 354(3) as thus:

> "Under this provision the Court is required to state the reasons for the sentence awarded and in the case of sentence of death, special reasons are required to be stated. It would thus be noticed that awarding of the sentence other than the sentence of death is the general rule now and only special reasons, that is to say, special facts and circumstances in a given case, will warrant the passing of the death sentence. It is unnecessary nor is it possible to make a catalogue of the special reasons which may justify the passing of the death sentence in a case."

19. Thereafter, in the case of *Rajendra Prasad vs. State of Uttar Pradesh* reported in 1979 (3) SCR 646 again the issue regarding imposition of the death penalty has been taken into consideration in the perspective of human rights jurisprudence within the limits of the Penal Code, impregnated by the Constitution. In this context the world voice showing the worth of the human person, a cultural legacy charged with compassion, an interpretative liberation from colonial callousness to life and liberty having concern for social justice as

setting the rights of individual justice, interest with the inherited text of the Penal Code to yield the goals desiderated by the Preamble and Articles 14,19 and 21 of the Constitution has been considered. The Apex Court considering the issue of social justice which is the genesis of Part-4 of the Constitution and which recognizes the concept of reasonableness and non-arbitrariness in the context of Article 38, 19 and 14 of the Constitution observed as under:

> "12. The social justice which the Preamble and Part IV (Art. 38) highlight, as paramount in the governance of the country has a role to mould the sentence. If the murderous operation of a die-hard criminal jeopardizes social security in a persistent, planned and perilous fashion then his enjoyment of fundamental rights may be rightly annihilated. One test for imposition of death sentence is to find out whether the murderer offers such a traumatic threat to the survival of social order. Some of the principles are-never hang unless society or its members may lose more lives by keeping alive an irredeemable convict. Therefore social justice projected by Art. 38 colours the concept of reasonableness in Art. 19 and non-arbitrariness in Art. 14. This complex of articles validates death penalty in limited cases. Maybe train dacoity and bank robbery bandits reaching menacing proportions, economic offenders profit killing in an intentional and organised way, are such categories in a Third World setting."

The Court in the said case has explained the social aspects with respect to offenders. The Court has observed as thus:-

> "Social defence against murderers is best insured in the short run by caging them but in the long run, the real run, by transformation through re-orientation of the inner man by many methods including neuro-techniques of which we have a rich legacy. If the prison system will talk the native language, we have the yogic treasure to experiment with on high-strung, high-risk murder merchants. Neuroscience stands on the threshold of astounding discoveries. Yoga, in its many forms, seems to hold splendid answers. Meditational technology as a tool of criminology is a mascent-ancient methodology. The State must experiment. It is cheaper to hang than to heal, but Indian life-any human life-is too dear to be swung dead save in extreme circumstances."

Thereafter referring the conduct and demeanor of the offender the Court emphasized as under:-

> "Nothing on record suggests that Rajendra Prasad was beyond redemption; nothing on record hints at any such attempt inside the prison Lock-up of a criminal for long years behind stone walls and iron bars, with drills of breaking the morale, will not change the prisoner for the better Recidivism is an index of prison failure, in most cases. Any way, Rajendra showed no incurable disposition to violent outbursts against

> his fellow-men. We see no special reason, to hang him out of corporeal existence. But while awarding him life imprisonment instead, we direct for him mental-moral healing courses through suitable work, acceptable meditational techniques and psychotherapic drills to regain his humanity and dignity. Prisons are not human warehouses but humane retrieval homes."

In the context of amended provision of Section 354(3) of Cr.P.C., referring section 367(5) of CrP.C., the Apex Court observed as under:

> "To start with, s. 367(5) obligated the court to 'state the reason why sentence of death was not passed'. In other words, the discretion was directed positively towards death penalty. The next stage was the deletion of this part of the provision leaving the judicial option open. And then came the new humanitarian sub-section [s. 354 (3)] of the Code of 1973, whereby the dignity and worth of the human person, under-scored in the Constitution, shaped the penal policy related to murder."

20. In the said judgment, with a majority view the Court held that the sacrifice of a life sentence is sanctioned only if otherwise public interest and social defence and public order would be smashed irretrievably. Such extraordinary grounds alone constitutionally qualify as special reasons. One stroke of murder hardly qualifies for this drastic requirement, however gruesome the killing may be. The searching question the Judge must put to himself is what is so-extra-ordinarily reasonable as to validate the wiping out of life itself and with it the great rights which inhere in him in the totality of facts. The Court in the said judgment has described the reformative theory of punishment in expanding years.

21. In view of these two judgments, in *Bachan Singh Vs. State of Punjab* reported in AIR 1980 SC 898 two questions were cropped up for consideration:

> (i) Whether death penalty provided for the offence of murder in Section 302, Penal Code is unconstitutional?
>
> (ii) If the answer to the foregoing question be in the negative, whether the sentencing procedure provided in Section 354(3) of the CrPC, 1973 (Act 2 of 1974) is unconstitutional on the ground that it invests the Court with unguided and untrammelled discretion and allows death sentence to be arbitrary or freakishly imposed on a person found guilty of murder or any other capital offence punishable under the Indian Penal Code with death or, in the alternative, with imprisonment for life.

The Court has considered the constitutional validity in the context of Article 19, 21 and 22 of the Constitution of India. In the said context, the Court has referred the 35th and 36th reports of the Law Commission of India and also the arguments of the abolitionist which have been substantially adopted by the

learned counsel for the petitioner that the death penalty is irreversible. Decided upon according to fallible process of law by fallible human beings, it can be - and actually has been - inflicted upon people innocent of any crime. While answering the said argument, the Court observed as under:-

> "Regarding (a): It is true that death penalty is irrevocable and a few instance, can be cited, including some from England of persons who after their conviction and execution for murder, were discovered to be innocent. But this, according to the Retentionists is not a reason for abolition of the death penalty, but an argument for reform of the judicial system and the sentencing procedure. Theoretically, such errors of judgment cannot be absolutely eliminated from any system of justice, devised and worked by human beings, but their incidence can be infinitesimally reduced by providing adequate safeguards and checks. We will presently see, while dealing with the procedural aspect of the problem, that in India, ample safeguards have been provided by law and the Constitution which almost eliminate, the chances of an innocent person being convicted and executed for a capital offence."

The other argument-(b) is in three steps, which is as under:

(b) There is no convincing evidence to show that death penalty serves any penological purpose:

(i) Its deterrent effect remains unproven. It has not been shown that incidence of murder has increased in countries where death penalty has been abolished, after its abolition.

(ii) Retribution in the sense of vengeance, is no longer an acceptable end of punishment.

(iii) On the contrary, reformation of the criminal and his rehabilitation is the primary purpose of punishment. Imposition of death penalty nullifies that purpose.

22. The Court, after referring various judgments of the Supreme Court of India, Supreme Court of US, views of various penologists, report of British Commission, report of Amnesty International, 1979 and the Surveyors arrived at a conclusion that it has evoked strong, divergent views. For the purpose of testing the constitutionality of the impugned provision as to the death penalty in Section 302, Penal Code on the ground of reasonableness in the light of Articles 19 and 21 of the Constitution. The Court said that it is not necessary to express any categorical opinion, one way or the other, looking to the antithetical views of the Abolitionists and Retentionists and to show which view is correct. The Court opined that the very fact that, the persons of reason, learning and light are rationally and deeply divided in their opinion on this issue, is sufficient to reject the arguments as advanced by the petitioner in the perspective of prevailing crime condition in India, contemporary public opinion channelized through the people's

representatives in Parliament. It is said that the death penalty is still a recognised legal sanction for murder or some types of murder in most of the civilised countries in the world. Referring 35th report of the Law Commission of India and the amendment brought in Sections 235(2) and 354(3) in the Cr.P.C. providing an opportunity of hearing with intent of pre-sentence hearing in a sentencing procedure. With the said observation it is held by the Court that "it is not possible to hold that the provision of death penalty as an alternative punishment for murder, in Section 302, Penal Code is unreasonable and not in the public interest".

23. Thereafter the Court has further considered the issue with a touchstone that such provision is constitutionally valid in view of the Article 21 of the Constitution of India.

24. The Apex Court, after referring the various judgments and also considering the Stockholm Declaration dated December 11, 1977, in which the India has also accepted the International Covenant alongwith Civil and Political Rights adopted by the General Assembly of the United Nations and in the context of Section 354(3) of Cr.P.C. has observed that the Penal Code described death penalty as an alternative punishment only for heinous crime which are not more than seven in number. Section 354(3) Cr.P.C. 1973 in keeping with the interest of the International Covenant has further restricted the area of death penalty, however, said that the Indian Penal Laws excluding the impugned provisions and their application are entirely in accordance with the international commitment. Thereafter the Court observed that the death penalty being exceptional one and not to be said to be guided by unfettered power not valid constitutionally.

25. In the said case, the Court has observed that deficiency pointed out by the Law Commission in 48th report in the sentencing procedure has now been introduced by the Penal Law bringing Sections 354(3) and 235(2) of Cr.P.C. As per Section 354(3) when an offender is required to be punished with death or in the alternative with imprisonment of life or for a term of years, the judgment must assign the reasons for sentence so awarded and in case of a death sentence, special reasons must be assigned. The Court while dealing with the constitutionality of Section 354(3) has referred sub-Section (2) of Section 235 of Cr.P.C. and said that it does not contain a specific provision as to evidence and it merely provides hearing to the accused on sentence, yet it is implicit in this provision that if a request is made in that behalf by either the prosecution or accused or by both, the judge should give the party or parties concerned an opportunity of producing the evidence on material relating to various factors bearing in mind on the question of sentence, though granting opportunity at the sentencing stage to lead evidence would not mean to deal or protract the trial as said in *Santa Singh vs. State of Punjab* reported in AIR 1976 SC 2386. The Court further referred the provision of Sections 432, 433 and 433 (A) of Cr.P.C. emphasizing the scope of

commutation and remission given to the State Government clarifying that in a case where the accused has been dealt with an offence in which the death penalty may be offered even alternatively or in a case where the death penalty has been commuted by the State Government as an imprisonment for life, the accused must serve at least minimum 14 years of the sentence while exercising such discretion by the State. The Court said that the expression 'special reasons' contemplated in sub-Section 3 of Section 354 Cr.P.C. obviously means the exceptional reasons founded on the exceptionally grave circumstances of the particular case relating to the crime as well as the criminal, therefore, made it clear that on conviction of a murderer and other capital offence punishable in the alternative of death penalty under the Penal Code, the extreme penalty should be imposed only in the high stream cases. Thus, after considering the legislative policy delineated in Section 354(3) and 235(2) prepositions (iv)(a) and (v)(b) of the judgment of *Jagmohan* (supra) the Court in the case of *Bachan Singh's* (supra) has recast as to how the penalty should be imposed and observed as under:

> "(a) The normal rule is that the offence of murder shall be punished with the sentence of life imprisonment. The court can depart from that rule and impose the sentence of death only if there are special reasons for doing so. Such reasons must be recorded in writing before imposing the death sentence.
>
> (b) While considering the question of sentence to be imposed for the offence of murder under Section 302 Penal Code; the court must have regard to every relevant circumstance relating to the crime as well as the criminal. If the court finds, but not otherwise, that the offence is of an exceptionally depraved and heinous character and constitutes, on account of its design and the manner of its execution, a source of grave danger to the society at large, the court may impose the death sentence.

The Court observed that the soundness or application of other proposition in *Jagmohan Singh's* case and the premises on which they rest, are not affected in any way by the legislative changes since made by the amendment in Section 354(3) of Cr.P.C. and said that the impugned provisions do not offend the Articles 14 and 21. Thus the Apex Court has propounded the theory of rarest of the rare cases.

26. So far as the question regarding standardization or to lay down the norms restricting the year of imposing the death penalty to a narrow category of murderer is concerned, the Apex Court has considered all the relevant aspects that includes the judgments of *Fur-man vs. Georgia* reported in 408 US 238/1992 US Lexis 169, *Gregg v. Georgia* reported in 428 US 153 (1976)/1976 US Lexis 82, *Ediga Anamma vs. State of Andhra Pradesh* reported in (1974) 4 SCC 443, *Proffitt v. Florida* reported in 428 U.S. 242 (1976) and other companion cases and after the judgment of *Fur-man* the statutory scheme prepared by the Georgia describing the aggravating and mitigating circumstances. Similarly after the judgment of *Profit*

v. Florida (supra) and the circumstances prevailing in India, the Court emphasized on the issue of judicial discretion while awarding sentence and the duties of the judges which they exercised with care and caution and said that giving power to a judge varying from life imprisonment to death penalty cannot be standarized (sic : standardized) and such discretion ought to be exercised by the judge on whom the discretion is conferred and such discretion is not unfettered but to be exercised judiciously. Thereafter, the Court described the aggravating and mitigating circumstances which may be a reason for the judge to arrive at a conclusion applying judicial discretion while pronouncing the sentence. The aggravating circumstances reported after considering the Penal Statute of USA, Fur-man, Georgia and the Indian Penal Code Amended Bill 1978, similarly the mitigating circumstances. As suggested by Dr. Chitale the circumstances are as under:-

> **Aggravating circumstances :** A Court may, however, in the following cases impose the penalty of death in its discretion:
>
> (a) if the murder has been committed after previous planning and involves extreme brutality; or
>
> (b) if the murder involves exceptional depravity; or
>
> (c) if. the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed -
>
> (i) while such member or public servant was on duty; or
>
> (ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or
>
> (d) if the murder is of a person who had acted in the lawful discharge of his duty under Section 43 of the CrPC, 1973, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance under Section 37 and Section 129 of the said Code.
>
> **Mitigating circumstances:**
>
> (1) That the offence was committed under the influence of extreme mental or emotional disturbance.
>
> (2) The age of the accused. It the accused is young or old, he shall not be sentenced to death.
>
> (3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.
>
> (4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions 3

and 4 above.

(5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.

(6) That the accused acted under the duress or domination of another person.

(7) That the condition of the accused showed that he was mentally defective and that the said defect unpaired his capacity to appreciate the criminality of his conduct."

Thereafter, it was observed that these are the relevant circumstances and must be given great weightage for the determination of the sentence with reason in the case of penalty of life, while in the case of death sentence special reason must be assigned affording opportunity.

27. In the case of *Bachan Singh* (supra) the Apex Court has made a tilt from the observation made in the judgment of *Rajendra Prasad* (supra) wherein the majority view with respect to 'special reasons' as stated was not related to the crime, but it should be related to the criminal. In this regard in *Bachan Singh* (supra) the Court observed as under:

"199. With great respect, we find ourselves unable to agree to this enunciation. As we read Sections 354(3) and 235(2) and other related provisions of the Code of 1973, it is quite clear to us that for making the choice of punishment or for ascertaining the existence or absence of "special reasons" in that context, the Court must pay due regard both to the crime and the criminal. What is the relative weight to be given to the aggravating and mitigating factors, depends on the facts and circumstances of the particular case. More often than not, these two aspects are so intertwined that it is difficult to give a separate treatment to each of them. This is so because 'style is the 'man'. In many cases, the extremely cruel or beastly manner of the commission of murder is itself a demonstrated index of the depraved character of the perpetrator. That is why, it is not desirable to consider the circumstances of the crime and the circumstances of the criminal in two separate water-tight compartments. In a sense, to kill is to be cruel and therefore all murders are cruel. But such cruelty may vary in its degree of culpability. And it is only when the culpability assumes the proportion of extreme depravity that "special reasons" can legitimately be said to exist.

And finally in para-207, the court held as under:

"207. There are numerous other circumstances justifying the passing of the lighter sentence; as there are countervailing circumstances of aggravation. "We cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society." Nonetheless, it cannot be over-emphasised that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive construction by the courts in accord with the sentencing policy writ

large in Section 354(3). Judges should never be bloodthirsty. Hanging of murderers has never been too good for them. Facts and figures albeit incomplete, furnished by the Union of India, show that in the past Courts have inflicted the extreme penalty with extreme infrequency - a fact which attests to the caution and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter. It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guidelines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3), viz., that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed."

28. Later in the case of *Machhi Singh & others vs. State of Punjab* reported in (1983) 3 SCC 470, the Apex Court has crystallized the guidelines indicated in the case of *Bachan Singh* (supra) and said that in the facts of each individual case where the question of imposing the death sentence arises, the following propositions emerge from the said case:

(i) the extreme penalty of death need not be inflicted except in gravest cases of extreme culpability;

(ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration alongwith the circumstances of the 'crime'.

(iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and only provided the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances has to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

While referring the aggravating and mitigating circumstances the Court said that to exercise a discretion by the court, certain questions must be in the mind of the court, which are required to be answered. Those questions posed are as under:-

"(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?

(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?"

The Court said that if upon taking an overall global view of all the circumstances in the light of the aforesaid proposition and taking into account the answers to the questions posed here in above, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so. The Court further said that while closing the shutter of deterrent approach of sentencing in India, the small window of "award of death sentence" was left open in the category of "the rarest of rare cases". It is also said that normally the rule is awarding of "life sentence", imposition of death sentence being justified, only in the rarest of rare cases, when the option of awarding sentence of life imprisonment is unquestionably foreclosed.

29. In view of the foregoing discussion of the judgments of *Jagmohan, Rajendra Prasad, Balwant Singh, Ediga Anamma and Bachan Singh* (supra) we can safely observe that the death penalty was found *intra-vires* and constitutionally valid and it is not violative of Article 14, 19, 21 and 38 of the Constitution of India. The Apex Court while declaring the death sentence as constitutionally valid made a twist towards the social justice taking it from deterrent to reformative theory of punishment. The court while recognizing the provision of sub-Section (3) of Section 354 as constitutionally valid said that the death penalty is an exception to the regular punishment and for which pre-sentence hearing that implicit recording of evidence for assigning the reasons showing mitigating and aggravating circumstances to penalize the criminal looking to the nature of crime.

30. In a celebrated case of *Mukesh and another v. State (NCT of Delhi) and others* reported in (2017) 6 SCC 1 the Apex Court in para-491 observed as under:-

"**491**. The principles laid down in Bachan Singh's case were considered in Machhi Singh and Ors. v. State of Punjab (1983) 3 SCC 470 and was summarised as under:-

"38. In this background the guidelines indicated in Bachan Singh's case (supra) will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentence arises. The following propositions emerge from Bachan Singh's case (supra):

(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

(ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.

(iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised."

31. Thereafter, the Apex Court classified that 'Manner of commission of crime', 'Motive', 'Anti-social or socially abhorrent nature of the crime', 'Magnitude of crime', and 'Personality of victim of murder' may be relevant consideration for commission of offence in totality to decide as to what sentence may be awarded. In the said case, the Apex Court has recast the aggravating and mitigating circumstances looking to the catena of judicial pronouncements post *Bachan Singh* and *Machhi Singh* (supra), in the case of *Ramnaresh* (supra) and described as under:

"Aggravating circumstances

(1) The offences relating to the commission of heinous crimes like murder, rape, armed dacoity, kidnapping, etc. by the accused with a prior record of conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal convictions.

(2) The offence was committed while the offender was engaged in the commission of another serious offence.

(3) The offence was committed with the intention to create a fear psychosis in the public at large and was committed in a public place by a weapon or device which clearly could be hazardous to the life of more than one person.

(4) The offence of murder was committed for ransom or like offences to receive money or monetary benefits.

(5) Hired killings.

(6) The offence was committed outrageously for want only while involving inhumane treatment and torture to the victim.

(7) The offence was committed by a person while in lawful custody.

(8) The murder or the offence was committed to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, murder is of a person who had acted in lawful discharge of his duty Under Section 43 Code of Criminal Procedure. When the

crime is enormous in proportion like making an attempt of murder of the entire family or members of a particular community. When the victim is innocent, helpless or a person relies upon the trust of relationship and social norms, like a child, helpless woman, a daughter or a niece staying with a father/uncle and is inflicted with the crime by such a trusted person.

(9) When murder is committed for a motive which evidences total depravity and meanness.

(10) When there is a cold-blooded murder without provocation.

(11) The crime is committed so brutally that it pricks or shocks not only the judicial conscience but even the conscience of the society.

Mitigating circumstances

(1) The manner and circumstances in and under which the offence was committed, for example, extreme mental or emotional disturbance or extreme provocation in contradistinction to all these situations in normal course.

(2) The age of the accused is a relevant consideration but not a determinative factor by itself.

(3) The chances of the accused of not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated.

(4) The condition of the accused shows that he was mentally defective and the defect impaired his capacity to appreciate the circumstances of his criminal conduct.

(5) The circumstances which, in normal course of life, would render such a behaviour possible and could have the effect of giving rise to mental imbalance in that given situation like persistent harassment or, in fact, leading to such a peak of human behaviour that, in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence.

(6) Where the court upon proper appreciation of evidence is of the view that the crime was not committed in a preordained manner and that the death resulted in the course of commission of another crime and that there was a possibility of it being construed as consequences to the commission of the primary crime.

(7) Where it is absolutely unsafe to rely upon the testimony of a sole eyewitness though the prosecution has brought home the guilt of the accused."

32. While imposing the penalty in the case of *Mukesh* (supra), the Apex Court analyzed the various cases of rape and murder wherein the death sentence was confirmed by the Court relying upon the judgment of *Shankar Kisanrao Khade v. State of Maharashtra* reported in (2013) 5 SCC 546 referring the reasons for confirming the death penalty in the above cases held as under:

"122. The principal reasons for confirming the death penalty in the above cases include:

(1) the cruel, diabolic, brutal, depraved and gruesome nature of the crime (Jumman Khan v. State of U.P. (1991) 1 SCC 752, Dhananjoy Chatterjee v. State of W.B. (1994) 2 SCC 220, Laxman Naik v. State of Orissa (1994) 3 SCC 381, Kamta Tewari v. State of M.P. (1996) 6 SCC 250, Nirmal Singh v. State of Haryana (1999) 3 SCC 670, Jai Kumar v. State of M.P. (1999) 5 SCC 1, State of U.P. v. Satish (2005) 3 SCC 114, Bantu v. State of U.P. (2008) 11 SCC 113, Ankush Maruti Shinde v. State of Maharashtra (2009) 6 SCC 667, B.A. Umesh v. State of Karnataka (2011) 3 SCC 85, Mohd. Mannan v. State of Bihar (2011) 5 SCC 317 and Rajendra Pralhadrao Wasnik v. State of Maharashtra (2012) 4 SCC 37);

(2) the crime results in public abhorrence, shocks the judicial conscience or the conscience of society or the community (Dhananjoy Chatterjee (1994) 2 SCC 220, Jai Kumar (1999) 5 SCC 1, Ankush Maruti Shinde (2009) 6 SCC 667 and Mohd. Mannan (2011) 5 SCC 317);

(3) the reform or rehabilitation of the convict is not likely or that he would be a menace to society (Jai Kumar(1999) 5 SCC 1, B.A. Umesh (2011) 3 SCC 85 and Mohd. Mannan (2011) 5 SCC 317);

(4) the victims were defenceless (Dhananjoy Chatterjee (1994) 2 SCC 220, Laxman Naik (1994) 3 SCC 381, Kamta Tewari (1996) 6 SCC 250, Ankush Maruti Shinde (2009) 6 SCC 667, Mohd. Mannan (2011) 5 SCC 317 and Rajendra Pralhadrao Wasnik (2012) 4 SCC 37);

(5) the crime was either unprovoked or that it was premeditated (Dhananjoy Chatterjee (1994) 2 SCC 220, Laxman Naik (1994) 3 SCC 381, Kamta Tewari (1996) 6 SCC 250, Nirmal Singh (1999) 3 SCC 670, Jai Kumar (1999) 5 SCC 1, Ankush Maruti Shinde (2009) 6 SCC 667, B.A. Umesh (2011) 3 SCC 85 and Mohd. Mannan (2011) 5 SCC 317) and in three cases the antecedents or the prior history of the convict was taken into consideration (Shivu v. High Court of Karnataka (2007) 4 SCC 713, B.A. Umesh (2011) 3 SCC 85 and Rajendra Pralhadrao Wasnik (2012) 4 SCC 37)."

33. The Court referring para-106 of *Shankar Kisanrao Khade* (supra) has stated that the cases where the death penalty was converted into imprisonment for life in which some of the factors that weighed by the Court are as under:

"106. A study of the above cases suggests that there are several reasons, cumulatively taken, for converting the death penalty to that of imprisonment for life. However, some of the factors that have had an influence in commutation include:

(1) the young age of the accused [Amit v. State of Maharashtra (2003) 8 SCC 93 aged 20 years, Rahul v. State of Maharashtra (2005) 10 SCC 322 aged 24 years, Santosh Kumar Singh v. State (2010) 9 SCC 747 aged 24 years, Rameshbhai

Chandubhai Rathod (2)(2011) 2 SCC 764 aged 28 years and Amit v. State of U.P.(2012) 4 SCC 107 aged 28 years];

(2) the possibility of reforming and rehabilitating the accused (in Santosh Kumar Singh (2010) 9 SCC 747 and Amit v. State of U.P.(2012) 4 SCC 107 the accused, incidentally, were young when they committed the crime);

(3) the accused had no prior criminal record (Nirmal Singh (1999) 3 SCC 670, Raju (2001) 9 SCC 50, Bantu (2001) 9 SCC 615, Amit v. State of Maharashtra (2003) 8 SCC 93, Surendra Pal Shivbalakpal (2005) 3 SCC 127, Rahul (2005) 10 SCC 322 and Amit v. State of U.P (2012) 4 SCC 107);

(4) the accused was not likely to be a menace or threat or danger to society or the community (Nirmal Singh (1999) 3 SCC 670, Mohd. Chaman (2001) 2 SCC 28, Raju (2001) 9 SCC 50, Bantu (2001) 9 SCC 615, Surendra Pal Shivbalakpal (2005) 3 SCC 127, Rahul (2005) 10 SCC 322 and Amit v. State of U.P. (2012) 4 SCC 107).

(5) a few other reasons need to be mentioned such as the accused having been acquitted by one of the courts (State of T.N. v. Suresh (1998) 2 SCC 372, State of Maharashtra v. Suresh (2000) 1 SCC 471, State of Maharashtra v. Bharat Fakira Dhiwar (2002) 1 SCC 622, State of Maharashtra v. Mansingh (2005) 3 SCC 131 and Santosh Kumar Singh (2010) 9 SCC 747);

(6) the crime was not premeditated (Kumudi Lal v. State of U.P. (1999) 4 SCC 108, Akhtar v. State of U.P. (1999) 6 SCC 60, Raju v. State of Haryana (2001) 9 SCC 50 and Amrit Singh v. State of Punjab (2006) 12 SCC 79);

(7) the case was one of circumstantial evidence (Mansingh (2005) 3 SCC 131 and Bishnu Prasad Sinha (2007) 11 SCC 467)."

34. Recently in the case of *Channulal Verma vs. State of Chhattisgarh* reported in 2018 SCC Online SC 2570, the three judges Bench of the Apex Court has taken into consideration the judgments of *Machhi Singh, Bachan Singh* (supra) and other judgments particularly the case of *Santosh Kumar Satishbhushan Bariyar* (supra) and *Shankar Kisanrao Khade* and also considering the 262nd Report of the Law Commission of the year 2015, which is as under:

"Chapter-VII of Report No. 262 contains the Conclusions and Recommendations. To quote :-

"A. Conclusions

7.1.1 The death penalty does not serve the penological goal of deterrence any more than life imprisonment. Further, life imprisonment under Indian law means imprisonment for the whole of life subject to just remissions which, in many states in cases of serious crimes, are granted only after many years of imprisonment which range from 30-60 years.

7.1.2 Retribution has an important role to play in punishment. However, it cannot be reduced to vengeance. The notion of "an eye for an eye, tooth for a tooth" has no place in our constitutionally mediated criminal justice system. Capital punishment fails to achieve any constitutionally valid penological goals.

7.1.3 In focusing on death penalty as the ultimate measure of justice to victims, the restorative and rehabilitative aspects of justice are lost sight of. Reliance on the death penalty diverts attention from other problems ailing the criminal justice system such as poor investigation, crime prevention and rights of victims of crime. It is essential that the State establish effective victim compensation schemes to rehabilitate victims of crime. At the same time, it is also essential that courts use the power granted to them under the Code of Criminal Procedure, 1973 to grant appropriate compensation to victims in suitable cases. The voices of victims and witnesses are often silenced by threats and other coercive techniques employed by powerful accused persons. Hence it is essential that a witness protection scheme also be established. The need for police reforms for better and more effective investigation and prosecution has also been universally felt for some time now and measures regarding the same need to be taken on a priority basis.

7.1.4 In the last decade, the Supreme Court has on numerous occasions expressed concern about arbitrary sentencing in death penalty cases. The Court has noted that it is difficult to distinguish cases where death penalty has been imposed from those where the alternative of life imprisonment has been applied. In the Court's own words "extremely uneven application of Bachan Singh has given rise to a state of uncertainty in capital sentencing law which clearly falls foul of constitutional due process and equality principle". The Court has also acknowledged erroneous imposition of the death sentence in contravention of Bachan Singh guidelines. Therefore, the constitutional regulation of capital punishment attempted in Bachan Singh has failed to prevent death sentences from being "arbitrarily and freakishly imposed".

7.1.5 There exists no principled method to remove such arbitrariness from capital sentencing. A rigid, standardization or categorization of offences which does not take into account the difference between cases is arbitrary in that it treats different cases on the same footing. Anything less categorical, like the Bachan Singh framework itself, has demonstrably and admittedly failed.

7.1.6 Numerous committee reports as well as judgments of the Supreme Court have recognized that the administration of criminal justice in the country is in deep crisis. Lack of resources, outdated modes of investigation, over-stretched police force, ineffective prosecution, and poor legal aid are some of the problems besetting the system. Death

penalty operates within this context and therefore suffers from the same structural and systemic impediments. The administration of capital punishment thus remains fallible and vulnerable to misapplication. The vagaries of the system also operate disproportionately against the socially and economically marginalized who may lack the resources to effectively advocate their rights within an adversarial criminal justice system.

7.1.7 Clemency powers usually come into play after a judicial conviction and sentencing of an offender. In exercise of these clemency powers, the President and Governor are empowered to scrutinize the record of the case and differ with the judicial verdict on the point of guilt or sentence. Even when they do not so differ, they are empowered to exercise their clemency powers to ameliorate hardship, correct error, or to do complete justice in a case by taking into account factors that are outside and beyond the judicial ken. They are also empowered to look at fresh evidence which was not placed before the courts. (Kehar Singh v. Union of India-(1989) 1 SCC 204 paras 7,10 & 16) Clemency powers, while exercisable for a wide range of considerations and on protean occasions, also function as the final safeguard against possibility of judicial error or miscarriage of justice. This casts a heavy responsibility on those wielding this power and necessitates a full application of mind, scrutiny of judicial records, and wide-ranging inquiries in adjudicating a clemency petition, especially one from a prisoner under a judicially confirmed death sentence who is on the very verge of execution. Further, the Supreme Court in Shatrughan Chauhan v. Union of India- (2014) 3 SCC1 -paras 55-56) has recorded various relevant considerations which are gone into by the Home Ministry while deciding mercy petitions.

7.1.8 The exercise of mercy powers under Article 72 and 161 have failed in acting as the final safeguard against miscarriage of justice in the imposition of the death sentence. The Supreme Court has repeatedly pointed out gaps and illegalities in how the executive confirms that retaining the death penalty is not a requirement for effectively responding to insurgency, terror or violent crime.

B. Recommendation

7.2.1 The Commission recommends that measures suggested in para 7.1.3 above, which include provisions for police reforms, witness protection scheme and victim compensation scheme should be taken up expeditiously by the government.

7.2.2 The march of our own jurisprudence— from removing the requirement of giving special reasons for imposing life imprisonment instead of death in 1955; to requiring special reasons for imposing the death penalty in 1973; to 1980 when the death penalty was restricted by the Supreme Court to rarest of rare cases - shows the direction in which

we have to head. Informed also by the expanded and deepened contents and horizons of the right to life and strengthened due process requirements in the interactions between the state and the individual, prevailing standards of constitutional morality and human dignity, the Commission feels that time has come for India to move towards abolition of the death penalty.

7.2.3 Although there is no valid penological justification for treating terrorism differently from other crimes, concern is often raised that abolition of death penalty for terrorism related offences and waging war, will affect national security. However, given the concerns raised by the law makers, the commission does not see any reason to wait any longer to take the first step towards abolition of the death penalty for all offences other than terrorism related offences.

7.2.4 The Commission accordingly recommends that the death penalty be abolished for all crimes other than terrorism related offences and waging war." (Emphasis supplied)

In the said judgment, the crucial points discussed by the three Judges Bench are as under:

"52. Aggravating circumstances as pointed out above, of course, are not exhaustive so also the mitigating circumstances. In my considered view, the tests that discussed in ***Shankar Kisan Rao Khade*** *(supra)* have to apply, while awarding death sentence are "crime test", "criminal test" and the "R-R test" and not the "balancing test". To award death sentence, the "crime test" has to be fully satisfied, that is, 100% and "criminal test" 0%, that is, no mitigating circumstance favouring the accused. If there is any circumstance favouring the accused, like lack of intention to commit the crime, possibility of reformation, young age of the accused, not a menace to the society, no previous track record, etc. the "criminal test" may favour the accused to avoid the capital punishment. Even if both the tests are satisfied, that is, the aggravating circumstances to the fullest extent and no mitigating circumstances favouring the accused, still we have to apply finally the rarest of the rare case test (R-R test). R-R test depends upon the perception of the society that is "society- centric" and not "Judge-centric", that is, whether the society will approve the awarding of death sentence to certain types of crimes or not. While applying that test, the court has to look into variety of factors like society's abhorrence, extreme indignation and antipathy to certain types of crimes like sexual assault and murder of intellectually challenged minor girls, suffering from physical disability, old and infirm women with those disabilities, etc. Examples are only illustrative and not exhaustive. The courts award death sentence since situation demands so, due to constitutional compulsion, reflected by the will of the people and not the will of the Judges." (Emphasis supplied)

35. It is relevant to note here that applying the ratio of *Jagmohan Singh, Rajendra Prasad, Bachan Singh & Machhi Singh* (supra), the Apex Court has awarded the death sentence and imprisonment for life. The Brief facts of the cases, reasons or special reasons to penalty of death or commutation accepting the aggravating and mitigating circumstances as discussed and the award of the sentence has been cataloged, which may be fruitful for reference to apply the ratio of the said judgments. In this regard, the description of those judgments may be find hereinbelow in a tabular form in two heads; (1) The cases in which the Apex Court affirmed the death sentence; and (2) The cases in which the death sentence is commuted to imprisonment for life, which are as under:-

Death Sentence Affirmed

S. No.	Details & Brief Facts of the case	Aggravating	Mitigating
1.	**(1991)3 SCC 471 (2J)-Sevaka Perumal & another vs. State of Tamil Nadu** **Offence-** u/s 302/34 and Section 364, 392, 120-B read with Section 397 IPC. The accused were indulged in illegal business of purchase and sale of Ganja. They conspired to entice innocent boys from affluent families, took them to far flung places where the dead body could not be identified. Letters were written to the parents purporting to be by the deceased to delude the parents that the missing boys would one day come home alive and that they would not give any report to the police and the crime would go undetected. Four murders in a span of five years were committed for gain in cold clouded, premeditated and planned way. One of the deceased was the nephew (elder sister's son) of the first accused.	i. Innocent boys victim. ii. Conspiracy to entice boys from affluent families. iii. Dead body could not be identified. iv. Four murders in a span of 5 years committed for gain in cold clouded, premeditated and planned way. v. Depravity & hardened criminality. vi. No regards for precious lives of innocent young boy. vii. Crime of murder for gain as a means of living.	i. Appellant young man. ii. Bread winner of the family.

* Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine to public confidence in the efficacy of law and society could not long endure under serious threats.			
2.	**(1994) 2 SCC 220 (2J) - Dhananjoy Chatterji @ Dhana vs. State of West Bengal.** **Offence-u/s** 302, 376 & 380 IPC. The accused was one of the security guard deputed to guard the building Anand Apartment. The deceased, a young girl of 18 years of age, complained to her mother that the accused had been teasing her on her way to and back from the school. On the complaint by the father of the deceased, the accused was transferred and another security guard was posted in his place. The accused went to the flat of the deceased at about 5.00 pm when she was all alone in her flat and committed rape and murder of the deceased.	1. Atrocity of the crime. 2. Conduct of the criminal. 3. Defenceless and without any provocation. 4. Unprotected state of victim. 5. Faith of society shaken. 6. Barbaric rape and murder.	1. Age 27 years. 2. Concern for dignity of human life is required to be kept in mind by the courts while considering the confirmation of sentence of death.
3.	**(1994) 3 SCC 381 (2J)- Laxman Naik vs. State of Orissa.** **Offence-**u/s 376 & 302 IPC. The accused alongwith his mother and her seven years' old grand daughter i.e. niece of the accused had gone to a neighbouring village to take part in a funeral ceremony. In the afternoon, when all the relatives assembled for the ceremony and were busy in the observance of the ceremony, the accused commanded the deceased, his seven years' old niece to	i. Accused uncle of the deceased and occupied status of guardian. ii. Victim 7 years old, unmindful of the preplanned, unholy designs of the accused. iii. Victim was a totally helpless child, no one to protect her in the desert. iv. Misused the	

	accompany him back to their village and the deceased followed him in obedience to his command. He sexually assaulted and murdered her, and her dead body was found lying in jungle with serious bleeding, injury in her private part and her clothes found smeared with blood.	confidence to fulfill the lust. v. Preplanned to commit by resorting to diabolic methods. Calculated, cold-blooded and brutal murder of girl of tender age.	
4.	**(1999) 5 SCC 1 (3J)- Jai Kumar vs. State of M.P.** **Offence -** u/s 302 IPC. The accused entered the house of his brother and bolted from outside the mother's room and thereafter removed certain bricks from the wall and Choukat. Thus facilitating the entry into the room where the deceased sister -in-law was sleeping with the child, the accused committed the murder of his sister-in-law at about 11.00 pm by parsul-blows and then kulhari blows on her neck severing her head from the body and taking away her eight years' old daughter and killing her in a jungle by axe-blows said to be by offering sacrifice to Mahua Maharaj and buried her in the sand covered with stone and thereafter came back home and carried the body of his deceased sister-in-law tied in a cloth to the jungle and hung the head tied on a branch with the hair and put the body on the trunk of the Mahua Tree .	i. Cold blooded murder of 2 who were in hapless and helpless situation without provocation. ii. Calculated Ghastly and Cruel murder. iii. Sent shock waves in the society. iv. Create feeling of revolt in the conscience. v. Subsequent disposal of the bodies. Living danger in the gruesome act	i. Age of accused 22 years. Possibility of Reformation

5.	**(2004) 2 SCC 338 (2J) -Sushil Murmu vs. State of Jharkhand** **Offence**-u/s 302 IPC. Human Sacrifice of Child 9 years old for prosperity of accused. The recovery of the dead body was at the behest of the accused, the severed head was recovered from the bag thrown in the pond.	i. No basic humanness. ii. Lacks the Psyche or mind set which can be amenable for any reformation. iii. Accused had a child of same age as of the victim , yet he diabolically designed in a most dastardly and revolting manner to sacrifice hapless and helpless child of another. iv. Brutality of act is amplified by the grotesque and revolting manner in which the helpless child's head was severed. v. Carried head in a Gunny bag and threw in the pond, shows diabolic act, cruel in execution. Planned and deliberate act.	
6.	**(2005) 3 SCC 114 (2J)-State of U.P vs Satish** **Offence-** u/s 363, 366, 376(2), 302 & 201 I.P.C On 16.8.2001 the victim who was studying in Sarvodaya Public School had gone to school and did not return at the usual time. On the next morning,	Relying on Principals (sic : Principles) laid down in Bachan Singh's case and Machhi Singh's case one of the Rarest of Rare.	

	her dead body was found in the sugarcane field of one Mulchand around 6.00 am. She was lying in a dead condition and blood was oozing from her private part and there were marks of pressing of her neck. The victim who was not even six years old lost her life on account of bestial act of the accused who raped her and thereafter murdered her.		
7.	**2005) 3 SCC 793 (2J)** **Holiram Bordoloi vs State of Assam.** **Offence-** U/S - 147, 148, 436, 326 & 302/149 I.P.C On the date of incident in question, the deceased was present at his house alongwith his wife, three children aged six years, eight years and sixteen years. The accused and the other accused persons who were armed with lathi, Dao, Jathi, Jong and various other weapons, came to the house of the deceased and started pelting stones on the bamboo wall of the said house. Thereafter, they closed the door from outside and set the house on fire. The son and one daughter and wife managed to come out from the house. The accused and another accused caught hold of him and threw him into the fire again. The deceased family was completely burnt and died on the spot. Thereafter, the elder brother who was staying in another	i. Cold blooded murder. ii. Accused leading the gang. iii. Victims did not provoke or contribute to the incident. iv. 2 victims were burnt to death by locking the house from outside. v. One of the victim was a 6 year old boy, who, somehow, managed to come out of the burning house, but he was mercilessly thrown back to the fire by accused. vi. Dragging of one of the victim by the accused to his house and then cutting him into pieces in broad day light, in the presence bystanders.	

	house at some distance of the house, was caught and dragged to the courtyard of the accused, where the accused cut him into pieces.	vii. The entire incident took place in the broad daylight and the crime was committed in the most barbaric manner to deter others from challenging the supremacy of the accused in the village. viii. Entire incident was preplanned. Accused when questioned under section 235(2) Cr.P.C on sentence did not say anything, silence shows he has no repentance for the ghastly act committed.	
8.	**(2007) 3 SCC 1 (2J)** **Ram Singh vs Sonia & others** **Offence u/s** - 354(3), 366, 368, 302 I.P.C The accused alongwith her husband murdered her step-brother and his family, which included 3 tiny tots aged 45 days, 2 and half year and 4 years, as also murdered her own father, mother and sister in a very diabolic manner so as to deprive her father from giving property to her stepbrother and his family.	i. Murder committed in diabolic manner. ii. Without any provocation. iii. Cold blooded and premediated. iv. Helpless victims. v. Not possessed with basic humanness as the act is brutal, grotesque and in revolting manner. vi. Completely lacks the psyche or mindset which can amenable for any reformation.	

9.	**(2007) 4 SCC 713** **Shivu & Another vs Registrar General, High Court of Karnataka & another** **Offence-U/S-** 302/34 & 376/34 I.P.C Accused aged about 20 and 22 years respectively were sexually obsessed youngsters, who prior to the alleged incident had attempted to rape two girls of same village, only Panchayat of village elders was called on each occasion and the accused were admonished. Emboldened they committed rape on the deceased, a young girl of 18 years and to avoid detection, committed heinous and brutal act of her murder.	1. Rarest of Rare Case following guidelines of Bachan Singh & Machhi Singh 2.Earlier 2 instances of Rape Recorded.	
10.	**(2008) 4 SCC 434** **Prajeet Kumar Singh vs State of Bihar** **Offence u/s-** 302 I.P.C The accused was living in the house where he was taking his meals for which he was paying Rs.500/- per month. For the last several months, he had not paid the amount and owed Rs.4000/- altogether as rent for the house and for food to the informant for which the informant was making demand regularly. The day before the incident, the accused came back at 3.00 pm. After having dinner, when the informant asked the accused for the dues, the accused told him	i. Brutality in murder as several incised wounds. ii. Victims were helpless and had no weapon. iii. Accused was living as P.G from 4 years, the act was preplanned. iv. Act was diabolic of the Superlative degree in conception and Cruel in execution and does not fall witin (sic : within) any comprehension of the basic humanness	

	that he should accompany him to his home where he would be paid his money. Thereafter, the informant and his wife went to sleep in their room which was on the third floor of the house and the accused also went to sleep in the adjoining room on the third floor. All the children of the informant were sleeping on the second floor. The accused picked up dab (dagger like weapon) from the house, and murdered the son of informant about 16 years, daughter about 15 years and niece about 8 years and caused injuries to the informant and his wife.	which indicates the mindset and cannot be said to be amenable to any reformation	
11.	**(2008) 7 SCC 561- Mohan Anna Chavan vs State of Maharashtra** **Offence u/s**-302, 363, 376, 201 I.P.C Two young girl aged five years and ten years were sexually assaulted and murdered. The appellant was serial rapist, convicted for kidnapping and raping a minor girl, again convicted for raping a girl less than nine years.	1. Serial Rapist 2. Rarest of Rare Case following guidelines of Bachan Singh & Machhi Singh	
12.	**(2008) 11 SCC 113 (2J)** **Bantu vs State of Uttar Pradesh** **Offence u/s-** 364, 376 & 302 I.P.C There was Devi Jagran in village, in the eventful night. A number of person of the locality	1. The serious kind of rape. 2. Planned manner. 3. Merciless in insertion of wooden stick causing death.	

	had assembled there. The informant, alongwith his brother and niece (deceased) had also gone there. Around 9.00 pm the accused, a neighbour of the informant reached there, and after exhibiting playful and friendly gesture with the deceased with whom he was familiar before because of neighbourhood, enticed her away on the pretext of giving her a balloon. The deceased aged six years was raped and murdered. The villagers saw the accused thrusting a stem/stick in the vagina of the deceased. The accused was caught red handed in completely naked state by the villagers and the deceased was lying on the ground with injuries over face, head and neck. A wooden stick of 33 cms was found inside the vagina, the total stick was 57 cms x 0.8 cms in diameters. The uterus was ruptured, perforated intestines and pressure marks were present on the stick.		
		* In operating the sentencing system, law should adopt the corrective machinery or the deterrence based on factual matrix. By deft modulation sentencing process	

		be stern where it should be, and tempered with mercy where it warrants to be.	
13.	**(2009) 6 SCC 667 (2J) -** **Ankush Maruti Shinde & others vs State of Maharashtra.** **Offence-u/s** 397 read with Section 395 and 396, Section 307 read with Section 34 and Section 376 of IPC. The accused entered the house of the victim at about 10.30 pm demanding money and valuable from them. The accused also snatched ornaments worn by the family members. Thereafter, they went out of the hut and consumed liquor. After some time, they re-entered the hut armed, started assaulting the family members and tied hands and legs of all. Three of accused then dragged a young girl aged 15 years out of the hut to guava garden, gang raped her. She was brought back dead in naked condition with injuries on her body. The other girl was also dragged towards the well and raped by one. She was brought back seriously injured. In the occurrence, five persons were murdered and two raped.	i. Murder were not only cruel, brutal but were diabolic. ii. Rape and murdered one victim of 15 years. iii. Incident is extremely revolting and shocking to conscience of community. iv. Defenceless attack without provocation and no animosity.	

14.	**(2010) 9 SCC 567-C.** **Muniappan & others vs State of Tamilnadu** **with** **D.K. Rajendran & anothers vs State of Tamilnadu** **Offence - U/S- 302 I.P.C** In a public demonstration against a court verdict, the accused became violent, violated prohibitory order and prevented the free flow of traffic and caused nuisance to general public at large. The accused were involved in two incidents. In the first incident, the accused burnt and damaged several buses. In the second incident burnt a bus carrying college girls where three girls were burnt to death and twenty were severely injured.	i. Offence had been committed after previous planning and extreme brutality. ii. Murder of helpless and unarmed young girl students in a totally unprovoked situation. iii. This activity is inhuman of the highest degree. iv. Commission of an offence is extremely brutal, diabolical, grotesque and cruel. v. Shocking to the collective conscience of the society.	
15.	**(2010) 10 SCC 611** **Sunder Singh vs State of Uttranchal** **Offence-U/S-** 302, 307, 436 I.P.C In this ghastly incident five persons of the same family were roasted alive and died either on the spot or while being taken to the hospital or in the hospital, and one suffered the burn injuries.	i. Murder committed in a cruel, grotesque and diabolic manner. ii. Poured Petrol in the room set it to fire and closed the room also. iii. Premeditated and cold- blooded mind, as had carried petrol to his own cousins house. iv. Agony caused by dying witnesses because of their burn injuries would be enormous.	i. Age of accused. ii. Rash act, without intention. iii. Remaining under shadow of death since 2004 till 2010.

		v. No immediate provocation though enmity of family land was going on. vi. Deceased were without arms and helpless.	
16.	**(2011) 5 SCC 317-** **Mohd. Mannan @ Abdul Mannan vs State of Bihar** **Offence-U/S-** 302, 376, 366 & 201 I.P.C The accused was working as a mason and engaged for the plaster work at the residence of informant's uncle. The accused gave two rupees to the niece of the informant aged about eight years to bring betel from the shop. After some time, the accused left the work, went to the shop and got seated the victim on the carrier of his bicycle, thereafter raped and murdered her. The deceased had injuries on the private part, her nails were munched and there were marks of bruises all over the body.	Rarest of Rare Case i. Age of accused, a matured man. ii. Misused the Trust in a calculated and pre-planned manner. iii. Girl aged 7 years, innocent and did no provocation for murder and was helpless and defenceless. iv. Act extreme indignation of the community and shocked the collective conscience of the society. v. Accused is a menace to the society and shall continue to be so and cannot be reformed.	
17.	**(2012) 4 SCC 37** **Rajendra Pralhadro Wasnik vs State of Maharashtra.** **Offence- U/S** - 302, 376(2)(f) & 377 I.P.C The accused came to the house of the victim at about 4.00 pm	Rarest of Rare Test i. Took advantage of the familiarity with the family under false name. ii. Belied the human relationship of Trust	

	and after having tea he left. Thereafter, again he came to the house at about 6.30 pm and took the victim to get her biscuit. The victim aged three years was raped and brutally murdered.	and Worthiness. iii. Crime is brutal and inhuman; all her private parts swollen and bleeding. Bleeding through nose and mouth, bites on chest. The pain and agony of the deceased minor girl is beyond imagination and is the limit of viciousness. iv. Left the deceased in badly condition without clothes, this is the abusive facet of human conduct.	
18.	**(2013) 3 SCC 215 (2J)** **Sunder @ Sundarajan vs State by Inspector of Police** **Offence-U/S** - 364-A, 302, 201 I.P.C The accused was waiting on a motorcycle near the school van of the victim, he told the victim that his mother had instructed him to bring the victim to the hospital since his mother and grand mother were not well. Thereafter, the family members received a call on the mobile phone, demanding ransom of Rs.5 lakhs for the release of their son. The accused strangulated the victim for ransom, put his body in a gunny bag and threw it in the tank.	i. Found guilty of offence U/S - 364-A IPC. ii. Guilty of offence U/S-302 I.P.C. iii. Child of 7 years. iv. No value for human life, as the child was killed for non- fulfillment of ransom demand. v. Extreme mental perversion not worthy of human conditions. vi. Traits of outrageous criminality.	

		vii. Well thought and planned manner. viii. Acquaintance choice of kidnapping male child, planned and consciously motivated.	
19.	**(2013) 10 SCC 421** **Deepak Rai vs State of Bihar** **Offence U/S -** 120-B, 148, 302 Read With Section 149, 307 Read With 149, 326, 429, 436 & 452 I.P.C The accused came to informant's house at 1.00 am, overpowered the husband of the deceased (sleeping in the veranda) and on the instruction of the accused, locked the door of the room where the wife and their five children aged 3 to 12 years were sleeping and set the house on fire after trapping them. When the informant attempted to save himself, they fired at him but he manged (sic : managed) to escape. The motive for the act was that the informant had not withdrawn FIR against the accused for theft of his buffalo.	i. Time, place, manner of and the motive behind commission of crime speaks loud of premeditated and callous nature of offence. ii. Ruthlessness and brutal murder by burning young children and lady alive to avenge their cause. iii. The threat the incident had instilled amongst the villagers, as no one deposed against the accused. iv. Extremely revolting and shocks the collective conscience of the community. v. Cold-blooded murder in a preordained fashion without provocation.	i. Young age. ii. Army background. iii. Custodial behavior. Lack of Criminal Antecedents.

20.	**(2015) 1 SCC 67- Mofil khan and another vs State of Jharkhand.** **U/S -** 302/449 Read With Section 34 At about 8.30 pm the deceased was offering Namaz in the mosque. The accused and others, who were none other than the deceased's brothers and nephews approached him, started assaulting him with sharp edged weapon such as sword, Tangi, Bhujali and spade. The deceased succumbed to the injuries. The accused, proceeded towards the house of the deceased and assaulted the two unarmed brothers with the aforesaid weapons due to which the two brothers collapsed and died. Thereafter the accused committed murder of the wife of the deceased and his four sons aged between 5 to 12 years.	i. Menace, threat and anti-theatrical to harmony in the society. ii. No provocation. iii. Deliberately preplanned crime. Diabolic murder.	i. No criminal antecedents. ii. Middle aged having dependant who would be devastated. iii. Reformation possibility.
21.	**(2015) 6 SCC 632 (3J) - Shabnam vs State of U.P** **Offence U/S** - 302/34 I.P.C The accused daughter involved in relationship with the other accused, driven by opposition to their alliance from the deceased family and alive to conception of their illegitimate child and to secure entire family property had hatched, depraved plan to first administer the family sedative mixed in tea prepared by the accused daughter and thereafter bleeding them to death by	i.Murder of own kith and kin. ii. Extreme brutal, calculated and diabolic nature of crime. iii. Little likelihood of reform and abstaining from future crime. iv. Motive for commission. v. Manner of execution.	Young age. Accused was pregnant and now has a minor child.

	slitting vital blood vessels in their throats. Murdered seven innocent persons and did not even spare ten months old infant, so as to leave no survivor for claiming share in family property in future.	vi. Magnitude of crime. vii Remorseless attitude.	
22.	**(2015) 6 SCC 652 (3J)** **Purshottam Dasrath Borate and another vs State of Maharashtra** **Offence U/S -** 302, 376 (2)(g), 364, 404 Read With Section 120-B I.P.C. The deceased was serving as an associate in a company for about a year, where she used to work in the night shift i.e. from 11.00 pm to 9.00 am. The company had arranged for and hired a private cab service to transport its employees from their residence to work place. Further, to ensure the safety and security of its female employees, the company imposed a mandatory condition upon the owner of the cab that a security guard be present. On the fateful day the cab was deputed to pickup the deceased from her residence at 10.30 pm. The driver of the cab and the security guard took the deceased to a jungle area and committed gang rape with the deceased and thereafter murdered her by means of strangulating her with her own Odhani, slashing her wrist with a blade and smashing	i. No provocation. ii. Meticulously executed a deliberate, cold blooded and preplanned crime. iii. Scant regard to the consequences. iv. Sheer brutality and apathy for human. v. Menace to society. vi. Impact of crime on community and particularly women in night shifts. Helpless young woman who had reposed trust.	i. Age. Lack of Criminal antecedents.

	her head with a stone, tripped the deceased of her possession and money and left her body in the field.		
23.	**(2017) 4 SCC 124 (3J)** **B.A. Umesh Vs. Registrar General, High Court of Karnataka** **Offence:u/s-** 376, 302 & 392 of IPC The accused raped, murdered and committed robbery. The victim, a widow lady was subjected to brutal rape and murder.	i. Strangulation of defenseless woman after raping her violently. ii. In addition, committed robbery. iii. Accused an ex-police official, not an illiterate villager. iv. Criminal history of 21 cases. v. Emboldened committed two more robbery. vi. Fled from lawful custody twice, no chance of reformation.	i. Accused aged 30 years. ii. Left seven years child unharmed. iii. Murder was not per-meditated (sic : pre- meditated). iv. Previous history not of rape & murder. v. Case of circumstantial evidence. vi. One H.C. Judge opined life imprisonment.
24.	**(2017) 6 SCC 1 (3J)** **Mukesh & another vs State (NCT of Delhi)** **U/S -** 365, 366, 376 (2)(g), 377, 201, 395, 397, 412, 302/ 120-B I.P.C Gang rape of a girl and murder of two inside moving bus and prosecutrix assaulted with hands, iron rods and kicks. Forced for oral sex. Entire intestine of prosecutrix perforated and splayed open due to repeated insertion of iron rods and hands repeatedly. Pulled out her internal organs and		i. Family circumstances such as poverty and rural background. ii. Young age. iii. Age of parents, ill-health of family members and their responsibilities. iv. Absence of criminal antecedents.

	threw the deceased in naked state from the moving bus. The friend of the deceased was also beaten up and thrown out of the bus.		v. Conduct in jail. vi. Likelihood of reformation.
25.	**Cr.A. No. 1433-1434/2014 - Khushwinder Singh Vs. State of Punjab.** **Offence: u/s** 302 of IPC. Accused stolen Rs.36,70,000/- after administering pills to six victims and threw them in the canal.	I. Six innocent persons killed. ii. Pre-planned manner. iii. Death in a diabolic and dastardly manner. iv. Extreme brutality. v. Collective conscious of society shocked. vi. Eyewitness account.	
<u>Death Sentence Commuted to Life Imprisonment</u>			
1.	**(1994) 4 SCC 353 - Jashubha Bharat Singh Gohil vs. State of Gujrat.** **Offence- u/s** 302 IPC 12 persons tried for committing murder of ten persons and causing injuries to others. Trial Court convicted the accused for life imprisonment and High Court enhanced the punishment to death sentence. Supreme Court commuted to Life Imprisonment.	1. Ten murders taken place in broad day light. 2. Conscious of the state shaken. 3. The manner in which the murders were committed exposed its gravity. 4. Unarmed and innocent persons, returning after offering condolence.	Specter of death hanging over head of the accused for more than six years.
	Special reasons to be assigned u/s 354(3) Cr.P.C..		

2.	**(1999) 3 SCC 19 - Om Prakash Vs. State of Haryana** **Offence- u/s** 302/34 IPC and Section 25 of the Arms Act. The accused, who were the neighbours of the deceased, entered into the house from the rear door and fired at the deceased and his family members to take revenge regarding the plot in dispute and dread anybody to confront them at the risk of elimination. 7 persons murdered.	i. Gruesome act. ii. Premeditated and well though murder.	*Noticing the mentally depressed condition, caused by constant harassment and dispute. Held not rarest of rare case, as this is not a crime committed because of lust for wealth or woman; such as extortion, decoity (sic : dacoity) or robbery nor even for lust and rape, it is not an act of anti social element, kidnapping and trafficking a minor girl or dealing in dangerous drugs which affects the entire moral fibers of the society and kills a number of persons, nor it is a crime committed for power or critical ambitions or part of organized criminal activities.

3.	**(2001) 2 SCC 28 - Mohd. Chaman vs. State (NCT of Delhi)** **u/s** 376, 302 of the IPC. The father of the victim was running a tailoring factory near his house. The accused was residing in the same house in a room adjacent to the room of the victim's parents. The accused sexually assaulted the victim aged 1 ½ years bitten over the cheek, injuries in vaginal wall, liver lacerated with vertical deep laceration, in the adjacent room from where the mother of the victim picked up the victim in an unconscious state, who was declared dead by the Doctor.	i. Age of victim 1 ½ years. ii. Prey to lust of 30 years old man in a preplanned way. iii. Killed in most revolting manner arousing intense and extreme indignation of the community. iv. An act of extreme depravity and arouses a sense of revolution in the mind of common man. v. Menace to the society as it is a calculated and cold-blooded murder.	i. No criminal antecedents. ii. No possibility of continued threat to the society or such; a dangerous person that to spare his life will endanger the community.
4.	**(2002) 3 SCC 76 - Lehna vs. State of Haryana** **Offence: u/s** 302, 458, 324 IPC. The father of deceased and accused had given 2 acres of land to the accused for the purpose of cultivation but the accused who was a person of bad habits tried to alienate the land that was given to him by his father. There was constant quarrel between the family over the ancestral land and the accused assaulted the deceased and the family members and three persons of the same family died.	1. The injuries sustained by the accused were of very serious nature. 2. Three persons of the same family died, who were his own kith and kins.	(i). No evidence of any diabolic planning to commit the crime. (ii) Deprived of the livelihood on account of the land being taken away. (iii) Frequency of quarrels indicates lack of any sinister planning to take away lives. (iv) The factual scenario gives impression of

			impulsive act and not planned assault.
5.	**(2002) 9 SCC 168 - Vashram NarshiBhai Rajpara vs. State of Gujrat.** **Offence:** 302 and 201 IPC. The accused, a fruit vendor purchased a house and started living in the house with his family consisting of his wife, four daughters and a son aged 5 years. The wife and the daughter of the accused did not like the house and started pressurizing him to sell and purchase another house. The accused purchased 5 litres of petrol in plastic can and kept in the kitchen. The accused and his son slept on the terrace of the house and other members slept in the rear room on the ground floor. At about 3.00 am, the accused sprinkled the petrol on his wife and daughters and set them on fire, thereafter, the accused ran away from the room by closing the door from outside. Brutal and cold blooded murder of his wife and four daughters by setting them on fire.	i. Meticulously planned. ii. Brutal & a gruesome act.	i. Quarrels and continuous harassment. ii. Constant nagging well affected the mental balance and such sustained provocation. iii. No criminal background and not menace to the society. iv. Mentally depressed condition of the accused.
6.	**(2003) 7 SCC 141 - Ram Pal Vs. State of U.P.** **Offence:** 302, 307, 436, 440/149 of IPC. The victim's family was accused of having committed the murder of two of the close relatives of the accused family, who in turn	i. 21 persons murdered by gunshot injuries or by burning in latched houses. ii. Young children were victims.	i. Incident was a sequel of murder of close relative of accused by the victims family. ii. Sufficient provocation.

	murdered 21 persons including young children by gunshot injury or burning them in latched houses.		iii. Spent 17 years in custody after the incident.
Balance sheet of the aggravating and mitigating circumstances has to be drawn up and further to accord full weightage to the mitigating circumstances and then to strike a balance between the aggravating and mitigating circumstances before the option is exercised.			
7.	**(2008) 13 SCC 767 -Swamy Shraddanand @ Murli Manohar Mishra vs. State of Karnataka.** **Offence u/s:** 302, 201 IPC. The accused married the deceased who came from a highly reputed and wealthy background. She was the grand daughter of a former Deewan of the Princely State of Mysore and held vast and very valuable landed properties in her own right. The accused murdered his wife after giving heavy dose of sleeping pills and put her in a wooden box when she was alive, dug a pit, filled with earth and cemented the surface and covered with stone slab.	i. Planned and cold-blooded murder. ii. Motive behind the crime.	Standardisation of sentence process impossible and tends to sacrifice justice at the altar of uniformity.
8.	**(2009) 6 SCC 498 -** **Santosh Kumar Satish Bariyar vs. State of Maharashtra** **Offence: u/s** 302 IPC The accused, who were the friends of the victim, hatched a conspiracy to abduct the victim for a ransom of Rs.10 lakhs from the victim's family.	i. Manner and method of disposal of the body of deceased was abhorrent. ii. Most foul and despicable case of murder.	i. Deceased was friend not enemy of accused. ii. Motive to collect money. iii. Age of accused. iv. No criminal history. v. Not professional killer.

	The accused called the victim to see a movie and after seeing the movie a ransom call for a demand of Rs. 10 lakhs was made but with fear of being caught, they murdered the victim, cut the body into pieces and disposed it off at different places.		vi. All unemployed and searching jobs. vii. Reformation and rehabilitation.
*Doctrine of Rehabilitation and weightage of mitigating circumstances. *Doctrine of Prudence in case of circumstantial evidence.			
9.	**(2010) 9 SCC 747 - Santosh Kumar Singh vs. State through CBI** **Offence u/s:** 302 & 376 IPC. Deceased student of LLB 6th Semester was being harassed and intimidated by the accused continuously, thereupon, the deceased made several complaints against the accused in different Police stations. On day of incident the deceased returned to her residence, where she was sexually assaulted and murdered by the accused. There were 19 injuries on the body, but no internal injury on private parts.	i. Accused belongs to a category with unlimited power or pelf or even more dangerously, a volatile and heady cocktail of the two.	i. Case of circumstantial evidence. ii. Age of accused 24/25 years. iii. Motive and murder had been proceeded by continuous harassment by the deceased over two years.
10.	**(2011) 3 SCC 685- Ramesh & others v. State of Rajasthan** **Offence u/s:** 302, 392, 120-B, 201, 404, 414, 457 & 460/34 IPC Accused Gordhanlal conspired with other accused persons trespassed into the house of deceased Ramlal by night and	i. Murder of gains. ii. Criminal record. iii. Ramesh/appellant inflicted injuries on both the deceased.	i. Accused not from wealthy background. ii. Motive was money. iii. Circumstantial evidence. iv. Reformation and

	looted ornaments of gold and silver and murdered 2 persons.		Rehabilitation. v. Languishing in Death Cell for more than six years.
11.	**(2011) 7 SCC 437 - State of Maharashtra vs. Goraksha Ambaju Adsul.** **Offence: u/s-** 302, 201 of IPC The accused who was serving in the Indian Army, used to demand partition of land and other property for him and his brother from his father. He and his brother murdered their father and 2 family members. The deceased were administered poisonous substance in pedas then strangulated with shoe laces and placed bodies in 2 trunks and left them in the train, which were found by the Station Master next day.	i. Brutal and diabolic killing of 3 innocent family members. ii. Manner in which crime committed is deplorable.	i. 2nd marriage of father. ii. Continuous quarrels for division of property. iii. Increase of pressure with passage of time and frustration. iv. Intensity of bitterness between members of family had exacerbated thought of revenge and retaliation. v. Continuous nagging.
12.	**(2012) 4 SCC 257-Ramnaresh & others vs. State of Chhattisgarh.** **Offence: u/s-** 449, 376(2)(g) and 302/34 IPC. One of the accused, brother-in law of the deceased, along with the other accused entered the house of deceased when her husband was away and committed rape and murdered her.	i. Crime has been committed brutally. ii. Accused Ranjeet being brother-in-law of deceased owed a duty to protect rather than sexual assault and murder alongwith his friends. iii. Crime is heinuous committed brutally.	i. Age of all accused. ii. Since deceased was mistress of brother of accused Ranjeet, this may have been matter of concern. iii. Possibility of death of the deceased

		iv. Helplessness of a mother of two infant at the odd hour of night in absence of her husband.	occurring co-incidentally as a result of act committed on her, thus not caused intentionally. iv. Not criminals nor incapable of being reformed cannot be terms menace.
	Doctorine (sic : Doctrine) of Proportionality - The principle of proportion between the crime and the punishment is the principle of 'Just Deserts' that serves the foundation of every criminal sentence that is justifiable.		
13.	**(2012) 5 SCC 766 - Neel Kumar @ Anil Kumar vs. State of Haryana** **Offence: u/s-** 376(2)(f), 302 & 201 IPC. The accused, father of the deceased, raped his own daughter who was 4 years old and murdered her. Cause of death was Asphyxia because of throttling which was antimortem in nature, lacerated wound was present in vagina extended from anus to urethral, opening admitting 4 fingers. Underlined muscles and ligaments were exposed and anus was also torn and on dissection, uterus was perforated in the abdomen.	i. Nature of offence. ii. Age of victim. iii. Relationship of victim with accused. iv. Gravity of injuries.	i. The accused can be reformed or rehabilitated. ii. Not a continuous threat to society.
14.	**(2013) 2 SCC 452 -Sangeet and another vs. State of Haryana.** **Offence u/s-**: 302, 307, 148, 449 r/w 149 IPC.		i. Body of Seema was burnt below the waist with a view to destroy evidence

	Due to the belief that the family of injured Amardeep had performed black magic leading to death of son of Ramphal, Ramphal & 5 other accused killed 3 adults and 1 child aged 3 years. The 3 adults had bullet injuries other injuries by sharp edged weapon "kukri'. Body of Seema was burnt below the waist and upper part of head of child.		of sexual assault. ii. No evidence of being professional killers. Rahul was blown off by firearm injury.

- This Court has not endrosed the approach of aggravating and mitigating circumstances in Bachan Singh. However, this approach has been adopted in several decisions. This needs a fresh look. In any even, there is little or no uniformity in the application of this approach.
- Aggravating circumstances relate to the crime while mitigating circumstances relate to criminal. A balance sheet cannot be drawn up for comparing the two. The considerations for both are distinct and unrelated. The use of mantra of aggravating and mitigating circumstances needs a review.
- In the sentence process, both the crime and the criminal are equally important. We have, unfortunately, not taken the sentencing process as seriously as it should be with the result that in capital offences, it has become Judge-centric sentencing rather than principled sentencing.
- The Constitution Bench of this Court has not encouraged standardisation and categorisation of crimes and even otherwise it is not possible to standardise and categorise all crimes.
- The grant of remission is statutory. However, to prevent its arbitrary exercise, the legislature has built in some procedural and substantive checks in statute. These need to be faithfully enforced.
- Emission can be granted under Section 432 Cr.P.C in the case of definite term of sentence. The power under this section is available only for granting "additional" remission., that is, for a period over and above the remission granted or awarded to a convict under the Jail Manual or other statutory rules. If the term of sentence is indefinite (as in life imprisonment), the power under Section 432 CrPC can certainly be exercised but not on the basis of that life imprisonment is an arbitrary or notional figure of twenty years of imprisonment.

• Before actually exercising the power of remission under Section 432 CrPC the appropriate Government must obtain the opinion (with reasons) of the Presiding Judge of the convicting or confirming Court. Remissions can, therefore, be given only on a case -by- case basis and not on in a wholesale manner.			
15.	**(2013)(2) SCC 713 -Gurvail Singh @ Gola and another vs. State of Punjab.** **Offence-: u/s** 302/34 IPC Accused and deceased were member of same family and there was dispute with regard to mutation of their shares in their names, since property was not mutated. The accused persons armed with Datar, Kirpan and Toka assaulted 4 persons of their family and murdered them.	Extremely brutal, grotesque, diabolic.	i. Age of first accused was 34 years and second was 22 years. ii. Unblemished antecedents. iii. Property dispute which culminated into death of four persons. iv Reformation and rehabilitation.
R-R Test- 1. Depends on the perception of the society and not Judge-centric. 2. Looks into various factors: 1. Society's abhorrence. 2. Extreme indignation and antipathy to certain types of crime, like rape and murder of minor girls, especially intellectually challenged minor girls, minor girls with physical disability, old and infirm women with disabilities.			
16.	**(2013) 5 SCC 546 -Shankar Kisanrao Khade vs. State of Maharashtra.** **Offence- u/s** 363, 366A, 376, 302, 201 IPC Gruesome murder of a minor girl, aged 11 years, with Intellectual Disability (moderate) after subjecting her to a series of acts of rape by a middle aged, strangulated and murdered her.	i. Victim aged 11 years, innocent, defenseless and having moderate intellectual disability. ii. The accused was a fatherly figure of 52 years, father of two children. iii. Ghastly manner of execution of crime.	i. Previous track record of accused. ii. Other options are not unquestionably/ foreclosed.

	The cause of death was Asphyxia due to strangulation and clear evidence of carnal intercourse were there.	iv. Ruthless crime as per rape was committed followed by murder. v. The action of the accused was not only inhuman but also barbaric. vi. Shocks not only judicial conscience but the conscience of the society. vii. Considering the age of accused reformation or rehabilitation is practically ruled out.	
17.	**(2014) 4 SCC 69-Anil @ Anthony Arikswamy Joseph vs. State of Maharashtra.** **Offence- u/s** 302, 377, 201 IPC. Gruesome murder of a minor boy, aged 10 years, who was staying with him from few days, after subjecting to carnal intercourse and then strangulating him to death.	i. Offence u/s 377 proved. ii. Murder was committed in an extremely brutal, grotesque, diabolical and dastardly manner. iii. Victim and innocent boy and only son of his mother. iv. Accused was in a dominating position. v. Life taken away in a gruesome and barbaric manner, pricked not only the judicial conscience but also the conscience of the society.	i. No previous criminal history. ii. Possibility of reformation or rehabilitation at the age of 42 years cannot be ruled out.

18.	**(2014) 5 SCC 353-Raj Kumar vs. State of M.P.** **Offence: u/s** 376, 450, 302 IPC The accused was the neighbor of the deceased and used to call him 'Mama'. On the said night the accused had taken liquor and meals in the house of the deceased and around midnight he raped the deceased aged 14 years and murdered her. The hymen of the deceased was torn and blood was oozing out from her private parts, some blood was also present in the cavity of her uterus.	i. Heinous crime. ii. Innocent, defenseless and helpless minor girl. iii. Relationship of accused with family of deceased. iv. Shocked the conscience of society.	Accused aged 32 years.
19.	**(2016) 9 SCC 675- Tattu Lodhi @ Pancham Lodhi vs. State of M.P.** **Offence: u/s** 366A, 364, 376(2)(f)/511, 201 IPC. The accused asked the victim to purchase and bring gutka for him, thereafter Kidnapped and committed rape of a minor girl, aged 7 year. The deceased put the dead body in a gunny bag and locked it in his house, with a view for destruction of evidence relating to the crime. The victim was throttled to death.	i. Brutality. ii. Helplessness of victim. iii. Unprovoked and premeditated design to attack.	Accused was about 27 years and there was no material to negate the chance of accused being reformed and gaining maturity.
20.	**(2017) 4 SCC 393 -Sunil vs. State of M.P.** Accused, 25 years old taken his niece (victim) aged 4 years on pretext of taking her to the parents and raped her and murdered her.		i. Young age of accused. ii. Can be reformed and rehabilitated. iii. Probability of not committing similar crime.

			iv. Not a threat to society.
21.	**2018 SCC Online SC 2570 - Chhannu Lal Verma vs. State of Chhattisgarh.** **Offence - u/s** 302, 307, 506(2) & 450 IPC The accused entered the house of the deceased and caused fatal injuries to 3 members of the family. Thereafter, the accused entered another house and inflicted grievous injuries to one person.	i. Murder of 3 persons. ii. Two of the deceased and one of the injured person were the women.	i. No evidence as to the uncommon nature of the offence or the improbability of reformation or rehabilitation of the accused has been adduced. ii. No analysis undertaken by the High Court, whether, the person would be a threat to the society or whether not granting Death Penalty would send a wrong message to the society. iii No previous criminal record apart from acquittal in the case under Section 376 I.P.C. iv. Does not fulfill the test of Rarest of Rare case, where the alternative option is unquestionably foreclosed.

			v. Despite having lost all hope, yet no frustration has set on the accused as per the certificate given by the Superintendent of jail, that, his conduct in jail has been good. Thus goes on to show that, he is not beyond reform. vi. Without assistance of psychological / psychiatric assessment and evaluation it would not be proper to hold, that, there is no possibility or probability of reform. vii. Procedural impropriety of not having a separate hearing for sentencing at the stage of trial. A bifurcated hearing for conviction and sentencing, a necessary condition.

22.	**(2019) 2 SCC 311 Viran Gyanlal Rajput vs. State of Maharashtra** **Offence- u/s** 363, 376, 302 and 201 of IPC and Section 10 and 4 of POCSO Act. The accused kidnapped the victim aged 13 years, raped her, murdered her by strangulation and buried her body in the field.	i. Dastardly nature and manner of crime. ii. Youth and helplessness of the victim.	i. Young age. ii. Lack of criminal antecedents. iii. Post incarceration conduct. iv. Not a menace to society. v. Possibility of reform.
23.	**(2019) SCC Online SC 42- Yogendra @ Joginder Singh vs. State of M.P.** **Offence: u/s** 302, 326A and 460 IPC. The deceased was married and had two issues. The accused snug into the room of the deceased and warned her that, as she doesn't want to live with him, he is not going to let her live neither anybody else and threw acid on her. When the other family members tried to save her, the accused threw acid on them, in the attack the deceased sustained 90% burn injuries and died and the other three members were disfigured and injured.	Accused was out on bail in another case and has committed the crime.	i.Disappointed with the deceased, who he believed had deserted him. ii. Not a cold blooded murder. iii. Intention was to cause injury or disfigurement, what was premeditated was injury not death. v. No particular depravity or brutality in the acts.
*There should be special reasons for sentencing to death. The term, 'Special Reasons' undoubtedly means, reasons that are, one of a special kind and not general reasons.			
24.	**2019 SCC Online SC 43 - Nand Kishore vs State of M.P.** **Offence: u/s** 302, 363,3 66, 367(2)(i) IPC.		*Special Reasons " not assigned by the High Court within the

	The accused took away the deceased aged 8 years from the 'Mela' and committed rape and murdered her in a barbaric manner. Both legs of the deceased were fractured. Several injuries on the private parts of the deceased inflicted by the accused due to which the intestine had come out. The headless body of the deceased was recovered.		meaning of section 354(3) Cr.P.C to impose death penalty on the accused.
	*Para 14, Ratio of Mukesh and another vs State of (NCT of Delhi)		
25	**(2019) SCC Online SC 81- Raju Jagdish Paswan vs. State of Maharashtra.** **Offence: u/s** 302, 376(2)(f) and 201 IPC. The accused dragged the victim aged 9 year old into the sugarcane field, forcibly raped her and threw her in the well. The cause of death was drowning and there was evidence of vaginal as well as anal intercourse.	i. Murder involves exceptional depravity. ii. Manner of commission of crime is extremely brutal.	i. Murder not preplanned. ii. Accused young man aged 22 years. iii. No evidence produced by prosecution that the accused had the propensity of committing further crimes, causing continuity of threat to society. iv. The state did not bring on record any evidence to show that the accused cannot be reformed and rehabilitated.

26	**(2019) SCC Online SC 363 - Sachine Kumar Singraha vs. State of M.P.** **Offence: u/s** 363, 376A, 302, 201-II IPC & Section 5(i)(m) r/w Section 6 of POCSO Act. The accused was the owner and driver of the vehicle in which he had taken the victim aged 5 years to the school, from the custody of her uncle on the false pretext of going along with her to school as he had to pay fees of his daughter. Thereafter, the victim was raped and murdered and body was found in the well with only an underwear.	i. Heinous offence in a premeditated manner. ii. False pretext given to the uncle of victim to gain custody of victim. iii. Abused faith. iv. Exploited the innocence and helplessness of the child.	i. Case rests on circumstantial evidence. ii. Probability of reformation. iii. Absence of prior offending history. iv. His overall conduct.
27.	**Criminal Appeal No. 1411/2018-** **Dhyaneshwar Suresh Borkar vs. State of Maharashtra** **Offence- u/s** 302, 364, 201, 34 IPC Accused killed a minor child.		I. Age of accused at the time of commission of offence was 22 years. ii. Spent 18 years in jail. iii. While in jail, his conduct was good. iv. Tried to join the society and has tried to become civilised man, completed his graduation from Jail. He has tried to become reformative. v. Written poem from jail. It appears he has realized his mistake.

36. If we analyze the judgments of the Apex Court, particularly the case of *Jagmohan Singh* (supra), the Apex Court has directed to consider the circumstances which are to be considered in alleviation of punishment, those factors are as under:

(i) The minority of the offender;

(ii) The old age of the offender;

(iii) The condition of the offender e.g., wife, apprentice;

(iv) The order of a superior military officer; or public offence;

(v) Provocation;

(vi) When offence was committed under a combination of circumstances and influence of motives which are not likely to recur either with respect to the offender or to any other;

(vii) The state of health and the sex of the delinquent.

In the same judgment while dealing with the issue of aggravating circumstances referring Ratanlal in his Law of Crimes, Twenty Second Edition has discussed as under:-

(i) Increased severity of punishment that includes manner in which the offence is perpetrated;

(ii) The reason of perpetration may be forceful or fraudulent, or by aid of accomplices or in the malicious motive by which the offender was actuated, or the consequences to the public or to individual sufferers, or the special necessity which exists in particular cases for counteracting the temptation to offend, arising from the degree of expected gratification, or the facility of perpetration peculiar to the case. These considerations naturally include a number of particulars i.e. time, place, persons and things, varying according to the nature of the case

The Court further referring Bentham introduced the following mitigating circumstances:

(1) absence of bad intention;

(2) provocation;

(3) self-preservation;

(4) preservation of some near friends;

(5) transgression of the limit of self-defence;

(6) submission to the menaces;

(7) submission to authority;

(8) drunkenness;

(9) childhood.

The Court clarified that the aforesaid are not only the aggravating and mitigating circumstances which require consideration while sentencing the offender.

37. Thereafter, in the case of *Rajendra Prasad* (supra) taking note of assignment of special reasons to hang a human being out of corporeal existence has not been recognized. The Court while awarding the sentence of life directed for mental-moral healing courses through suitable work, acceptable meditational techniques and psychotherapic drills to regain his humanity and dignity. The Court observed that the prisons are not human warehouses but humane retrieval homes. Thus, it reflects that from the analogy of *Jagmohan Singh* (supra) taking into consideration the human values, liberty of a citizen to live and life, the Court directed to commute the sentence with reformation of the offenders in the prisons taking recourse as specified hereinabove.

38. Thereafter, in the case of *Bachan Singh* (supra), the court has taken into consideration the aggravating and mitigating circumstances. In aggravating circumstances it has been classified that (i) the nature of commission of murder with plan and extreme brutality; (ii) the offence involves exceptional depravity; or (iii) if the murder is of a member of any of the armed forces police force or a public servant when he was on duty or while discharging the lawful duty; (iv) if the murder is committed of a person who is acting in lawful discharge of the duty under Section 43 of Cr.P.C. or who rendered assistance to Magistrate or Police officer demanding his aid or requiring his assistance.

39. The mitigating circumstances taken note of by the Apex Court in the said case are - (i) The offence committed under the influence of extreme mental or emotional disturbance; (ii) If the accused is young or old, he should not be sentenced to death; (iii) If there is probability that the accused would not repeat the criminal act of violence as would constitute a continuing threat to society; (iv) the probability that the accused can be reformed and rehabilitated; (v) In the facts and circumstances of the case the accused believed that he was morally justified in committing the offence; (vi) that the accused acted under the duress or domination of another person; (vii) if the condition of the accused shows that he was mentally defective and that the said defect unpaired his capacity to appreciate the criminality of his conduct. These factors require consideration in the rarest of the rare cases, assigning special reasons after giving due opportunity, that includes to lead evidence without delay in trial.

40. In the case of *Machhi Singh* (supra) while accepting the proposition of aggravating and mitigating circumstances emerged from the case of *Bachan Singh* (supra), certain proposition have been laid down to award the death sentence. The propositions are (i) the extreme penalty of death need not be inflicted except in gravest cases of extreme culpability; (ii) before opting for the death penalty, the circumstances of the offenders also require to be taken into consideration alongwith the circumstances of the 'crime' (iii) Life imprisonment is the rule of the death sentence is an exception. In other words, death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and only provided the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances. The balance-sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded the full weightage to strike out balance between both of them before exercising of such option of the death penalty. In view of the foregoing facts, the analogy drawn up in the case of *Bachan Singh* (supra) to award death penalty in rarest of rare cases has been reaffirmed with the aforesaid proposition in the case of *Machhi Singh* (supra) also. The Court has laid down the guidelines to the judges who ought to have exercised the discretion either to award the capital punishment or the imprisonment of life. They must think about the said guidelines, which are as thus:

> "(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?
>
> (b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?"

Therefore, relying upon the propositions and guidelines the provoking reasons specified in Section 354(3) of Cr.P.C. has been made necessary while taking recourse of the death sentence, which is an exception deferring from the imprisonment of life on finding it is inadequate punishment.

41. In the case of *Mukesh* (supra) the Apex Court relied upon the cases of *Bachan Singh, Machhi Singh* and *Ram Naresh* (supra) and analyzed in detail the aggravating and mitigating circumstances as aforementioned, but, in nutshell, the basic principle as enumerated in the cases of *Bachan Singh* and *Machhi Singh* (supra) has been explained with scope using different words, but, conscientiously the soul of the circumstances were the same.

42. Now we will analyze the aggravating circumstances taken into consideration by the Apex Court in the head the death sentence affirmed in

various cases quoted above. In those cases the aggravating circumstances discussed are, the innocence of the victim; conspiracy to pick the boys and girls and to entice them for bad habits though they belong to effluent family and later committed their murder; premeditated and planned way of commission of offence; giving false assurance of returning of the young aged boys and girls thereby police action may be checked against them; the offence is committed for gain of the offender who are menace of living affecting society at large. The Court has further taken into consideration the atrocities of crime against the defenseless and the persons without any provocation which loses the faith of the society; the case of barbaric rape, murder, extortion, dacoity, robbery, trafficking of minor girl, dealing with the dangerous drugs and chain of murder; conduct of the offender; offender is a guardian and committed offence by misusing of confidence to fulfill the trust, hapless and helpless situation because no one is to protect; calculated cold blooded murder, pre-planned offences mentioned above, brutal, ghastly, unmoral offence; shocking conscience of the society creating shocking waves; the manner of subsequent disposal of the body ignoring no humanness; lack of psyche or mind set which may not be amenable for any reformation; doing an act like severing head from the body and to carry it and throw in a pond thereby the feeling and conscience of the society may revolt. It is further explained that if the offender is a gangster and doing act mercilessly having no repentance; serial rapist; defenseless attack without provocation and no animosity; the accused is a menace to the society and shall continue to be so; by his act shocking the collective conscience of the society; taking advantage of familiarity; belied the human relationship of trust and worthiness; the pain and agony of the deceased is beyond imagination and the limit of viciousness, floating abusive facet of human conduct; extreme mental perversion not worth of human conditions; traits of outrageous criminality; the threat of the incident instilled amongst the villagers, as no one would depose against the accused; the act of the offender is anti-theatrical to harmony in the society; murder of own kith and kin; disclosing magnitude of crime; remorseless attitude; the impact of the crime on the women working in the night; the antecedents and the act done by a police officer not an illiterate.

43. Now we can examine the cases aforementioned in the head of death sentence commuted for life imprisonment in which the mitigating circumstances were taken into consideration, that are the death penalty awarded in the specter of death hanging over the head of the accused for a long time; long mental depressed condition causes mental harassment and if the case does not come within the purview of the nature that the crime is not committed for a lust for wealth or woman such as extortion, dacoity, rape, anti-social element, kidnapping and trafficking a minor girl or dealing in dangerous drugs; no criminal antecedents; no possibility of threat to the society or endangour (sic : endanger) the community;

no evidence of diabolic planning to commit the crime; the incident is a consequence of an offence with the family victim; when the relation of the deceased and accused of as a friend; unemployment; possibility of reformation and rehabilitation; age of the accused; the accused is not from a wealthy background; in a case of circumstantial evidence; second marriage of the father; the offence in between the family members; the nature of the offence committed by the accused morally justified; the offence has not been committed intentionally; the accused is not a professional killer; the criteria of age either about the young age or 60 years is not relevant, it may be a person having possibility of rehabilitation and reformation; there is no possibility of committing the similar crime; the test of rarest of rare cases has not been fulfilled; the conduct in the jail is relevant factor after awarding sentence; prior to awarding sentence the psychological psychiatric assessment and evaluation of the conduct must show that there is no possibility of reformation; separate hearing for sentencing has not been afforded and the special reasons have not been assigned; the overall conduct of the accused since the date of occurrence till pronouncement of the judgment by any of the Court ought to be seen; the accused became civilized and having interest to the culture and literature. Thus, the said circumstances have been taken as mitigating circumstances.

44. In view of the analysis of the judgments of the Apex Court for the purpose of sentencing policy as made hereinabove, some of the judgments of this Court require consideration.

45. In the case of *Kamta Tiwari vs. State of M.P.* reported in (1996) (6) SCC 250 the death penalty was awarded by the Division Bench of this Court which was assailed before the Apex Court. The Apex Court while deciding the case and affirming the judgment found the case to be a case of rarest of rare case vide judgment dated 4.9.1996 by Two Judges Bench. The Apex Court has taken into consideration only the aggravating circumstances and not the mitigating circumstances which have been taken into consideration in the subsequent judgments of the Apex Court by three judges. Some of them are referred in the preceding paragraphs. It is to be noted here that the mitigating circumstances for reformation and rehabilitation, conduct in jail, the criminal antecedents and in a case of circumstantial evidence what is to be done has not been taken into consideration in the case of *Kamta Tiwari* (supra). Similar is the position in the case of *Jai Kumar vs. State of M.P.* decided by the Apex Court on 9th May, 1999, the Two Judges Bench of the Apex Court has affirmed the sentence of the High Court, however, mitigating circumstances have not been considered in this case.

46. It is further required to be noticed that in the case of *Vijay Raikwar vs. State of M.P.* the Division Bench of this Court has pronounced the judgment on 2.7.2014 and affirmed the death sentence, but the Apex Court by three Judges

Bench vide judgment dated 5th February, 2019 set aside the judgment of the High Court and commuted the sentence, therefore, the judgment of *Vijay Raikwar* of the Division Bench of this Court is no longer in existence. Similar is the position in the case of *State of M.P. vs. Yogendra @ Jogendra Singh* the Division Bench has affirmed the death sentence, but three Judges Bench of the Apex Court vide judgment dated 17th January, 2019 has set aside the judgment of the High Court and commuted the sentence to imprisonment for life. Similar is the position in the case of *State of M.P. vs. Sachin Kumar Singhraha* decided by the Division Bench of this Court on 3rd March, 2016 in Criminal Reference No. 05/2015 and Criminal Appeal No. 2203/2015 affirming the death sentence awarded by the trial court, but the three Judges Bench of the Apex Court vide judgment dated 12th March, 2019 commuted the sentence of death penalty to life imprisonment.

47. Some of the other Division Bench judgments are also required to be taken note of, which are *State of M.P. vs. Bhagwani & Anr* decided on 9.5.2018 by the Division Bench of this Court affirming the death penalty, but the Apex Court in SLP (Crl.) Nos. 4821-4822/2018 with SLP (Crl.) Nos. 4865-4866/2018 vide order dated 29.5.2018 stayed the execution of the death sentence of accused. Similarly, the Division Bench of this Court in the case of *Mahendra Singh Gond vs. State of M.P.* vide judgment dated 25.1.2019 affirmed the jail sentence awarded by the trial court, but the Apex Court in SLP (Cri.) 1524/2019 vide order dated 18.2.2019 of three Judges Bench stayed the execution of the impugned judgment. Similar is the position in the case of *State of M.P. vs. Vinod alias Rahul Chouhtha* decided on 8th August, 2018 by the Division Bench of this Court, but, the Apex Court in SLP (Crl.) No.1524/2019 vide order dated 15.2.2019 of three Judges stayed the execution of the death sentence of the petitioner-accused.

48. It is relevant to mention here that the Apex Court in the case of *Santosh Kumar Satishbhushan Bariyar* (supra) observed regarding adoption of Resolution No. 62/149 on 18.12.2007 calling upon the country on the issue of retention of the death penalty with intent to establish a world wide moratorium of executive with a view to abolish the death penalty. The India was one of the signatory out of the 59 nations, however, the Apex Court observed that the credible research is to be made by the Law Commission of India and National Human Rights Commission. Thereafter in the case of *Shankar Kisanrao Khade* (supra) the Apex Court while dealing the issue of death sentence has expressed its concern. In the said case, the Apex Court called the intervention of the Law Commission of India on the issue (1) It seems that the Courts have been applying the rarest of rare principle while the Executive has taken into consideration some factors not known to the Courts for converting a death sentence to imprisonment for life. The Court was of the opinion that because we are dealing with the lives of people in a case of death or rape victim or murder, therefore it is imperative to

consider the said issue otherwise the Courts lay down their judgment on jurisprudential basis for awarding the death penalty and when the alternative is unquestionably foreclosed so that the prevailing uncertainty is avoided; (2) It does prima facie appear that two important organs of the State that is the Judiciary and the Executive are treating the life of convicts convicted of an offence punishable with death with different standards. While the standard applied by the Judiciary is that of the rarest of rare principle (however subjective or judge-centric it may be in its application) the standard applied by the Executive in granting commutation is not known. Therefore, it could happen (and might well have happened) that in the cases in which the Sessions Judge, the High Court and the Supreme Court are unanimous in their view in awarding the death penalty to a convict, any other option being unquestionably foreclosed, but the Executive has taken a diametrically opposite opinion and has commuted the death penalty.

49. On the basis of the above directions, the Law Commission of India, in Chapter-7 of Report No. 262 contained certain conclusions which have been taken into consideration in the case of *Chhannulal* (supra) .

50. The said judgment crystallizes the tests which have to be applied for at the time of awarding the death sentence, those are 'crime test', 'criminal test' and R-R test (rarest of rare test) and not the 'balancing test'. The court further observed that the 'crime test' ought to be fully satisfied i.e. hundred percent and 'criminal test' zero percent i.e. no mitigating circumstances favouring the accused. The circumstances favouring the accused are lack of intention to commit the crime, possibility of reformation, age of the accused, not a menace to the society, previous track record. The 'criminal test' may favour the accused to avoid capital punishment. In case the aggravating and mitigating circumstances test favouring or non-favouring the accused applies, still we have to apply finally the 'R-R test' (rarest of rare test) which is based upon the perception of the society i.e. 'society-centric' and not the 'judge-centric'. While applying these tests, the Court has to look into the variety of factors, like societies adherence and antipathy, but certain type of crime like sexual assault and murder of intellectually challenged minor girl suffering from disability, old and infirm women with those disabilities. The aforementioned, though illustrated, but not found exhaustive, therefore, left it open to the judge to decide in individual cases.

51. It is seen that the advocates appearing in the trial court on behalf of the accused are not well-prepared and are not able to put effective defence on behalf of the accused. The advocates who receive the case from the legal aid representing the accused are also not well-prepared. They are not well acquainted with case of the prosecution or the chronology of the events as took place in the case and not in a position to discuss the case with accused. This is also one of the mitigating factor, which requires consideration.

52. Therefore, in view of the foregoing, we can safely assume a significant difference in the cases in which the death penalty awarded by this Court being affirmed by the Apex Court it is either by two judges Bench or only taking into consideration the aggravating circumstances and not the mitigating circumstances. One of the judgment of the Madhya Pradesh High Court in a death reference of *State of M.P. vs. Nand Kishore* has also been decided by Three Judges Bench vide judgment dated 18th January, 2019 in which the Apex Court found that the special reasons as required to be mentioned for the death penalty have not been mentioned either by the trial court or by the High Court, therefore, in view of the provisions of Section 354(3) of Cr.P.C. the said judgment was found unsustainable. The Apex Court has taken one important aspect into consideration that the judgment of *Mukesh* (supra), which was relied before them was a case of eyewitness account while the case of *Nand Kishore* (supra) was a case of circumstantial evidence, therefore, taking into consideration of the said fact as a mitigating factor, the judgment of the Division Bench of the High Court was set aside by the Apex Court.

53. It is further apparent that on pronouncement of the various judgments by the Apex Court from January, 2019 till April, 2019 much emphasis has been laid down on the reformative theory of punishment. The reasons of such reformative approach is found in the case of *Chhannulal* (supra) in which the Three Judges Bench of the Apex Court has taken into consideration the 262nd Report of Law Commission. The said recommendation has been given much weightage by Three Judges Bench and commuted the death penalty into life imprisonment although in the said case the issue regarding re-consideration of the ratio of the case of *Bachan Singh* (supra) afresh in the light of the said report was not found justified by the majority of the two judges. Thus, taking note of the analysis of the judgment, the Constitutional Bench of the Apex Court, Three Judges Bench of the Apex Court and the other judgments, simultaneously also of Division Bench Judgments of this Court, the recent view is based on the reformative approach giving due weightage to aggravating and mitigating circumstances of the individual case distinguishing it from the cases of eyewitness account or of circumstantial evidence cases.

54. It is to be noted here that Section 376-A of the Indian Penal Code has been amended w.e.f. 3.2.2013 by the Act No. 22 of 2018; Section 376-AB of IPC has been inserted w.e.f. 21.4.2018 in which the punishment has been prescribed not less than 20 years, which may extend to imprisonment for life, which shall mean imprisonment for the remainder of life, and with fine or with death. Similarly, under Section 302 of IPC, punishment is prescribed with death, or imprisonment for life with fine. Thus it is clear that as per Section 302 of IPC either sentence of death or imprisonment for life is prescribed while as per Section 376-A or 376-AB of IPC, the minimum sentence is of 20 which may extend to imprisonment for life,

which shall be remainder for life with fine or with death is prescribed. Therefore, the interpretation made by the Apex Court in the cases of death or of rape in the sentencing policy awarding death sentence or of life imprisonment, applying the 'crime test', 'criminal test' and R-R test (rarest of rare test) would equally apply in the cases under Sections 376-A and 376-AB of IPC also. There cannot be different interpretation between offences under Sections 376-A, 376-AB or 302 of IPC.

55. In the context of the same, the facts of the present case are required consideration for the purpose of awarding the sentence drawing the balance-sheet of aggravating and mitigating circumstances and taking into consideration the factum with respect to commission of offence and also the antecedents and conduct of the accused accused demonstrating that he maybe menace to the society and therefore, requires elimination on the basis of the facts and lastly to find out the rarest of the rare case fit to affirm the death sentence.

56. In view of the foregoing facts, we have examined the aggravating and mitigating circumstances of this case, which are as under:

Aggravating circumstances:

1. Extremely brutal, diabolic and cruel act.
2. Victim was aged five years.
3. Helplessness of the minor girl.
4. No provocation by victim.
5. Nature of offence and that the accused was in a dominating position.
6. Gravity of injuries.
7. Relationship of victim with accused.
8. Subsequent disposal of dead body.
9. Shocking to the collective conscience of society.

Mitigating circumstances:

1. Age of accused is 19 years.
2. Case of circumstantial evidence.
3. No evidence produced by prosecution that the accused had the propensity of committing further crimes causing continuous threat to society.
4. The State did not bring on record any evidence to show that the accused cannot be reformed or rehabilitated.

5. Other punishment options are unquestionably foreclosed.

6. Therefore possibility of reformation cannot be ruled out.

7. Accused is not a professional killer.

8. There is no criminal antecedents of accused.

57. In addition to the aforesaid, it is a case of circumstantial evidence in which the principle of prudence applies. If we see the judgments of Apex Court as per the table drawn hereinabove then it is luculent that in the cases of circumstantial evidence, while awarding sentence of death penalty clinching cogent evidence ought to be looked into with more care and circumspection in exceptional cases otherwise in a case of circumstantial evidence the death penalty may not prudent. In the present case, the age of the accused is 19 years and the possibility of reformation and rehabilitation of his entire career cannot be shut down. Simultaneously it is to observe here that nothing has come on record as well as in the finding of the trial court as to why the rehabilitation and reformation of the accused is not possible and such observation of the court is based on the hypothesis and without any basis. As per the report received from the jail, the behaviour of the accused is prudent and unquestionable, therefore, setting aside the said finding, in our considered opinion, the policy of reformation and rehabilitation cannot be ruled out in the case of appellant-accused who is 19 years of age. The observation made by the trial court while recording the finding that the accused may be dangerous to the society is based on the presumption and hypothesis, which cannot be accepted without any basis. In this regard the prior and subsequent antecedents of the accused in the jail are relevant, which do not draw any inference in negative side as observed by the trial court.

58. In view of the foregoing observation, in our considered opinion, the conviction of the appellant-accused recorded by the trial court for the charge under Section 363, 366-A, 376(2)(f)(i) and 201 of the IPC is hereby affirmed, but, on the point of sentence for an offence under 376A read with Section 376-AB and 302 of IPC, it is not one of the rarest of rare case in which option of other punishment has been unquestionably foreclosed. Therefore, we commute the death penalty to the imprisonment for life.

59. Accordingly, the appeal filed by the appellant- accused and the death reference sent for confirmation of death sentence are hereby allowed in part. The finding regarding guilty of the appellant for the charges under Sections 363, 366A, 376(2)(f)(i) and 201 of the IPC are hereby confirmed, but, so far as the death penalty for the offence under Section 376A read with Section 376-AB and 302 of IPC awarded by the trial court is set aside. The death penalty is commuted to the sentence of life imprisonment. It is made clear that the sentence of life imprisonment of the appellant would mean the sentence of 30 years.

60. Apart from the decision of this appeal, this Court does have certain duties and power to issue appropriate direction for implementation of the directions of the Apex Court as observed in the case of *Rajendra Prasad* (supra). The Apex Court has directed that the meditational technology must be used as a tool of criminology which is a mascent-ancient methodology and directed to experiment it. The Apex Court further observed that the said methodology would be beneficial to heal the life of human. This Court is unaware whether this methodology has been adopted by the State Government or not including the use of techniques like psychotherapic drills to regain the humanity and dignity of the mental psycho status of a prisoner converting to be a human, therefore, it is directed that the State Government must ensure to adopt the methodology as directed in the judgment of *Rajendra Prasad* (supra) and adequate steps ought to be taken by them. We hope and trust that the State Government shall ensure the observations of the Apex Court.

61. At the end, it is our duty to record the words of appreciation in favour of the *amicus curaie* (sic : *curiae*) who have assisted this Court in the disposal of this appeal, and death reference wherein the appellant-accused has been awarded capital punishment by the trial court, therefore, their assistance is hereby acknowledged.

62. Registrar concerned of this Court is directed to send a copy of this judgment to all the District and Sessions judges for circulation, and a copy be also sent to the Chief Secretary to the State Government and Principal Secretary, Law Department, for communication and to adhere to the direction of the Court.

Order accordingly

I.L.R. [2019] M.P. 1541 (DB)
APPELLATE CRIMINAL

Before Smt. Justice Anjuli Palo & Mr. Justice Vishal Dhagat

Cr.A. No. 1486/2010 (Jabalpur) decided on 6 July, 2019

DHOKAN @ DHOKAL @ GOKUL …Appellant

Vs.

STATE OF M.P. …Respondent

***A. Penal Code (45 of 1860), Section 376(2)(f) – Rape of Minor Girl – Interested Witness – Medical Evidence* – Held – FIR duly corroborated by statement of prosecutrix where she specifically stated about the act of appellant – During examination of prosecutrix, Doctor found bleeding from private parts and also found injuries and gave a definite opinion of intercourse – No reason to disbelieve testimony of prosecutrix – Appellant rightly convicted – Appeal dismissed. (Paras 8, 11, 12, 19 & 21)**

क. दण्ड संहिता (1860 का 45), धारा 376(2)(एफ) – अवयस्क बालिका का बलात्संग – हितबद्ध साक्षी – चिकित्सीय साक्ष्य – अभिनिर्धारित – प्रथम सूचना प्रतिवेदन अभियोक्त्री के कथन जिसमें उसने अपीलार्थी के कृत्य के बारे में विनिर्दिष्ट रूप से बताया है, द्वारा सम्यक् रूप से संपुष्ट – अभियोक्त्री के परीक्षण के दौरान, चिकित्सक ने गुप्तांगों से रक्तस्त्राव पाया तथा चोटें भी पाई एवं संभोग का एक निश्चित मत दिया – अभियोक्त्री के परिसाक्ष्य पर अविश्वास करने का कोई कारण नहीं – अपीलार्थी उचित रूप से दोषसिद्ध – अपील खारिज।

***B. Penal Code (45 of 1860), Section 376(2)(f) and Criminal Procedure Code, 1973 (2 of 1974), Section 154 – Delayed FIR* – Held – FIR lodged after three days of the incident – Prosecutrix is a child belonging to village and in such cases, victim and her family members find it difficult to go and lodge a report at police station due to shame and fear of defamation in society – Testimony of prosecutrix cannot be discarded merely on basis of delayed FIR. (Para 13 & 16)**

ख. दण्ड संहिता (1860 का 45), धारा 376(2)(एफ) एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 154 – विलंबित प्रथम सूचना प्रतिवेदन – अभिनिर्धारित – घटना के तीन दिनों के पश्चात् प्रथम सूचना प्रतिवेदन दर्ज किया गया – अभियोक्त्री गांव की एक बालिका है तथा ऐसे प्रकरणों में, पीड़िता तथा उसके परिवार के सदस्यों को शर्म और समाज में बदनामी के भय के कारण पुलिस थाने जाना एवं प्रतिवेदन दर्ज कराना कठिन लगता है – अभियोक्त्री के परिसाक्ष्य को मात्र विलंबित प्रथम सूचना प्रतिवेदन के आधार पर अस्वीकार नहीं किया जा सकता।

Cases referred:

(1995) 5 SCC 518, (1996) 2 SCC 384, 2018 (4) Crimes 271 (SC), (2017) 2 SCC 51.

B.R. Vijaywar and *Sangeet Naidu*, for the appellant.
Anjana Kurariya, G.A. for the respondent/State.

J U D G M E N T

The Judgment of the Court was delivered by : **ANJULI PALO, J. :-** Appellant has preferred this appeal being aggrieved by the judgment dated 11.03.2010 passed by the Sessions Judge, Sagar in Session Trial No. 125/2009 whereby, the appellant has been convicted under Section 376(2)(F) of IPC and sentenced to undergo life imprisonment with fine of Rs. 1,000/- and in default of fine, rigorous imprisonment for one year.

2. As per the prosecution case, on 20.12.2008 at village Sahavan, the appellant committed rape with the prosecutrix (PW-7) who is a minor girl aged about 5-6 years old. FIR (Ex. P/2) has been lodged by the prosecutrix on 23.12.2008 at Police Station. Crime was registered against the appellant under

Section 376 of IPC and on 25.12.2008 at Police Station Banda, Sagar. After due investigation, charge-sheet was filed before the concerned Court.

3. After committal of the case, learned trial Court conducted trial against the appellant. Considering the testimonies of the prosecutrix (PW-7), her mother Devka (PW-6) and the opinion of Dr. Mamta Timori (PW-4), the trial Court held the appellant guilty for committing rape with a minor girl. Hence, convicted and sentenced him as mentioned above.

4. The appellant has challenged the aforesaid findings on the grounds that the prosecution evidence is contradictory and the findings of the trial Court is based on the testimony of interested and unreliable witnesses. There are many omissions and improvements in their testimonies. The FIR has been lodged belatedly. Hence, it is prayed to set aside the impugned judgment and appellant be acquitted from the charge leveled against him.

5. Learned Government Advocate appearing for the respondent/State supported the findings of learned trial Court and submitted that the judgment is rightly based on cogent and reliable evidence produced by the prosecution.

6. Heard learned counsel for the parties at length and perused the record.

7. It is not in dispute that at the time of incident, the prosecutrix was about 5 to 6 years old. Dr. Mamta Timori (PW-4), Medical Officer in the MLC report (Ex. P/11) mentioned about her bodily characters which also establish that the age of the prosecutrix was under 7 years.

8. Prosecutrix (PW-7) in her statement categorically stated against the appellant in corroboration of FIR (Ex. P/12) on the date of incident at about 8:00 pm, the prosecutrix went to purchase sugar from the shop at village Sahavan. From there, the appellant lured her and took her to a lonely place and committed rape with her. She further explained that due to forcible intercourse committed by the appellant, blood was oozing from her private parts. We do not find any reason to disbelieve the testimony of prosecutrix (PW-7).

9. Devka Patel (PW-6) mother of the prosecutrix, duly corroborated the testimony of prosecutrix. In her cross-examination, she denied the suggestions that on the occasion of Sankranti, she demanded Rs. 1,000/- and 50 kilograms of wheat from the appellant. On refusal to do so, Devka Patel falsely implicated the appellant and lodged false FIR at Police Station. In our view her testimony is also reliable.

10. Learned counsel for the appellant submits that FIR was lodged belatedly. As per the testimony of Sushma Shrivastav (ASI) (PW-1), on 23.12.2008, Devka Patel reported the incident at Police Station. From the statement of Sushma Shrivastav (PW-1), it is clear that FIR was lodged after three days.

11. On 24.12.2008, Dr. Mamta Timori (PW-4) examined the prosecutrix and found an abrasion of size 1.5 cm x 0.5 cm on the right thigh in external examination. During the internal examination, she found the following injuries along with bleeding from her private parts :

(1) Blood clot present on the labia majora (vulva).

(2) Blood oozing from the vagina at 4-8 o'clock position.

(3) Hymen ruptured at 6 o'clock position and blood was oozing.

12. Dr. Mamta Timori (PW-4) gave a definite opinion that intercourse was committed with the prosecutrix. She also explained that the prosecutrix was admitted for treatment in Dafrin Hospital, Sagar for seven days. Her bedhead tickets (Ex. P/10) establish that the prosecutrix was under treatment for the injuries caused to her private parts.

13. We cannot ignore that the prosecutrix is a child, belonging to a village. In cases of rape, the victim and her family members find it difficult to go and lodge a report at police station due to shame and fear of defamation in society. Their reluctance to go to the police is because of society's attitude towards the victim.

14. In case of *Karnel Singh vs. State of Madhya Pradesh* reported in (1995) 5 SCC 518, the Hon'ble Supreme Court has held as under :

> "7.....The submission overlooks the fact that in India women are slow and hesitant to complain of such assaults and if the prosecutrix happens to be a married person she will not do anything without informing her husband. Merely because the complaint was lodged less than promptly does not raise the inference that the complaint was false. The reluctance to go to the police is because of society's attitude towards such women; it casts doubt and shame upon her rather than comfort and sympathise with her. Therefore, delay in lodging complaints in such cases does not necessarily indicate that her version is false."

15. Likewise in case of *State of Punjab vs. Gurmit Singh & Ors.* Reported in (1996) 2 SCC 384, the Hon'ble Supreme Court has held that :

> "8.....The courts cannot over-look the fact that in sexual offences delay in the lodging of the FIR can be due to variety of reasons particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving it a cool thought that a complaint of sexual offence is generally lodged....."

16. Therefore, only on the ground that the FIR was lodged with some delay, we cannot discard the testimonies of the prosecutrix and her mother Devka (PW-6).

17. Learned counsel for the appellant submits that there are many material contradictions and omissions in the testimony of the prosecutrix. Both are related hence, without corroboration from the independent witness, conviction cannot be based on it.

18. In case of *State (Govt. of NCT of Delhi) vs. Pankaj Chaudhary & Ors.*, 2018 (4) Crimes 271 (SC), the Hon'ble Supreme Court has held as observed as under :

> "24. It is now well-settled principle of law that conviction can be sustained on the sole testimony of the prosecutrix if it inspires confidence. [**Vishnu alias Undrya v. State of Maharashtra (2006) 15 1 SCC** 283]. It is well-settled by a catena of decisions of this Court that there is no rule of law or practice that the evidence of the prosecutrix cannot be relied upon without corroboration and as such it has been laid down that corroboration is not a sine qua non for conviction in a rape case. If the evidence of the victim does not suffer from any basic infirmity and the 'probabilities factor' does not render it unworthy of credence, as a general rule, there is no reason to insist on corroboration except from medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming. [**State v. N.K. The accused (2000) 5 SCC 30**]."

19. Looking to the age of the prosecutrix and the facts narrated by her in her statement, we are not inclined to accept the aforesaid contention. The prosecutrix specifically stated about the acts of the appellant which establish that the appellant committed intercourse with her.

20. In case of *State of Himachal Pradesh vs. Sanjay Kumar @ Sunny* reported in (2017) 2 SCC 51, the Hon'ble Supreme Court has held that :

> "31. After thorough analysis of all relevant and attendant factors, we are of the opinion that none of the grounds, on which the High Court has cleared the respondent, has any merit. By now it is well settled that the testimony of a victim in cases of sexual offences is vital and unless there are compelling reasons which necessitate looking for corroboration of a statement, the courts should find no difficulty to act on the testimony

> of the victim of a sexual assault alone to convict the accused. No doubt, her testimony has to inspire confidence. Seeking corroboration to a statement before relying upon the same as a rule, in such cases, would literally amount to adding insult to injury. The deposition of the prosecutrix has, thus, to be taken as a whole. Needless to reiterate that the victim of rape is not an accomplice and her evidence can be acted upon without corroboration. She stands at a higher pedestal than an injured witness does. If the court finds it difficult to accept her version, it may seek corroboration from some evidence which lends assurance to her version. To insist on corroboration, except in the rarest of rare cases, is to equate one who is a victim of the lust of another with an accomplice to a crime and thereby insult womanhood. It would be adding insult to injury to tell a woman that her claim of rape will not be believed unless it is corroborated in material particulars, as in the case of an accomplice to a crime. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? The plea about lack of corroboration has no substance {**See Bhupinder Sharma v. State of Himachal Pradesh, (2008) 8 SCC 551**}. Notwithstanding this legal position, in the instant case, we even find enough corroborative material as well, which is discussed hereinabove."

21. In the light of the principle laid down by the Hon'ble Supreme Court, the testimony of prosecutrix coupled with the medical opinion of Dr. Mamta Timori (PW-4) is sufficient to convict the appellant for committing the offence with the prosecutrix.

22. In that view of the matter, in our considered opinion, the trial Court has rightly convicted the appellant for the charge under Section 376(2)(F) of IPC and awarded proper sentence as mentioned in the judgment.

23. In view of the foregoing discussion, the judgment of the trial Court is hereby upheld. This appeal being devoid of any merit, is hereby **dismissed**.

24. Copy of this judgment along with its record be sent to the Court below for information and compliance.

Appeal dismissed

I.L.R. [2019] M.P. 1547 (DB)
APPELLATE CRIMINAL
Before Smt. Justice Anjuli Palo & Mr. Justice Vishal Dhagat
Cr.A. No. 1510/2010 (Jabalpur) decided on 6 July, 2019

POORAN @ PUNNI @ BHURE AHIRWAR …Appellant

Vs.

STATE OF M.P. …Respondent

A. Penal Code (45 of 1860), Section 302 – Appreciation of Evidence **– Held – FIR lodged promptly with all essential facts against appellant – Evidence of doctor corroborated the testimony of complainant regarding injuries – FSL report established that blood found on seized weapon and clothes of accused was of the deceased – Contradictions in testimony of prosecution witnesses are trivial in nature and neither material nor sufficient to wholly discard the same – Appellant rightly convicted – Appeal dismissed. (Paras 8, 11 & 17)**

क. दण्ड संहिता (1860 का 45), धारा 302 – साक्ष्य का मूल्यांकन – अभिनिर्धारित – अपीलार्थी के विरूद्ध सभी आवश्यक तथ्यों के साथ तत्परता से प्रथम सूचना प्रतिवेदन दर्ज किया गया – चिकित्सक का साक्ष्य चोटों के संबंध में परिवादी के परिसाक्ष्य की संपुष्टि करता है – न्यायालयिक विज्ञान प्रयोगशाला प्रतिवेदन यह स्थापित करता है कि जब्तशुदा शस्त्र तथा अभियुक्त के कपड़ों पर पाया गया रक्त मृतक का था – अभियोजन साक्षीगण के परिसाक्ष्य में विरोधाभास तुच्छ स्वरूप के हैं तथा उक्त को संपूर्ण रूप से नकारने हेतु न तो तात्विक हैं न ही पर्याप्त हैं – अपीलार्थी उचित रूप से दोषसिद्ध – अपील खारिज।

B. Penal Code (45 of 1860), Section 302 – Interested Eye Witness – Credibility **– Held – Apex Court concluded that evidence as a whole having a ring of truth cannot be discarded merely because maker is a related witness – In instant case, evidence of three eye witnesses who are close relative of deceased are trustworthy and reliable and duly corroborated by evidence of Inspector – No reason to disbelieve their testimony. (Para 10 & 11)**

ख. दण्ड संहिता (1860 का 45), धारा 302 – हितबद्ध चक्षुदर्शी साक्षी – विश्वसनीयता – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि साक्ष्य जब संपूर्ण रूप से सत्य प्रतीत होता है, तो उसे मात्र इस कारण से नकारा नहीं जा सकता कि साक्ष्य देने वाला एक संबंधित साक्षी है – वर्तमान प्रकरण में, तीन चक्षुदर्शी साक्षीगण जो कि मृतक के निकट रिश्तेदार हैं, का साक्ष्य भरोसेमंद तथा विश्वसनीय है तथा निरीक्षक के साक्ष्य द्वारा सम्यक् रूप से संपुष्ट है – उनके परिसाक्ष्य पर अविश्वास करने का कोई कारण नहीं।

C. Criminal Practice – Burden of Proof **– Held – It is a cardinal principle of criminal jurisprudence that guilt of accused must be proved**

beyond all reasonable doubts – Burden on the prosecution is only to establish its case beyond reasonable doubt and not all doubts. (Para 15)

ग. दाण्डिक पद्धति – सबूत का भार – अभिनिर्धारित – आपराधिक विधिशास्त्र का यह एक मुख्य सिद्धांत है कि अभियुक्त की दोषिता सभी युक्तियुक्त संदेहों से परे साबित होनी चाहिए – अभियोजन पर केवल अपने प्रकरण को युक्तियुक्त संदेह से परे एवं न कि सभी संदेहों से परे स्थापित करने का भार है।

Cases referred:

AIR 2018 SC 4529, (2018) 7 SCC 623, 2018 (4) Crimes 238 (SC), (2017) 13 SCC 583, (2017) 11 SCC 195.

Madan Singh, for the appellant.
Anjana Kurariya, G.A. for the respondent.

J U D G M E N T

The Judgment of the Court was delivered by : **ANJULI PALO, J. :-** This appeal has been filed by the accused against the judgment dated 05.7.2010 passed by Sessions Judge, Sagar in Sessions Trial No. 18/2010, whereby appellant was convicted under section 302 of the Indian Penal Code and sentenced to under R.I. for life with fine of Rs. 10,000/- and in default of deposit fine amount to suffer further R.I. for 1 year.

2. In brief, the prosectuion (sic : prosecution) case is that on 22.10.2009 at village Khajuriya in the father-in-law's house the appellant caused death of his wifc-Tibbo. Report has been lodged by his father-in-law, namely, Gorelal on the same day within an hour at Police Station, Moti Nagar, District Sagar. After investigation charge sheet was filed against the appellant in the concenred (sic : concerned) Court and thereafter the case was committed to the trial Court.

3. The trial Court after considering the evidence of the witnessess and medical evidence held the appellant guilt of having committed murder of his wife by use of sickle ('hasiya'). Hence, convicted and sentenced the appellant as aforemcntinocd (sic : aforementioned).

4. The appellant challenged the findings of the learned trial Court on the grounds that the learned trial Court has wrongly convicted him by ignoring the material contradictions and omissions in the version of prosecution witnesses. The prosecution witnesses are interested witnesses and, therefore, they are not reliable. They reached on the spot after committal of the murder of deceased by other known person. The appellant has prayed for setting aside the impugned judgment and for his acquittal from the charge levelled against him.

5. Learned Government Advocate has opposed the contentions raised by learned counsel for the appellant and submitted that the impugned judgment of the trial Court is just and proper.

6. We have heard the learned counsel for the parties and persued (sic : perused) the record.

7. Witness-Gorelal (PW.l) is the main witness. His testimony is unchallenged on the point that on the date of incident his daughter- Tibbo (since deceased) was staying at his house. On that day at about 9.30 p.m. the appellant (son-in-law) came there. He took dinner in his house. They both were sleeping together outside. Tibbo was sleeping inside the room. At about 10 am to 10.30 am. the appellant knocked the doors of the deceased and went inside the room. He repeatedly inflicted the blows by sickle on his daughter-Tibbo. Deceased-Tibbo shouted to save her. Then Gorelal (PW-1) had seen the incident. He also saw that appellant assaulted the deceased by sickle on her neck. He tried to save Tibbo Bai, but he failed to do so. Then he rushed to call his sons, namely, Danny and Shyamlal, who were at Tea Shop. When he returned alongwith his sons, they found that appellant was inside the room and his daughter was lying still alive in injured condition. His sons, namely, Danny and Shyamlal broght (sic : brought) the Tibbo to the Hospital and neighbours caught hold of the appellant to handover him to the Police. Gorelal (PW-1) further deposed that on the same day he lodged an FIR (Exhibit-P-1). He further stated that earlier also the appellant tried to kill his daughter and entire family. But, his daughter alongwith her children ran away to his house for the shelter to save themselves. This incident happened 15 days prior to date of death of the deceased.

8. The testiony (sic : testimony) of Gorelal (PW-1) is duly corroborated by his sons, namely, Danny (PW-2) and Shyamlal (PW-3). Learned counsel further submits that there are contradictions in their testimony but we find that such contradictions are trival (sic : trivial) in nature and neither material nor sufficient to wholly discard their testimony. See also *Smt. Shamim Vs. State (GNCT of Delhi)*, AIR 2018 SC 4529.

9. In the case of *State of A.P. vs. Pullugummi Kasi Reddy Krishna Reddy*, (2018) 7 SCC 623 the Supreme Court has held as under :-

> *"Discrepancies which do not shake the credibility of the witnesses and the basic version of the prosecution case to be discarded. If the evidence of the witnesses as as whole contains the ring of truth, the evidence cannot he doubted."*

10. In the cases of *State of M.P. Vs. Chhaakkilal and others* and *Ramveer and Chhaakki Lal and another,* 2018 (4) Crimes 238 (SC) it has been observed that finding recorded by trial Court is entitled to great weight. The same cannot be interfered with unless vitiated bv serious error. It is also observed that the evidence as a whole having a ring of truth cannot be discarded merely because the maker is a related witness. Conviction can be based on evidence of solitary eye witness. It is further observed that omissions or lapses in investigation cannot be a ground to discard the prosecution case which is otherwise credible and cogent.

11. Therefore, we are not inclined to accept the contentions of the learned counsel of the appellant to disbelieve the testimony of above three eye witnesses. It is true that they are close relative of the deceased. We find their presence on the spot is quite natural. Their version is also trust-worthy and reliable, which is duly corroborated by evidence of Inspector Mr.Amit Soni (PW. 10) who registered the FIR (Exhibit-P-1) on the same day. The facts mentioned in the FIR are duly proved from the testimony of Gorelal (PW.l), Danny (PW.2) & Shyamlal (PW.3). FIR has been lodged promptly within an hour with all essential facts agaisnt (sic : against) the appellant, who is real son in law of the complainant. Hence, we are not inclined to treat the aforesaid FIR as concocted one. Dr. Sudhir Jain (PW.8) has also corroborated the testimony of Gorelal (PW.l) who specified that appellant inflicted 12-13 blows on entire body of his daughter by sickle.

12. In a case of *Chandrasekar and another Vs. State*, (2017) 13 SCC 583 the Supreme Court has held as under:-

> *"Witness being related to deceased, not a ground to reject his testimony just requiring greater scrutiny and caution in considering the same. False implication negated. The intention to cause death alongwith motive stands established.*

13. Dr.Sudhir Jain (PW.8) has also found incised wound of various sizes on the head, nose, neck, right arm, left ear, left hand, forehead, nasal bone, both wrists, left palm, right knee, both cheeks and left and front side of legs and other body parts of the deceased. Sizes of wonds (sic : wounds) were about 1 cm X 1 cm to 4 cm X 10 cm. with different depths. Under every wound subcutaneous ecchymosis was present. During internal examination Doctor Jain found huge sub-dural blood clot on left side of tempo parital region. All the injuries were caused within 24 hours by hard and sharp object, which seems penetrating also. As per Dr.Sudhir Jain deceased (Tibbo) died due to coma, which caused due to above injuries.

14. In our opinion also the injuries are sufficient to cause death of the deceased and the same were ante-mortem and homicidal in nature, which might be caused by sickle seized by Inspector Amit Soni (PW. 10). He also seized clothes of the appellant and produced all the articles before the Court which were blood stained.

15. It is important to note that appellant himself admitted in his statement recorded under section 313 of Cr.P.C. that at the time of incident he was present at the house of Gorelal (PW.l) to bring back his wife. He has taken a defence that Shyamlal (PW.3) caused death of Tibbo, when Tibbo came to save him during the incident. Shyamlal assaulted him. Such defence cannot be accpetcd (sic : accepted) inasmuch as during cross-examination of the eye witnesses, he has

neither suggested such type of defence nor questioned their testimony in that regard. In question No. 12 he admitted the version of PW.3 (Shymalal) that after the incident he was caught hold at the house of the appellant. It is a cardinal principle of criminal jurisprudence that the guilt of the accused must be proved beyond all reasonable doubts. However, the burden on the prosecution is only to establish its case beyond reasonable doubt and not all doubts. In *Yogesh Singh Vs. Mahaveer Singh and others*, (2017)11 SCC 195 in paragaphs 17 & 18 it has been held thus:-

> *"17. However, the rule regarding the benefit of doubt does not warrant acquittal of the accused by resorting to surmises, conjectures or fanciful considerations, as has been held by this Court in State of Punjab V. Jagir Singh (SCC pp.285-86 para 23)*
>
> *"23. A criminal trial is not like a fairy tale wherein one is free to give flight to one's imagination and fantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the offence with which he is charged. Crime is an event in real life and is the product of interplay of different human emotions. In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the final analysis would have to depend upon its own facts. Although the benefit of every reasonable doubt should be given to the accused, the courts should not at the same time reject evidence which is ex facie trusthworthy, on grounds which are fanciful or in the nature of conjectures.*
>
> *18. Similarly, in Shivaji Bobade vs. State of Maharashtra (1973) 2 SCC 793, V.R.Krishna Iyer, J stated thus:- (SCC p. 799 para 6):-*
>
> *"6. The cherished principles or golden thread of proof beyond doubt which runs through the web of our law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt. The excessive solicitude reflected in the attitude that a thousand guilty men may go but one innocent martyr shall not suffer is a false dilemma. Only reasonable doubts belong to the accused. Otherwise any practical system of justice will then break down and lose credibility with the community. "*

16. We find that false defence has been taken by the appellant. Inspector Amit Soni (PW.10) had arrsted (sic : arrested) him on the same date of incident and seized his blood stained clothes. Amit Soni (PW.10) prepared arrest memo

(Exhibit-P-8), in which, it is mentioned that blood stains are present on the clothes of the appellant.

17. In the FSL report (Exhibit-P-13) it was established that on the sickle seized from the appellant and on the clothes of the appellant human blood was found, which belongs to deceased's Blood Group-B. The Assistant Chemical Examiner also gave finding that hair found on sickle are similar with hair of the deceased, which are Article 'F'. All these evidence are connecting evidence, which clearly establish the involvement of the appellant with the crime in question.

18. Therefore, we are not inclined to take a different view than the one taken by the learned trial Court, because the trial Court has rightly appreciated the entire evidence available on record and then gave a finding about the guilt of the appellant. Looking to the facts and circumstances of the case and in view of aforesaid analysis, we do not find any merit in the appeal. Appellant is in jail. Let a copy of this judgment be sent to jail for information. Record of the court below be send to the trial Court.

19. Accordingly, appeal stands dismissed.

Appeal dismissed

I.L.R. [2019] M.P. 1552 (DB)
ARBITRATION REVISION

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

Arb.R. No. 4/2009 (Gwalior) decided on 3 May, 2019

STATE OF M.P. & ors. …Applicants

Vs.

M/S. SEW CONSTRUCTION LTD. …Non-applicant

A. Madhyastham Adhikaran Adhiniyam, M.P. (29 of 1983), Section 7-B(1)(b) – Limitation – **Cause of action for filing claim accrued on 17.02.2004 and claim preferred before the final authority on 10.11.2006, whereby the same was rejected on 14.12.2006 – Reference petition filed before Tribunal on 10.12.2007, i.e within one year as stipulated in Section 7-B(1)(b) – Reference petition was within limitation. (Para 16)**

क. माध्यस्थम् अधिकरण अधिनियम, म.प्र. (1983 का 29), धारा 7–बी(1)(बी) – परिसीमा – दावा प्रस्तुत करने हेतु वाद हेतुक दिनांक 17.02.2004 को प्रोद्भूत हुआ तथा दिनांक 10.11.2006 को अंतिम प्राधिकारी के समक्ष दावा प्रस्तुत किया गया, जिसे दिनांक 14.12.2006 को अस्वीकार किया गया था – अधिकरण के समक्ष निर्देश याचिका, दिनांक 10.12.2007 को अर्थात् धारा 7–बी(1)(बी) में नियत अनुसार एक वर्ष के भीतर प्रस्तुत की गई – निर्देश याचिका परिसीमा के भीतर थी।

B. ***Madhyastham Adhikaran Adhiniyam, M.P. (29 of 1983), Section 7-B(1)(b) – Limitation* – Provisions of Statute and Agreement – Applicability – Held – Although agreement clause provides limitation of 28 days for referring a dispute to Tribunal but statutory limitation provided under the statute of 1983 will have overriding effect over provisions of agreement.** **(Para 16)**

ख. माध्यस्थम् अधिकरण अधिनियम, म.प्र. (1983 का 29), धारा 7–बी(1)(बी) – परिसीमा – कानून के उपबंध एवं करार – प्रयोज्यता – अभिनिर्धारित – यद्यपि करार खंड, एक विवाद को अधिकरण को निर्दिष्ट करने के लिए 28 दिनों की परिसीमा उपबंधित करता है परंतु 1983 के कानून के अंतर्गत उपबंधित कानूनी परिसीमा का करार के उपबंधों पर अध्यारोही प्रभाव होगा।

C. ***Civil Procedure Code (5 of 1908), Section 11 – Res Judicata* – Held – Earlier reference petition was for seeking expenditure for extra lead, without there being any sanction/written order of Superintending Engineer but in instant reference petition, there was a written order by the SE permitting the change of quarry for circumstances beyond control of contractor – Plea of *res-judicata* not available to State.** **(Para 17)**

ग. सिविल प्रक्रिया संहिता (1908 का 5), धारा 11 – पूर्व न्याय – अभिनिर्धारित – पूर्व में निर्देश याचिका अधीक्षण यंत्री की किसी मंजूरी/लिखित आदेश के बिना अतिरिक्त स्थान के लिए व्यय चाहने हेतु थी परंतु वर्तमान निर्देश याचिका में, एस.ई. द्वारा ठेकेदार के नियंत्रण से बाहर की परिस्थितियों के लिए खदान परिवर्तन की अनुज्ञा देने वाला एक लिखित आदेश था – पूर्व न्याय का अभिवाक् राज्य को उपलब्ध नहीं।

D. ***Contract Act (9 of 1872), Section 70 – Variations in Agreement* – Held – Once there was sanction of Superintending Engineer of works to change the quarry for circumstances beyond control of contractor, then the contractor is entitled to be compensated for such variations – Revision dismissed.** **(Para 22 & 24)**

घ. संविदा अधिनियम (1872 का 9), धारा 70 – करार में फेरफार – अभिनिर्धारित – एक बार ठेकेदार के नियंत्रण से परे परिस्थितियों के लिए खदान परिवर्तन करने की अधीक्षण यंत्री, कार्य की मंजूरी थी, तो ठेकेदार उक्त फेरफार के लिए प्रतिकर पाने का हकदार है – पुनरीक्षण खारिज।

E. ***Civil Procedure Code (5 of 1908), Section 115 – Revision – Scope* – Held – Issue of rate being purely a factual issue, does not call for any detailed analysis or deliberation in a revision petition.** **(Para 18)**

ङ. सिविल प्रक्रिया संहिता (1908 का 5), धारा 115 – पुनरीक्षण – व्याप्ति – अभिनिर्धारित – दर का विवाद्यक पूर्ण रूप से एक तथ्यात्मक विवाद्यक होने के कारण, पुनरीक्षण याचिका में किसी विस्तृत विश्लेषण अथवा विचार–विमर्श की आवश्यकता नहीं।

***F. Arbitration Agreement – Pari Materia – Clause 3.11(A)* – Held – As per clause of agreement, it was obligatory on part of contractor to bring approved quality of material – Later part of clause provides that no claim will be entertained except where there is any change of quarry for circumstances beyond control of contractor under written orders of Superintendent Engineer of work – It cannot be said that provisions of clause are *pari materia* with each other. (Para 15)**

च. माध्यस्थम् करार – समविषय – खंड 3.11(ए) – अभिनिर्धारित – करार के खंड अनुसार, ठेकेदार के लिए अनुमोदित गुणवत्ता की सामग्री लाना आबद्धकर था – खंड का बाद वाला भाग उपबंधित करता है कि जहां ठेकेदार के नियंत्रण से परे परिस्थितियों के लिए अधीक्षण यंत्री, कार्य के लिखित आदेशों के अधीन खदान का कोई परिवर्तन होगा, तो कोई दावा ग्रहण नहीं किया जाएगा – यह नहीं कहा जा सकता कि खंड के उपबंध एक दूसरे के समविषय हैं।

Cases referred:

(1957) 1 ALL ER 49, (1829) 7 Connecticut 457, AIR 1964 SC 669, 2006 (1) MPLJ 234, AIR 1968 SC 1218, AIR 1970 SC 1201, AIR 1977 SC 329, AIR (36) 1949 PC 39, AIR 1973 SC 1174, AIR 1962 SC 779, AIR 1960 Punj 585, (2017) 5 SCC 743.

Pratip Visoriya, G.A. for the applicants/State.
V.R. Rao with *Nitin Agrawal,* for the non-applicant.

O R D E R

The Order of the Court was passed by :

VIVEK AGARWAL, J.:- State of Madhya Pradesh through its instrumentalities has filed this Arbitration Revision being aggrieved by award dated 26.11.2008 passed in Reference Case No.6/08 by M.P. Arbitration Tribunal, Vindhyachal Bhawan, Bhopal, in the case of M/s. S.E.W. Construction Ltd. Vs. State of M.P. (Water Resources Department), whereby on the ground of expenditure incurred by the respondent in bringing sand from Mahuar river as per the terms and conditions of sanction granted by the Superintending Engineer in terms of the provisions contained in clause 3.11(A), Reference Case has been allowed and Arbitration Tribunal has directed to pay such difference amount on account of cost incurred by the contractor in bringing sand for the purpose of construction from a distant lead alongwith interest at the rate of 9% from the date of filing of the reference petition.

2. Learned counsel for the State submits that State had issued tender notice No.1/1992-93 for the construction of Masonry Dam from RD 80M to 543M of Madikhed Dam. The tender of the respondent/contractor was accepted on 6.11.1993 for an amount of Rs. 1,22,81,86,600/-. Thereafter a contract was

entered into between the parties and as per para 4.3.29.2 of the agreement for any kind of dispute, the respondent was to first approach petitioner No.3 and in terms of such clause respondent/Contractor submitted an application dated 10.11.2006 raising claims for extra payment and same was rejected vide memo dated 14.12.2006. It is submitted that though the limitation for preferring his claim was 28 days as per the agreement, but the respondent approached the Tribunal on 10.12.2007, thus, the entire claim of the contractor is time barred.

3. It is also submitted by learned counsel for the State that whole controversy hinges on interpretation of clause 3.11(A) which reads as under :-

> "3.11(A) The quoted rates of the contractor shall be inclusive of the leads and lifts and in no case separate payment for leads or lifts to any materials including water shall be payable. Similarly no leads or lifts for the materials issued by the department as prescribed in the tender documents shall be payable. The contractor shall bring approved quality of materials. Different quarries are shown in Annexure C. The details shown in the Annexure C are only as a guide to the contractor but the contractor before tendering should satisfy himself regarding the quantity and quality available and all other details of Annexure C and provide for any variation in respect of leads, lifts, place and method of quarrying, type of rocks to be quarried and all such other aspects in his tendered rate. Later on any claim whatsoever shall not entertained except where any quarry is changed for circumstance beyond the control of contract under the written order of Superintending Engineer in-charge of work."

4. Thus, placing reliance on clause 3.11(A) of the agreement, it is submitted that the details of different quarries arc shown in Annexure C which are to be used only as a guide. The claimant/contractor had entered into contract with open eyes after satisfying himself and had accepted the quarry. Therefore, plea of the contractor in his reference petition that as lot of water had flown through the *Nala* in past rainy season eroding the sand quarries necessitating the contractor to approach the competent authority in terms of the clause 3.11(A) with a request to transport sand from Mahuar river quarry (Chandrapetha) and demanding extra expenditure incurred in extra lead in transportation of sand could not have been permitted by the Arbitration Tribunal. It is submitted that learned Tribunal erred in shifting the entire burden on the State for such extra lead having failed to appreciate the fact that principle of *pari materia* is attracted because the terms and conditions of the contract agreement and other factual and legal aspects have not been changed. It is submitted that the interpretation which has been given to various clauses of the agreement by the Tribunal is arbitrary and cannot stand on its own leg.

5. It is also submitted by the learned counsel for the State that earlier the contractor had filed a claim on similar grounds before the Arbitration Tribunal for a different period claiming reimbursement of the extra expenditure for execution of the same work and that was rejected by the learned Tribunal by a detailed and speaking order dated 16.10.2007 passed in Reference Petition No.38/03, and therefore, Tribunal should have applied same interpretation while dealing with the present reference petition which is subject matter of this Arbitration Revision, rather than taking a different view.

6. It is also submitted that once award passed in Reference Petition No.38/03 had attained finality, then principles of *res judicata* being applicable, the subsequent reference petition from which this Arbitration Revision originates should not have been allowed and on this ground alone, present revision petition deserves to be allowed. It is submitted that as per the terms and conditions of the agreement, contractor is not allowed to claim extra payment for extracting sand from another quarry which was permitted taking into account the factual situation, but Tribunal has erred in giving different interpretation to clause 3.11(A). It is submitted that respondent/claimant has wrongly claimed extra lead at the rate of Rs. 7.22/- per kms and inadequate data has been produced by the claimant and the same has been accepted by the Tribunal unnecessarily burdening the public exchequer. It is submitted that the rate of interest per annum from the date of institution i.e. 10.12.2007 is also on the higher side and interest ought not to have been awarded and even this award of interest has vitiated the whole award. Placing reliance on such submissions, it is prayed that impugned award be quashed and this Arbitration Revision be allowed.

7. Shri V.R.Rao, learned senior counsel for the respondent, in his turn submits that petitioners/State are trying to give a very narrow interpretation to the provisions contained in clause 4.3.29.2, so also to the provisions contained in clause 3.11(A).

8. It is also submitted by learned counsel for the respondent that provisions contained in Section 7-B of the M.P. Madhyastham Adhikaran Adhiniyam 1983 (hereinafter shall be referred to as "the Adhiniyam of 1983") provides for period of duration for approaching the final authority, has to be given full play. It is submitted that the cause of action to the contractor had arisen on 10.11.2006 when a quantified claim was referred to the final competent authority for its decision and finally accrued on 14.12.06 when such quantified claim was rejected by the final authority. Since claim petition was filed on 10.12.2007 within one year of rejection of quantified claim by the final competent authority, the reference petition was within the prescribed period of limitation as has been prescribed under Section 7-B of the Adhiniyam of 1983.

9. It is further submitted that principles of *res judicata* will not apply because there are two distinct cause of actions. Reference petition No.38/03 was filed

claiming expenditure incurred by the contractor upto June, 2002 for bringing sand entailing extra lead when there was no sanction by the competent authority i.e. Superintending Engineer as is provided under clause 3.11(A), whereas Reference Petition No.6/08 was filed claiming compensation for such extra lead after permission was granted by the Superintending Engineer in terms of the provisions contained in clause 3.11(A), and therefore, rightly the Tribunal taking into consideration all provisions contained in Section 11 CPC has rejected plea of *res judicata* because the issue in the later reference petition became different from the earlier issue by virtue of there being absence of such sanction by the competent authority when earlier Reference Petition No.38/03 was filed, whereas in the present case, such sanction of the Superintending Engineer was extended to the contractor as can be seen from the correspondence between the contractor and the Executive Engineer, Executive Engineer and the Collector of the District and thereafter between the Executive Engineer and the Superintending Engineer. It is pointed out that contractor had sent letter dated 24.1.2002, Ex.P/3, with reference to allotment of sand quarries at villages Jughai, Ganiyar, Chandpata and Lamkana upon which the Executive Engineer had requested the Collector vide communication dated 25.1.2002, Ex.P/4. The Collector in turn had reserved such quarries vide communication dated 29.1.2002 in regard to such reservation of sand quarries. Thereafter on 19.3.2002 Executive Engineer had requested the Superintending Engineer to permit transportation of sand from Mahuar river due to inadequacy of available sand at Barua *Nala*. Vide Ex.P/16 an agenda note was sent highlighting necessity of permitting transportation of sand from Mahuar river and such sanction was granted by the Superintending Engineer vide Ex.P/17 dated 20.10.2002. It is pointed out that earlier allotted quarries were within the periphery of 20 kms but since contractor was forced to transport sand from a distance beyond 20 kms from Mahuar river for the circumstances beyond the control of contractor, therefore, claim for excess lead has been rightly awarded by the Arbitration Tribunal.

10. It is submitted by the learned counsel for the respondent that rate of interest too does not call for any interference inasmuch as it is a commercial transaction and contractor is required to deploy capital after making arrangements for the same from commercial banks at commercial rates which are at any given point of time much higher than the rate of interest awarded by the Tribunal i.e. 9%.

11. After hearing learned counsel for the parties and perusing the record, we would like to first advert to the argument put forth by the learned counsel for the State that principle of *para materia* is attracted. In fact, the correct word is *pari materia* and not para materia as has been mentioned in ground B of the Arbitration Revision. The meaning and import of *pari materia* is that a statute must be read as a whole as words are to be understood in their context. Extension of this rule of context permits reference to other statutes in *pari materia* i.e. the statutes dealing

with the same subject matter or forming part of the same system. In his book 'Principles of Statutory Interpretation, 31st Edition, Hon'ble Justice G.P.Singh has referred to case of *A.G. v. HRH Prince Ernest Augustus of Hanover*, (1957) 1 ALL ER 49 wherein Viscount Simonds conceived it to be a right and duty to construe every word of a statute in its context and he used the word context in its widest sense including "other statutes in *pari materia*". In the case of *United Society v. Eagle Bank*, (1829) 7 Connecticut 457 it has been held that statutes are in *pari materia* which relate to the same person or thing, or to the same class of persons or things. The word par must not be confounded with the word *simli*s. It is used in opposition to it-intimating not likeness merely but identity. It is a phrase applicable to public statutes or general laws made at different times and in reference to the same subject. In the case of *State of Punjab v. Okara Grain Buyers Syndicate Ltd., Okara*, AIR 1964 SC 669 it has been held that when two pieces of legislation are of differing scopes, it cannot be said that they are in *pari materia*.

12. As per clause 2.25 of the agreement it was agreed that the material to be used on work specified in contract will be only from the quarries specified in Annexure C. If the changes of quarries from those mentioned in Annexure- C are necessitated due to any reasons during execution of work such changes will be made only with the approval of the Superintending Engineer given in writing. Any alterations of items, affected by change of such quarry wil1 be governed by clauses 4.3.13.1, 4.3.13.2 and 4.3.13.3 of the agreement in form B.

13. Annexure C stated thus :

Annexure C
Statement of Quarries

S. No.	Description of	Name and Location of Quarry
1.	Masonry Stone	Stone Quarry on upstream or downstream of dam site about 2 Kms.
2.	Rubble	- do -
3.	Metal	- do -
4.	Sand	Barua Nalla about 20 Kms from site
5.	Casing	About 2.5 Km from Dam site
6.	Hearting	About 2.5 Km from Dam site
7.	Useful rubble and spall will also be available from excavation of foundation. It will be compulsory on part of contractor to use it on work as per issues made by the department at the rates indicated in Annexure -I	

> Note: This Statement is only for the guidance of the contractor. The tenderer should satisfy himself regarding availability of the required quantity and quality of materials."

14. Clause 3.11(A) when read in totality leads to a conclusion that it was obligatory on the part of the contractor to bring approved quality of materials. Different quarries shown in the Annexure C were only to be used as a guide to the contractor and the contractor before tendering should have satisfied himself regarding the quantity and quality available and all other details of Annexure C and provided for any variation in respect of leads, lifts, place and method of quarrying, types of rocks to be quarried and all such other aspects in his tendered rate i.e. the contractor should have satisfied himself of the quantity, quality, distance (leads) and lifts etc. before tendering on the basis of quarries indicated in Annexure C and failure to do so would not have given rise to unaccountable claim to be entertained at the end of employer.

15. The later part of clause 3.11 (A) provides that later on any claim whatsoever shall not be entertained except where any quarry is changed for circumstance beyond the control of contract under the written order of Superintending Engineer in-charge of work. Thus, there being a caveat provided in clause 3.11(A) that if there is any change of quarry for circumstances beyond the control of the contractor under the written orders of the Superintending Engineer of the work, then it cannot be said that provisions contained in clause 3.11(A) are *pari materia* with each other. In fact, as per the law laid down in the case of *Okara Grain Buyers Syndicate Ltd.* (supra) the scope of two clauses forming part of clause 3.11(A) cannot be said to be in *pari materia*, and therefore, this argument of *pari materia* deserves to be rejected and is rejected.

16. Another ground which has been raised to assail the impugned award is in regard to limitation. It is submitted that the reference petition as was filed by the contractor was barred by time as it was filed beyond the period of 28 days as is stipulated in clause 4.3.29.2. Section 7-B(l) of the Adhiniyam of 1983 provides that :

> The Tribunal shall not admit a reference petition unless -
>
> (a) the dispute is first referred for the decision of the final authority under the terms of the works contact; and
>
> (b) the petition to the Tribunal is made within one year from the date of communication of the decision of the final authority:
>
> Provided that if the final authority fails to decide the dispute within a period of six months from the date of reference to it, the

> petition to the tribunal shall be made within one year of the expiry of the said period of six months."

In the present case, admitted facts are that for the first time a quantified claim was preferred to the Superintending Engineer (final authority) on 10.11.2006 and such cause of action for filing the claim had accrued for the first time on 17.2.04. Thus, within a period of three years claim was referred to the final authority i.e. the 'Superintending Engineer on 10.11.2006. Superintending Engineer had rejected this claim filed by the respondent on 14.12.2006 and thereafter reference petition was filed before the Arbitration Tribunal on 10.12.2007 i.e. within one year of the final decision of the final authority as per the stipulation provided in Section 7 B(l)(b). Clause 4.3.29.2 though provides for limitation of 28 days for referring a dispute to the Arbitration Tribunal constituted under the Adhiniyam of 1983 from the date of final decision of the Superintending Engineer, but the statutory limitation as provided under Section 7-B shall have overriding effect over the provisions of the agreement and since statute itself provides limitation of one year, that will have overriding effect over the contract agreement because a fresh cause of action arises in favour of the respondent when dispute is decided by the final authority, therefore, as far as issue of limitation is concerned, we are of the opinion that Arbitration Tribunal was justified in holding the reference petition to be within period of limitation as stipulated in Section 7-B of the Adhiniyam of 1983. For authority, please see judgment of this High Court in the case of *Ramla Construction, New Delhi v. State of M.P.* as reported in 2006(1) MPLJ 234.

17. As has been discussed above, even plea of *res judicata* is not available to the State inasmuch as reference petition No.38/03 was filed before the Tribunal for a period where later part of clause 3.11 (A) had not come into play i.e. because earlier claim was filed seeking extra lead without there being any sanction of the Superintending Engineer as there was no written order of the Superintending Engineer in-charge of the work permitting change of quarry recording circumstances beyond the control of contractor, whereas present reference petition which is subject matter of this Arbitration Revision was filed seeking non-compliance of written order of the Superintending Engineer in-charge of the work who had permitted the change of quarry for the circumstances beyond the control of the contractor after forming a three men committee and taking their report as can be seen from Annexure P/8.

18. Coming to the claim for extra lead at Rs.7.22 per kms. which is the core issue. The same as observed supra revolves around clause 3.11 (A) of the Agreement. The Tribunal taking into account the factual aspect in paragraphs 58, 59 and 60 upheld the claim by the Contractor holding that the permission granted to the Contractor by the Competent Authority i.e. the Superintending Engineer was without any condition, such as that the cost is to be borne by the Contractor. Even otherwise, it is a factual issue and it was within the competence of the

revision petitioners to have produced evidence as to the correct calculation after drawing data as to the cost of POL (petrol, oil and lubricants) etc. at the relevant point of time, but from perusal of their written statement filed before the Arbitration Tribunal, it appears that no such attempt was made by the authorities of the State to delve into this issue and dispute the rate in its true spirit. Therefore, at this stage when we are hearing revision petition and scope of which is to be largely governed by the provisions contained in Section 115 of CPC which provides that the High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears-

> (a) to have exercised a jurisdiction not vested in it by law, or
>
> (b) to have failed to exercise a jurisdiction so vested, or
>
> (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit, therefore, in view of such provisions as discussed above dealing with scope of Section 115 CPC in the State of M.P., this Court is of the opinion that issue of rate being purely a factual issue does not call for any detailed analysis or deliberation in a revision petition, therefore, this argument of rate also deserves to be rejected.

19. It is to be appreciated that whether later part of clause 3.11(A) provides for any variation in the contract or not. As per Hudsons's 'Building and Engineering Contracts' 11th Edition by I.N. Duncan Wallace Volume 1 the word "variation" can be used in a number of different senses. Thus it is frequently used by lawyers for an agreed alteration or modification by the parties of the terms of a pre- existing contract between them. Even in construction contracts it may occasionally be used by the draftsman for an agreed alteration or extension of the contract completion date, or for compensatory provisions which may alter the contract price, such as fluctuations or "variation of price" clauses, or "changed circumstance". The term "variation as normally used in the present chapter denotes an alteration which has been duly authorized or instructed by the owner or his A/E, and for the cost of which the owner will prima facie be responsible to the contractor. It has been further provided that there are reasons for providing variation clauses which have been summarized in chapter 7 para 7.005, dealing with reasons for variation clauses, as under :-

> "7.005 These are inserted into nearly all construction contracts at the present day for two principal reasons. In the first place, they give the owner the power to require a variation of the work, unilaterally and as of right, as opposed to relying on the

willingness of the contractor to agree to the variation, which would otherwise enable the contractor to exert unacceptable pricing or other pressures on the owner in return for his agreement to carry out the variation. In the second place, it has already been seen that an architect has no implied authority to contract on behalf of his employer. In the absence of such a provision, therefore, the contractor will not be able to recover payment for any additional or varied work which he has done on the A/E's instructions, unless he can show a separate contract with the owner that he should do it and be paid for it (as, for example, where the owner knows of the architect's instruction and does not countermand it, provided that it is realised or ought to be realised by the owner that a change of price is intended or probable as a consequence of the instruction). With such a provision the contractor, provided he complies with any requirements of form, is protected from any denial by the owner of the A/E's authority to order the variation. A third and subsidiary reason for variation clauses is that they enable the parties to agree in advance on the basis for valuing and pricing the varied work."

Similarly, para 7.043 which deals with power to order variations reads as under:-

"7.043 For some reason, modern draftsmen of variation clauses tend to make rather laborious lists of matters where the power to vary may be exercised. So far as the permanent work is concerned, all that is in fact necessary is a power to add, omit, or substitute different work (the last, on analysis, usually representing a combination of omissions and additions). As previously noted, most contracts do not deal expressly with the controversial question of temporary works of working methods, although the post-1973 ICE conditions do include a power to order "changes in the specified sequence method or timing of construction (if any)." Such provisions, although highly desirable in the owner's interest, require careful draftsmanship to avoid confusion and confrontation.

No doubt in some of the older cases there was a tendency to construe the range of matters as to which an order might be given somewhat strictly if the language was ambiguous, but it may be doubted whether this will be so at the present day. The following early case, for instance, probably turned, at least partly, on the then strict rules of pleading, and it is suggested that virtually any alteration of the permanent work will be covered at the present day by a clause giving a power to add or omit work."

20. In this regard, provisions of Section 70 of the Indian Contract Act are relevant to the contract and it reads as under:-

> **"S.70. Obligation of person enjoying benefit of non-gratuitous act.**- Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered."

Thus, section 70 of the Contract Act deals with obligation of person enjoying the benefit of non-gratuitous act. For authority, please see judgment rendered by the Supreme Court in the case of *Mulamchand v. State of Madhya Pradesh* as reported in AIR 1968 SC 1218 and *Pilloo Dhunji Shaw Sidhwa v. Municipal Corporation of the City of Poona*, AIR 1970 SC 1201.

21. There are three ingredients to support the cause of action under Section 70 of the Indian Contract Act and these are; First the goods are to be delivered lawfully or anything has to be done for another person lawfully. Second the thing done or the goods delivered is so done or delivered "not intending to do so gratuitously". Third the person to whom the goods are delivered "enjoys the benefit thereof." It is only when these ingredients are pleaded in the plaint that a cause of action is constituted under Section 70 of the Indian Contract Act. It has been held that if any plaintiff pleads the three ingredients and proves the three features, the defendant is then bound to make compensation in respect of word to restore the things so done or delivered. For authority, please see judgment in the case of *Union of India vs. Sita Ram Jaiswal* as reported in AIR 1977 SC 329. In the case of Governor-General in Council, represented by the *General Manager, South Indian Railway vs. The Municipal Council, Madura*, AIR (36) 1949 PC 39 the word "lawfully" has been held to be understood as bonafide.

22. While discussing the scope of Section 70, the Supreme Court in the case of *Pannalal v. Dy. Commissioner, Bhandara and anr.*, AIR 1973 SC 1174 has held that the real basis of the liability under Section 70 is the fact that the person for whom the work has been done, has accepted the work and has received the benefit thereunder. This section prevents unjust enrichment and it applies as much to individual as to Corporation and Government. In the case of *Mulamchand* (supra) it has been held that obligation under Section 70 is not founded upon any contract or tort, but upon a third category of law, namely, quasi contract or restitution. In the case of *West Bengal Vs. B.K.Mondal* as reported in AIR 1962 SC 779 it has been laid down that between the person claiming compensation and persons against whom it is claimed some lawful relationship must subsist, for that is the implication of the use of the word "lawfully" in this section. But the said lawful relationship arises not because the party claiming compensation has done

something for the party against whom the compensation is claimed but because what has been done by the former has been accepted and enjoyed by the latter. In the case of *State of Punjab Vs. Hindustan Development Board Ltd.* as reported in AIR 1960 Punj 585 it is held that "a person who does work or supplies goods under a contract, express or implied, for which no price is fixed, is entitled to be paid a reasonable sum for his labour and the materials supplied. If the work is outside the contract, the terms of the contract can have no application; and the contractor, in the absence of any new agreement is entitled to be paid a reasonable price for such work as was done by him. It is, however, necessary in all such cases, that the extra work outside the contract should have been ordered or accepted by the defendant. If it is a kind of additional or varied work contemplated by the contract, the contractor must be paid for it, and will be paid for it according to the prices regulated by the contract. If, on the other hand, it was additional or varied work, so peculiar, so unexpected, and so different from what any person reckoned or calculated upon, that it is not within the contract at all, one of the two courses must have been open to him, he might have said: 'I entirely refuse to go on with the contract, *non haec in foedera veni*: I never intend to construct this work upon this new and unexpected footing, or, he might have said, I will go on with this, but this is not the kind of extra work contemplated by the contract and if I do it, I must be paid a *quantum meruit* for it." Therefore, principles enunciated under Section 70 of the Contract Act when read in consonance with the provisions contained in clause 3.11 (A), it is apparent that once there was sanction of the Superintending Engineer of the works to change the quarry for the circumstances beyond the control of the contractor, then after giving such sanction for change of quarry, authorities of the State were precluded from saying that the contractor was bound by the provisions contained in clause 3.11(A) providing for escalation from the quarries mentioned in Annexure C attached to the agreement.

23. Trite it is that the scope of interference with the award is limited. In *Sharma & Associates Contractors Private Limited Vs. Progressive Constructions Limited,* (2017) 5 SCC 743 (though in context to section 30 of the Arbitration Act, 1940), it is held:

> "12. In support, the learned counsel referred to the following judgments of this Court:
>
> 12.1. B.V. Radha Krishna vs. Sponge Iron India Ltd.[1997) 4 SCC 693:
>
> "11. The disposal of the matter by the High Court in the manner shown above does not come within the ambit of Section 30 of the Arbitration Act. This Court, time and again, has pointed out the scope and ambit of Section 30 of the Act. In State of Rajasthan v. Puri Construction

Co. Ltd. after referring to decisions of this Court as well as English cases, the Court observed as follows: (SCC p. 492, para 12)

"12. On the scope and ambit of the power of interference by the court with an award made by an arbitrator in a valid reference to arbitration, various decisions have been made from time to time by Law Courts of India including this Court and also by the Privy Council and the English Courts. Both the parties have referred to such decisions in support of their respective contentions. The factual contentions of the respective parties are proposed to be scrutinised and then the facts are proposed to be tested within the conspectus of judicial decisions governing the issues involved."

This Court again observed in paras 26-28 as follows: (SCC pp. 500-501)

'26 The arbitrator is the final arbiter for the dispute between the parties and it is not open to challenge the award on the ground that the arbitrator has drawn his own conclusion or has failed to appreciate the facts. In Sudarsan Trading Co. v. State of Kerala (1989) 2 SCC 38 it has been held by this Court that there is a distinction between disputes as to the jurisdiction of the arbitrator and the disputes as to in what way that jurisdiction should be exercised. There may be a conflict as to the power of the arbitrator to grant a particular remedy. One has to determine the distinction between an error within the jurisdiction and an error in excess of the jurisdiction. *"Court cannot substitute its own evaluation of the conclusion of law or fact to come to the conclusion thai the arbitrator had acted contrary to the bargain between the parties*." Whether a particular amount was liable to be paid is a decision within the competency of the arbitrator. By purporting to construe the contract the court cannot take upon itself the burden of saying that this was contrary to the contract and as such beyond jurisdiction. If on a view taken of a contract, the decision of the arbitrator on certain amounts awarded is a possible view though perhaps not the only correct view, the award cannot be examined by the court. Where the reasons have been given by the arbitrator in making the award the court cannot examine the reasonableness of the reasons. If

the parties have selected their own forum, the deciding forum must be conceded the power of appraisement of evidence. The arbitrator is the sole judge of the quality as well as the quantity of evidence and it will not be for the court to take upon itself the task of being a judge on the evidence before the arbitrator."

12.2 Ispat Engineering & Foundry Works v. SAIL, (2001) 6 SCC 347:

"4. Needless to record that there exists a long catena of cases through which the law seems to be rather well settled that the reappraisal of evidence by the court is not permissible. This Court in one of its latest decisions (Arosan Enterprises Ltd. v. Union of India [(1999) 9 SCC 449]) upon consideration of decisions in Champsey Bhara & Co. v. Jivraj Balloo Spg. & Wvg. Co. Ltd. [AIR 1923 PC 66 : 1923 AC 480], Union of India v. Bungo Steel Furniture (P) Ltd. [AIR 1967 SC 1032 : (1967) 1 SCR 324], N. Chellappan v. Kerala SEB [(1975) 1 SCC 2891, Sudarsan Trading Co. v. State of Kerala [(1989) 2 SCC 38], State of Rajasthan v. Puri Construction Co. Ltd. [(1994) 6 SCC 485] as also in Olympus Superstructures (P) Ltd. v. Meena Vijay Khetan [(1999) 5 SCC 651] has stated that reappraisal of evidence by the court is not permissible and as a matter of fact, exercise of power to reappraise the evidence is unknown to a proceeding under Section 30 of the Arbitration Act. This Court in Arosan Enterprises [(1999) 9 SCC 449] categorically stated that in the event of there being no reason in the award, question of interference of the court would not arise at all. In the event, however, there are reasons, interference would still be not available unless of course, there exist a total perversity in the award or the judgment is based on a wrong proposition of law. This Court went on to record that in the event, however, two views are possible on a question of law, the court would not be justified in interfering with the award of the arbitrator if the view taken recourse to is a possible view. The observations of Lord Dunedin in Champsey Bhara [AIR 1923 PC 66 : 1923 AC 480] stand accepted and adopted by this Court in Bungo Steel Furniture [AIR 1967 SC 1032 : (1967) 1 SCR 324] to the effect that the court had no jurisdiction to investigate into the merits of the case or to examine the documentary and oral evidence in the record for the purposes of finding out whether or not the

> arbitrator has committed an error of law. The court as a matter of fact, cannot substitute its own evaluation and come to the conclusion that the arbitrator had acted contrary to the bargain between the parties."
>
> 12.3 Indu Engineering & Textiles Ltd. v. DDA, (2001) 5 SCC 691:
>
> "5. The scope for interference by the court with an award passed by the arbitrator is limited. Section 30 of the Arbitration Act, 1940 (for short "the Act") provides in somewhat mandatory terms that an award shall not be set aside except on one or more of the grounds enumerated in the provision...
>
> xxx xxx xxx
>
> 7. This Court, while dealing with the power of courts to interfere with an award passed by an arbitrator, had consistently laid stress on the position that an arbitrator is a Judge appointed by the parties and as such the award passed by him is not to be lightly interfered with...
>
> 8.As noted earlier, the Division Bench in appeal filed under Section 39 of the Act, reversed the order passed by the Single Judge and set aside the award holding that there was no material before the arbitrator for accepting the claim of the appellant. The Division Bench exceeded the limits of its jurisdiction in entering into the facts of the case and in interpreting the agreement between the parties and correspondence which was a part of the said agreement. What was the price of the commodity to be paid by the respondent to the appellant was essentially a question of fact. Even assuming that the arbitrator had committed an error in coming to the conclusion that the appellant was entitled to the claim of the escalated price of the commodity (hard coke) under the terms of the agreement and the Division Bench felt that the conclusion should have been otherwise, it was not open to it to interfere with the award on that score."

24. In view of such legal position authorizing the employer to provide for variation clauses and since there exists a variation clause in later part or clause 3.11(A), this Court is of the opinion that once such variation was sanctioned by the employer (Superintending Engineer) and contractor was permitted to entail extra lead to bring sand from Mahuar river, such variation having been sanctioned by

the employer, contractor is entitled to be compensated for such variation as it was made in the interest of the work so to facilitate the contractor to complete the work. Therefore, there is no illegality or arbitrariness in the impugned award calling for exercise of revisional jurisdiction of this Court, therefore, Arbitration Revision fails and is dismissed.

Parties to bear their own costs.

Revision dismissed

I.L.R. [2019] M.P. 1568
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice Sheel Nagu

M.Cr.C. No. 3423/2019 (Gwalior) decided on 24 April, 2019

SAHIL GUPTA …Applicant

Vs.

STATE OF M.P. & ors. …Non-applicants

Essential Commodities Act (10 of 1955), Section 3 & 7 and Criminal Procedure Code, 1973 (2 of 1974), Section 482 – Quashment of Proceeding – FIR – Ingredients – Irregularities in Fair Price Shop **– Held – In the FIR, non-mention of particular clause of particular Control Order or name of Control Order promulgated u/S 3 of the Act of 1955, not by itself render the FIR vitiated, provided, the FIR discloses allegation of breach of any of the Orders promulgated u/S 3 of the Act – In instant case, Pre-requisites of Section 7 are satisfied to attract its penal provision – No case for interference made out – Application dismissed. (Paras 4, 6 & 10)**

आवश्यक वस्तु अधिनियम (1955 का 10), धारा 3 व 7 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – कार्यवाही अभिखंडित की जाना – प्रथम सूचना प्रतिवेदन – घटक – उचित मूल्य की दुकान में अनियमितताऐं – अभिनिर्धारित – प्रथम सूचना प्रतिवेदन में 1955 के अधिनियम की धारा 3 के अंतर्गत प्रख्यापित नियंत्रण आदेश का नाम अथवा विशिष्ट नियंत्रण आदेश का विशिष्ट खंड उल्लिखित न किया जाना, अपने आप में प्रथम सूचना प्रतिवेदन को दूषित नहीं करता, परंतु यह कि प्रथम सूचना प्रतिवेदन, अधिनियम की धारा 3 के अंतर्गत प्रख्यापित आदेशों में से किसी के भंग का अभिकथन प्रकट करता हो – वर्तमान प्रकरण में, धारा 7 के दाण्डिक उपबंध आकर्षित करने के लिए उसकी पूर्व–अपेक्षाओं की संतुष्टि होती है – हस्तक्षेप हेतु प्रकरण नहीं बनता – आवेदन खारिज।

Cases referred:

M.Cr.C. No. 8836/2013 decided on 13.03.2015, 1982 CLJ 1145.

Harshad Bahirani, for the applicant.
Manish Nayak, P.L. for the non-applicant/State.

O R D E R

SHEEL NAGU, J.:- Inherent powers of this Court u/S.482 of Cr.P.C. are invoked for quashing of FIR dated 06.01.2019 bearing Crime No.0007/2019 registered at Police Station Civil Line, District Datia alleging offences punishable u/Ss.3/7 of Essential Commodities Act against the petitioner.

2. Learned counsel for rival parties are heard on the question of admission.

3. Learned counsel for petitioner primarily submits that in the face of FIR not specifying the Control Order which is alleged to be breached, the FIR alleging offence punishable u/S.3/7 Essential Commodities Act 1955 ("1955 Act" for brevity) is not sustainable on the anvil of provision of Sec.7 of 1955 Act which as a pre-requisite requires that it's penal provision get attracted only when any Order promulgated u/S.3 of the 1955 Act is violated and not otherwise.

4. True it is, the FIR does not mention any clause of any Order or name of any particular Order which is alleged to be breached. However, a bare perusal of the allegations reveal that on an inspection of the fair price shop run by the petitioner firm, it was found that cash memos vouching for sale of fertilizer were not being issued to purchaser/farmer and the stock book was not maintained and neither was the stock position and price list of fertilizers displayed at the place of business.

5. The Fertiliser (Control) Order 1985, under Clause-4 and Clause-5 provides for display or stock position and price list of fertilizer and obliges a dealer to issue cash or credit memo to a purchaser of fertilizer in a particular form prescribed as "M". For ready reference and convenience Clause-4 and Clause-5 of Fertiliser (Control) Order 1985 are reproduced below :-

> ***4. Display of stock position and price list of fertilisers.-*** *Every dealer, who makes or offers to make a retail sale of any fertilisers, shall prominently display in his place of business:-*
>
> *a) the quantities of opening stock of different fertilisers held by him on each day;*
>
> *Explanation -The actual stocks at any point of time during the day may be different from that of the displayed opening stocks to the extent of sale and receipt of such fertilisers upto the time of inspection during that day*
>
> *(b) a list of prices or rates of such fertilisers fixed under clause 3 and for the time being in force.*
>
> ***5.Issue of cash/credit memorandum.*** *Every dealer shall issue a cash or credit memorandum to a purchaser of a fertiliser in Form M.*

6. When the allegations in the impugned FIR are tested on the anvil of Clause-4 & 5 of 1985 Order, it is obvious that the mandatory provision of these

clause were found to be breached and therefore, in the considered opinion of this Court even if the mention of Clause-4 and 5 of the Fertilizer Control Order is not reflected in expressed terms in the FIR but if the allegation reveals breach of the said Clauses then the pre-requisites of Sec.7 of the Act,1955 are satisfied for attracting it's penal provision.

7. Learned counsel for petitioner has vehemently argued that the allegations are not true.

8. This Court is afraid that veracity of the allegations cannot be gone into at this nascent stage of the prosecution where investigation is still pending.

9. Learned counsel for the petitioner has relied upon the decision of coordinate bench of this Court in M.Cr.C.8836/2013 passed on 13-03-2015 to submit that non-mention of the Control Order in the FIR which is found to be breached was treated to be fatal for the FIR assailed therein.

10. A bare perusal of the order dated 13-03-2015 of the coordinate bench reveals that the Court had inter alia held that the allegation in the FIR assailed before it by itself did not disclose any violation of any Control Order promulgated u/S.3 of the Act, 1955 and therefore, the said M.Cr.C. was allowed not merely on the ground of non-mention of any specific Control Order in the FIR. Thus the said decision is of no avail to the petitioner. Thereafter, the petitioner has relied upon the decision of single Bench of Madras High Court in *P. Appavu Gounder Vs. Collector of South Arcot Dt. at Cuddalore*, 1982 CLJ 1145, which discloses that the report submitted by the Inspecting Authority did not disclose breach of any Control Order and therefore, the said decision is further of no avail.

11. In view of above, and the FIR prima facie revealing breach of Clause-4 and 5 of Fertiliser (Control) Order 1985 (notwithstanding non-mention of Clause-4 & 5 and name of Control Order in impugned FIR) this Court does not consider this case to be fit for interference in the limited inherent powers available u/S.482 of Cr.P.C.

12. Accordingly, petition stands dismissed.

13. It is made clear that the findings recorded herein are only for the purpose of this order and shall not prejudice the petitioner and the prosecution during investigation and trial.

Application dismissed

I.L.R. [2019] M.P. 1571
MISCELLANEOUS CRIMINAL CASE
Before Ms. Justice Vandana Kasrekar
M.Cr.C. No. 25503/2017 (Indore) decided on 18 June, 2019

MANOJ SINGHAL & anr. ...Applicants

Vs.

RAJENDRA SINGH BAPNA & anr. …Non-applicants

***A. Criminal Procedure Code, 1973 (2 of 1974), Sections 200, 202, 203, 204 & 482 – Private Complaint – Quashment – Stage of Trial* – Held – Magistrate u/S 202 Cr.P.C. decided to enquire into the complaint, thus mandatory proceeding is under way to determine whether complaint is to be registered or not – Statement of complainant is not yet recorded and Magistrate has not even taken cognizance of the matter, thus petition is premature – Looking to complaint, *prima facie* case to proceed with issuance of notice is made out – Quashment at such initial stage is impermissible – Application disposed. (Paras 22 to 25)**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 200, 202, 203, 204 व 482 – निजी परिवाद – अभिखंडन – विचारण का प्रक्रम – अभिनिर्धारित – मजिस्ट्रेट ने दं.प्र.सं. की धारा 202 के अंतर्गत परिवाद पर जांच करने का विनिश्चय किया, अतः यह अवधारित करने के लिए कि क्या परिवाद दायर किया जाना है अथवा नहीं, आज्ञापक कार्यवाही जारी है – परिवादी के कथन अभी तक अभिलिखित नहीं किये गये हैं तथा मजिस्ट्रेट ने मामले का संज्ञान भी नहीं लिया है, अतः याचिका समयपूर्व है – परिवाद को देखते हुए, नोटिस जारी कर आगे बढ़ने का प्रथम दृष्ट्या प्रकरण बनता है – ऐसे प्रारंभिक प्रक्रम पर अभिखंडन अननुज्ञेय है – आवेदन निराकृत।

***B. Criminal Procedure Code, 1973 (2 of 1974), Section 203 & 204 – Duty of Court* – Held – Apex Court concluded that before passing any order u/S 203 or 204 Cr.P.C., Magistrate is duty bound to consider the complaint, documents annexed with it, statements u/S 200 Cr.P.C. and enquiry proceeding u/S 202 Cr.P.C., otherwise the order, if any passed by Magistrate would be bad in law. (Para 23)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 203 व 204 – न्यायालय का कर्तव्य – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि दं.प्र.सं. की धारा 203 अथवा 204 के अंतर्गत कोई आदेश पारित करने के पूर्व, मजिस्ट्रेट परिवाद, उसके साथ संलग्न दस्तावेजों, दं.प्र.सं. की धारा 200 के अंतर्गत कथनों एवं दं.प्र.सं. की धारा 202 के अंतर्गत जांच कार्यवाही पर विचार करने हेतु कर्तव्य द्वारा आबद्ध है, अन्यथा, मजिस्ट्रेट द्वारा यदि कोई आदेश पारित किया गया है, विधि की दृष्टि से दोषपूर्ण होगा।

***C. Criminal Procedure Code, 1973 (2 of 1974), Section 482 – Quashment – Scope* – Held – If Court finds that a case or proceedings has**

been instituted on malice or criminal machinery has been misused, then it can quash such proceedings and when cognizance is already taken in a matter, same can be quashed u/S 482 Cr.P.C. (Para 15)

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – अभिखंडन – विस्तार – अभिनिर्धारित – यदि न्यायालय ने यह पाया कि कोई प्रकरण अथवा कार्यवाहियां विद्वेष से संस्थित किये गये हैं या आपराधिक तंत्र का दुरूपयोग हुआ है, तो वह उक्त कार्यवाहियां अभिखंडित कर सकता है तथा जब एक मामले में पहले ही संज्ञान लिया जा चुका है, उक्त को दं.प्र.सं. की धारा 482 के अंतर्गत अभिखंडित किया जा सकता है।

Cases referred:

AIR 1992 SC 604, (2017) 13 SCC 369, (2002) 3 SCC 89, AIR 1963 SC 1430.

S.K. Vyas with *Aniruddha A. Gokhale,* for the applicants.
Aviral Vikas Khare, for the non-applicant No. 1.

O R D E R

VANDANA KASREKAR, J. :- This petitioners have filed the present petition under Section 482 of Cr.P.C. for quashment of private complaint dated 26/05/2017 which is pending before the JMFC, Indore for offences under Sections 323, 294, 500 and 506-B of IPC.

2. The respondent no.1 was initially appointed as Manager Pharmacy with Bombay Hospital Indore vide appointment order dated 3/11/2003. After employment, the services of the respondent seemed satisfactory, however, on account of perpetual nuisance and poor work performance, the respondent no.1 was issued a warning for which he also submitted a written apology. Inspite of warnings, the performance of respondent no.1 remained poor and, therefore, his services were terminated vide order dated 30/05/2016. When the Management issued a termination letter to respondent, he started throwing tantrums and became very aggressive. Respondent no.1 also tried to commit suicide by trying to jump from the first floor of the hospital, but was saved by the Management just in time. Intimation to this effect was also given to Lasudiya Police Station on 30/05/2016.

3. On the contrary, the respondent no.1 filed a frivolous and false complaint with Police Station - Lasudiya that, the petitioner no.1 man-handled the complainant and also abused him and threatened him. Being aggrieved from the said termination order, the respondent no.1 filed a suit under Order 7 Rule 1 of CPC for declaration, permanent injunction and damages to the tune of Rs.1,21,17,312/- before the XVth Additional District Judge, Indore.

4. The petitioners filed an application under Order 7 Rule 11 of CPC for dismissal of suit. This application was allowed and the suit filed by the respondent no.1 was dismissed. Thereafter, the respondent no.1 filed a complaint before the learned Judicial Magistrate First Class, Indore for offences under Section 323, 294, 500 and 506-B of IPC, on 26/05/2017. The learned JMFC has taken the cognizance of the said complaint. Being aggrieved by that, the petitioners have filed the present petition for quashment of the complaint.

5. Learned Senior Counsel appearing on behalf of the petitioners submit that the complaint filed by the respondent no.1 is totally baseless, frivolous and is made with a view to harass and falsely implicate the present petitioners with a malafide intention to settle his personal vendetta. He furthe (sic : further) submits that the respondent has also filed a civil suit claiming damages and also chose to file a private complaint for the said offences. Thus, the allegations made in the private complaint are nothing, but an afterthought. He further argues that a bare perusal of the entire chain of sequences would indicate that the said complaint has been filed only with a malafide intention for wrecking vengeance upon the petitioners. He submits that on the basis of the allegations made in the complaint, no offence is made out against the present petitioners. The respondent no.1 has alleged in the complaint that the petitioners published an advertisement in the newspaper regarding want of Manager Pharmacy, inspite of the said post being held by the respondent with an intent to defame the complainant, however, on the basis of these allegations, no case for defamation can be ascribed against the present petitioners.

6. Learned Senior Counsel for the petitioners relied on the judgment passed by the Hon'be Apex Court in the case of *State of Haryana & Ors. Vs. Bhajanlal & Ors.* Reported in AIR 1992 SC 604, wherein it has been held that whenever a Court is of the opinion that a criminal machinery has been resorted to only for the purposes of harassing a person and to settle personal vendetta then it is the duty of the court to counter such frivolous litigation and the court under Section 482 Cr.P.C. has ample power to quash such a litigation.

7. That, event (sic : even) the Lasudiya Police Station **(Annexure-P/10, Page No.62)** has held that the complaint filed by the respondent no.1 seems to have been filed being aggrieved by his termination order by the management and hence, the petition deserves to be allowed.

8. Where the Court is being utilized for any oblique purpose then in such cases it becomes a duty of courts to quash such cases.

9. That, the respondent no.1 has given a list of 33 witnesses, **(Page 54 of petition)** which he wishes to summon. It is submitted that some of the witnesses are senior officials residing at Bombay, who have no nexus with the present case

at hand. It is not even mentioned as how these witnesses are material and why is their presence material. The present witnesses have been arrayed as witnesses merely for harassing them in as much as being at Bombay they could not have been arrayed as an accused in the present mater (sic : matter) . There is no connection or even an averment as regards how the senior officials residing at Bombay would have any nexus with the present litigation which only indicates thatUhe idea of the respondent no.1 is to merely harass the senior officials by calling them at Indore which clearly cannot be allowed.

10. That, the respondent tried to commit suicide the moment he received the termination letter**(Annexure-P/3, Page No.17)**, which was duly received by him on 30/05/2016, which was duly intimated to the P.S. Lasudiya(Annexure-P/4), Page No. 19). As a counter to the aforementioned complaint, respondent no.1 filed a frivolous complaint that he was threatened with life and further alleged assault. Even this complaint was silent about any form of defamation which clearly spells out that on two occasions where the respondent no.1 could have reported the alleged defamation, did not do so and, hence, it reaches to only one logical conclusion that the present complaint is a counter blast to his termination.

11. Learned Senior Counsel for the petitioners also placed reliance on the judgment passed by the Apex Court in the case of *Vineet Kumar and Ors. v. State of Uttar Pradesh and Anr.* (2017) 13 SCC 369, The Hon'ble Apex Court has observed as under:

> *"Inherent power given to the High Court under Section 482 CrPC is with the purpose and object of advancement of justice. In case solemn process of Court is sought to be abused by a person with some oblique motive, the Court has to thwart the attempt at the very threshold. Judicial process is a solemn proceeding which cannot be allowed to 8 be converted into an instrument of oppression or harassment. When there are materials to indicate that a criminal proceeding is manifestly attended with mala fide and proceeding is maliciously instituted with an ulterior motive, the High Court will not hesitate in exercise of its jurisdiction under Section 482 CrPC to quash the proceeding. The present is a fit case where the High Court ought to have exercised its jurisdiction under Section 482 CrPC and quashed the criminal proceedings."*

12. It is submitted that the present case is nothing but an arm twisting method to gain oblique motives and hence being based on malice this Hon'ble Court definitely has the Jurisdiction to quash the same.

13. That, the Learned Trial Court after going through the averments of the complaint has chosen to examine the complainant and the witnesses, which means that the Learned Trial Court has already taken cognizance in the matter.

Once a court takes cognizance in the matter then the same has to reach its logical conclusion and hence, in this wake of the matter it cannot be said that the petition is premature.

14. Learned Senior Counsel further relied on the judgment passed by the Apex Court in the case of *State of Karnataka* v. *M. Devendrappa and Anr.*, (2002) 3 SCC 89, it was held that while exercising powers under Section 482 Cr.P.C, the court does not function as a court of appeal or revision. Inherent jurisdiction under the Section though wide has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the Section itself. It was further held as under:-

> ***"It would be an abuse of process of the court to allow any action which would result in injustice and prevent promotion of justice. In exercise of the powers court would be justified to quash any proceeding if it finds that initiation/continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice****. When no offence is disclosed by the complaint, the court may examine the question of fact. When a complaint is sought to be quashed, it is permissible to look into the materials to assess what the complainant has alleged and whether any offence is made out even if the allegations are accepted in toto".*

15. A bare perusal of the aforementioned law makes it amply clear that in a case where a Court finds that there has been a case or a proceeding instituted on malice or the criminal machinery has been misused, the ***Court may quash any such proceedings and since cognizance has already been taken in the matter, the same can be quashed under section 482 of the code of criminal procedure***. He further submits that the Respondent No. 1 has alleged in the complaint that the petitioners published an advertisement in the news paper regarding want of a Manager Pharmacy inspite of the said post being held by the Respondent with an intent to defame the complainant however, a bare perusal of the same would indicate that the said advertisement was for want of an Assistant Manager/ Manager Pharmacy. It is noteworthy that the Medical Store in the Hospital runs 24 hours and the purpose of the advertisement was not to defame the Complainant but was to run the store efficiently. Thus, in this view of the matter no case of defamation can be ascribed against the present petitioners.

16. In the light of the aforesaid, he submits that the complaint is merely abuse of process of law and, hence, deserves to be dismissed on this very ground.

17. The respondent no.1 has filed reply of the said complaint. A preliminary objection has been taken by the respondents stating that the present application is not maintainable. He submits that after filing of private complaint by the

respondent, the Magistrate is in the process of recording preliminary evidence under the provisions of Section 200 of Cr.P.C. The learned Magistrate has not yet applied his mind and after recording of the evidence if the court comes to the conclusion that there is no sufficient grounds to proceed further, he may even dismiss the complaint under Section 203 of Cr.P.C. This Court cannot usurp the jurisdiction of the learned Magistrate by invoking the powers under Section 482 of Cr.P.C. In the present case, he submits that the Magistrate has not yet applied his mind and not issued summons on the private complaint field (sic : filed) by the respondent no.1. The respondent has further stated that quashment of any FIR or private complaint under the provisions of Section 482 of Cr.P.C. is permissible only in exceptional circumstances and, that too, to meet the ends of justice and to prevent the abuse of process of law. By mere reading of the private complaint makes out a case against the accused person. The petitioners in the present petition has made several false statements, either to prejudice the Court or to get undue advantage from this Court. However, on this ground also the present petition deserves to be dismissed.

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

19. In the present case, the respondent no.1 has filed a private complaint before the JMFC, Indore for offence under Sections 294, 323, 500 and 506-B of IPC. Thereafter, the Magistrate has taken cognizance in the matter. The petitioners have filed the present petition for quashment of the complaint firstly, on the ground that name of several irrelevant witnesses are given by the respondent along with the complaint. Secondly, on the ground that civil suit filed by the respondent no.1 was dismissed by the trial Court in respect of similar matter.

20. The petitioners have further stated that as per report dated 12/09/2017 submitted by the Police Station - Lasudiya stating the complaint to be false and finding that the respondent no.1 has attempted to commit suicide and lastly, the petitioners have contended that the complaint filed by the respondent no.1 is false and made only with personal vendetta.

21. Counsel for the respondent no.1 has raised preliminary objection stating that the present petition is pre-mature, as the Magistrate has not even taken cognizance in the matter. The Magistrate is yet to apply its mind to decide whether notices under Section 204 of Cr.P.C. is to be issued or not and, thus no order/proceeding by which petitioners are said to be aggrieved, has been passed by the Magistrate. Unless notices are issued to accused, the accused has no right to say in the proceeding. For the said purpose, he had relied on the judgment passed by the Apex Court in the case of *Chandra Deo Singh Vs. Prokash Chandra Bose* reported in AIR 1963 SC 1430. Relevant portions from Paragraphs 6 to 12 of the said judgment is reproduced as under :-

6. The certificate was sought by the appellant on four grounds. The first ground was that respondent No. 1 had no locus standi to appear and contest a criminal case before the issue of process. The second ground was that the test propounded by the learned single judge for determining the question whether any process should be issued by the court was erroneous. The third ground was that a Magistrate making an enquiry under s. 202 of the Code of Criminal Procedure had no jurisdiction "to weigh the evidence in golden scales" as was done in the present case.

7. Taking the first ground, it seems to us clear from the entire scheme of Ch. XVI of the Code of Criminal Procedure that an accused person does not come into the picture at all till process is issued. This does not mean that he is precluded from being present when an enquiry is held by a Magistrate. He may remain present either in person or through a counsel or agent with a view to be informed of what is going on But since the very question for consideration being whether he should be called upon to face an accusation, he has no right to take part in the proceedings nor has the Magistrate any jurisdiction to permit him to do so. It would follow from this, therefore, that it would not be open to the Magistrate to put any question to witnesses at the instance of the person named as accused but against whom process has not been issued ; nor can he examine any witnesses at the instance of such a person, of course, the Magistrate himself is free to put such questions to the witnesses produced before him by the complainant as he may think proper in the interests of justice. But beyond that, he cannot go. It was, however, contended by Mr. Sethi for respondent No. 1 that the very object of the provisions of Ch. XVI of the' Code of Criminal Procedure is to prevent an accused person from being harassed by a frivolous complaint and, therefore, power is given to a Magistrate before whom complaint is made to postpone the issue of summons to the accused person pending the result of an enquiry made either by himself or by a Magistrate subordinate to him. A privilege conferred by these provisions can, according to Mr. Sethi, be waived by the accused person and he can take part in the proceedings. No doubt, one of the objects, behind the provisions of s. 202, Cr.P.C. is to enable the Magistrate to scrutinise carefully the allegations made in the complaint with a view to prevent a person named therein as accused from being called upon to face an obviously frivolous complaint. But there is also another object behind this provision and it is to find out what material there is to support the allegations made in the complaint. It is the bounden duty of the Magistrate while

making an enquiry to elicit all facts not merely with a view to protect the interests of an absent accused person, but also with a view to bring to book a person or persons against whom grave allegations are made. Whether the complaint is frivolous or not has, at that stage, necessarily to be determined on the basis of the material placed before him by the complainant. Whatever defence the accused may have can only be enquired into at the trial. An enquiry under s. 202 can in no sense be characterised as a trial for the simple reason that in law there can be but one trial for an offence. Permitting an accused person to intervene during the enquiry would frustrate its very object and that is why the legislature has made no specific provision permitting an accused person to take part in an enquiry.

This court in Vadilal Panchal v. Dattatraya Dulaji Ghadigsonkar (1), may usefully be quoted "The enquiry is for the purpose of ascertain- ing the truth or falsehood of the complaint that is, for ascertaining whether there is evidence in support of the complaint so as to justify the issue of process and commencement of proceedings against the person concerned. The section does not say that a regular trial for adjudging the guilt or otherwise of the person complained against should take place at that stage for the person complained against can be legally called upon to answer the 'accusation made against him only when a process has issued and he is put on trial."

8. Coming to the second ground, we have no hesitation in holding that the test propounded by the learned single judge of the High Court is wholly wrong. For determining the question whether any process is to be issued or not, what the Magistrate has to be satisfied is whether there is "sufficient ground for proceeding" and not whether there is sufficient ground for the conviction. Whether the evidence is adequate for supporting the conviction can be determined only at the trial and not at the stage of enquiry. A number of decisions were cited at the bar in which the question of the scope of the enquiry under s. 202 has been considered.

In all these cases, it has been held that the object of the provisions of s. 202 is to enable the Magistrate to form an opinion as to whether process should be issued or not and to remove from his mind any hesitation that be may have felt upon the mere perusal of the complaint and the consideration of the complainant's evidence on oath. The courts have also pointed out in these cases that what the Magistrate has to see is whether +,here is evidence in support of the allegations, of the complainant and not whether the evidence is sufficient to

warrant a conviction. The learned judges in some of these cases have been at pains to observe that an enquiry under s. 202 is not to be likened to a trial which can only take place after process is issued, and that there can be only one trial. No doubt, as stated in sub-s. (1) of s. 202 itself, the object of the enquiry is to ascertain the truth or falsehood of the complaint, but the Magistrate making the enquiry has to do this only with reference to the intrinsic quality, of the statements made before him at the enquiry which would naturally mean the complaint itself, the statement on oath made by the complainant and the statements made before him by persons examined at the instance of the complainant.

9. This brings us to the third ground. Section 203 of the Code of Criminal Procedure which empowers a, Magistrate to dismiss a complaint reads thus :

" The Magistrate before whom a complaint is made or to whom it has been transferred, may dismiss the complaint, if, after considering the statement on oath (if any) of the complainant and the witnesses and, the result of the investigation or inquiry, if any, under s. 202. there is in his judgment no sufficient ground for proceeding. In such case he shall briefly record his reasons for so doing."

10. If before issue of process, he had sent down the complaint to a Magistrate subordinate to him for making the enquiry, he has the power to dismiss the complaint, if in his judgment, there is no sufficient ground for proceeding. One of the conditions, however, requisite for doing so is the consideration of the statements on oath if any made by the complainant and the witnesses and of the result of the investigation of the enquiry which he had ordered to be made under s. 202, Cr.P.C. In the case before us, an investigation by a police officer was not ordered by the learned Sub-Divisional Magistrate, but an enquiry by a Magistrate, First Class. He had, therefore, to consider the result of this enquiry. It was not open to him to consider in this connection the statements recorded during investigation by the police on the basis of the first information report lodged by Panchanan Roy or on the basis of any evidence adduced before him during the enquiry arising out of the complaint made by Mahendra Singh. All these were matters extraneous to the proceedings before him.

What the Magistrate could not do, the High Court was incompetent to do, and, therefore, its order reversing that of the Sessions judge cannot be sustained.

> 12. Fortunately, no such question arises for consideration in this case but we may point out that since the object of an enquiry under s. 202 is to ascertain whether the allegations made in the complaint are intrinsically true, the Magistrate acting under s. 203 has to satisfy himself that there is sufficient ground for proceeding. In order -to come to this conclusion, he is entitled to consider the evidence taken by him or recorded in an enquiry under s. 202, or statements made in an investigation under that section, as the case may be. He is not entitled to rely upon any material besides this.

22. In the present case, I have perused the proceedings of the case pending before the JMFC. After perusal of the said proceedings, it reveals that the Magistrate has only taken the cognizance in the matter and has not recorded the statement of the complainant, therefore, if after recording the statement of the complainant if Magistrate reached to the conclusion that case is cognizable, the Court will then issue summons to the petitioners or it may dismiss the complaint as provided under Section 203 of Cr.P.C.

23. At this stage, the petition filed by the petitioners under Section 482 of Cr.P.C. appears to be pre-mature. The Apex Court in the case of *Chandra Deo Singh* (supra) has held that before passing any order either under Section 203 or 204 of Cr.P.C. the Magistrate is duty bound to consider the materials, which necessarily includes complaint, documents annexed with complaint, statements under Section 200 and enquiry proceeding under Section 202 Cr.P.C. In case the Magistrate proceeds and passes any order without considering the aforesaid material, the order shall be bad in the eyes of law. Thus, allowing quashment at this initial stage would amount to doing a thing which Magistrate is barred, and thus impermissible as held in the case of *Chandra Deo Singh* (supra).

24. The Magistrate exercising its power under Section 202 has decided to enquire into the complaint before proceeding further and, thus, mandatory proceeding under Section 202 Cr.P.C. is under way to determine whether the complaint is to be registered or not.

25. As submitted in the preceding paras, the stage for filing the present petition for quashment of complaint has not yet arrived. Even otherwise, looking at the complaint as its face value, prima facie case to proceed with issuance of notice is made out in the present case. The present petition is pre-mature, as the Magistrate has not even taken cognizance in the matter. Thus, no case for quashment, as prayed is made out.

26. With the aforesaid, the miscellaneous criminal case stands disposed of.

Order accordingly

I.L.R. [2019] M.P. 1581 (DB)
MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice Sujoy Paul & Mr. Justice B.K. Shrivastava

M.Cr.C. No. 37842/2018 (Jabalpur) decided on 28 June, 2019

MONIKA WAGHMARE (SMT.) …Applicant

Vs.

STATE OF M.P. & ors. …Non-applicants

(Alongwith M.Cr.C. No. 38518/2018)

***A. Prevention of Corruption Act (49 of 1988), Section 19 and Criminal Procedure Code, 1973 (2 of 1974), Section 319 – Sanction for Prosecution – Disparaging Remarks* – Held – Sanction for prosecuting petitioner granted on basis of certain disparaging/adverse remarks in judgment of a case, in which petitioner was not even a party/accused – No opportunity of hearing was given to petitioner, which is against principle of natural justice – Prejudice caused to petitioner established – Disparaging remarks and sanction granted on that basis is set aside – Application allowed. (Paras 27 & 35 to 37)**

क. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 19 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 319 – अभियोजन के लिए मंजूरी – अपकथित टिप्पणियां – अभिनिर्धारित – याची को अभियोजित करने के लिए मंजूरी एक प्रकरण, जिसमें याची एक पक्षकार/अभियुक्त भी नहीं था, के निर्णय में कुछ अपकथित/प्रतिकूल टिप्पणियों के आधार पर प्रदान की गई – याची को सुनवाई का कोई अवसर प्रदान नहीं किया गया, जो कि नैसर्गिक न्याय के सिद्धांत के विरूद्ध है – याची को प्रतिकूल प्रभाव कारित होना स्थापित हुआ – अपकथित टिप्पणियां तथा उस आधार पर प्रदान की गई मंजूरी अपास्त – आवेदन मंजूर।

***B. Prevention of Corruption Act (49 of 1988), Section 19 – Sanction for Prosecution – Procedure* – Held – Apex Court concluded that sanctioning authority itself needs to examine/scrutinize the whole record with accuracy and precision and by independently applying his mind, taking into account all the relevant facts before grant of sanction. (Para 30)**

ख. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 19 – अभियोजन के लिए मंजूरी – प्रक्रिया – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि मंजूरी प्राधिकारी को मंजूरी प्रदान करने से पूर्व, स्वयं संपूर्ण अभिलेख का परीक्षण/जांच, शुद्धता एवं यथार्थता के साथ तथा सभी सुसंगत तथ्यों को विचार में लेते हुए स्वतंत्र रूप से अपने मस्तिष्क का प्रयोग करते हुये करने की आवश्यकता है।

***C. Adverse Remarks – Opportunity of Hearing* – Held – Apex Court concluded that casting aspersions on a witness or any other person not before him affects his character, reputation or his career – Opportunity of hearing should be given to such person, otherwise offending remarks would be in violation of natural justice. (Para 34 & 35)**

ग. प्रतिकूल टिप्पणियां – सुनवाई का अवसर – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि एक साक्षी अथवा किसी अन्य व्यक्ति पर जो उसके समक्ष न हो आक्षेप लगाना, उसके चरित्र, ख्याति अथवा उसके कैरियर को प्रभावित करता है – ऐसे व्यक्ति को सुनवाई का अवसर प्रदान किया जाना चाहिए, अन्यथा अपमानजनक टिप्पणियां नैसर्गिक न्याय का उल्लंघन होगी।

Cases referred:

AIR 1964 SC 1, AIR 1964 SC 703, 2014 (3) SCC 92, 1997 (7) SCC 622, 2014 (14) SCC 295, 2015 (16) SCC 163, 2012 (3) SCC 64, 2015 (15) SCC 629, 2007 (11) SCC 273, 1986 (4) SCC 566, 1996 (6) SCC 234, 2001 (1) SCC 596, AIR 2018 SC 5412.

S.C. Datt and *Manish Datt* with *Siddharth Datt*, for the applicant.
Akhil Singh, G.A. for the non-applicant/State.
Abhijeet Awasthy, for the Lokayukt Organization.

O R D E R

The petitioner, who was working at the relevant time as Naib Tahasildar, filed the first petition under Section 482 of Cr.P.C. with the prayer for expunging the remarks made by the learned Special Judge in the impugned judgment passed in Special Case No.03/2015 dated 09.02.2016 (Annexure-1). The second petition filed under Section 482 Cr.P.C. assails the order dated 08.09.2018 (Annexure-1) whereby the competent authority has granted sanction under Section 19 of the Prevention of Corruption Act, 1988 (P.C. Act) for the offences punishable under Sections 7, 12, 13(1)(d) and 13(2) of the said act.

2. Draped in brevity, the relevant facts as narrated by the petitioner is that at the relevant time she was working as Naib Tahasildar. The accused -Mohanlal Katare was Reader and Chandra Gopal Maskole was an employee of his Court. On 20.06.2014, a written complaint (Annexure-P/4) was lodged by the complainant - Ashok Kumar Saini (P.W.-5) before the Superintendent of Police, Lokayukta, Bhopal stating that he preferred an appeal before the Court of Tahasildar Babai seeking partition of 12 acres of land situated in Village Sangakhedakala and Village Magariya. The accused - Mohanlal posted in the Court of Tahasildar as Assistant Grade II demanded illegal gratification for such partition by fixing the rate Rs.2,000/- per acre. Since the complainant was not

ready to fulfill the illegal demand aforesaid, he submitted the complaint to initiate prosecution against the accused persons. In turn, a trap was conducted in this regard. On 25.06.2014, the complainant went to the Tahasildar's Court and talked with accused Mohanlal regarding payment of bribe and got the conversation recorded in a voice recorder provided by the respondent organization. The voice recorder was produced with seizure memo (Ex.P/7) and transcript panchnama (Ex.P/8) before the Court below.

3. Thereafter, a first information report regarding the said incident was recorded by Constable - Jhannulal Bilwad (P.W.-1) and matter was forwarded to Lokayukta Office, Bhopal and Crime No.276/14 was instituted.

4. The prosecution alleged that a sum of Rs.15,000/- was received by the accused - Mohanlal from the complainant as illegal gratification and the said amount was handed over to the co-accused - Chandra Gopal in order to keep the amount safely. Chandra Gopal, as per prosecution story, assisted Mohanlal for receiving illegal gratification. Copy of the complaint dated 20.06.2014 is marked as Annexure-P/2.

5. Shri S.C. Datt, learned senior counsel urged that the Investigating Agency recorded the statements of prosecution witnesses under Section 161 Cr.P.C., which are cumulatively filed as Annexure-P/3. The transcript of conversation and voice recording is filed as Annexure-P/4. It is argued that in the statement recorded under Section 161 Cr.P.C., the complainant did not depose anything against the present petitioner. On the contrary, he in specific terms stated that nothing has been demanded by the present petitioner. The complaint is confined to the conduct and action of the said accused persons.

6. The Investigating Agency, in due course, filed a charge-sheet before the competent Court which transmitted the matter to the Court of learned Special Judge constituted under the provisions of the Prevention of Corruption Act for trial. The learned Special Judge after recording the evidence and hearing the parties before it, convicted and sentenced the accused - Mohanlal for the offences punishable under Section 7 R/W Section 13(1)(d) and 13(2) of Prevention of Corruption Act. The accused Chandrapal was acquitted by the Special Court.

7. It is pointed out that the accused - Mohanlal at the final stage of trial submitted an application under Section 319 of Cr.P.C. to take cognizance of offence against the petitioner, the then Naib Tahasildar, with a prayer to decide the said application expeditiously. Learned senior counsel submitted that this application was filed after recording the statement of Mohanlal in the Court dated 03.09.2015. Learned Special Judge recorded a finding in the judgment that since no sanction was accorded under Section 19 against the present petitioner, the aforesaid application filed under Section 319 Cr.P.C. by Mohanlal cannot be accepted.

8. Shri S.C. Datt, learned senior counsel submits that there is no error in this finding because as per the settled legal position, the Special Court cannot take cognizance of a findings against a public servant in absence of a valid sanction for the said purpose. However, in Para 51 of the judgment, learned Special Judge has made certain adverse remarks against the petitioner which became moving spirit and operative reason for according sanction against the petitioner by the respondents. This sanction is also called in question in the next matter.

9. The contentions of Shri S.C. Datt and Shri Manish Datt, learned senior counsel are that the petitioner was not a party in Special Case No.3/2015. The petitioner did not get any opportunity to cross-examine the accused - Mohanlal regarding discrepancy/contradiction in his statement recorded under Section 161 of Cr.P.C. with the Court statement. The petitioner did not get any opportunity whatsoever to putforth her defence. The Court below considered the fact that the matter was pending before the petitioner for deciding the question of partition since 08.10.2013. On 16.06.2014, written submissions were also filed yet the petitioner did not pass the order.

10. Learned Special Judge further recorded that complainant Ashok Kumar Saini narrated about the demand raised by the petitioner i.e. Rs.2,000/- per acre and for depositing the said amount, directed to meet Mohanlal. This statement is supported by transcript panchnama based on recorded conversation.

11. It is common ground taken by learned senior counsel that the petitioner was suffering from breast cancer and was undergoing prolonged treatment. For this purpose, she was remained on sanctioned leave between 13.05.2013 to 13.06.2013, 28.10.2013 to 11.11.2013 and between 06.02.2014 to 06.05.2014. The leave documents are filed along with the petition. It is submitted that the delay in deciding the matter was because of said serious ailment of the petitioner. If opportunity would have been granted to the petitioner to explain the reasons for delay in deciding the pending matter, the matter would have been different. Without hearing the petitioner, the adverse remarks are liable to be interfered with. Reliance is place on AIR 1964 SC 1 (*Dr. Raghubir Saran Vs. State of Bihar and another*), AIR 1964 SC 703 (*State of U.P. Vs. Mohammad Naim*).

12. Shri Manish Datt, learned senior counsel by placing reliance on 2014 (3) SCC 92 (*Hardeep Singh Vs. State of Punjab*) argued that power under Section 319 of Cr.P.C. cannot be exercised on mere asking. The parameters for exercising this power is laid down by Apex Court and the same shows that the person preferring application under Section 319 Cr.P.C. must make out a case stronger than a *prima facie* case. In addition, he has to fulfill the other parameters laid down in the said judgment, since no case was made out to entertain the application under Section 319, the learned Special Judge should not have made observations mentioned in Para 51 and 52 of the judgment.

13. Shri S.C. Datt, learned senior counsel placed reliance on the document dated 24.07.2017 (Annexure-R/1) whereby the Lokayukta organization requested the competent authority to grant sanction. It is pointed out that prayer for sanction is mainly based on Para 51 and 52 of the impugned judgment dated 09.02.2016. The said argument is further pressed by referring the document dated 03.07.2018 (Annexure R/1). It is urged that the respondents have accorded sanction mainly on the basis of adverse remarks made by the Special Judge in the impugned Judgment. The Competent Authority while according sanction has miserably failed to see that there was no interaction alleged or recorded by the complainant between Mohanlal and present petitioner or between complainant and petitioner. But on a cock and bull story narrated by Mohanlal and without any iota of evidence, the sanction was accorded against the petitioner without application of mind. It is urged that the relevant documents including the statement of Mohanlal recorded under Section 161 Cr.P.C. was not examined by the prosecution agency and sanctioning authority. Had it been done, it would have been crystal clear that he did not narrate anything about any demand or acceptance or any conversation recorded against the present petitioner.

14. Learned senior counsel placed reliance on 1997 (7) SCC 622 (*Mansukhlal Vithaldas Chauhan Vs. State of Gujrat*) and 2014 (14) SCC 295 (*CBI Vs. Ashok Kumar Aggarwal*) and argued that the sanction order is passed in a mechanical manner without due application of mind. The latent interference in the mind of sanctioning authority was founded upon adverse remarks made in the impugned judgment.

15. In view of aforesaid contentions, it is prayed that adverse remarks made by the Court be expunged and said sanction order may be interfered with.

16. Learned senior counsel during the course of argument also relied on the reply of respondent No.2 filed through the OIC, a Dy. Collector. By taking this Court to the said reply, it is submitted that the reply merely narrated the brief history of the case. No averments are devoted to show which are the relevant documents, which were perused by the Sanctioning Authority before granting sanction.

17. Sounding a contra note, Shri Abhijeet Awasthy, learned counsel for other side supported the impugned judgment and sanction order. Shri Awasthy submitted that the application under Section 319 Cr.P.C. preferred by the accused persons is rejected by the Court below. The said Court has not issued any direction to the Prosecuting Agency to proceed against the petitioner. Merely the liberty was reserved to proceed against the petitioner. As per Section 190 Cr.P.C., the Special Judge himself can take cognizance of an offence. Thus, it cannot be said that the observations made *suo motu* by the learned Single Judge are without competence/jurisdiction. In the case of *Ashok Kumar Agrawal* (supra), the stages

are mentioned during which sanction order can be called in question. Same is the view taken in 2015(16) SCC 163 (*CBI Vs. Ashok Kumar Aswal*). The Prosecuting Agency produced the relevant material, which is evident from the last para of Page 27 of the reply. In view of 2012 (3) SCC 64 (*Subramaniyam Swami Vs. Manmohan Singh*), the petitioner has no right of hearing before passing the order of sanction.

18. Shri Awasthy has taken pains to contend that sanction order is passed after due application of mind. The Special Judge has not passed any effective order against the petitioner and merely made innocuous observations which do not require any interference by this Court.

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

20. We have heard learned counsel for the parties at length and perused the record.

21. In the instant case, this is not in dispute that in the Spl. Case No.03/2015 decided on 09.02.2016 the present petitioner was not an accused/party. It is also clear that in the initial statement of complainant recorded under Section 161 Cr.P.C., he did not depose anything against the present petitioner. Admittedly, the name of the petitioner was sought to be arraigned at the final stage by preferring an application under Section 319 Cr.P.C. by the accused person and not by the prosecution. The learned Special Judge in Paragraphs No. 51 & 52 opined as under:

> ''(51) अभियुक्त की ओर से कुमारी मोनिका वाघमारे के विरूद्ध भी अधिनियम के अधीन अपराध का संज्ञान लिये जाने हेतु धारा 319 दं.प्र.सं. के अंतर्गत आवेदन बचाव साक्ष्य के प्रक्रम पर प्रस्तुत किया गया था जिसका निराकरण निर्णय के समय ही किये जाने का आदेश दिया गया था। **नायब तहसीलदार बाबई के उक्त प्रकरण के अवलोकन से प्रकट होता है कि दिनांक 08.10.13 से प्रकरण तर्क हेतु बढ़ाया जाता रहा। दिनांक 16.06.14 को उभयपक्ष द्वारा लिखित तर्क भी प्रस्तुत कर दिए गए थे, किन्तु तत्कालीन नायब तहसीलदार कुमारी मोनिका बाघमारे के द्वारा ओदश पारित नहीं किया गया। अभियोगी अशोक सैनी के द्वारा भी उससे मोनिका बाघमारे के द्वारा 2000/– रूपए प्रति एकड़ की दर से मांग किया जाना एवं रूपए देने हेतु कटारे बाबू से मिलने के लिए निर्देशित किया जाना बताया गया है, जिसका समर्थन ट्रांसकिप्ट पंचनामा एवं रिकार्ड की गई वार्तालाप की सी.डी. से भी हुआ है।**
>
> (52) अभियोजन स्वीकृति के अभाव में लोक सेवक के विरूद्ध न्यायालय द्वारा अधिनियम के अधीन अपराध का संज्ञान नहीं लिया जा सकता अतः आवेदन अंतर्गत धारा 319 दं.प्र.सं. को स्वीकार नहीं किया जा सकता। अतः तहसील बाबई में पदस्थ तत्कालीन नायब तहसीलदार कुमारी

मोनिका बाघमारे के विरूद्ध यदि किसी कार्यवाही की आवश्यकता हो तो उचित कार्यवाही हेतु निर्णय की प्रतिलिपि पुलिस अधीक्षक, विशेष पुलिस स्थापना लोकायुक्त कार्यालय, भोपाल एवं प्रमुख सचिव (राजस्व), वल्लभ भवन, भोपाल की ओर आवश्यक कार्यवाही किए जाने हेतु सूचनार्थ प्रेषित की जावे।''

[Emphasis Supplied]

22. The Lokayukta organization by communication dated 24.07.2017 (Annexure-R/1) made following request:

''2. माननीय विशेष न्यायालय होशंगाबाद के द्वारा पारित निर्णय दिनांक 09.02.2016 की कण्डिका 51–52 में माननीय विशेष न्यायाधीश महोदय द्वारा लेख किया गया है कि नायब तहसीलदार बाबई के उक्त प्रकरण के अवलोकन से प्रकट होता है कि दिनांक 08.10.2013 से प्रकरण तर्क हेतु बढ़ाया जा रहा है, दिनांक 16.04.2016 को उभय पक्ष द्वारा लिखित तर्क भी प्रस्तुत कर दिये गये थे किन्तु तत्कालीन तहसीलदार कुमारी मोनिका वाघमारे के द्वारा आदेश पारित नहीं किया गया। फरियादी अशोक सोनी के द्वारा भी उससे कुमारी मोनिका वाघमारे के द्वारा 2,000/– रूपये प्रति एकड़ की दर से मांग किया जाना एवं रूपये देने हेतु कटारे बाबू से मिलने के लिए निर्देशित किया जाना बताया गया है। जिसका समर्थन ट्रांसस्क्रिप्ट पंचनामा एवं रिकार्ड की गई वार्तालाप की सी.डी. से भी हुआ है। निर्णय की कण्डिका 52 में विशेष न्यायाधीश द्वारा लेख किया गया है कि ''अभियोजन स्वीकृति के अभाव में लोक संवक के विरूद्ध न्यायालय द्वारा अधिनियम के अधीन अपराध का संज्ञान नहीं लिया जा सकता है।

आवेदन अर्न्तगत धारा 319 द.प्र.सं. को स्वीकार नहीं किया जा सकता। अतः तहसील बाबई मे पदस्थ तत्का. नायब तहसीलदार कु. मोनिका वाघमारे के विरूद्ध यदि किसी कार्यवाही की आवश्यकता हो तो उचित कार्यवाही हेतु निर्णय की प्रतिलिपि पु.अ.विपुस्था. भोपाल एवं प्रमुख सचिव (राजस्व) वल्लभ भवन भोपाल की ओर सूचनार्थ प्रेषित की जावे।

3. माननीय विशेष न्यायालय होशंगाबाद की कण्डिका 51–52 के परिप्रेक्ष्य में कुमारी मोनिका वाघमारे के विरूद्ध धारा 7,13(1)डी, 13(2) भ्रष्टाचार निवारण अधिनियम 1988 के तहत पर्याप्त साक्ष्य उपलब्ध पायी गई है। ''प्रकरण की विशेष पुलिस स्थापना संलग्न है। जिसके आधार पर कुमारी मोनिका वाघमारे के विरूद्ध अपराध प्रथम दृष्टया प्रमाणित पाये गये है।''

4. अतः आरोपिया को भ्रष्टाचार निवारण अधिनियम 1988 की धारा 7,12,13(1)डी, 13(2) भ्रष्टाचार निवारण अधिनियम 1988 के अंतर्गत दण्डनीय अपराध के लिये न्यायालय में अभियोजित करने हेतु भ्रष्टाचार

निवारण अधिनियम 1988 की धारा 19(1) बी, सी, के अंतर्गत म.प्र. शासन की अभियोजन स्वीकृति आवश्यक है।''

[Emphasis Supplied]

23. In turn, by letter dated 23.06.2018 the Revenue Department opined as under:

''4. माननीय विशेष न्यायालय होशंगाबाद की **कण्डिका 51, 52 के परिप्रेक्ष्य में** कुमारी मोनिका वाघमारे के विरूद्ध धारा 7, 13 (1) डी, 13 (2) के अतंर्गत भ्रष्टाचार निवारण अधिनियम 1988 के तहत पर्याप्त साक्ष्य उपलब्ध पाई गई है। जिसके आधार पर कुमारी मोनिका वाघमारे के विरूद्ध अपराध प्रथम दृष्टया प्रमाणित पाये गये है।

5. अतः प्रस्तुत दस्तावेजो के आधार पर यह प्रथम दृष्टया प्रतीत हुआ है कि शासकीय सेवक होते हुए भी आरोपी श्री कुमारी मोनिका वाघमारे, तत्कालीन नायब तहसीलदार तहसील कार्यालय बाबई जिला होशंगाबाद, द्वारा 2000/– रूपयें प्रति एकड़ की दर से मांग किये जाने का अपचार किया है और उसका यह कृत्य शासकीय कर्तव्यों के निर्वहन की दृष्टि से संरक्षणीय नहीं है।''

[Emphasis Supplied]

24. The parties have taken a diametrically opposite stand before this Court regarding the meaning, effect and impact of Paragraphs No.51 & 52 of the impugned judgment. The learned senior counsel contended that observations are adverse in nature, whereas Shri Awasthi, learned counsel for the other side took the opposite view. Thus, these paragraphs are required to be scrutinized with utmost care and caution. A careful and conjoint reading of such paragraphs leaves no room for any doubt that pending application of accused under Section 319 Cr.P.C. was rejected by Special Judge on the ground that no sanction was granted against the petitioner/Public Servant. To this extent, no fault can be found in the impugned judgment.

25. Pausing here for a moment, it will be useful to examine the scope of power under Section 319 Cr.P.C. In *Hardeep Singh* (supra) it was held as under:

> *"**105**. Power under Section 319 CrPC is a discretionary and an extraordinary power. It is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner.*

> ***106***. *Thus, we hold that though only a prima facie case is to be established from the evidence led before the court, not necessarily tested on the anvil of cross-examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 CrPC. In Section 319 CrPC the purpose of providing if "it appears from the evidence that any person not being the accused has committed any offence" is clear from the words "for which such person could be tried together with the accused". The words used are not "for which such person could be convicted". There is, therefore, no scope for the court acting under Section 319 CrPC to form any opinion as to the guilt of the accused."*
>
> *[Emphasis Supplied]*

26. A bare perusal of principle laid down in the above case will make it clear that only when strong and cogent evidence occurs against a person from the evidence led, the power under Section 319 Cr.P.C. can be exercised. The power cannot be exercised in a cavalier manner. The purpose of giving power under Section 319 is to give authority to the Court to try a person together with the accused. The purpose of relying on this judgment is to show that power under Section 319 is to be exercised with great care and precision. Learned Special Judge although did not entertain the application under Section 319 Cr.P.C., but passed a remark in Paragraph No. 51 that a perusal of letter of Naib Tehsildar, Babai shows that case was adjourned from 08.10.2013 *for arguments*. On 16.06.2014, both the parties submitted their written submissions, but the then Naib Tehsildar did not pass the final order. This finding/remark gives an impression that only reason for adjournment of matter w.e.f. 08.10.2013 was for want of advancing arguments and despite the fact that written arguments were submitted, the petitioner did not pass the final order. In the next breath, learned Special Judge recorded that accused- Ashok Saini narrated about demand of Rs.2,000/- per acre by the present petitioner, which is supported by transcript panchnama and statement recorded in the CD.

27. In our considered opinion, in absence of sanction, the application under Section 319 Cr.P.C. was rightly rejected by holding that no cognizance of offence can be taken in absence of sanction. Since application under Section 319 Cr.P.C. was not entertained by the learned Special Court, there was no occasion for the Court to observe and record that despite submission of written submissions the decision was not passed by the petitioner coupled with the subsequent finding

about demand of money by the petitioner which is allegedly recorded in transcript panchnama and statement recorded in CD. Even assuming that the application under Section 319 was entertainable, in the light of principal (sic : principle) laid down in *Hardeep Singh* (supra) such application could have been allowed only when a case more then *prima facie* case is made out before the Court. In the instant case, on the one hand application under Section 319 Cr.P.C. was disallowed and on the other hand certain observations/remarks have been passed. We find force in the argument of Shri Datt that if petitioner would have been put to notice by the Special Court, she would have been in a position to explain the reasons for not passing the judgment which may be based upon her own serious ailment of cancer or with any other reason put forth by her. In addition, she could have cross-examined the complainant about the contradiction in his statements recorded under Section 161 & 164 Cr.P.C. and the court statement.

28. We have also carefully examined the recommendations for sanction by Lokayukta organization extracted above, as well as the decision granting sanction. We find force in the argument of learned counsel for the petitioner that great emphasis is laid by the Lokayukta organization while claiming sanction on Paragraphs No.51 & 52 of the impugned judgment. In turn, while granting sanction also the aforesaid paragraphs became operative reason for the sanctioning authority.

29. In the case of *Mansukhlal*(Supra), the Apex Court opined thus-

> *"18. The validity of the sanction would, therefore, depend upon the material placed before the sanctioning authority and the fact that all the relevant facts, material and evidence have been considered by the sanctioning authority. Consideration implies application of mind. The order of sanction must ex facie disclose that the sanctioning authority had considered the evidence and other material placed before it. This fact can also be established by extrinsic evidence by placing the relevant files before the Court to show that all relevant facts were considered by the sanctioning authority."*
>
> *(Emphasis supplied)*

30. In the case of *Ashok Kumar Aggarwal*(Supra), the Apex Court considered the requisites for sanction and poignantly held as under:

> *"16. In view of the above, the legal propositions can be summarised as under:*
>
> *16.1. The prosecution must send the entire relevant record to the sanctioning authority including the FIR, disclosure statements, statements of witnesses, recovery memos, draft*

charge-sheet and all other relevant material. The record so sent should also contain the material/document, if any, which may tilt the balance in favour of the accused and on the basis of which, the competent authority may refuse sanction.

16.2. The authority itself has to do complete and conscious scrutiny of the whole record so produced by the prosecution independently applying its mind and taking into consideration all the relevant facts before grant of sanction while discharging its duty to give or withhold the sanction.

16.3. The power to grant sanction is to be exercised strictly keeping in mind the public interest and the protection available to the accused against whom the sanction is sought.

16.4. The order of sanction should make it evident that the authority had been aware of all relevant facts/materials and had applied its mind to all the relevant material.

16.5. In every individual case, the prosecution has to establish and satisfy the court by leading evidence that the entire relevant facts had been placed before the sanctioning authority and the authority had applied its mind on the same and that the sanction had been granted in accordance with law."

(Emphasis Supplied)

As per *ratio decidendi* of this case, the sanctioning authority itself needs to examine/scrutinize the whole record with accuracy and precision and by independently applying its mind by taking into account all the relevant facts before grant of sanction. It should be manifest and evident from order of sanction that authority was aware of all relevant facts/material and had applied its mind to all relevant material. The same view is taken in 2015 (15) SCC 629, (*T. K. Ramesh Kumar vs. State*).

31. In 2007 (11) SCC 273 (*State of Karnataka vs. Amir Jaan*), the Apex Court opined that entire record containing the materials collected against the accused should be placed before the sanctioning authority. In the event, the order of sanction does not indicate application of mind as to the materials placed before the said authority before order of sanction was passed, the same may be produced before the Court to show that such material had infact been produced. The recommendation of sanction dated 24.7.2017 Annexure R/1 is mainly founded upon the observation of Special Court in para 51 and 52 of judgment dated 09.02.2016. Thereafter, a bald statement is made that sufficient evidence is found against the petitioner on perusal of certain documents. In the enclosure to this letter, it is mentioned that judgment of Special Court, the recommendations and

original documents are being sent. In the sanction order also, a bald statement is mentioned which shows that the consideration for grant of sanction is para 51 and 52 of the said judgment as well as availability of sufficient material. The sanctioning authority who was impleaded in this case although filed reply through the Deputy Collector did not demonstrate before this Court that such relevant material had infact been produced and considered. He merely stated the story of prosecution and did not refer to the specific document/evidence being produced and considered by the sanctioning authority.

32. The sanctioning authority has clearly passed the order of sanction based on para 51 and 52 of the judgment of Special Court. Thus, we have no hesitation to hold that adverse remark made in para 51 of the judgment of Special Court became one of the operative reason for the authority to accord sanction against the petitioner.

33. The ancillary question is whether such adverse remarks could have been recorded by the Special Court without hearing the petitioner and whether sanction founded upon such disparaging remarks can sustain judicial scrutiny. This aspect is no more *res integra*.

34. In the case of *Dr. Raghuveer Saran* (Supra), the Apex Court deprecated the practice of casting aspersions on a witness or any other person not before him affects the character of such person or witness. The Court expressed its concern that such remarks may affect the reputation or career of such person.

35. In AIR 1964 SC 703 (*State of U.P. vs. Mohammad Naim*), for the purpose of making disparaging remarks, the litmus test laid down was as under:

> *"(a) whether the party whose conduct is in question is before the court or has an opportunity of explaining or defending himself;*
>
> *(b) whether there is evidence on record bearing on that conduct justifying the remarks; and*
>
> *(c) whether it is necessary for the decision of the case, as an integral part thereof, to animadvert on that conduct. It has also been recognised that judicial pronouncements must be judicial in nature, and should not normally depart from sobriety, moderation or reserve."*

This judgment is consistently followed by Supreme Court in 1986 (4) SCC 566 (*State of M.P. and others vs. Nandlal Jaiswal and others*), 1996 (6) SCC

234 (*Dr. Dilip Kumar Deka and another vs. State of Assam and another*) and 2001 (1) SCC 596 (*Manish Dixit and others vs. State of Rajasthan*). In a recent judgment reported in AIR 2018 SC 5412 (*State (Govt. of NCT of Delhi*) *vs. Pankaj Chaudhary and others*), the Apex Court opined that before any castigating remarks are made by the Court against any person, particularly when such remarks could ensure serious consequences on a future career of a person concerned, he should have been given an opportunity of being heard in the matter in respect of proposed remarks or strictures. Such an opportunity is the basic requirement for; otherwise, offending remarks would be in violation of principles of natural justice.

36. In the instant case, adverse/disparaging remarks which resulted into issuance of sanction order were passed without affording opportunity to the petitioner which clearly runs contrary to principles of natural justice. Thus, we are constrained to hold that such adverse remark mentioned in para 51 of the judgment is liable to be interfered with. We will be failing in our duty if the argument of Shri Abhijit Awasthy based on the judgment of *Ashok Kumar Aswal*(Supra) is not considered wherein in para 15 it was held that the Apex Court, time and again, has laid down that the validity of a sanction order, if one exists, has to be tested on the touchstone of the prejudice to the accused which is essentially a question of fact and, therefore, should be left to be determined on the course of the trial and not in the exercise of jurisdiction either under Section 482 of the Criminal Procedure Code or in a proceeding under Articles 226/227 of the Constitution. Ordinarily, this course needs to be adopted before the Court below where prejudice, an essential question of fact needs to be determined. In the present case, indisputably, the sanction order is founded upon certain disparaging remarks made against the petitioner without affording any opportunity to her. The prejudice caused to the petitioner is duly established in the peculiar factual backdrop of this matter before this Court. Thus, question of prejudice need not be determined in a course of trial in a case of this nature. Putting it differently, the adverse remarks mentioned in para 51 of the judgment became foundation for issuing the sanction order when admittedly petitioner was not heard by the Special Court. Thus, such disparaging remarks cannot sustain judicial scrutiny and accordingly for examining the validity of sanction order, petitioner is not required to be relegated to the trial court.

37. In view of foregoing analysis, the disparaging remarks mentioned in para 51 of the judgment dated 09.6.2016 are set aside. The impugned sanction order dated 24.7.2017 which is based on such disparaging remark is also set aside. The

case is remitted back to the sanctioning authority for reconsideration of the matter and take a fresh decision regarding grant of sanction in accordance with law.

38. Petitions are **allowed** to the extent indicated above.

Order accordingly