VOL. 2

INDIAN LAW REPORT (M.P.) COMMITTEE

JUNE 2019

PATRON

Hon'ble Shri Justice RAVI SHANKER JHA

Acting Chief Justice

CHAIRMAN

Hon'ble Shri Justice SUJOY PAUL

MEMBERS

Shri Shashank Shekhar, In-charge, Advocate General, *(ex-officio)*
Shri Umakant Sharma, Senior Advocate
Shri Kishore Shrivastava, Senior Advocate
Shri Aditya Adhikari, Senior Advocate
Shri Ritesh Kumar Ghosh, Advocate, Chief Editor, *(ex-officio)*
Shri Avanindra Kumar Singh, Principal Registrar (ILR)
Shri Manoj Kumar Shrivastava, Principal Registrar (Judicial), *(ex-officio)*

SECRETARY

Shri Joginder Singh, Registrar (Exam)

PUBLISHED BY

SHRI AVANINDRA KUMAR SINGH, PRINCIPAL REGISTRAR (ILR)

TABLE OF CASES REPORTED
(Note : An asterisk (*) denotes Note number)

..*.*.*.*.*.*.*.

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

relating to Indore property and Bombay property were entirely different with different sets of defendants which could not have been clubbed together – Suit regarding Bombay property is clearly not maintainable in Indore Courts – Trial Court rightly striked out the pleadings and relief pertaining to Bombay property – Appeal dismissed. [Shivnarayan (D) By L.Rs. Vs. Maniklal (D) Thr., L.Rs.] (SC)…1178

सिविल प्रक्रिया संहिता (1908 का 5), धारा 16 व 17 – वाद की पोषणीयता – वाद हेतुक – अभिनिर्धारित – दो से अधिक न्यायालयों की अधिकारिता में स्थित संपत्तियों से संबंधित, एक न्यायालय में प्रस्तुत वाद केवल तब पोषणीय है जब एक वाद हेतुक पर वाद प्रस्तुत किया गया है – वर्तमान प्रकरण में, वाद पत्र में प्रतिवादीगण के भिन्न समूह के साथ भिन्न वाद हेतुक शामिल हैं – इंदौर की संपत्ति तथा बॉम्बे की संपत्ति के संबंध में वाद हेतुक पूर्णतः भिन्न थे जिसमें प्रतिवादीगण के भिन्न समूह थे, जिसे एक साथ संयोजित नहीं किया जा सकता – बॉम्बे की संपत्ति के संबंध में वाद स्पष्ट रूप से इंदौर न्यायालयों में पोषणीय नहीं है – विचारण न्यायालय ने बॉम्बे की संपत्ति से संबंधित अभिवचन एवं अनुतोष को उचित रूप से हटा दिया – अपील खारिज। (शिवनारायण (मृतक) द्वारा विधिक प्रतिनिधि वि. मानिकलाल (मृतक) द्वारा विधिक प्रतिनिधि) **(SC)…1178**

***Civil Procedure Code (5 of 1908), Section 16 & 17 – Place of Institution of Suit* – Held – A suit in respect of immovable property or properties situated in jurisdiction of different courts may be instituted in any court within whose local jurisdiction, any portion of property or properties may be situated – Further, a suit in respect of more than one property situated in jurisdiction of different courts can be instituted in a court within whose local jurisdiction one or more properties are situated provided suit is based on same cause of action with respect of properties situated in jurisdiction of different courts. [Shivnarayan (D) By L.Rs. Vs. Maniklal (D) Thr., L.Rs.] (SC)…1178**

सिविल प्रक्रिया संहिता (1908 का 5), धारा 16 व 17 – वाद संस्थित करने का स्थान – अभिनिर्धारित – भिन्न न्यायालयों की अधिकारिता में स्थित अचल संपत्ति या संपत्तियों के संबंध में एक वाद को उस न्यायालय में संस्थित किया जा सकता है जिसकी स्थानीय अधिकारिता के भीतर संपत्ति या संपत्तियों का कोई भाग स्थित हो – इसके अतिरिक्त भिन्न न्यायालयों की अधिकारिता में स्थित एक से अधिक संपत्ति के संबंध में वाद उस न्यायालय में संस्थित किया जा सकता है जिसकी स्थानीय अधिकारिता एक या अधिक संपत्तियां स्थित हैं परंतु यह कि वाद, भिन्न न्यायालयों की अधिकारिता में स्थित संपत्तियों के संबंध में समान वाद हेतुक पर आधारित हो। (शिवनारायण (मृतक) द्वारा विधिक प्रतिनिधि वि. मानिकलाल (मृतक) द्वारा विधिक प्रतिनिधि) **(SC)…1178**

***Civil Procedure Code (5 of 1908), Section 16 & 17 and General Clauses Act (10 of 1897), Section 13 – Word "property"* – Held – Word "property" in Section 17 although has been used in 'singular' but by virtue of Section 13 of General Clauses Act, it may also be read as 'plural' i.e. "properties". [Shivnarayan (D) By L.Rs. Vs. Maniklal (D) Thr., L.Rs.] (SC)…1178**

INDEX

सिविल प्रक्रिया संहिता (1908 का 5), धारा 16 व 17 एवं साधारण खण्ड अधिनियम (1897 का 10), धारा 13 – शब्द ''संपत्ति'' – अभिनिर्धारित – यद्यपि शब्द ''संपत्ति'' को धारा 17 में 'एकवचन' में उपयोग किया गया है किंतु सामान्य खंड अधिनियम की धारा 13 के आधार पर उसे 'बहुवचन' अर्थात ''संपत्तियों'' के रूप में भी पढ़ा जा सकता है। (शिवनारायण (मृतक) द्वारा विधिक प्रतिनिधि वि. मानिकलाल (मृतक) द्वारा विधिक प्रतिनिधि) **(SC)…1178**

***Civil Procedure Code (5 of 1908), Sections 96, 104(1) & (2), Order 43 Rule 1 and Order 39 Rule 1 & 2 – Injunction Order – Miscellaneous Appeal – Maintainability* – Held – Misc. Appeal u/S 104(1) r/w Order 43 Rule (1)(r) CPC shall be maintainable before the High Court if interim injunction order is granted by lower appellate Court in an appeal u/S 96 CPC – Misc. appeal before High Court shall not be maintainable if order of interim injunction is passed by lower appellate Court in Misc. Appeal u/S 104(1) r/w Order 43 Rule 1(r) in view of the bar u/S 104(2) CPC – In present case, impugned order was passed in an appeal u/S 96 CPC and hence appeal is maintainable but in the present facts, possession has already been taken by respondents after passing of decree – No interference is called for – Appeal dismissed. [Mangilal Vs. Ganpatlal] …876**

सिविल प्रक्रिया संहिता (1908 का 5), धाराएँ 96, 104(1) व (2), आदेश 43 नियम 1 एवं आदेश 39 नियम 1 व 2 – व्यादेश आदेश – विविध अपील – पोषणीयता – अभिनिधारित – सि.प्र.सं. की धारा 104(1) सहपठित आदेश 43 नियम (1)(आर) के अंतर्गत विविध अपील उच्च न्यायालय के समक्ष पोषणीय होगी यदि सि.प्र.सं. की धारा 96 के अंतर्गत एक अपील में निचले अपीली न्यायालय द्वारा अंतरिम व्यादेश का आदेश प्रदान किया गया है – यदि सिविल प्रक्रिया संहिता की धारा 104(1) सहपठित आदेश 43 नियम 1(आर) के अंतर्गत विविध अपील में निचले अपीली न्यायालय द्वारा अंतरिम व्यादेश का आदेश पारित किया गया है, तो धारा 104(2) के अंतर्गत वर्जन को दृष्टिगत रखते हुए, उच्च न्यायालय के समक्ष विविध अपील पोषणीय नहीं होगी – वर्तमान प्रकरण में, सि.प्र.सं. की धारा 96 के अंतर्गत अपील में आक्षेपित आदेश पारित किया गया था और इसलिए अपील पोषणीय है परंतु वर्तमान तथ्यों में, डिक्री पारित होने के पश्चात् प्रत्यर्थीगण द्वारा पहले ही कब्जा ले लिया गया है – कोई हस्तक्षेप आवश्यक नहीं – अपील खारिज। (मांगीलाल वि. गनपतलाल) **…876**

***Civil Procedure Code (5 of 1908), Sections 96, 104(1) & (2) and 107(2) – Miscellaneous Appeal* – Held – Appellate Court hearing an appeal against a decree exercises original jurisdiction as available to trial Court – Apex Court concluded that an appeal u/S 96 CPC is a continuation of a suit – Further, "an appeal against a decree" is denotably different from "an appeal against an order" – Section 104(2) bars a second miscellaneous appeal against any order of the appellate Court passed in miscellaneous appeal u/S 104(1) CPC. [Mangilal Vs. Ganpatlal] …876**

specific objection raised by defendants in written statement, the plaintiff, after proceeding further with the suit, may file such application at the stage of final hearing – Plaintiffs cannot be allowed to reopen proceedings under garb of such application because when a new defendant is added, a de novo trial would be conducted so far as newly added defendant is concerned – Impugned order allowing the application is set aside – Petition allowed. [Sehdev Dubey Vs. Smt. Pushpa Tiwari] **…*45**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 1 नियम 10 – पक्षकार बनाया जाना – कार्यवाही का प्रक्रम – अभिनिर्धारित – कार्यवाहियों के किसी भी प्रक्रम पर आदेश 1 नियम 10 के अंतर्गत एक आवेदन प्रस्तुत किया जा सकता है परंतु इसका यह अर्थ नहीं है कि प्रत्यर्थीगण द्वारा लिखित कथन में विनिर्दिष्ट आपत्ति उठाये जाने के बावजूद, वादी, वाद में आगे की कार्यवाही करने के पश्चात्, अंतिम सुनवाई के प्रक्रम पर उक्त आवेदन प्रस्तुत कर सकता है – वादी को उक्त आवेदन की आड़ में कार्यवाहियां पुनः प्रारंभ करने की मंजूरी नहीं दी सकती क्योंकि जब एक नया प्रतिवादी जोड़ा जाता है, तो जहां उस नये जोड़े गये प्रतिवादी का संबंध है, नये सिरे से विचारण किया जाएगा – आवेदन मंजूर करने वाला आक्षेपित आदेश अपास्त – याचिका मंजूर। (सहदेव दुबे वि. श्रीमती पुष्पा तिवारी) **…*45**

***Civil Procedure Code (5 of 1908), Order 1 Rule 10 – Impleadment of Purchaser of Suit property – Principle of Lis Pendens* – Held – Sale deed in his favour already executed prior to institution of suit, thus principle of lis pendens would not apply – Decree would not be binding on him. [Sehdev Dubey Vs. Smt. Pushpa Tiwari]** **…*45**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 1 नियम 10 – वाद संपत्ति के क्रेता को पक्षकार बनाया जाना – विचाराधीन वाद का सिद्धांत – अभिनिर्धारित – विक्रय विलेख, वाद संस्थित होने के पूर्व, पहले ही उसके पक्ष में निष्पादित किया जा चुका है, अतः विचाराधीन वाद का सिद्धांत लागू नहीं होगा – डिक्री उस पर बाध्यकारी नहीं होगी। (सहदेव दुबे वि. श्रीमती पुष्पा तिवारी) **…*45**

***Civil Procedure Code (5 of 1908), Order 1 Rule 10 – Necessary Party – Locus Standi* – Held – R-1 claiming her title through the grandfather of petitioner whereas petitioner claiming that his grandfather was never the owner of the suit land and the unregistered sale deed produced by R-1 is a forged document – It cannot be said that petitioner has no locus standi to oppose the claim of R-1 – Petitioner is a necessary party thus his application for impleadment allowed – Petition allowed. [Deepak Kumar Saxena Vs. Smt. Nirmala Devi]** **…*35**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 1 नियम 10 – आवश्यक पक्षकार – सुने जाने का अधिकार – अभिनिर्धारित – प्रत्यर्थी क्र. 1 याची के दादा/नाना के माध्यम से अपने हक का दावा कर रही है जबकि याची यह दावा कर रहा है कि उसके दादा/नाना

कभी भी वाद भूमि के स्वामी नहीं थे तथा प्रत्यर्थी क्र. 1 द्वारा प्रस्तुत किया गया अरजिस्ट्रीकृत विक्रय विलेख एक कूटरचित दस्तावेज है – यह नहीं कहा जा सकता कि याची को प्रत्यर्थी क्र. 1 के दावे के विरोध की सुनवाई का कोई अधिकार नहीं है – याची एक आवश्यक पक्षकार है, अतः पक्षकार बनाने हेतु उसका आवेदन मंजूर किया गया – याचिका मंजूर। (दीपक कुमार सक्सेना वि. श्रीमती निर्मला देवी) **…*35**

***Civil Procedure Code (5 of 1908), Order 1 Rule 10 – Term "dominus litus"* – Held – Petitioner not claiming any relief against R-1 – It is the case of petitioner that by creating forged document, R-1 trying to grab government land – Petitioner's application for impleadment cannot be rejected on the ground that plaintiff is *"dominus litus"*. [Deepak Kumar Saxena Vs. Smt. Nirmala Devi] …*35**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 1 नियम 10 – शब्द ''वाद नियंत्रक'' – अभिनिर्धारित – याची प्रत्यर्थी क्र. 1 के विरूद्ध किसी अनुतोष का दावा नहीं कर रहा – याची का यह प्रकरण है कि कूटरचित दस्तावेज बनाकर, प्रत्यर्थी क्र. 1 सरकारी भूमि को हथियाने की कोशिश कर रहा है – पक्षकार बनाने हेतु याची का आवेदन इस आधार पर अस्वीकार नहीं किया जा सकता कि वादी ''वाद नियंत्रक'' है। (दीपक कुमार सक्सेना वि. श्रीमती निर्मला देवी) **…*35**

***Civil Procedure Code (5 of 1908), Order 2 Rule 2 – Scope* – Held – In present case, suit is not against same defendants or same defendants jointly – There are different set of defendants who have different cause of action – Order 2 Rule 2 cannot be read in a manner as to permit clubbing of different cause of action. [Shivnarayan (D) By L.Rs. Vs. Maniklal (D) Thr., L.Rs.] (SC)…1178**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 2 नियम 2 – व्याप्ति – अभिनिर्धारित – वर्तमान प्रकरण में, वाद, समान प्रतिवादीगण या संयुक्त रूप से समान प्रतिवादीगण के विरूद्ध नहीं है – यहां प्रतिवादीगण के भिन्न समूह है जिसका भिन्न वाद हेतुक है – आदेश 2 नियम 2 को इस ढंग से नहीं पढ़ा जा सकता जिससे कि भिन्न वाद हेतुक को संयोजित करने की अनुज्ञा दी जा सके। (शिवनारायण (मृतक) द्वारा विधिक प्रतिनिधि वि. मानिकलाल (मृतक) द्वारा विधिक प्रतिनिधि) **(SC)…1178**

***Civil Procedure Code (5 of 1908), Order 14 Rule 2 – Preliminary Issue* – Held – Issue of court fees is always liable to be decided as a preliminary issue because Court fees is payable in advance at the time of filing of suit and appeal – There is no provision for payment of Court fees after adjudication of suit and appeal. [Badrilal (deceased) through L.Rs. Nirmala Vs. Akash] …1076**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 14 नियम 2 – प्रारंभिक विवाद्यक – अभिनिर्धारित – न्यायालय फीस का विवाद्यक हमेशा प्रारंभिक विवाद्यक के रूप में विनिश्चित किये जाने योग्य है क्योंकि वाद तथा अपील प्रस्तुत करने के समय न्यायालय

INDEX

INDEX

INDEX

अपनी सेवा समाप्ति का विरोध नहीं किया – उसने अपने दावे तथा साक्ष्य में 11 वर्ष के विलंब के संबंध में कोई स्पष्टीकरण नहीं दिया – पक्षकारों के मध्य कोई ''औद्योगिक विवाद'' विद्यमान नहीं – प्रत्यर्थी पुनःस्थापन हेतु हकदार नहीं – आक्षेपित आदेश अपास्त – याचिका मंजूर। (कार्यपालन यंत्री लोक स्वास्थ वि. देवेन्द्र कुमार पंवार) ...*40

***Industrial Disputes Act (14 of 1947), Section 10 – Reference – Nature & Scope* – Held – Order of reference is in realm of an administrative act – Apex Court concluded that in making a reference u/S 10, appropriate government is doing an administrative act and not a judicial or quasi judicial act – Any factual foundation in order of Dy. Labour Commissioner or in reference order will not create any right in favour of any party – Labour Court will be free to adjudicate the matter on its own merits. [Rajasthan Patrika Pvt. Ltd. (M/s.) Vs. State of M.P.]** **(DB)...1217**

औद्योगिक विवाद अधिनियम (1947 का 14), धारा 10 – निर्देश – स्वरूप एवं विस्तार – अभिनिर्धारित – निर्देश का आदेश एक प्रशासनिक कार्य के दायरे में है – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि धारा 10 के अंतर्गत निर्देश करते समय, समुचित सरकार एक प्रशासनिक कार्य कर रही है तथा न कि एक न्यायिक अथवा अर्धन्यायिक कार्य – उप–श्रम आयुक्त के आदेश अथवा निर्देश आदेश में कोई भी तथ्यात्मक आधार, किसी पक्षकार के पक्ष में कोई अधिकार सृजित नहीं करेगा – श्रम न्यायालय, मामले को उसके अपने गुण–दोषों के आधार पर न्यायनिर्णीत करने हेतु स्वतंत्र होगा। (राजस्थान पत्रिका प्रा. लि. (मे.) वि. म.प्र. राज्य) **(DB)...1217**

***Industrial Disputes Act (14 of 1947), Section 10 – Termination – Retrenchment Compensation* – Held – Since it is established that respondent worked for 240 days in petitioner's establishment and before termination retrenchment compensation was not paid, Rs. 50,000 compensation granted in lieu of reinstatement – Impugned order modified. [Karyapalan Yantri Lok Swastha Vs. Devendra Kumar Panwar]** **...*40**

औद्योगिक विवाद अधिनियम (1947 का 14), धारा 10 – सेवा समाप्ति – छंटनी प्रतिकर – अभिनिर्धारित – चूंकि यह स्थापित है कि प्रत्यर्थी ने याची के संस्थान में 240 दिनों तक कार्य किया है तथा सेवा समाप्ति के पूर्व छंटनी प्रतिकर का भुगतान नहीं किया गया था, पुनःस्थापन के बदले 50,000/– रू. प्रतिकर प्रदान किया गया – आक्षेपित आदेश उपांतरित। (कार्यपालन यंत्री लोक स्वास्थ वि. देवेन्द्र कुमार पंवार) ...*40

***Industrial Disputes Act (14 of 1947), Section 25-F – Compensation in-lieu of Re-instatement – Quantum* – Held – Looking to 12 yrs. period of service of workman who was working in substantive capacity and does not suffer from any blemish or taint in his career, quantum of compensation awarded enhanced from Rs. 2 lacs to 4 Lacs. [Arun Kumar Dixit Vs. Scindia Kanya Vidhyalay]** **...980**

औद्योगिक विवाद अधिनियम (1947 का 14), धारा 25–एफ – पुनःस्थापन के बदले प्रतिकर – मात्रा – अभिनिर्धारित – कर्मकार, जो कि अधिष्ठायी क्षमता में कार्य कर रहा था

INDEX

रूप से मुक्त, राज्य में निहित होती है – धारा 5(एफ), जमींदारों पर उक्त सामान्य भूमि पर कोई अधिकार प्रदत्त नहीं करती तथा एक बार निहित किये जाने की तिथि के पूर्व से उसे 1950–51 लोक प्रयोजन हेतु चरनोई के रूप में अभिलिखित किये जाने से उक्त को निहित किये जाने से नहीं बचाती – अपील खारिज। (छतर सिंह वि. माधो सिंह) **(SC)…1171**

***Madhya Bharat Zamindari Abolition Act, (13 of 1951), Section 4(1)(a) & 5(f) – Grove Lands* – Held – Trees standing on side of road would not fulfill requirement of a 'Grove' – When land is primarily used for 'Charnoi', it would not fall into the category of 'Grove' and Section 5(f) would not save such trees from vesting – The fruit bearing trees irrespective of numbers have also vested in State u/S 4(1)(a). [Chattar Singh Vs. Madho Singh]**
(SC)…1171

मध्य भारत जमींदारी उन्मूलन अधिनियम, (1951 का 13), धारा 4(1)(ए) व 5(एफ) – बाग भूमियां – अभिनिर्धारित – सड़क किनारे खड़े वृक्ष, ''बाग'' की अपेक्षा की पूर्ति नहीं करेंगे – जब प्राथमिक रूप से भूमि का उपयोग ''चरनोई'' हेतु किया गया है, वह ''बाग'' की श्रेणी के भीतर नहीं आयेगी तथा धारा 5(एफ) उक्त वृक्षों को निहित होने से नहीं बचाएगी – फलदार वृक्ष भी संख्या का विचार किये बिना, धारा 4(1)(ए) के अंतर्गत राज्य में निहित हो गये हैं। (छतर सिंह वि. माधो सिंह) **(SC)…1171**

***Money Lenders Act, M.P. (13 of 1934), Section 11B and Municipal Corporation Act, M.P. (23 of 1956), Section 69(3) & (4) – License – Requirement of Character Certificate* – Held – Even if under the Act of 1934, there is no condition for obtaining a money lending license, but in order to do business or trade, under the Act of 1956, Municipal Corporation is competent to impose conditions of requirement of character certificate, in public interest – As per Section 11 B of Act of 1934, it is always a discretion of registering authority to issue a certificate or not – Three criminal cases found pending against petitioner and on this ground his application for obtaining license was rejected, which cannot be said to be arbitrary and contrary to statutory provisions. [Mahesh Palod Vs. Assistant Commissioner (License)]**
…991

साहूकार अधिनियम, म.प्र. (1934 का 13), धारा 11बी एवं नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धारा 69(3) व (4) – अनुज्ञप्ति – चरित्र प्रमाण–पत्र की आवश्यकता – अभिनिर्धारित – यद्यपि 1934 के अधिनियम के अंतर्गत, साहूकारी अनुज्ञप्ति प्राप्त करने हेतु कोई शर्त नहीं है, परंतु 1956 के अधिनियम के अंतर्गत, कारबार अथवा व्यापार करने के लिए नगरपालिक निगम, लोक हित में चरित्र प्रमाण–पत्र की आवश्यकता की शर्त अधिरोपित कर सकता है – 1934 के अधिनियम की धारा 11बी के अनुसार, प्रमाण–पत्र जारी करना अथवा नहीं करना, यह हमेशा रजिस्ट्रीकरण प्राधिकारी का विवेकाधिकार है – याची के विरूद्ध तीन आपराधिक प्रकरण लंबित पाये गये एवं इस आधार पर अनुज्ञप्ति प्राप्त करने हेतु उसका आवेदन अस्वीकार किया गया था, जिसे मनमाना तथा कानूनी उपबंधों के प्रतिकूल नहीं कहा जा सकता। (महेश पालोड वि. असिस्टेन्ट कमिश्नर (लाईसेंस) **…991**

INDEX

INDEX

आदेश पारित किया जा सकता है – ऐसा आदेश अवधि विनिर्दिष्ट न कर, अधिनियम की धारा 3(3) एवं संविधान के अनुच्छेद 22(4) के अनुसार उक्त को दूषित करता है। (आकाश यादव वि. म.प्र. राज्य) **(DB)…1020**

***National Security Act (65 of 1980), Section 3(3) and Constitution – Article 226 – Writ Jurisdiction – Scope* – Held – Detention order can be challenged at any stage and the distinction between pre decision stage and post decision stage is inconsistent – Even at pre execution stage, jurisdiction of Court can be invoked. [Akash Yadav Vs. State of M.P.] (DB)…1020**

राष्ट्रीय सुरक्षा अधिनियम (1980 का 65), धारा 3(3) एवं संविधान – अनुच्छेद 226 – रिट अधिकारिता – विस्तार – अभिनिर्धारित – निरोध आदेश को किसी भी प्रक्रम पर चुनौती दी जा सकती है तथा विनिश्चय के पूर्व प्रक्रम तथा विनिश्चय के बाद के प्रक्रम के मध्य विभेद असंगत है – यहां तक कि निष्पादन पूर्व प्रक्रम पर, न्यायालय की अधिकारिता का अवलंब लिया जा सकता है। (आकाश यादव वि. म.प्र. राज्य) **(DB)…1020**

***National Security Act (65 of 1980), Section 3(3) & 3(5) – Submission of report to Central Government* – Held – Nothing on record to show that compliance of Section 3(5) of the Act has been made by State by submitting report to Central Government together with grounds on which order has been made – Non-compliance of the mandatory provision of Section 3(5) vitiated the order. [Akash Yadav Vs. State of M.P.] (DB)…1020**

राष्ट्रीय सुरक्षा अधिनियम (1980 का 65), धारा 3(3) व 3(5) – केन्द्र सरकार को प्रतिवेदन प्रस्तुत किया जाना – अभिनिर्धारित – अभिलेख पर यह दर्शाने हेतु कुछ भी नहीं है कि राज्य द्वारा केन्द्र सरकार को उन आधारों के साथ–साथ जिन पर आदेश पारित किया गया है, प्रतिवेदन प्रस्तुत कर अधिनियम की धारा 3(5) का अनुपालन किया गया है – धारा 3(5) के आज्ञापक उपबंध का अननुपालन आदेश को दूषित करता है। (आकाश यादव वि. म.प्र. राज्य) **(DB)…1020**

***National Security Act (65 of 1980), Sections 3(3), 8, 9, 10 & 13 – Detention Order – Reference to Advisory Board* – Held – Nothing on record to establish that State made reference to Advisory Board within 3 weeks from date of detention – It is not brought on record that as per opinion of Advisory Board, State confirmed the detention order to continue upto maximum period of 12 months – Even in the return filed, State has not stated regarding compliance of Sections 8, 9 & 10 of the Act – Impugned order and further approval by State Government is in non observance of the procedure prescribed under the Act of 1980 and hence quashed – Petitioner directed to be released from jail – Petition allowed. [Akash Yadav Vs. State of M.P.] (DB)…1020**

राष्ट्रीय सुरक्षा अधिनियम (1980 का 65), धाराएँ 3(3), 8, 9, 10 व 13 – निरोध आदेश – सलाहकार बोर्ड को निर्देश – अभिनिर्धारित – यह स्थापित करने हेतु अभिलेख पर कुछ नहीं है कि निरोध की तिथि से 3 सप्ताह के भीतर राज्य ने सलाहकार बोर्ड से

INDEX

पारित किया जाना प्रतिषिद्ध करता हो – 1990 का अधिनियम स्पष्ट रूप से अतिरिक्त जिला मजिस्ट्रेट अथवा उपखंड मजिस्ट्रेट द्वारा धारा 3, 4, 5 व 6 के अंतर्गत जिला मजिस्ट्रेट की शक्तियों का प्रयोग अनुध्यात करता है –यह ठहराते हुए कि अतिरिक्त जिला मजिस्ट्रेट को कोई अधिकारिता नहीं है उच्च न्यायालय द्वारा पारित किया गया आक्षेपित आदेश कायम रखने योग्य नहीं एवं अपास्त किया गया – अपीलें मंजूर। (म.प्र. राज्य वि. धर्मेन्द्र राठोर)
(SC)…960

***Reserve Bank of India, Master Circular, Clause 2.1.3(c) – "Willful Defaulter"* – Held – Bank paid amount to foreign exporters for purchase of machinery by petitioner – He is legally bound to repay this amount to bank even if loan or fund was not directly disbursed in petitioner's current account but it was directly paid to exporters on behalf of petitioner – Relationship of lender and borrower established – Since petitioner defaulted in repayment of the same, even it has the capacity to pay, he was rightly declared "Willful Defaulter" under Clause 2.1.3(c) of Master Circular. [Revati Cements Pvt. Ltd. Vs. State Bank of India]** **…*43**

भारतीय रिजर्व बैंक, मास्टर परिपत्र, खंड 2.1.3(सी) – ''जानबूझकर व्यतिक्रमी'' – अभिनिर्धारित – बैंक ने विदेशी निर्यातकों को याची द्वारा मशीनरी क्रय करने हेतु रकम अदा की – वह बैंक को इस रकम का प्रतिसंदाय करने के लिए विधिक रूप से तब भी बाध्य है, यहां तक कि यदि ऋण या निधि का भुगतान सीधे याची के चालू खाते में न किया हो परंतु उसे याची की ओर से निर्यातकों को सीधे भुगतान किया गया था – उधार देने वाले एवं उधार लेने वाले का संबंध स्थापित – चूंकि याची ने उक्त के प्रतिसंदाय में व्यतिक्रम किया, यहां तक कि वह भुगतान करने की स्थिति में होते हुए भी, उसे उचित रूप से मास्टर परिपत्र के खंड 2.1.3(सी) के अंतर्गत ''जानबूझकर व्यतिक्रमी'' घोषित किया गया था। (रेवती सीमेन्ट प्रा. लि. वि. स्टेट बैंक ऑफ इंडिया) **…*43**

***Reserve Bank of India, Master Circular, Clause 2.1.3(c) & 3(b) – "Willful Defaulter" – Opportunity of Hearing – Advocate* – Identification Committee is neither a Court nor a Tribunal – Borrower is not having a right to be represented through lawyer/counsel – RBI provided double check system before declaring any unit as "Willful Defaulter" – Since "Review Committee" has affirmed the stand of "Identification Committee", thus opportunity of hearing is not required. [Revati Cements Pvt. Ltd. Vs. State Bank of India]** **…*43**

भारतीय रिजर्व बैंक, मास्टर परिपत्र, खंड 2.1.3(सी) व 3(बी) – ''जानबूझकर व्यतिक्रमी'' – सुनवाई का अवसर – अधिवक्ता – पहचान समिति न तो न्यायालय है न ही कोई अधिकरण – उधार लेने वाले को विधिज्ञ/अधिवक्ता के जरिए प्रतिनिधित्व का अधिकार नहीं है – भारतीय रिजर्व बैंक किसी इकाई को ''जानबूझकर व्यतिक्रमी'' घोषित करने से पूर्व दोहरी जांच प्रणाली उपबंधित करता है – चूंकि ''पुनर्विलोकन समिति'' ने ''पहचान समिति'' के मत की पुष्टि की है, अतः सुनवाई का अवसर अपेक्षित नहीं है। (रेवती सीमेन्ट प्रा. लि. वि. स्टेट बैंक ऑफ इंडिया) **…*43**

INDEX

INDEX

* * * * *

THE INDIAN LAW REPORTS M.P. SERIES, 2019

(Vol.-2)

JOURNAL SECTION

FAREWELLS

HON'BLE MR. JUSTICE SANJAY KUMAR SETH,
CHIEF JUSTICE

Born on June 10, 1957. After obtaining B.A. and LL.B. Degrees, enrolled as an Advocate in the year 1981 and started independent practice in the year 1983 mainly on Constitutional and Civil sides. Held the post of part time Reporter of I.L.R (M.P. Series) in the year 1988-89 and as part time Editor,ILR in the year 1998-99. Was Government Advocate from the year 1989 till June, 1996. Was appointed as Deputy Advocate General from July, 1996 to February, 1997 and again from March, 1999 to June, 2000. Was appointed as Additional Advocate General in July, 2000. Elevated as Judge of the High Court of Madhya Pradesh on 21.03.2003 and was appointed as permanent Judge on 19.01.2004. Was appointed as Chairman of Advisory Board in the year 2016. Became Administrative Judge of the M.P. High Court at main seat, Jabalpur with effect from 20.03.2017. Was appointed as Executive Chairman, State Legal Services Authority with effect from 19.04.2017. Was also the Chairman of Law Reporting Committee/Indian Law Report (M.P.) Committee from September, 2014 to February, 2017. Assumed the office as Acting Chief Justice of this Court on 02.11.2018. Was sworn in as the 24th Chief Justice of the Madhya Pradesh High Court on November 14, 2018 and demitted Office on June 09, 2019.

We, on behalf of The Indian Law Reports (M.P. Series) wish His Lordship a healthy, happy and prosperous life.

HON'BLE MR. JUSTICE HULUVADI G. RAMESH

Born on May 20, 1957. Did Primary and Higher Secondary schooling in native place, Maddur, Chennapatna. Graduated in B.Sc. and later obtained LL.B degree and thereafter, did LL.M in Constitutional and Administrative Law from Mysore University. Enrolled as an Advocate on 12.03.1981. Practiced in the Courts at Mysore and Bangalore districts and High Court at Bangalore. Secured First Rank in the Direct District Judges selection conducted by the Karnataka State Judiciary and joined Karnataka Judicial Service on 02.02.1993 as District and Sessions Judge. Was promoted to the cadre of District Judge (Super Time Scale) on 23.06.2000. Elevated as the Additional Judge of the Karnataka High Court on 08.09.2003 and as a Permanent Judge on 24.09.2004. Was transferred to Allahabad High Court on 16.02.2015 and from there, to Madras High Court on 11.04.2016. Was appointed as Acting Chief Justice of Madras High Court twice, from 17.02.2017 to 04.04.2017 and from 07.08.2018 to 11.08.2018. Took oath as Judge of the High Court of Madhya Pradesh on November 15, 2018 and demitted Office on May 19, 2019.

We, on behalf of The Indian Law Reports (M.P. Series), wish His Lordship a healthy, happy and prosperous life.

FAREWELL OVATION TO HON'BLE MR. JUSTICE SANJAY KUMAR SETH, CHIEF JUSTICE AND HON'BLE MR. JUSTICE HULUVADI G. RAMESH, ADMINISTRATIVE JUDGE, GIVEN ON 17.05.2019 IN THE CONFERENCE HALL OF THE HIGH COURT OF MADHYA PRADESH AT JABALPUR.

Hon'ble Mr. Justice, R.S. Jha, bids farewell to the demitting Judges :-

We have assembled here to bid a warm and affectionate farewell to Hon'ble Shri Justice Huluvadi G. Ramesh, the Administrative Judge and Hon'ble Shri Justice Sanjay Kumar Seth, the Chief Justice, who will be demitting office on 19th May, 2019 and 9th June, 2019 respectively, on attaining the age of superannuation. It is on account of this unprecedented situation where the two Senior-most Judges are demitting office, that I am required to initiate this farewell ovation.

Hon'ble Shri Justice H.G. Ramesh was born on 20th May, 1957 at Huluvadi Chennapatna, District Ramanagara (Karnataka). Brother Justice Ramesh has been an erudite scholar. After graduating in Science from Yuvraja College, Mysore in 1977 and obtaining an LL.M. Degree from Mysore University, Mysore in 1982, he enrolled himself as an Advocate on 12th March, 1981 and started practice in Civil, Criminal and writ side at Mysore District Court, Bangalore District Court and the High Court of Karnataka, Bangalore. Shri Justice Ramesh stood 1st in the direct District Judges selection conducted by the Karnataka State Judiciary in the year 1991. Thereafter, he was appointed as District & Sessions Judge on 2nd February, 1993 and served in District Court, Dharwad and as Principal District & Sessions Judge, Belgaum, Coorg and Hassan. He also held the post of Registrar Judicial in the High Court of Karnataka from 20th January, 1997 to 25th May, 1998.

Hon'ble Shri Justice Ramesh was elevated as an Additional Judge of the Karnataka High Court on 8th September, 2003 and thereafter appointed as permanent Judge on 24th September, 2004. On 16th February, 2015, Shri Justice Ramesh joined the Allahabad High Court as Senior Judge of that Court and served there up to 10th April, 2016. On 11th April, 2016, he assumed charge of the Senior-Most Judge at Madras High Court. He was appointed as Acting Chief Justice of Madras High Court with effect from 16.02.2017 and performed duties as such till 04.04.2017 and again from 07.08.2018 to 11.08.2018. Thereafter, on 15th November, 2018, Shri Justice Ramesh assumed charge of the office of Judge of this Court. He is presently holding the office of Executive Chairman of Madhya Pradesh State of Legal Services Authority as well as Administrative Judge of this Court.

Hon'ble Shri Justice Ramesh not only possesses vast knowledge of law but also of subjects of general importance. His wisdom, learning, courtesy, grace,

sound knowledge of law and legal acumen is manifested in his judicial work. Hard working and painstaking, he is equally at home in almost all branches of law. During his tenure, he has rendered several land mark Judgments which adorn the Law Journals. He has disposed of more than 62000 cases as Judge of various High Courts. He has put in service as a Judge for more than 25 years, initially 10 years 8 months as District and Sessions Judge and later more than 15 years as Judge of the High Court.

Shri Justice Ramesh is the embodiment of all the desirable qualities reasonably expected of a Judge and indeed of a noble human being and, therefore, he commanded enduring respect and admiration of the members of the Bar.

Hon'ble Chief Justice Shri Sanjay Kumar Seth was born on 10th June, 1957. After graduating in Arts, His Lordship earned the degree of Law and got himself enrolled as an Advocate with the Bar Council of Madhya Pradesh. He joined the chambers of late Shri K.K. Adhikari, Advocate, who was later on elevated as Judge of this High Court in 1983. After elevation of late Shri K.K. Adhikari as Judge, Hon'ble Shri Justice Seth started independent practice mainly on the Constitutional and Civil sides. His Lordship held the post of Sub Editor of I.L.R. (M.P. Series) in 1988-89 and was appointed Editor in 1998-99. He worked as a Government Advocate from 1989 to June, 1996 and thereafter held the office of Deputy Advocate General from July, 1996 to February, 1997 and again from March, 1999 to June, 2000. In July, 2000 he was appointed as Additional Advocate General, which post he held till his elevation as a Judge of this Court.

Recognizing his merit and legal acumen, Hon'ble Shri Justice Sanjay Kumar Seth was elevated as an Additional Judge of the High Court of Madhya Pradesh on 21st March, 2003 and as permanent Judge on 19th January, 2004.

Hon'ble Shri Justice Seth besides doing exemplary judicial work, also discharged the role of Chairman of the Advisory Board constituted under the National Security Act with effect from 9th August, 2016; as Administrative Judge of this Court with effect from 20th March, 2017; as member of various Administrative Committees; and then as Executive Chairman of Madhya Pradesh State Legal Services Authority with effect from 19th April, 2017, his Lordship incessantly worked for ameliorating and redressing the problems of the needy people. He displayed unflinching commitment for the cause of the down trodden.

After elevation of Hon'ble Shri Justice Hemant Gupta, the then Chief Justice, as Judge of the Supreme Court of India, Hon'ble Shri Justice Seth assumed the office of the Acting Chief Justice of this Court and was ultimately appointed as Chief Justice of High Court of Madhya Pradesh on 14th November, 2018. His appointment was welcomed with open arms by all as this High Court got a Chief Justice who was a son of the soil after nearly thirty years.

His Lordship has endeared himself amongst the litigant public of the State in and outside the Court. His Lordship is an embodiment of nobility and compassion that is expected of a Judge. Amongst his colleagues, he is known for his wit, kind heartedness, love and compassion. He is a great support for all of us on the Bench as well as of great help in administrative matters.

Personally, I have had the unique privilege of being associated with him, as an advocate and then as a Judge and had numerous occasions to thank God for this blessing. Being a person bestowed with great intellect, knowledge and wisdom and being possessed of a pleasant and amicable disposition, he has been a true friend, guide and philosopher not just to me but for all Judges of this Court and members of the Bar.

As a Chief Justice his Lordship has been an untiring striver and has fulfilled his responsibilities with great distinction, invaluably contributing to the cause of truth and justice with the same untiring zeal and enthusiasm with which he began his carrier. This is what has distinguished his Lordship from the ordinary.

His Lordship's judgments in the field of Constitutional Law, Civil Law, Criminal law, Tax Law and other laws are a testimony of his extraordinary uncanny judicial ability and outstanding intellect to decide even the most complex legal issues with simple ease.

Knowing him, I am sure that His Lordship would henceforth indulge in his hobby and passion for reading and higher academic pursuits and spend quality time with Mrs. Renu Seth, his life partner, who is present amongst us here today, and who has been the greatest and most important supporting and guiding force behind him.

On this occasion, I congratulate both, Justice Ramesh and Justice Seth, on the event of removal of all suffocating and confining restrictions and restoration of normalcy in their lives. A great Saint of our times has said "Life is a Game, play it." You can now do so with fierce abandon.

I, on my behalf and on behalf of my esteemed brother & sister Judges and the Registry of the High Court, wish Hon'ble Shri Justice H.G. Ramesh, Administrative Judge and Hon'ble Shri Justice Sanjay Kumar Seth, Chief Justice and their family members a very happy, prosperous and glorious future. पश्येम शरदः शतं ; जीवेद शरदः शतं ; श्रृणुयाम शरदः शतं ; अदीनाः शरदः शतं ; भूयश्च शरदः शतात्

I pray to God that: you see a 100 beautiful autumns; you live a meaningful life for 100 autumns; you hear pleasant things for 100 autumns; be healthy and independent for 100 autumns; and you live for more than 100 years.

"Jai Hind"

Shri Ajay Gupta, Additional Advocate General, M.P., bids farewell:-

Today, we all have gathered to give farewell ovation to Hon'ble Shri Justice S.K. Seth and Honb'le Shri Justice Huluvadi G. Ramesh who will be demitting their offices as Judges of High Court during the ensuing summer vacations.

Hon'ble Shri Justice S.K. Seth:-

My Lords, Hon'ble Shri Justice S.K. Seth was born on 10.06.1957. After obtaining degrees of BA and LL.B he was enrolled as an Advocate in the year 1981 and started practice under the able guidance of Late Shri K.K. Adhikari. Since 1983 he started practicing independently. During the period between 1988 to 1989 he worked as Sub Editor of ILR (MP Series). From the year 1989 to June 1996 My Lord worked as Government Advocate, in Advocate General's Office, then twice from July, 1996 to February, 1997 and from February, 1999 to June, 2000 he was appointed as Deputy Advocate General. In July, 2000 My Lord was appointed as Additional Advocate General and he worked as such till March 21, 2003 when My Lord was elevated as Judge of this High Court.

My Lords, Hon'ble Shri Justice S.K. Seth hails from a family of high repute. Families from both his father's as well as his mother's side were of high repute. He is son of Mr. R.K. Seth who was District and Sessions Judge and Registrar of High Court of Madhya Pradesh. He is maternal grandson of Rajarshi Purshottam Das Tondon.

Hon'ble Shri Justice S.K. Seth also led the legacy of his family and earned a good reputation in the position of an Advocate, by holding various positions in the office of Advocate General or even after adorning the office of Judge of this Hon'ble High Court, he was appointed Chairman of the Advisory Board on 09.08.2016 and became the Administrative Judge of this Court w.e.f. 20.03.2017. He was also appointed as Chairman of the State Legal Services Authority w.e.f. 19.04.2017 and now My Lord will be demitting office on 09.06.2019 completing the tenure of more than 16 years after touching the zenith as Chief Justice, which is a dream of every lawyer in the legal profession.

In the words of Henry Wadsworth Longfellow-

"Great is the art of beginning, but greater is the art of Ending".

My Lords, Hon'ble Shri Justice S.K. Seth dealt with almost all kinds of cases (Civil, Criminal, Constitutional, Arbitration, Contract, Taxation etc.) in his career whether as an Advocate or as a Judge of this Hon'ble Court. Few of his remarkable judgments are –

S. Kumar Ltd. Vs. Addl. Commissioner of Sales Tax reported in 2005(1) MPLJ page 352,

Karamchand Thapar & Brothers Vs. MPEB reported in 2000(2) MPLJ page 453,

Ashok Kumar and another Vs. S.R. Verma through LRs and ors. reported in 2008(3) MPLJ page 582,

C.K. Asati Vs. Union of India reported in 2005(1) MPLJ page 573,

Krishnakant Vs. Durgeshnandini reported in 2005(1) MPLJ page 339,

Madhya Pradesh Poorv Kshetra Vidyut Vitaran Co. Ltd. Vs. Easun Reyrolle Ltd. reported in 2016(4) MPLJ page 716.

Shri Justice S.K. Seth has displayed persistent and unyielding commitment to expeditious judicial disposals with stellar legal acumen. The same is exhibited in his landmark judgments.

Shri Justice S.K. Seth has been a Judge par excellence, renowned for his legal knowledge, judicious disposition and amiable personality. Being of an equable temperament, and truly amazing fortitude and humility, he has commanded great respect and constant endorsement of his work from the Bar. Behind his affable hidden personality, is an outstanding and hard working Judge known for giving a patient hearing to everyone.

There is a long list of fine judgments authored by Hon'ble Shri Justice S.K. Seth in distinct jurisdiction, and especially on shaping civil jurisprudence, are a testament to the dedication with which he has actually outperformed the constitutional mandate of justice dispensation bestowed upon him.

Martin Luther King, Jr said that “Human progress is neither automatic nor inevitable… Every step towards the goal of justice requires sacrifice, suffering, and struggle; the tireless exertions and passionate concern of dedicated individuals”. Shri Justice S.K. Seth is that dedicated individual.

Shri Justice S.K. Seth's contribution to justice dispensation will be forever remembered. Your contributions shall continue to act as a guiding light for us and you shall remain an ideal for us all to follow.

We wish Shri Justice S.K. Seth good health and deep contentment with his accomplishments.

Hon'ble Shri Justice Huluvadi G. Ramesh:-

My Lords, Hon'ble Shri Justice Huluvadi G. Ramesh was born on 20.05.1957 in an affluent agricultural family of Mr. Gangadharappa and Mrs. Kamlamma. He did his schooling in Huluvadi village. He got Higher Education in Yuvaraja's College, Mysore and did LLM from Mysore University. In the year

1981 he was enrolled as an Advocate and he practiced in the Courts of Mysore and Bangalore Districts and High Court at Bangalore. On 2nd February, 1993 he joined Karnataka Judicial Service as District Judge. On 8th September, 2003 My Lord was elevated as Judge of the High Court of Karnataka, from where on 16th Feb. 2015 he was transferred to Allahabad High Court and then to Madras High Court. For the periods from 11.02.2017 till 04.04.2017 and 07.08.2018 to 11.08.2018 he was appointed as Acting Chief Justice of Madras High Court from where he was transferred to this High Court on 15.11.2018 as Administrative Judge.

My Lord, Hon'ble Shri Justice Huluvadi G. Ramesh dealt with cases in almost all sides of law. His notable judgment is Essar Telecom Infrastructure Pvt. Ltd Vs. Union of India reported in (2012) 52 VST 306 (Kar) wherein he held that the provision of cellular telephony towers on rent to service providers would not attract the imposition of service tax.

My Lords', Unbiased, Fair and Swift are some of the adjectives that Your Lordship epitomise.

I think everyone present here today will agree that both Your Lordships have greatly contributed to this institution by delivering justice in a speedy and just manner. Your Lordships relentless endeavours have helped in reducing the ever increasing number of pending cases. Due to my Lords' profound knowledge of law and easy grasp of facts, it was always a pleasure for advocates to argue before Your Lordships and one could always be sure that after arguments were concluded, a well reasoned and just judgment would be pronounced. Your Lordships never made a distinction between the senior and junior members of the bar and encouraged the younger members of the bar to prepare and argue matters. It is this manner of hearing and deciding matters head on, which strengthened faith and confidence in the minds of the litigants towards administration of Justice.

My Lords, it can be said without a doubt that Your Lordships would be missed by one and all and while we are saddened to see your Lordships demitting the office of Judge of this Hon'ble Court, we extend our best wishes for your Lordships' future pursuits. I am sure, that Your Lordships would be very happy now and able to spend more time with your families after a long and successful career, which will serve as a beacon light for the present and future generations of lawyers.

I on behalf of all the Law officers of the State and on my own behalf wish a long, happy and fulfilling life beyond the Bench.

Shri Raman Patel, President, High Court Bar Association, Jabalpur, bids farewell:-

माननीय मुख्य न्यायाधिपति श्री संजय कुमार सेठ :–

माननीय न्यायाधिपति श्री संजय कुमार सेठ का जन्म दिनांक 10 जून 1957 को हुआ था। अपनी स्नातक एवं विधि की उपाधि प्राप्त करने के उपरांत उन्होंने अधिवक्ता के रूप में पंजीयन होने के पश्चात दिवंगत अधिवक्ता श्री के.के. अधिकारी जी के मार्गदर्शन में विधि व्यवसाय प्रारंभ किया। आप प्रारंभ से मेधावी छात्र रहे। श्री अधिकारी के पदोन्नति के उपरांत आपने स्वतंत्र रूप से विधि व्यवसाय का प्रारंभ किया। आपका मुख्य रूप से संवैधानिक एवं सिविल प्रकरणों की ओर रूझान रहा आपके द्वारा विधि व्यवसाय को नवीन दिशा प्रदान की गई आपके द्वारा अधिवक्ता के रूप में दिलाये गये कई निर्णय रिपोर्टेड हुये। वर्ष 1988 से 89 आप आई.एल.आर. (म.प्र सीरीज) के उपसंपादक के रूप में पदस्थ हुये उसके उपरांत वर्ष 1998–99 में आई.एल.आर. (म.प्र सीरीज) के संपादक पद को भी आपके द्वारा सुशोभित किया गया। वर्ष जून 1996 में आपने सरकारी अधिवक्ता के रूप में भी कार्य किया उसके उपरांत आपने उप महाधिवक्ता एवं उसके उपरांत अतिरिक्त महाधिवक्ता का पदभार संभाला।

मार्च 2003 में आप म.प्र. उच्च न्यायालय के न्यायाधिपति के रूप में सुशोभित हुये इसी के साथ आपको सलाहाकार समिति का अध्यक्ष भी नियुक्त किया गया इसके उपरांत आपने दिनांक 20. 03.2017 को म.प्र. उच्च न्यायालय में प्रशासनिक न्यायमूर्ति का पदभार भी संभाला एवं राज्य विधि प्राधिकरण के अध्यक्ष के पद में भी रहे। माननीय मुख्य न्यायाधिपति श्री हेमंत गुप्ता की पदोन्नति उपरांत आपको म.प्र. उच्च न्यायालय का कार्यवाहक मुख्य न्यायाधिपति पदस्थ किया गया जिसके उपरांत आपको म.प्र. उच्च न्यायालय के मुख्य न्यायाधिपति के रूप में आज दिनांक तक पदस्थ रहे, आपके द्वारा पद में रहते हुये विभिन्न प्रकरणों में ऐतिहासिक निर्णय दिये गये जो जीवन पर्यन्त हम अधिवक्ताओं का मार्गदर्शन करते रहेंगे।

माननीय न्यायाधिपति श्री हुलुवडी गंगाधरप्पा रमेश जी :–

आप माननीय न्यायाधिपति श्री हुलुवडी गंगाधरप्पा रमेश जी, म.प्र. उच्च न्यायालय के माननीय न्यायमूर्ति जी का जन्म दिनांक 20 मई, 1957 को कर्नाटक राज्य के रामनगरा जिले में हुआ एवं आपकी प्रारंभिक शिक्षा मैसूर जिले में हुई। वर्ष 1974 से 1982 तक अपनी शिक्षा पूर्ण करने के उपरांत आपने अपना नामांकन अधिवक्ता के रूप में दिनांक 12 मार्च 1981 को कराया उसके उपरांत अपना अधिवक्ता के रूप में विधि व्यवसाय जिला न्यायालय मैसूर से प्रारंभ किया एवं लगातार विधि जगत की उंचाईयों को प्राप्त किया। जल्द ही आपके द्वारा विधि जगत के सभी क्षेत्रों में प्रवीणता हासिल कर ली गई। आपने जिला न्यायालय बैंगलोर उसके उपरांत उच्च न्यायालय कर्नाटक में पैरवी की। आपकी विशेष रूचि संवैधानिक एवं सिविल प्रकरणों में थी।

आपकी योग्यता एवं श्रेष्ठता का अंदाजा इस बात से लगाया जा सकता है कि वर्ष 1991 में कर्नाटक राज्य द्वारा आयोजित जिला न्यायाधीश की चयन प्रक्रिया में आपको प्रथम स्थान प्राप्त हुआ जिसके उपरांत आपने फिर कभी मुड कर नहीं देखा एवं नित नई उंचाईयों को प्राप्त किया। आपकी नियुक्ति वर्ष 1993 में जिला न्यायाधीश धरवाद में हुई जहां आपकी पदोन्नति प्रधान जिला एवं सत्र न्यायाधीश बेलगम, कुर्ग एवं हसन जिला न्यायालय में हुई एवं वर्ष 1997 में आपको रजिस्ट्रार (न्यायिक) उच्च न्यायालय कर्नाटक में पदोन्नत किया गया। जिसके उपरांत आपको म.प्र. उच्च न्यायालय जबलपुर के न्यायाधिपति के रूप में पदोन्नत किया गया एवं आपने आज दिनांक तक म.प्र.

उच्च न्यायालय के प्रशासनिक न्यायमूर्ति के पद को शोभायमान किया। आपको जीवन में जो भी विभाग एवं कार्यक्षेत्र प्रदान किया आपने अपनी दूरदृष्टिता एवं योग्यता से उसे नवीन उंचाईयां प्रदान की। आपके द्वारा दिये गये ऐतिहासिक निर्णय जीवन पर्यन्त हम अधिवक्ताओं को मार्गदर्शन प्रदान करते रहेंगे। आप हम अधिवक्ताओं के लिये प्रेरणा स्त्रोत है।

Shri Manoj Sharma, President, High Court Advocates' Bar Association, Jabalpur, bids farewell:-

We have assembled here to bid a fond farewell to Hon'ble Shri Justice Huluvadi Gangadharappa Ramesh, the Administrative Judge, Madhya Pradesh High Court, and Hon'ble Shri Justice Sanjay Kumar Seth, the Chief Justice Madhya Pradesh High Court as both of their Lordships would be demitting office on 19th May, 2019 and 9th June, 2019 respectively, during the ensuing Summer Vacations.

My Lord Justice Huluvadi Gangadharappa Ramesh was born on 20th May, 1957 and after completing his Graduation in Science, did his Graduation in Law, followed by Post Graduation in Constitutional and Administrative Law from Mysore University.

My Lord was enrolled as an Advocate on 12th March, 1981 and started his practice in the Courts at Mysore and Bangalore and High Court at Bangalore. This besides, My Lord taught Law in Mysore University. My Lord secured the top rank in the Direct District Judges Selection in the Year 1991 and came to be appointed as a District & Sessions Judge in the year 1993, earning further promotion in Super Time Scale in the year 2000.

My Lord was elevated as Judge of the Karnataka High Court on 8th September, 2003 and continued as such till 14th February, 2015. My Lord was then transferred to Allahabad High Court on February 16, 2015 and to Madras High Court in April, 2016. My Lord was also Acting Chief Justice of Madras High Court twice, from 17th February, 2017 till 4th April, 2017 and from 6th August, 2018 to 12th August, 2018.

My Lord Justice Huluvadi Gangadharappa Ramesh has to his credit more than a decade as a practicing advocate and more than a quarter century as Judge, and has a unique distinction of having decided more than 62,000 cases as High Court Judge.

What really further qualifies this great achievement is not merely numbers, but the persistent quest to do substantial justice. The passion and deep understanding of life's stark realities, in the ever changing social milieu, were the unique perspectives that My Lord Justice Huluvadi Gangadharappa Ramesh brought in his functioning as a Judge. In all his decision making, protection of

human and fundamental rights of individuals is an essential ingredient, which runs as a silver chord all throughout in his judgments.

That on 19th of May, 2019 My Lord may be demitting the high office of Judge of High Court, but that by no means can bring to an end the great potential to serve the society and the zeal My Lord has for the same in whatever capacity My Lord so chooses.

My Lord we at Jabalpur were in fact very fortunate to have you as our Judge, although for a very brief tenure.

On behalf of High Court Advocates' Bar Association and on my own behalf I wish God speed to Hon'ble Shri Justice Huluvadi Gangadharappa Ramesh in all his future endeavors.

I wish Hon'ble Shri Justice Huluvadi Gangadharappa Ramesh, Mrs. Annapurna NR and all his family members happiness, peace and good health.

My Lord Hon'ble Shri Justice Sanjay Kumar Seth:-

The Chief Justice High Court of Madhya Pradesh was born on 10.06.1957, in an illustrious and renowned family. My Lord the Chief Justice after graduating from Arts and Law, enrolled as an Advocate in the year 1981.

My Lord displayed a keen scholarship right from his initial days and served as a Sub Editor of ILR M.P. Series in 1988-89 and as Editor in 1998-99 contributed to the growth of legal literature.

My Lord's unique ability and understanding of the functioning of Government and its Institutions became apparent during his tenure as a Government Advocate from 1989 to 1996 and in higher capacities as the Dy. Advocate General from July 1996 to February 1997 and March 1999 to June 2000. In July, 2000, My Lord was appointed as Additional Advocate General, in which capacity he continued till elevation as Judge of Madhya Pradesh High Court on 21.03.2003.

That My Lord was appointed as the 24th Chief Justice of Madhya Pradesh High Court on 14th November, 2018, an event much cherished by all of the members of Bar, as after nearly three decades we had Chief Justice from our own Bar.

My Lord Hon'ble Shri Justice Sanjay Kumar Seth as a Judge and as the Chief Justice, brought great compassion, integrity and clarity to the decision making both on judicial and administrative side. Many judgments rendered by My Lord adorn the Law Journals to posterity as a testament of your Lordship's high scholarship.

On all the issues concerning welfare of advocates and the development of Bar, My Lord the Chief Justice gave high priority and extended his fullest cooperation. I am personally thankful for this sage and holistic approach of My Lord the Chief Justice.

My Lord Hon'ble Shri Justice Sanjay Kumar Seth, the Chief Justice will be demitting office on 9th June, 2019, during Summer Vacations, after a long and illustrious career as Advocate, Law officer of State, Judge High Court and the Chief Justice Madhya Pradesh High Court.

That My Lord the Chief Justice has been one of us all throughout and in his official capacity as Judge and as the Chief Justice remained a good friend of the Bar. I am instantly reminded of a quote by an unknown author:

"Though miles may lie between us, We are never far apart, For friendship doesn't count miles, It's measured by the heart."

On behalf of High Court Advocates' Bar Association and on my own behalf I wish God speed to Hon'ble Shri Justice Sanjay Kumar Seth, The Chief Justice, in all his future endeavors.

I wish Hon'ble Shri Justice Sanjay Kumar Seth, the Chief Justice, Mrs. Renu Seth and all his family members happiness, peace and good health.

God Bless our High Court,

God Bless Us all

Shri Shivendra Upadhyay, Chairman, M.P. State Bar Council, bids farewell:-

आज हम अपने सम्माननीय मुख्य न्यायाधिपति एवं प्रशासनिक न्यायाधिपति के विदाई समारोह के लिये एकत्रित हुये है। अल्प समय के लिये प्रभावी साथ आप लोगों से रहा। आप लोगों की कार्यशैली, न्यायिक समझ व विशेषाधिकार के प्रभावी उपयोग से लाभांवित मध्यप्रदेश का आम पक्षकार व न्यायिक जगत हमेशा याद रखेगा। मुख्य न्यायाधिपति श्री एस.के. सेठ साहब की पदस्थापना चुनौतीपूर्ण थी। जिन लोगों के साथ अधिवक्ता के रूप में काम किया उन्हीं के साथ न्यायिक अधिकारी के रूप मे जिस प्रतिष्ठापूर्ण ढंग से आपने काम किया वह न्यायिक जगत के लिये एक दृष्टांत के रूप मे देखा जायेगा। यहां यह कहना उचित होगा कि सेठ साहब ने न्याय की चादर जो उन्हें सौंपी गयी थी उसे निर्दाग न्यायिक जगत को सौंप रहे हैं यह गर्व का विषय है। आदरणीय सेठ साहब के साथ मुझे नेशनल लॉ इंस्टीट्यूट ऑफ यूनिवर्सिटी, भोपाल में अत्यधिक विवादित प्रकरण में काम करने का अवसर मिला। आपने जिस सहजता व निर्भीकता से निर्णय सबके साथ मिलकर लिया वह आपकी महान सोच का परिणाम है। वास्तव में उस निर्णय के लिये मध्यप्रदेश का न्यायिक जगत आपको साधुवाद देता है। आपकी सख्त प्रशासक व सुलझी हुयी न्यायिक समझ न्यायिक अधिकारियों के लिये मार्गदर्शक साबित होगी। आपको आपकी दक्षता के अनुसार मुख्य न्यायाधिपति के रूप में काम करने

का अवसर कम मिला इसका खामियाजा मध्यप्रदेश के न्यायिक जगत को भुगतना पडा। मैं मध्यप्रदेश राज्य अधिवक्ता परिषद् की ओर से और अपनी ओर से आपके उज्ज्वल भविष्य की कामना करता हूं।

आदरणीय न्यायमूर्ति श्री एच.जी. रमेश जी ने न्यायिक परंपरा के पुराने युग के प्रणेता की तरह काम किया। आपकी न्यायिक समझ, आपका कार्य करते समय संयम व आपके द्वारा विधिक गुत्थियों को जिस सरलता से सुलझाने का प्रयास किया है वह मध्यप्रदेश का न्यायिक जगत हमेशा याद रखेगा। आपने न्यायिक विवेक का जिस प्रभावी ढंग से प्रयोग किया है वह आने वाले न्यायाधिपतियों के लिये मार्गदर्शक होगा। हमें अफसोस है कि आप जैसे प्रभावी व विद्वान न्यायाधिपति के बीच बहुत कम समय काम करने के लिये अवसर मिला लेकिन अल्प समय मे आपने मध्यप्रदेश के न्यायिक जगत में जो दिशानिर्देश व मार्गदर्शन दिया है उससे मध्यप्रदेश का न्यायिक जगत हमेशा आपका आभारी रहेगा। आपके उज्ज्वल भविष्य के लिये ईश्वर से मैं अपनी ओर से व मध्यप्रदेश राज्य अधिवक्ता परिषद् की ओर से कामना करता हूं।

मध्यप्रदेश राज्य अधिवक्ता परिषद् ने अपने अनुभवों के आधार पर हिन्दुस्तान की सभी अधिवक्ता परिषदों व विधिज्ञ परिषद् व तत्कालीन भारत सरकार को यह समझाने का प्रयास किया था कि कॉलेजियम प्रथा प्रभावी नहीं है वह दोषपूर्ण है। सभी ने समझकर प्रस्तावों के रूप में व विधायिका ने बिल के रूप मे न्यायिक नियुक्ति विधेयक पारित किया। यह मैं इस अवसर पर इसलिये जिक्र कर रहा हूं कि मध्यप्रदेश का न्यायिक जगत आप दोनों जैसे योग्य न्यायाधिपति के न्यायिक कार्य से विमुख हो रहा है इसलिये इस अवसर पर इस पीड़ा में मध्यप्रदेश राज्य अधिवक्ता परिषद् आप सब को शामिल करना उचित समझती है। उक्त न्यायिक नियुक्ति विधेयक की सुनवाई के दौरान माननीय उच्चतम न्यायालय ने माना कि न्यायिक चयन की कॉलेजियम प्रथा मे दोष है और उन्होंने न्यायिक नियुक्ति को असंवैधानिक घोषित करते वक्त एम.ओ.पी. बनाने का निर्देश दिया। लेकिन अफसोस कि आज तक एम.ओ.पी. नही बना व उसके न बनने की वजह से मध्यप्रदेश सबसे ज्यादा पीड़ा झेल रहा है। हमारे यहां से हमारे प्रदेश की कॉलेजियम, न्यायाधिपतियों का चयन करके भेजती है, माननीय उच्चतम न्यायालय की कॉलेजियम उसे बगैर किसी कारण का उल्लेख किये निरस्त कर देती है। सबसे ज्यादा पीड़ाजनक स्थिति न्यायमूर्ति श्री राजेन्द्र मेनन जी के प्रकरण मे हुई जहां उच्चतम न्यायालय की कॉलेजियम ने उन्हें उच्चतम न्यायालय के न्यायाधिपति नियुक्त करने की सिफारिश तय की फिर उस सिफारिश को बगैर किसी कारण के वापस ले लिया। यह चिंतनीय विषय है। न्यायिक संस्थाओं में विश्वास इस तरह के निर्णयों से आम जनता में समाप्त होगा। जिस न्यायपालिका का सम्मान पूरे विश्व मे स्वतंत्र व निष्पक्ष न्यायपालिका का, हमारे पूर्व विद्वानों ने मेहनत करके बनाया है वह क्षण भर मे इस तरह के निर्णयों से धूमिल हो जायेगा। इस पर विचार करना चाहिये व अपने सुझाव माननीय उच्चतम न्यायालय को व राष्ट्रपति महोदय को व विधायिका को देना चाहिये।

मध्यप्रदेश मे लंबित प्रकरणों की संख्या के आधार पर 70 न्यायाधिपतियों के पद वांछित है। मध्यप्रदेश राज्य अधिवक्ता परिषद् ने 17 न्यायाधिपति, जो भविष्य मे वांछित है, उनके पद अधिसूचित करने का प्रयास किया। प्रशासकीय स्तर पर यह कहा गया कि आपके यहां के न्यायाधिपतियों के पद भर जायें तब यह पद अधिसूचित करेंगे। पिछले 5 वर्ष से 19 न्यायाधिपतियों के पद रिक्त ही रहे आये। तमाम प्रयासों के बाद वो पद नहीं भरे जा सके। न्यायाधिपतियों की नियुक्ति का कोई मापदण्ड नही है व उच्चतम न्यायालय की गलियारों की जो बातें प्रकाश में आयीं है उसमे प्रमुख बात उभर कर आयी है कि अंग्रेजी का ज्ञान उस स्तर का नहीं है, जो न्यायिक अधिकारियों के लिये चाहिये। संविधान का अनुच्छेद 348 बनाने के बाद विधायिका ने अनुच्छेद 349 बनाया है। उसके पीछे मंशा यह थी कि 15 वर्ष मे जो पूरा न्यायिक जगत अंग्रेजीमय है वह हिन्दी सीख जायेगा व 15 वर्ष के बाद संभावित

संशोधन हो सकेगा व राष्ट्र भाषा हिन्दी न्यायालयों की भाषा होगी। मध्यप्रदेश, राजस्थान, बिहार जैसे राज्य हिन्दी को न्यायालयीन भाषा के रूप मे स्वीकार कर चुके हैं। बिहार ने एक कदम आगे जाकर हिन्दी की याचिकायें भी लगाने की अनुमति दे दी है। मेरा ऐसा मानना है कि बोलने में भले मध्यप्रदेश का अभिभाषक अंग्रेजी भाषा में उतना धारा प्रवाह न बोल पाता हो पर ज्ञान में वह कम नहीं है। हमें गर्व है कि मैं उस जिले में काम करता हूं जहां माननीय न्यायमूर्ति श्री गुरूप्रसन्न सिंह जी और श्री जे.एस. वर्मा जी ने हमारे अधिवक्ता संघ में काम किया है। माननीय गुरूप्रसन्न सिंह जी को उच्चतम न्यायालय विधिक जगत नहीं ले जा पाया यह विधिक जगत की महान भूल आज अवधारित की जाती है। उनके द्वारा लिखी गई किताबें पूरे विश्व का न्यायिक जगत उपयोग करता है। माननीय न्यायमूर्ति श्री जे.एस. वर्मा, भारत के मुख्य न्यायाधिपति के रूप में व कई विवादित परिस्थितियों में खेवनहार के रूप मे पहचाने जाते हैं। मध्यप्रदेश राज्य अधिवक्ता परिषद् का यह मानना है कि रिक्त न्यायाधीशों का पद न भरने से न्यायिक व्यवस्था चरमरा गयी है। आज अधीनस्थ न्यायालयों के ऊपर माननीय उच्च न्यायालय का, निर्णयों मे विधिक नियंत्रण नहीं है क्योंकि अधीनस्थ न्यायालयों के द्वारा किये गये निर्णय उस न्यायाधीश के न्यायिक जीवनकाल में परीक्षित ही नहीं होते। संविधान के अनुच्छेद 141 के बारे में अधीनस्थ न्यायालयों के न्यायाधीशों का यह मानना है कि यह उनके लिये नहीं बना है। माननीय उच्चतम न्यायालय व उच्च न्यायालय के न्याय दृष्टांतों का मनन करना व उस पर अमल करना अधीनस्थ न्यायालयों ने बंद कर दिया है व अधीनस्थ न्यायालय विधि के उच्चतम न्यायालय व उच्च न्यायालय के मार्गदर्शन को सिर्फ यह लिखकर मुक्त हो जाते हैं कि तथ्यों व परिस्थितियों से न्याय दृष्टांत मेल नहीं खाता व एक पद में पूरे न्याय दृष्टांत लिखकर निर्णय की औपचारिकता पूरी करते हैं। विधि का सुस्थापित सिद्धांत कि 100 दोषी छूट जायें लेकिन एक निर्दोष दण्डित न हो यह इतिहास की बात हो गयी। आज अधीनस्थ न्यायालयों की नजर में व्यक्तिगत स्वतंत्रता का कोई महत्व नहीं रह गया है व उनके द्वारा पारित निर्णय न्यायाधिपतियों की कमी की वजह से ऊपर माननीय उच्च न्यायालय के स्तर पर परीक्षित ही नहीं हो पाते क्योंकि उसकी सुनवाई आते आते या तो पक्षकार मर जाता है तो याचिका निरर्थक हो जाती है अथवा आपराधिक प्रकरण में दी गयी सजा भुगतकर पक्षकार बाहर आ जाता है। यह पीड़ा मध्यप्रदेश की पूरी न्यायिक जगत की पीड़ा है। आज यह पीड़ा इसलिये उभर कर आयी कि हम अपने बीच से दो न्यायाधिपति सेवानिवृत्त होने की वजह से उनके न्यायिक उद्गारों से वंचित होंगें।

मध्यप्रदेश की उपेक्षा न्यायिक व्यवस्था में की जा रही है, वह पीड़ादाई है। हमारे दो योग्य न्यायाधिपति माननीय न्यायमूर्ति आलोक अराधे एवं न्यायमूर्ति पंकज जायसवाल स्थानांतरित कर दिये गये उनके न्यायिक कार्यों से मध्यप्रदेश का पक्षकार वंचित हुआ। अभी मध्यप्रदेश के दो मुख्य न्यायाधिपति माननीय श्री राजेन्द्र मेनन एवं माननीय श्री एस.के. सेठ थे। मध्यप्रदेश का न्यायिक जगत यह आशा करता है कि उनकी जगह दो मुख्य न्यायाधिति इस बड़े प्रदेश को मिलेंगे व मध्यप्रदेश का न्यायिक जगत यह भी आशा करता है कि मध्यप्रदेश को उसके खाली 19 स्वीकृत पद व प्रत्याशित 17 पद कुल 36 न्यायाधिपति बहुत जल्द मिलेंगे। मैं पुनः मध्यप्रदेश राज्य अधिवक्ता परिषद् की ओर से व अपनी ओर से दोनों न्यायाधिपतियों के उज्ज्वल भविष्य के लिये कामना करता हूं।

धन्यवाद।

———————————————

Shri Jinendra Kumar Jain, Assistant Solicitor General, bids farewell:-

म.प्र. उच्च न्यायालय में यह प्रथम अवसर है जब मुख्य न्यायमूर्ति एवं प्रशासनिक न्यायमूर्ति को एक साथ विदाई देने का अवसर है। इस अवसर पर मैं न्यायमूर्तिगण का स्वागत एवं अभिनन्दन करता हूं।

आज हम एक ऐसे व्यक्तित्व को भाव–भीनी विदाई दे रहे हैं जिसने अपने जीवन की यात्रा मद्दूर चेन्नापटना से प्रारम्भ की, बचपन के साथियों के साथ प्राथमिक एवं हायर सेकेंडरी परीक्षा उत्तीर्ण करने के पश्चात् मैसूर से विधि स्नातक एवं स्नातकोत्तर की उपाधि अर्जित कर जो ज्ञान प्राप्त किया उसे अध्यापन के द्वारा ज्ञान की ज्योति को दीपक के माध्यम से प्रकाश की किरणों को बिखेर कर एक दीप से अनेक दीपों को आलोकित किया।

इसी समय दिशा परिवर्तन कर विधि के क्षेत्र में प्रवेश कर बैंगलोर के सिविल न्यायालय एवं उच्च न्यायालय में वकालत के माध्यम से अपनी प्रतिभा बिखेरते हुये न्यायिक सेवा की ओर अग्रसर होकर कर्नाटक प्रदेश न्यायपालिका द्वारा संचालित परीक्षा में प्रथम स्थान अर्जित कर जिला एवं सत्र न्यायाधीश के सम्मानजनक पद पर पदस्थ होकर अपनी प्रतिभा की किरणों की आभा कर्नाटक के कई जिलों में बिखेरते हुये प्रगति चक्र का पहिया कर्नाटक उच्च न्यायालय में न्यायाधिपति के गरिमामय पद सुशोभित करते हुये लगभग 12 वर्षों तक न्यायिक सेवा के माध्यम से अनेक महत्वपूर्ण निर्णय पारित किये।

कर्नाटक प्रदेश की जनता को अपनी प्रतिभा से लाभान्वित करते हुये, उत्तरप्रदेश, मद्रास उच्च न्यायालयों, प्रदेश की सीमा से बाहर देश के अन्य राज्यों में न्यायाधीश के पद का निर्वहन करते हुये लगभग 62 हजार प्रकरणों के निराकरण का कीर्तिमान स्थापित करते हुये संस्कारधानी जबलपुर में उच्च न्यायालय में प्रशासनिक न्यायाधीश के पद पर पदस्थ होकर अपनी सेवायें प्रदत्त की। जबलपुर में आपका सीमित समय हमें प्राप्त हुआ इसलिये हम आपकी प्रतिभा का अधिक समय लाभ नही ले सके।

आज के इस विदाई समारोह में वर्तमान मुख्य न्यायाधिपति के गौरवशाली पद पर पदस्थ होकर गौरवमयी परम्परा के प्रतीक म.प्र. उच्च न्यायालय से निवृत्तमान हो रहे मुख्य न्यायमूर्ति श्री संजय कुमार सेठ का मैं हृदय से स्वागत एवं अभिनन्दन करता हूं।

म.प्र. उच्च न्यायालय का गौरवशाली इतिहास रहा है, प्रदेश के प्रथम मुख्य न्यायाधिपति श्री एम. हिदायतुल्ला जिन्होंने भारत के महामहिम राष्ट्रपति के पद को सुशोभित किया उसी पद पर मुख्य न्यायाधिपति के पद पर आसीन होना हम सभी के लिये गौरव की बात है। संस्कारधानी में मां नर्मदा के आंचल में बचपन से लेकर मुख्य न्यायाधिपति तक का सफर जबलपुर की माटी से सीधा सम्बंध, 22 वर्ष वकालत करने के पश्चात् लगभग 16 वर्ष न्यायिक सेवा में पूरी ईमानदारी एवं कर्तव्य निष्ठा से पद का निर्वहन करने के पश्चात क्षेत्र परिवर्तन की ओर अग्रसर व्यक्तित्व को भावभीनी विदाई के अवसर पर मैं अपने मिश्रित भावों के साथ आपके उज्ज्वल भविष्य की कामना करता हूं।

विगत 38 वर्षों में अधिवक्ता के रूप में, शासकीय अधिवक्ता के रूप में, न्यायमूर्ति के रूप में कार्य किया। इन क्षेत्रों में कार्य करने में जो समस्यायें थी उन्हें चुनौती के रूप में स्वीकार किया, सभी के मध्य सामंजस्य रख कर, जिला न्यायालय से लेकर उच्च न्यायालय तक परिवार के मुखिया की तरह न्याय को सुलभ, सस्ता एवं आखिरी छोर तक पहुॅचाने के लिये जो प्रयत्न किये गये, जो योजनायें लागू की गई उसके लिये बधाई के पात्र हैं।

इस अवसर पर मैं अपनी ओर से, भारत सरकार की ओर से, समस्त केन्द्रीय विधि अधिकारियों की ओर से, मुख्य न्यायमूर्ति एवं प्रशासनिक न्यायमूर्ति का हार्दिक अभिनन्दन करता हूँ एवं भविष्य में उज्ज्वल कीर्तिमान कायम रखेंगे इसी भावना को संजोते हुये आपको बहुत बहुत बधाई देता हूँ।

'धन्यवाद'

———————————

Shri T.S. Ruprah, Representative, Senior Advocates' Council, bids farewell:-

When Hon'ble Shri Justice H.G. Ramesh came to this Hon'ble Court and adorned the Bench here, we all witnessed a very experienced, calm, quiet, composed and balanced Judge. One thing has been conspicuously noticeable that is the discipline Your Lordship maintained in the Court room. A special tranquility prevailed in Your Lordship's Court which helped the Court to discharge judicial function efficiently.

After joining the Judiciary, Hon'ble Shri Justice H.G. Ramesh soon earned a name as one of the most impartial and bold Judge in the Judicial Services. Because of Your Lordship's legal acumen and experience as the District and Sessions Judge, Your Lordship left an impression to be remembered for all times to come.

On My Lord's elevation as an Additional Judge of the Karnataka High Court, the Bar witnessed one of the finest Judges being elevated to the Karnataka High Court from the State's Higher Judicial Services. Your Lordship always kept in mind that the duties of a Judge are sacrosanct and always did justice with your sacred and divine duties. During My Lord's relatively short tenure here at Jabalpur, the Bar witnesses a great Judge, who has been gifted with a personality which conquered all who had the privilege to know you.

****

With a heavy heart the Bar bids farewell to one of its excellent and most adorable Chief Justice, Hon'ble Shri Justice Sanjay Kumar Seth.

Hailing from the renowned Seth family of Jabalpur, My Lord joined the Bar in the year 1981 at the chambers of Late Shri K.K. Adhikari, Advocate, and never looked back since then. As a lawyer Your Lordship had a lucrative practice on the constitutional and civil sides. My Lord also worked as Editor of I.L.R. (M.P. Series) and looking to his laborious work and studious nature, My Lord was picked up to be a Law Officer in the office of the Advocate General and was appointed as Additional Advocate General in July, 2000. Your encouraging and gentlemanly personality, humanitarian conduct, Your Lordship's experience as

lawyer on all sides of law and Your Lordship's intellectual touch turned the tides. The Bar welcomed Your Lordship's joining the galaxy of legal luminaries as a Judge of this great institution.

Your Lordship's tenure as a Judge has been most satisfying. Humanitarian approach always depicted in your judgments. Your Lordship always heard the lawyers patiently and conducted the Court with utmost dignity and decorum. No lawyer felt any tension in your Court. Your Lordship has won the hearts of the Members of the Bar. The junior lawyers were always encouraged, advised and instructed to work hard.

My Lord's colossal judicial personality has made its presence felt in every sphere of administration of justice. It has brought happiness and satisfaction in the hearts of victims of injustice. Your Lordship is held in great reverence and affection by the people.

In fact, it was a matter of great pride and honour for the Members of the Bar when Your Lordship was appointed as the Chief Justice of this Hon'ble Court. It was after a long-long span of time that the M.P. High Court had a Chief Justice from amongst its own Judges. It was a jubilant experience in the Bar. During Your Lordship's tenure, Your Lordship discharged the onerous task of Chief Justice proficiently, but it was too short a period. The Bar wished for a longer tenure. The Bar has experienced Your Lordship's great respect, affection and concern for its Members. My Lord's simplicity, nobility, cordiality and emotional attachment with the Bar would be deeply remembered while the Bar would miss you immensely.

I, on behalf of the Senior Advocates Council and my own behalf extend good wishes to Hon'ble Shri Justice H.G. Ramesh and our Chief Justice, Hon'ble Shri Justice Sanjay Kumar Seth and hope that your colossal experience at the Bar and the Bench is beneficially availed of and shall be utilized for the betterment of the society at large. I extend my heartfelt good wishes to My Lords as well as Your Lordships' families for a healthy, peaceful and happy long life.

Farewell Speech delivered by Hon'ble Mr. Justice Huluvadi G. Ramesh, Administrative Judge :-

Greetings of the day to all !

First, I am thankful for the unduly kind words of appreciation that have been made this afternoon.

Today is the day of my retirement after serving this noble profession as Judge for 26 years, 03 months and 17 days and that has brought all of us here to bid me farewell.

The legal profession is a noble profession and the judicial system is the core and protector of Democratic and Constitutional values. Both aim to serve the society in their own way and those who have spirit of public service, tend to draw more towards it. As we all know; Judiciary, Legislature and Executive are three organs of the Government. The Judiciary is independent of the other two branches of Government. This is what encouraged me to choose this side of the coin after initially practicing as an Advocate for about 10 years. I have had the honour of serving as Judge of the High Court of Karnataka, High Court of Allahabad, High Court of Madras and High Court of Madhya Pradesh and twice as officiating Chief Justice at High Court of Madras. For me, becoming a Judge involved a steep learning curve. The journey to this day has been full of ups and downs. It is said that "when the going gets tough, the tough get going". The arduous the path, the resilient you are to learn the lesson of life.

The Parliament of England is supreme, leaving the judiciary only to interpret the law whereas the Constitution of India is drafted borrowing various Constitutional principles from USA, UK, Australia and Ireland etc.. While keeping Constitutional supremacy, in course of time, the judiciary asserted supremacy over the other two wings of the Government, namely, Legislature and Executive by exercising the power of review and also judicial activism.

In Lord Acton's words "All power tends to Corrupt; absolute power corrupts absolutely". Only hope is that India being a country of *Sanatan Dharma* where we believe in God, Christ and Allah being a secular country. No one is above the law and God. The persons who are sitting at higher echelons of the Supreme Court and High Court must have self-restraints and also be conscious of *Dharma* while dealing with the legitimate right of every member of the judiciary and the public at large and the other two organs of the Government and policy decisions. The system would survive only when the Judges sitting and taking decisions would be conscious of *Dharma* and self-restraints. More so, they must stick to the principles of equality in upholding the Constitutional values. To take whimsical decisions, to inculcate favoritism, nepotism, communal bias and hatredness is as bad as any corruption. The corruption is not only in the form of money but even the favouritism, nepotism and prejudice is also a sort of corruption and that is why decision makers should always be conscious not to act whimsically. More than everything, while dealing with the entitlement of legitimate right of individual, one must follow the principles of natural justice placing himself in a position of a person against whom he will take a conscious decision at every moment, at every stage and at every level.

The judicial supremacy attained in course of time while exercising the power of judicial review will have to be reviewed by the Judiciary or by the Parliament (Legislature) to maintain balance between the three organs of the Constitution by way of mutual respect. There should also be self-imposed judicial

restraints and each and every decision taken, must be conscious. Often it is being said that tyranny of the unelected should not give way to encroach upon the rights of other two organs like Executive and Legislature while promoting harmony in the guise of power of judicial review. I hope, the independent body of selection of Judges would be constituted by giving a priority to maintain secularism and distributive justice so that power of judiciary is balanced.

A person who adjudicates should not exercise the power of appointment as it is being practiced in various Constitutions of well developed countries like America and USSR etc. to set an example of exercise of power of check and balance and separation of powers as canvassed by French political philosopher De Montesquieu as it was by political and constitutional experience. The order of the day needs that with the improvement of science and technology; the timely justice, distributive justice and the secular justice is pivotal for survival of the Constitutional form of Government. A feeling of secularism must prevail over a Judge while rendering justice; both judicial and administrative to maintain harmony in the survival of the constitutional principles and constitutional form of Government.

I pray to Almighty to give the strength to the Advocate community in the country at large who fight for right cause to uphold the Constitutional principles and fight for the right cause for the survival of constitutional form of Government. May long live the democracy, secularism, equality, personal liberty and justice.

Joining and leaving is the natural phenomenon of everyone's life but it is important to thank and acknowledge the support and encouragement that I received over the years from all my near and dear. Unfortunately, due to paucity of time, I have to be concise but I do not intend this gratitude to be a mere formality.

I will always be indebted to my parents; mother – Mrs. Kamalamma and my father Late H. Gangadharappa for setting my career on its course. My successful career would have been impossible without my wife Mrs. Annapurna. She has been of immense support to me and on couple of occasions when there were setbacks, she has been there to lift me up again. My son Vybhav, his wife Rachna and my daughter Sagarika and son-in-law Dr. Suraj, all are source of inspiration and they are my assets. My loving grandson Arjun is a bundle of joy and light of my life.

I always received a wonderful help from all of my colleagues, both past and present and the learned members of the Bar and solicitors wherever I discharged my duties as Judge across the country. The Judges rely upon the expertise and competence of advocates in presenting the respective cases and all the relevant facts and principles of law so as to make the task of delivering judgment easier. Without their support, it would not have been possible for me to conduct the Court. I came across certain erudite lawyers and I enjoyed the intellectual debate during the course of hearing of the cases. My task over the

years was made much easier because of the assistance made by the legal practitioners and disposal of nearly 62,000 cases of all types during the span of 15 years and 08 months being as Judge of the High Court speaks about the same.

I wish to further acknowledge the support and assistance given to me by all the officers and administrative staff of the Registry, be it in Sessions Court of Karnataka, High Courts at Bangalore, Allahabad, Chennai or Jabalpur throughout the last more than 26 years. This acknowledgment also extends to all the staff of the Registry at all places of my functioning.

Behind every great product is a great team. The Judges also work with a small but necessary team. I was fortunate enough to have with me a number of personal staff over the years in Ms. Anitha at High Court of Karnataka, Mr. Balgopal at Allahabad High Court, Ms. Punya Laxmi at Madras High Court, all other stenographers, judgment-writers and also some Court officers. All of them were of immense help to me. My present staff, Christopher, Sachin Chaudhary, Prem Shankar Mishra, Vinod Tiwari, Ms. Reena Sharma, Dinesh Bihare, Miss Rashmi Bagri, Fareed Khan, Court Attendants Ranchhor Das, Rajmani Sharma, Ghanshyam and my personal guards are no exception. I acknowledge the efforts of all other persons who were attached to me, whose names I could not mention here and I would like to thank everyone for valuable service rendered and also love and care for whole duration of my career and for allowing me to work as efficiently as I have.

Any of the shortcomings in the course of rendering justice be pardoned. Hope such a mistake would have occurred by oversight but not consciously and deliberately. Now, it is time for me to look forward to spend time with my family and the freedom to pursue my hobbies and interests.

I express my special thanks to all of you and wish you continue to be successful in your life. There is a lot of learning ahead of you; so be focused and persistent and you will be successful in your future endeavours.

Once again, I thank everyone present here, for sparing your precious time for the occasion.

Thank you very much. Jai Hind !!

Farewell Speech delivered by Hon'ble Mr. Justice Sanjay Kumar Seth, Chief Justice :-

A very good afternoon to one and all present here.

At this watershed moment of my life, I feel honoured and sad at the same time; honoured because I owe my professional success to this Bar, sad because it's me who has to do the tough job of bidding goodbye, after 38 years of long association. Everyone arrives at a time, where goodbyes had to be said. After all,z life consists of inevitable beginnings and endings.

It seems that only yesterday I took the oath of office as a puisne Judge of this Court and thought that I had plenty of time to shape up, but "The Moving Finger writes; and, having writ, Moves on:

My time is up and now it is my turn to bid farewell and your turn to take stock of the promises I made at the time of my elevation.

I am extremely grateful to Brother Jha and other Hon'ble speakers, who have spoken so generously about me on this occasion.

I am aware that this is the result of their looking at me with glasses tinted with love and affection.

It was with nervousness, I assumed the high Office of the Judge and then the Chief Justice of this Court. The fact that many eminent men and great Judges have preceded me in this august office, made me more conscious of my limitations. I had no pretensions of even equaling any of them, much less excelling them. No one can do better than the best he is capable of. My ambition as Judge all along had been to attain the ideals of judicial administration. On this Day of Judgment, I hope that I had not let you down nor belied your expectations.

I belong to the common stock and come from a middle class service background. My late father retired as a District Judge. Except that, I did not have any judicial lineage in the High Court and had to come up from the bottom of the ladder in the legal profession.

This impelled me, from the very start, to utmost industry since that was the surest method of success I have ever known. It was tough going, but I enjoyed every bit of it. To me, the work has always been pleasure. Looking back, I can say without fear of contradiction, that whatever I have achieved in the profession, it is due to co-operation of you all, of which I never had any doubt.

I was both lucky and fortunate in having a fine set of men as my colleagues on the Bench. I had their co-operation and support in full measure.

I am extremely grateful to my parents, my wife and children for their unflinching support. I am equally grateful to my senior and companion Judges on the Bench. I learnt a lot from them. For constrains of time and space, I am unable to mention and thank each of them personally. Please excuse me.

I am thankful to the Officers of the Registry; and my personal staff for their ungrudging and faithful assistance in the performance of my duties. I thank you all once again for the tremendous good will and affection towards me. I wish each one of you all the best in life.

Thank you.

NOTES OF CASES SECTION

Short Note
****(40)***
Before Mr. Justice Vivek Rusia
W.P. No. 2791/2017 (Indore) decided on 27 March, 2019

KARYAPALAN YANTRI LOK SWASTHA …Petitioner

Vs.

DEVENDRA KUMAR PANWAR …Respondent

A. Industrial Disputes Act (14 of 1947), Section 10 – Industrial Dispute – Reference – Limitation **– Held – For reference before Labour Court, law of limitation does not apply but there should be a satisfactory explanation for the delay – Labour Court has to examine whether after termination, workman has raised his voice or remained silent and if he remained silent and did not agitate then there is no "Industrial Dispute" – Respondent admitted in cross examination that he did not agitate his termination – In his claim and evidence did not give any explanation in respect of 11 years delay – No "Industrial Dispute" exist between parties – Respondent not entitled for reinstatement – Impugned order set aside – Petition allowed.**

क. औद्योगिक विवाद अधिनियम (1947 का 14), धारा 10 – औद्योगिक विवाद – निर्देश – परिसीमा – अभिनिर्धारित – श्रम न्यायालय के समक्ष निर्देश हेतु, परिसीमा विधि लागू नहीं होती परंतु विलंब के लिए एक संतोषजनक स्पष्टीकरण होना चाहिए – श्रम न्यायालय को यह परीक्षण करना होगा कि क्या सेवा समाप्ति के पश्चात्, कर्मकार ने अपनी आवाज उठाई अथवा मौन रहा और यदि वह मौन रहा तथा उसने विरोध नहीं किया तो कोई ''औद्योगिक विवाद'' नहीं है – प्रतिपरीक्षण में प्रत्यर्थी ने स्वीकार किया है कि उसने अपनी सेवा समाप्ति का विरोध नहीं किया – उसने अपने दावे तथा साक्ष्य में 11 वर्ष के विलंब के संबंध में कोई स्पष्टीकरण नहीं दिया – पक्षकारों के मध्य कोई ''औद्योगिक विवाद'' विद्यमान नहीं – प्रत्यर्थी पुनःस्थापन हेतु हकदार नहीं – आक्षेपित आदेश अपास्त – याचिका मंजूर।

B. Industrial Disputes Act (14 of 1947), Section 10 – Termination – Retrenchment Compensation **– Held – Since it is established that respondent worked for 240 days in petitioner's establishment and before termination retrenchment compensation was not paid, Rs. 50,000 compensation granted in lieu of reinstatement – Impugned order modified.**

ख. औद्योगिक विवाद अधिनियम (1947 का 14), धारा 10 – सेवा समाप्ति – छंटनी प्रतिकर – अभिनिर्धारित – चूंकि यह स्थापित है कि प्रत्यर्थी ने याची के संस्थान में 240 दिनों तक कार्य किया है तथा सेवा समाप्ति के पूर्व छंटनी प्रतिकर का भुगतान नहीं किया गया था, पुनःस्थापन के बदले 50,000/– रू. प्रतिकर प्रदान किया गया – आक्षेपित आदेश उपांतरित।

NOTES OF CASES SECTION

Cases referred:

AIR 2016 SC 2984, (2004) 3 SCC 514, (2002) 3 SCC 25, AIR 2003 SC 38, 2006 (2) MPLJ 432, 2015 (4) MPLJ 5, 2010 (2) MPLJ 30, 1969 MPLJ 271.

Arjun Pathak, for the petitioner.
M.K. Choudhary, for of the respondent.

Short Note
****(41)***
Before Mr. Justice G.S. Ahluwalia
M.P. No. 1887/2017 (Gwalior) decided on 9 January, 2019

NANDU @ GANDHARVA SINGH …Petitioner

Vs.

RATIRAM YADAV & ors. …Respondents

***A. Evidence Act (1 of 1872), Section 45 – Report of Handwriting Expert in Rebuttal – Right of Parties* – Held – Trial Court cannot take away the right of the petitioner/defendant to produce the report of handwriting expert in rebuttal of the report of handwriting expert filed by respondent No.1/plaintiff – Impugned order set aside – Petition allowed.**

क. साक्ष्य अधिनियम (1872 का 1), धारा 45 – खंडन में हस्तलिपि विशेषज्ञ का प्रतिवेदन – पक्षकारों का अधिकार – अभिनिर्धारित – विचारण न्यायालय प्रत्यर्थी क्र. 1/वादी द्वारा प्रस्तुत हस्तलिपि विशेषज्ञ के प्रतिवेदन के खंडन में हस्तलिपि विशेषज्ञ का प्रतिवेदन प्रस्तुत करने के याची/प्रतिवादी के अधिकार से उसको वंचित नहीं कर सकता – आक्षेपित आदेश अपास्त – याचिका मंजूर।

***B. Practice – Adjournments – Duty of Advocate* – Held – Bar should not create hurdles in justice dispensation system by unnecessary seeking adjournments – Seeking adjournments for no reasons amounts to professional misconduct – Advocates are not mouthpiece of their clients for purpose of delaying Court proceedings nor they should avoid hearing but being officers of Court, they have sacrosanct duty towards Court.**

ख. पद्धति – स्थगन – अधिवक्ता का कर्तव्य – अभिनिर्धारित – अनावश्यक स्थगन चाहते हुए, बार को न्याय वितरण प्रणाली में बाधा उत्पन्न नहीं करना चाहिए – बिना किन्हीं कारणों के स्थगन चाहना व्यवसायिक अवचार की कोटि में आता है – न्यायालय की कार्यवाहियों को विलंबित रखने के प्रयोजन हेतु अधिवक्ता अपने पक्षकारों के प्रवक्ता नहीं होते, न ही उन्हें सुनवाई से बचना चाहिए बल्कि न्यायालय का अधिकारी होने के नाते, न्यायालय के प्रति उनका परम कर्तव्य है।

Cases referred:

(2001) 6 SCC 135, (2013) 5 SCC 202, 2010 (I) MP JR SN 22.

Gaurav Mishra, for the petitioner.
Pratip Visoriya, for the respondent No. 1.

Short Note
****(42)***
Before Mr. Justice G.S. Ahluwalia
M.P. No. 105/2019 (Gwalior) decided on 16 January, 2019

PRATAP SINGH GURJAR …Petitioner

Vs.

STATE OF M.P. & anr. …Respondents

***A. Civil Procedure Code (5 of 1908), Section 11 – Res-Judicata* – Held – Once suit of petitioner is dismissed and had lost upto stage of second appeal, subsequent proceedings between same parties for same subject matter would be barred by principle of *Res-Judicata*/Constructive *Res-Judicata*.**

क. सिविल प्रक्रिया संहिता (1908 का 5), धारा 11 – पूर्व न्याय – अभिनिर्धारित – एक बार याची का प्रकरण खारिज हो जाने तथा द्वितीय अपील के प्रक्रम तक हारे जाने पर, समान पक्षकारों के मध्य समान विषय वस्तु के लिए पश्चात्वर्ती कार्यवाहियां पूर्व–न्याय / आन्वयिक पूर्व–न्याय के सिद्धांत द्वारा वर्जित होंगी।

***B. Constitution – Article 227 – Suppression of Facts* – Held – There was a conscious and deliberate suppression of fact of earlier litigation with a sole intention to obtain favourable order, by playing fraud on Court – Cost of 2 lacs imposed – Petition dismissed.**

ख. संविधान – अनुच्छेद 227 – तथ्यों को छिपाना – अभिनिर्धारित – न्यायालय के साथ कपट करके, अनुकूल आदेश प्राप्त करने के एकमात्र आशय के साथ, पूर्व मुकदमेबाजी का तथ्य, भानपूर्वक तथा जानबूझकर छिपाया गया था – 2 लाख का व्यय अधिरोपित – याचिका खारिज।

Cases referred:

(2004) 7 SCC 166, (2010) 2 SCC 114, (2013) 11 SCC 531, (2010) 11 SCC 557, (2016) 11 SCC 484.

U.K. Bohare, for the petitioner.
Vivek Jain, G.A. for the respondents/State.

NOTES OF CASES SECTION

Short Note
****(43)***
Before Mr. Justice Vivek Rusia
W.P. No. 27421/2018 (Indore) decided on 11 March, 2019

REVATI CEMENTS PVT. LTD. & anr. …Petitioners

Vs.

STATE BANK OF INDIA & ors. …Respondents

***A. Reserve Bank of India, Master Circular, Clause 2.1.3(c) – "Willful Defaulter"* – Held – Bank paid amount to foreign exporters for purchase of machinery by petitioner – He is legally bound to repay this amount to bank even if loan or fund was not directly disbursed in petitioner's current account but it was directly paid to exporters on behalf of petitioner – Relationship of lender and borrower established – Since petitioner defaulted in repayment of the same, even it has the capacity to pay, he was rightly declared "Willful Defaulter" under Clause 2.1.3(c) of Master Circular.**

क. भारतीय रिजर्व बैंक, मास्टर परिपत्र, खंड 2.1.3(सी) – ''जानबूझकर व्यतिक्रमी'' – अभिनिर्धारित – बैंक ने विदेशी निर्यातकों को याची द्वारा मशीनरी क्रय करने हेतु रकम अदा की – वह बैंक को इस रकम का प्रतिसंदाय करने के लिए विधिक रूप से तब भी बाध्य है, यहां तक कि यदि ऋण या निधि का भुगतान सीधे याची के चालू खाते में न किया हो परंतु उसे याची की ओर से निर्यातकों को सीधे भुगतान किया गया था – उधार देने वाले एवं उधार लेने वाले का संबंध स्थापित – चूंकि याची ने उक्त के प्रतिसंदाय में व्यतिक्रम किया, यहां तक कि वह भुगतान करने की स्थिति में होते हुए भी, उसे उचित रूप से मास्टर परिपत्र के खंड 2.1.3(सी) के अंतर्गत ''जानबूझकर व्यतिक्रमी'' घोषित किया गया था।

***B. Reserve Bank of India, Master Circular, Clause 2.1.3(c) & 3(b) – "Willful Defaulter" – Opportunity of Hearing – Advocate* – Identification Committee is neither a Court nor a Tribunal – Borrower is not having a right to be represented through lawyer/counsel – RBI provided double check system before declaring any unit as "Willful Defaulter" – Since "Review Committee" has affirmed the stand of "Identification Committee", thus opportunity of hearing is not required.**

ख. भारतीय रिजर्व बैंक, मास्टर परिपत्र, खंड 2.1.3(सी) व 3(बी) – ''जानबूझकर व्यतिक्रमी'' – सुनवाई का अवसर – अधिवक्ता – पहचान समिति न तो न्यायालय है न ही कोई अधिकरण – उधार लेने वाले को विधिज्ञ/अधिवक्ता के जरिए प्रतिनिधित्व का अधिकार नहीं है – भारतीय रिजर्व बैंक किसी इकाई को ''जानबूझकर व्यतिक्रमी'' घोषित करने से पूर्व दोहरी जांच प्रणाली उपबंधित करता है – चूंकि

''पुनर्विलोकन समिति'' ने ''पहचान समिति'' के मत की पुष्टि की है, अतः सुनवाई का अवसर अपेक्षित नहीं है।

Cases referred:

2015 SCC online DEL 14128, 2013 SCC Online Cal 11603, 2018 SCC Online Bom 1761, (2013) 7 SCC 369.

S.C. Bagadiya with *Jerry Lopez*, for the petitioners.
A.K. Sethi with *R.C. Singhal*, for of the respondents.

Short Note
****(44)***
Before Mr. Justice Sheel Nagu
M.Cr.C. No. 10582/2019 (Gwalior) decided on 27 March, 2019

RUCHI GUPTA (SMT.) & anr. …Applicants

Vs.

STATE OF M.P. & anr. …Non-applicants

A. Dowry Prohibition Act, (28 of 1961), Section 2 & 4 and Criminal Procedure Code, 1973 (2 of 1974), Section 482 – Quashment of Proceeding – **Charge u/S 498-A IPC against petitioners already quashed in separate petition – Held – Allegations of demand of dowry are omnibus in nature but that by itself cannot persuade this Court to interfere with prosecution case, where *prima facie*, foundational ingredients of offence appears to be made out – No ground of failure of justice exist – Application dismissed.**

क. दहेज प्रतिषेध अधिनियम, (1961 का 28), धारा 2 व 4 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – कार्यवाही अभिखंडित की जाना – याची के विरूद्ध भा.दं.सं. की धारा 498–ए के अंतर्गत आरोप को पहले ही पृथक याचिका में अभिखंडित किया गया है–अभिनिर्धारित – दहेज की मांग करने के अभिकथन सर्वग्राही/बहुप्रयोजनीय स्वरूप के हैं परंतु वे अपने आप से इस न्यायालय को अभियोजन प्रकरण में हस्तक्षेप करने के लिए प्रेरित नहीं कर सकते जहां प्रथम दृष्ट्या, अपराध के बुनियादी घटक बनते प्रतीत होते हैं – न्याय की विफलता का कोई आधार विद्यमान नहीं – आवेदन खारिज।

B. Dowry Prohibition Act, (28 of 1961), Section 2 & 4 and Penal Code (45 of 1860), Section 498-A – Demand of Dowry – Definition & Scope – **Held – Definition of demand of dowry is couched in generic and wide language and is not as exhaustive and restrictive in its scope, sweep and application as definition of "Cruelty" u/S 498-A IPC – Legislature has kept the contours of "dowry demand" flexible and inclusive.**

ख. दहेज प्रतिषेध अधिनियम, (1961 का 28), धारा 2 व 4 एवं दण्ड संहिता (1860 का 45), धारा 498–ए – दहेज की मांग – परिभाषा व विस्तार – अभिनिर्धारित – दहेज की मांग की परिभाषा सामान्य तथा व्यापक भाषा में वर्णित की गई है एवं अपने विस्तार, प्रभावक्षेत्र और प्रयोजन में उतनी विस्तृत एवं निर्बंधनात्मक नहीं है जितना कि भा. दं.सं. की धारा 498–ए के अंतर्गत ''क्रूरता'' की परिभाषा है – विधान–मंडल ने ''दहेज की मांग'' के दायरे को लचीला एवं समावेशी रखा है।

Suresh Agarwal, for the applicants.
S.S. Rajput, P.P. for of the non-applicant No. 1/State.
V.D. Sharma, for the non-applicant No. 2.

Short Note
****(45)***
Before Mr. Justice G.S. Ahluwalia
W.P. No. 1436/2016 (Gwalior) decided on 2 January, 2019

SEHDEV DUBEY …Petitioner

Vs.

SMT. PUSHPA TIWARI & ors. …Respondents

A. Civil Procedure Code (5 of 1908), Order 1 Rule 10 – Impleadment of Party – Stage of Proceeding **– Held – An application under Order 1 Rule 10 can be filed at any stage of proceedings but it does not mean that inspite of specific objection raised by defendants in written statement, the plaintiff, after proceeding further with the suit, may file such application at the stage of final hearing – Plaintiffs cannot be allowed to reopen proceedings under garb of such application because when a new defendant is added, a *de novo* trial would be conducted so far as newly added defendant is concerned – Impugned order allowing the application is set aside – Petition allowed.**

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 1 नियम 10 – पक्षकार बनाया जाना – कार्यवाही का प्रक्रम – अभिनिर्धारित – कार्यवाहियों के किसी भी प्रक्रम पर आदेश 1 नियम 10 के अंतर्गत एक आवेदन प्रस्तुत किया जा सकता है परंतु इसका यह अर्थ नहीं है कि प्रत्यर्थीगण द्वारा लिखित कथन में विनिर्दिष्ट आपत्ति उठाये जाने के बावजूद, वादी, वाद में आगे की कार्यवाही करने के पश्चात्, अंतिम सुनवाई के प्रक्रम पर उक्त आवेदन प्रस्तुत कर सकता है – वादी को उक्त आवेदन की आड़ में कार्यवाहियां पुनः प्रारंभ करने की मंजूरी नहीं दी सकती क्योंकि जब एक नया प्रतिवादी जोड़ा जाता है, तो जहां उस नये जोड़े गये प्रतिवादी का संबंध है, नये सिरे से विचारण किया जाएगा – आवेदन मंजूर करने वाला आक्षेपित आदेश अपास्त – याचिका मंजूर।

***B. Civil Procedure Code (5 of 1908), Order 1 Rule 10 – Impleadment of Purchaser of Suit property – Principle of Lis Pendens* – Held – Sale deed in his favour already executed prior to institution of suit, thus principle of *lis pendens* would not apply – Decree would not be binding on him.**

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 1 नियम 10 – वाद संपत्ति के क्रेता को पक्षकार बनाया जाना – विचाराधीन वाद का सिद्धांत – अभिनिर्धारित – विक्रय विलेख, वाद संस्थित होने के पूर्व, पहले ही उसके पक्ष में निष्पादित किया जा चुका है, अतः विचाराधीन वाद का सिद्धांत लागू नहीं होगा – डिक्री उस पर बाध्यकारी नहीं होगी।

N.K. Gupta with *Ravi Gupta,* for the petitioner.
Anand Bhardwaj, for the respondent Nos. 1 & 3.
Vivek Jain, for the respondent No. 9.

Short Note
****(46)***
Before Mr. Justice Atul Sreedharan
Cr.A. No. 4345/2018 (Jabalpur) decided on 13 May, 2019

SURENDRA & ors. …Appellants

Vs.

STATE OF M.P. & anr. …Respondents

***Penal Code (45 of 1860), Section 307 and Criminal Procedure Code, 1973 (2 of 1974), Section 228 – Framing of Charge – Nature of Injury* – Held – Site of human body on which injury is caused by assailant would more precisely disclose his intention whether same be of causing death of victim or merely to cause bodily pain or hurt – Nature of injury by itself will not be reliable and safe *indicia* for *prima facie* assessment of an intention – Victim was assaulted on vital part of body (head) – Charge rightly framed u/S 307 IPC – Appeal dismissed.**

दण्ड संहिता (1860 का 45), धारा 307 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 228 – आरोप विरचित किया जाना – चोट का स्वरूप – अभिनिर्धारित – मानव शरीर का वह स्थान, जिस पर हमलावर द्वारा चोट कारित की गई है, उसके आशय को अधिक स्पष्ट रूप से प्रकट करेगा कि क्या वह पीड़ित की हत्या करने का है या मात्र शारीरिक पीड़ा अथवा उपहति कारित करने का – एक आशय के प्रथम दृष्ट्या निर्धारण के लिए चोट का स्वरूप अपने आप में विश्वसनीय एवं सुरक्षित संकेत नहीं होगा – पीड़ित के शरीर के महत्वपूर्ण अंग (सिर) पर हमला किया गया था – भा.दं.सं. की धारा 307 के अंतर्गत उचित रूप से आरोप विरचित किया गया – अपील खारिज।

Case referred:

(2019) 4 SCC 146.

Sharad Verma, for the appellants.
Madhur Shukla, G.A. for of the respondent No. 1-State.
Dhananjay Asati, for the respondent No. 2.

I.L.R. [2019] M.P. 1171 (SC)
SUPREME COURT OF INDIA

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

C.A. No. 8718/2012 decided on 6 February, 2019

CHATTAR SINGH & ors. …Appellants

Vs.

MADHO SINGH & ors. …Respondents

***A. Madhya Bharat Zamindari Abolition Act, (13 of 1951), Section 4(1)(a) & 5(f) – "Charnoi Lands" – Ownership* – Held – Once land is recorded as "Charnoi" i.e. common land reserved for grazing of cattle of villagers, such common land clearly vests in State as provided u/S 4(1)(a) whereunder all land, forest, trees, village-sites, pathways etc vests in State absolutely free from all encumbrances – Section 5(f) did not confer any rights on Zamindars on such common land and did not save same from vesting, once it was recorded as Charnoi for public purpose before date of vesting in 1950-51 – Appeal dismissed. (Para 10 & 11)**

क. मध्य भारत जमींदारी उन्मूलन अधिनियम, (1951 का 13), धारा 4(1)(ए) व 5(एफ) – ''चरनोई भूमियां'' – स्वामित्व – अभिनिर्धारित – एक बार भूमि को ''चरनोई'' अर्थात् ग्रामीणों के पशुओं के चरने हेतु आरक्षित सामान्य भूमि, अभिलिखित किये जाने पर उक्त सामान्य भूमि स्पष्ट रूप से राज्य में निहित है जैसा कि धारा 4(1)(ए) के अंतर्गत उपबंधित है जिसके अंतर्गत सभी भूमि, वन, वृक्ष, ग्राम–स्थान, पथ्या इत्यादि, सभी विल्लंगमों से पूर्ण रूप से मुक्त, राज्य में निहित होती है – धारा 5(एफ), जमींदारों पर उक्त सामान्य भूमि पर कोई अधिकार प्रदत्त नहीं करती तथा एक बार निहित किये जाने की तिथि के पूर्व से उसे 1950–51 लोक प्रयोजन हेतु चरनोई के रूप में अभिलिखित किये जाने से उक्त को निहित किये जाने से नहीं बचाती – अपील खारिज।

***B. Madhya Bharat Zamindari Abolition Act, (13 of 1951), Section 4(1)(a) & 4(2) – "Khud-Kasht" Lands* – Held – In order to save land from vesting, Section 4(2) requires land to be personally cultivated by Zamindar or through employees or hired labourers and it should be recorded in revenue papers as "Khud-Kasht" otherwise all land vest in State as provided u/S 4(1)(a). (Para 9 & 10)**

ख. मध्य भारत जमींदारी उन्मूलन अधिनियम, (1951 का 13), धारा 4(1)(ए) व 4(2) – ''खुद–काश्त'' भूमियां – अभिनिर्धारित – भूमि को निहित होने से बचाने के लिए, धारा 4(2), जमींदार द्वारा व्यक्तिगत रूप से अथवा कर्मचारियों या भाड़े के श्रमिकों के जरिए खेती करने की अपेक्षा करती है तथा राजस्व अभिलेख पर उसे ''खुद–काश्त'' के रूप में अभिलिखित होना चाहिए अन्यथा सभी भूमि राज्य में निहित होती है जैसा कि धारा 4(1)(ए) के अंतर्गत उपबंधित है।

***C. Madhya Bharat Zamindari Abolition Act, (13 of 1951), Section 4(1)(a) & 5(f) – Grove Lands* – Held – Trees standing on side of road would not fulfill requirement of a 'Grove' – When land is primarily used for 'Charnoi', it would not fall into the category of 'Grove' and Section 5(f) would not save such trees from vesting – The fruit bearing trees irrespective of numbers have also vested in State u/S 4(1)(a). (Para 12)**

ग. मध्य भारत जमींदारी उन्मूलन अधिनियम, (1951 का 13), धारा 4(1)(ए) व 5(एफ) – बाग भूमियां – अभिनिर्धारित – सड़क किनारे खड़े वृक्ष, ''बाग'' की अपेक्षा की पूर्ति नहीं करेंगे – जब प्राथमिक रूप से भूमि का उपयोग ''चरनोई'' हेतु किया गया है, वह ''बाग'' की श्रेणी के भीतर नहीं आयेगी तथा धारा 5(एफ) उक्त वृक्षों को निहित होने से नहीं बचाएगी – फलदार वृक्ष भी संख्या का विचार किये बिना, धारा 4(1)(ए) के अंतर्गत राज्य में निहित हो गये हैं।

Case referred:

(1968) 1 SCR 761.

J U D G M E N T

The issue in the present appeal is whether the land recorded as 'Charnoi' i.e. Common land for grazing of cattle of villagers vests in State on abolition of intermediaries on 02.10.1951 or it was saved from vesting in favour of proprietor being grove under section 5(f) of the Madhya Bharat Abolition of Zamindari Act.

2. The plaintiffs/respondents filed suit for declaration and permanent injunction with respect to the suit land. They specifically pleaded that the suit land was recorded as Charnoi and it had been used for the purpose of grazing their cattle by the villagers and illegally it has been given to the defendants. Kalu Singh, father of defendant Nos.2 and 3, who was the ex- zamindar filed an application before the Tehsildar praying that the suit land be granted to him because it was recorded in his name before the abolition of Zamindari Rights.The Tehsildar rejected the application. Thereafter, he filed appeals before the Sub-Divisional Officer and Additional Commissioner both the authorities dismissed the appeals. Thereafter, the appeal was filed before the Board of Revenue by Kalusingh. The Board of Revenue vide order dated 2.12.1959 set aside the orders of Tehsildar and Sub Divisional Officer and Additional Commissioner and held that Kalusingh is entitled to get the land in his name as Bhumiswami, in view of Section 5(f) of the Madhya Bharat Zamindari Abolition Act. On the basis of the aforesaid order the father of defendant Nos.2 and 3, filed an application before the Collector and Collector vide order dated 14.3.1968 granted the suit land in area 72 Bigas and 18 Biswas to the father of defendant Nos.2 and 3 as Bhumiswami. After the death of their father, defendant Nos.2 and 3 filed an application before the Collector that their names be recorded as Bhumiswami over the aforesaid land and that

application has been allowed by the Collector on 13.05.1968. As against the said orders, the plaintiffs filed the suit.

3. In the instant case, the entries prior to the date of abolition clearly record the land to be Charnoi land and subsequent thereto also the land had been recorded continuously as Charnoi land. Apart from that, there was admission made by the defendant that villagers had been grazing their cattle in the land in question up to 1967. Relying upon the admission coupled with the khasra entries to which statutory presumption of correctness is attached. The Trial Court decreed the suit. However, the Appellate Court reversed the same holding that it was a grove and saved from the vesting under the provisions of Section 5(f) of the Madhya Bharat Zamindari Abolition Act, 1951, which came into force on 2.10.1951.

4. The High Court has reversed the findings of the First Appellate Court. The High Court has considered and relied on the khasra entries to hold that it was recorded as Charnoi land as such vested in the State and it was not khud-kasht land of the ex-proprietor.

5. Shri Sushil Kumar Jain learned senior counsel appearing for the appellant(s) has vehemently argued at length. He relied upon a decision of this Court in *Shrimant Sardar Chandrojirao Angre v. State of Madhya Pradesh*, reported in (1968) 1 SCR 761, to contend that such groves are saved from vesting. He submits that there were more than one lac trees of sitafal (pumpkin) and that finding has not been reversed by the High Court. As such it should be treated as 'grove'.

6. Learned counsel appearing on behalf of the respondents has supported the judgment of the Trial Court and that of the High Court.

7. The provision contained in Section 4 of the Madhya Bharat Zamindari Abolition Act deals with the consequences of vesting. Section 4 is extracted hereunder:

> "4. Consequence by the vesting of an estate in the State. - (1) Save as otherwise provided in this Act when the notification under Section 3 in respect of any area has been published in the Gazette, then, notwithstanding anything contained in any contract, grant or document or in any other law for the time being in force, the consequences as hereinafter set forth shall from the beginning of the date specified in such notification (hereinafter referred to as the date of vesting) ensue, namely :-
>
> (a) all rights, title and interest of the proprietor in such area, including land (cultivable, barren or Bir), forest, trees, fisheries, wells (other than private wells), tanks, ponds, water channels, ferries,

pathways village-sites, hats, and bazars and mela- grounds and in all sub-soil, including rights, if any, in mines and minerals, whether being worked or not shall cease and be vested in the State free from all encumbrances;

(b) all grants and confirmation of the title of or to land in the property so vesting or of or to any right or privilege in respect of such property or land revenue in respect thereof shall whether liable to presumption or not, determine;

(c) all rents and cesses in respect of any holding in the property so vesting for any period after the date of vesting which, but for such vesting would have been payable to the proprietor, shall vest in the State and be payable to the Government and any payment made in contravention of this clause shall not be a valid discharge of the person liable to pay the same;

Explanation. - The word "Holding" shall for the purpose of this clause be deemed to include also land given, on behalf of the proprietor, to any person on rent for any purpose other than cultivation;

(d) all arrears of revenue, cesses or other dues in respect of any property so vesting and due by the proprietor for any period prior to the date of vesting shall continue to be recoverable from such proprietor and may, without prejudice to any other mode of recovery, be realised by deducting the amount from the compensation money payable to such proprietor under Chapter V;

(e) the interest of the proprietor so acquired shall not be liable to attachment or sale in execution of any decree or other process of any Court, civil or revenue, and any attachment existing at the date of vesting or any order for attachment passed before such date shall, subject to the provisions of Section 73 of the Transfer of Property Act, 1882, cease to be in force;

(f) every mortgage with possession existing on the property so vesting or part thereof on the date immediately preceding the date of vesting shall, to the extent of the amount secured on such property or part thereof be deemed without prejudice to the rights of the State under Section 3, to have been substituted by a simple mortgage.

(2) Notwithstanding anything contained in sub-section (1), the proprietor shall continue to remain in possession of his Khud-kasht land, so recorded in the annual village papers before the date of vesting.

(3) Nothing contained in sub-section (1) shall operate as bar to the recovery by the outgoing proprietor of any sum which becomes due to him before the date of vesting in virtue of his proprietary rights."

8. The provision contained in Section 5 of Madhya Bharat Zamindari Abolition Act

deals with private wells, trees, buildings, house sites, and enclosures. Section 5(f) deals with groves. Section 5 is extracted hereunder:

> "5. Private wells, trees, buildings, house sites, and enclosures.- (a) All open enclosures used for agricultural or domestic purposes and in continuous possession (which includes possession of a former proprietor) for twelve years immediately before the 1st of January, 1951, all open house sites purchased for consideration, all buildings, places of worship, wells, situated in and trees standing on lands included in such enclosures of house-sites or land appertaining to such buildings or places of worships within the limits of a village-site belonging to or held by the outgoing proprietor or any other person shall continue to belong to or be held by such proprietor or other person as the case may be, and the land thereof, with the areas appurtenant thereto, shall be settled with him by the Government on such terms and conditions as it may determine.
>
> (b) All private wells and buildings on occupied land belonging to or held by the outgoing proprietor or any other person shall continue to belong to or be held by such proprietor or other person.
>
> (c) All trees standing on land comprised in a Khudkasht or homestead and belonging to or held by the outgoing proprietor or any other person shall continue to belong to or be held by such proprietor or other person.
>
> (d) All trees standing on occupied land other than lands comprised in Khudkasht or home-stead and belonging to or held by a person other than the outgoing proprietor shall continue to belong to or be held by such person.
>
> (e) All tanks situate on occupied land and belonging to or held by the outgoing proprietor or any other person shall continue to belong to or be held by such proprietor or other person.
>
> (f) All groves wherever situate and recorded in village papers in the name of the outgoing proprietor or any other person shall continue to belong to or be held by such proprietor or such other person and the land under such grove shall be settled with such proprietor or such other person by the Government on such terms and conditions as it may determine."

9. Section 4 makes it clear that all lands (cultivable, barren or bir), forest, trees, village-sites, hats, bazars, mela-grounds shall vest in the State automatically free from all encumbrances. Section 4(2) provides saving of only khud-kasht land, which is so recorded in the Samvat year 2007 corresponding to the agricultural year 1950-51 before the date of vesting. The date of vesting is 2.10.1951. Khud-kasht has been defined in Section 2(c) as under:

> "2(c) "Khud-kasht" means land cultivated by the Zamindar himself or through employees or hired labourers and includes sir land;"

10. In order to save the land from vesting Section 4(2) requires land to be 'personally cultivated' by Zamindar or through employees or hired labourers and another sine qua non in that it should be so recorded in revenue papers as "khud-kasht", otherwise all land vest in the State as provided in Section 4(1)(a). Once the land is recorded as 'Charnoi' i.e., common land reserved for grazing of cattles of villagers, such common land clearly vests in the State as provided in Section 4(1)(a) all the land, the forest, trees, village-sites, pathways etc. vest in the State absolutely. Since the land was 'Charnoi' i.e., common grazing land for cattle of the villagers having huge area 72 bighas 18 biswa the fruit-bearing trees of custard apple also vested in the State.

11. The provisions contained in Section 5(f) in Madhya Bharat Zamindari Abolition Act did not confer any rights on Zamindars on such common land and did not save same from vesting, once it was recorded as 'Charnoi' for public purpose before the date of vesting in the year 1950-51 i.e., Samvat year 2007. Samvat year used to commence from 1st July, and ended on 30th June of next Gregorian calendar year. The provision of Section 5(f) would not come into play to confer any right on such common land.

12. In *Shrimant Sardar Chandrojirao Angre* (supra), this Court has observed as under:

> "It would seem therefore that the word "grove" conveys compactness or at any rate substantial compactness to be recognized as a unit by itself which must consist of a group of trees in sufficient number to preclude the land on which they stand from being primarily used for a purpose, such as cultivation, other than as a grove-land. The language of Section 5(b)(iv) does not require however that the trees needs be fruit-bearing trees nor does it require that they should have been planted by human labour or agency. But they must be sufficient in number and so standing in a group as to give them the character of a grove and to retain that character the trees would or when fully grown preclude the land on which they stand from being primarily used for a purpose other than that of a grove-land. Cultivation of a patch here and a patch there would have no significance to deprive it of its character as a grove. Therefore, trees standing in a file on the roadside intended to furnish shade to the road would not fulfil the requirements of a grove even as understood in ordinary parlance.
>
> **emphasis supplied"**

It is apparent from aforesaid observations that "grove" to be recognized as such should be of such trees when fully grown preclude land on which they are

standing from being primarily used for a purpose other than that of grove-land. This Court further observed that trees standing on the side of the road would not fulfil the requirement of a grove even as understood in the ordinary sense. Thus, when land is primarily used for 'Charnoi' i.e. common grazing land for cattle of villagers, it would not fall into the category of 'grove' and provision of Section 5(f) would not save such trees from vesting. The village sites, comprise of common land reserved for villagers, vest in State. It cannot be retained by Zamindar as he had no existing right on such land even before date of vesting, it being common land, it belonged to villagers. No individual can claim that such land belongs to him exclusively. The fruit bearing trees irrespective of numbers have also vested in the State under Section 4(1)(a). No right can be claimed on trees on such common land under Section 5(f) by a proprietor. The decision taken by the Additional Commissioner while holding that land being grazing land has vested in the State was in accordance with law. The Board of Revenue's order to the contrary was perverse and illegal.

13. The question as to title in view of the provisions under the M.P. Land Revenue Code, 1959 is the domain of civil court, the Trial Court was absolutely right in decreeing the suit in favour of villagers. Such common land could not have been settled at all in favour of the erstwhile proprietor or his legal representatives. The approach of the First Appellate Court holding it to be grove was perverse and contrary to the provisions and the law laid down by this Court in *Shrimant Sardar Chandrojirao Angre* (supra). The First Appellate Court has failed to understand the purport of 'Charnoi' which is a common land reserved for the public purpose and is not exclusively for grazing of cattle of Zamindar. Such village sites/common land clearly vests in the State automatically free from all encumbrances.

14. Thus, we have absolutely no hesitation to reject the submissions raised by the learned senior counsel appearing on behalf of the appellant and even the decision in *Shrimant Sardar Chandrojirao Angre* (supra) does not support the cause espoused that said case did not relate to "Charnoi" land. As such, decision is not at all applicable, even otherwise decision negates submission raised on behalf of appellants that it was "grove".

15. Thus, for the aforesaid reasons, we find absolutely no ground to interfere with the impugned judgment of the High Court. The appeal, being devoid of merits, is hereby dismissed. The parties are left to bear their own costs.

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

Appeal dismissed.

I.L.R. [2019] M.P. 1178 (SC)
SUPREME COURT OF INDIA
Before Mr. Justice Ashok Bhushan & Mr. Justice K.M. Joseph
C.A. No. 1052/2019 decided on 6 February, 2019

SHIVNARAYAN (D) BY LRs. …Appellants

Vs.

MANIKLAL (D) THR. LRs. & ors. …Respondents

A. Civil Procedure Code (5 of 1908), Section 16 & 17 and General Clauses Act (10 of 1897), Section 13 – Word "property" **– Held – Word "property" in Section 17 although has been used in 'singular' but by virtue of Section 13 of General Clauses Act, it may also be read as 'plural' i.e. "properties". (Para 28)**

क. सिविल प्रक्रिया संहिता (1908 का 5), धारा 16 व 17 एवं साधारण खण्ड अधिनियम (1897 का 10), धारा 13 – शब्द ''संपत्ति'' – अभिनिर्धारित – यद्यपि शब्द ''संपत्ति'' को धारा 17 में 'एकवचन' में उपयोग किया गया है किंतु सामान्य खंड अधिनियम की धारा 13 के आधार पर उसे 'बहुवचन' अर्थात ''संपत्तियों'' के रूप में भी पढ़ा जा सकता है।

B. Civil Procedure Code (5 of 1908), Section 16 & 17 – Expression "any portion of the property" **– Held – The expression can be read as portion of one or more properties situated in jurisdiction of different courts and can also be read as portion of several properties situated in jurisdiction of different courts. (Para 28)**

ख. सिविल प्रक्रिया संहिता (1908 का 5), धारा 16 व 17 – अभिव्यक्ति ''संपत्ति का कोई भाग'' – अभिनिर्धारित – अभिव्यक्ति को भिन्न न्यायालयों की अधिकारिता में स्थित एक या अधिक संपत्तियों के भाग के रूप में पढ़ा जा सकता है तथा भिन्न न्यायालयों की अधिकारिता में स्थित विभिन्न संपत्तियों के भाग के रूप में भी पढ़ा जा सकता है।

C. Civil Procedure Code (5 of 1908), Section 16 & 17 – Place of Institution of Suit **– Held – A suit in respect of immovable property or properties situated in jurisdiction of different courts may be instituted in any court within whose local jurisdiction, any portion of property or properties may be situated – Further, a suit in respect of more than one property situated in jurisdiction of different courts can be instituted in a court within whose local jurisdiction one or more properties are situated provided suit is based on same cause of action with respect of properties situated in jurisdiction of different courts. (Para 28)**

ग. सिविल प्रक्रिया संहिता (1908 का 5), धारा 16 व 17 – वाद संस्थित करने का स्थान – अभिनिर्धारित – भिन्न न्यायालयों की अधिकारिता में स्थित अचल संपत्ति या संपत्तियों के संबंध में एक वाद को उस न्यायालय में संस्थित किया जा सकता है जिसकी

स्थानीय अधिकारिता के भीतर संपत्ति या संपत्तियों का कोई भाग स्थित हो – इसके अतिरिक्त भिन्न न्यायालयों की अधिकारिता में स्थित एक से अधिक संपत्ति के संबंध में वाद उस न्यायालय में संस्थित किया जा सकता है जिसकी स्थानीय अधिकारिता एक या अधिक संपत्तियां स्थित हैं परंतु यह कि वाद, भिन्न न्यायालयों की अधिकारिता में स्थित संपत्तियों के संबंध में समान वाद हेतुक पर आधारित हो।

***D. Civil Procedure Code (5 of 1908), Section 16 & 17 – Maintainability of Suit – Cause of Action* – Held – Suit filed in a court pertaining to properties situated in jurisdiction of more than two courts, is maintainable only when suit is filed on one cause of action – In present case, plaint encompasses different cause of action with different set of defendants – Cause of action relating to Indore property and Bombay property were entirely different with different sets of defendants which could not have been clubbed together – Suit regarding Bombay property is clearly not maintainable in Indore Courts – Trial Court rightly striked out the pleadings and relief pertaining to Bombay property – Appeal dismissed.**

(Paras 21 & 29)

घ. सिविल प्रक्रिया संहिता (1908 का 5), धारा 16 व 17 – वाद की पोषणीयता – वाद हेतुक – अभिनिर्धारित – दो से अधिक न्यायालयों की अधिकारिता में स्थित संपत्तियों से संबंधित, एक न्यायालय में प्रस्तुत वाद केवल तब पोषणीय है जब एक वाद हेतुक पर वाद प्रस्तुत किया गया है – वर्तमान प्रकरण में, वाद पत्र में प्रतिवादीगण के भिन्न समूह के साथ भिन्न वाद हेतुक शामिल हैं – इंदौर की संपत्ति तथा बॉम्बे की संपत्ति के संबंध में वाद हेतुक पूर्णतः भिन्न थे जिसमें प्रतिवादीगण के भिन्न समूह थे, जिसे एक साथ संयोजित नहीं किया जा सकता – बॉम्बे की संपत्ति के संबंध में वाद स्पष्ट रूप से इंदौर न्यायालयों में पोषणीय नहीं है – विचारण न्यायालय ने बॉम्बे की संपत्ति से संबंधित अभिवचन एवं अनुतोष को उचित रूप से हटा दिया – अपील खारिज।

***E. Civil Procedure Code (5 of 1908), Order 2 Rule 2 – Scope* – Held – In present case, suit is not against same defendants or same defendants jointly – There are different set of defendants who have different cause of action – Order 2 Rule 2 cannot be read in a manner as to permit clubbing of different cause of action. (Para 30)**

ङ. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 2 नियम 2 – व्याप्ति – अभिनिर्धारित – वर्तमान प्रकरण में, वाद, समान प्रतिवादीगण या संयुक्त रूप से समान प्रतिवादीगण के विरूद्ध नहीं है – यहां प्रतिवादीगण के भिन्न समूह है जिसका भिन्न वाद हेतुक है – आदेश 2 नियम 2 को इस ढंग से नहीं पढ़ा जा सकता जिससे कि भिन्न वाद हेतुक को संयोजित करने की अनुज्ञा दी जा सके।

Cases referred:

AIR 1930 PC 188, AIR 1936 PC 189, AIR 1923 Calcutta 501, (1908) ILR 30 All. 560, AIR 1952 Nag. 303 (FB), AIR 1960 Ori. 159, AIR 1968 Kant. 82, AIR 1972 Delhi 90, AIR 1975 All. 91, AIR 1932 PC 172, AIR 1942 All. 387.

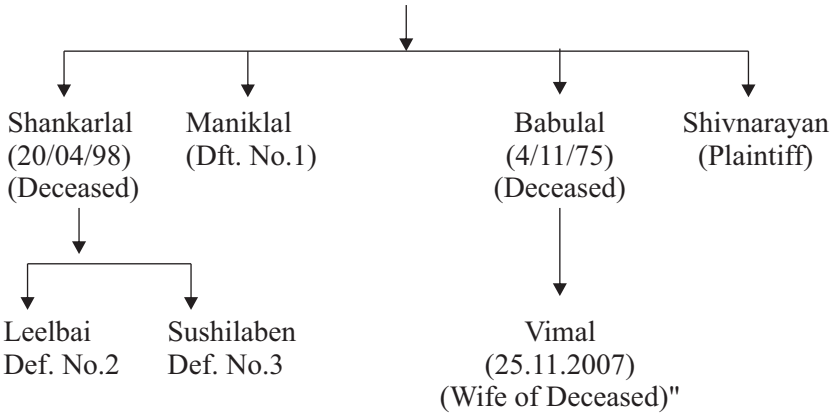
J U D G M E N T

The Judgment of the Court was delivered by : **ASHOK BHUSHAN, J.**:- This appeal has been filed by the appellant against the judgment of High Court of Madhya Pradesh dated 13.11.2013 by which judgment writ petition filed by the appellant challenging the order dated 17.08.2011 of the III Additional District Judge, Indore in Civil Suit No.60-A of 2010 has been upheld dismissing the writ petition.

2. Brief facts of the case necessary to be noticed for deciding this appeal are:-

2.1 The appellant filed Civil Suit No.60-A of 2010 before the District Judge praying for declaring various transfer documents as null and void with regard to suit property mentioned in Para No. 1A and Para No.1 B of the plaint. Plaintiff also prayed for declaration that suit properties mentioned in Para Nos.1A and 1B are Joint Family Property of plaintiff and defendant Nos.1 to 3 and plaintiff is entitled to receive 1/3rd part of the suit property. A Will executed by one Lt. Smt. Vimal Vaidya was also sought to be declared to be null and void. Certain other reliefs were claimed in the suit. The parties shall be referred to as described in the suit. The plaintiff in Para No.2 of the plaint has set the following genealogy of the parties:-

"Kaluram Bairulal Vaidya
(Since Deceased dt. 15/08/1969)



2.2 In Para No.1 of the plaint, description of the property was mentioned to the following effect:-

1.A) Plot No. SP 79, Sudama Nagar Indore (M.P.) size 30 ft. X 50 ft. area 1500 Sq. Ft. through membership no. 2905 of Shikshak Kalyar Samiti, Sudama Nagar, Indore.

B) Bombay Suburban District S. No. 341, Pt. of Bandra Grant Flat No.C/1/3, Sahitya Sahavas Co-op. Housing Society, Second Floor, building known as "Abhang" Bandra (E), Mumbai- 400 051 situated on the plot bearing no. C.T.S. No. 629, (S. No. 341-A.B.S.D.) Madhusudan Kalekar Marg, Gandhinagar, Bandra (East) Mumbai - 51.

2.3 The plaintiff sought relief with regard to two properties (hereinafter referred to as Indore property, situate at Indore, State of Madhya Pradesh and Mumbai property situate at Mumbai, State of Maharashtra). Plaintiff's case in the plaint was that Indore Property was purchased by plaintiff's father in the year 1968-1969. Plaintiff's father died on 15.08.1969. Thereafter, Indore property was joint family property of the plaintiff and defendant Nos. 1 to 3. Plaintiff's brother Babulal shifted to Pune. Babulal was allotted Mumbai property under a Government Scheme for extraordinary persons like writers and educationist. Babulal died in the year 1975. Thereafter, the Mumbai property, on the basis of succession certificate issued by Court of Civil Judge (Senior Division), Pune came in the name of widow of Babulal, Smt. Vimal Vaidya. Smt. Vimal Vaidya transferred the Mumbai flat by sale deed dated 15.10.2007 in favour of defendant Nos. 7 and 8. It was further pleaded in the plaint that Smt. Vimal Vaidya also dealt with Indore Property. The name of Smt. Vimal Vaidya was mutated in the year 1986 in the Indore property and thereafter she transferred the Indore property in favour of defendant Nos. 9 and 10. One set of pleadings was with regard to a Will executed in the year 2000 by Smt. Vimal Vaidya in favour of defendant Nos. 4 to 6. On aforesaid pleadings, following reliefs were prayed in Para No. 25 of the plaint:-

"A) The property mentioned in Para No.1 of the Plaint and its deed of transfer documents be declared null and void which is not binding on the part of the plaintiff.

B) The property mentioned in Para No.1B of Plaint and document related to its registered deed to transfer be declared null and void and which is not binding on the part of Plaintiff.

C) The property mentioned in Para No. 1A and 1B of the Plaint is joint family property of the Plaintiff and defendant No. 1 to 3 be declared joint family property and Plaintiffs right to receive 1/3 part of the suit property.

D) Court Commissioner be appointed to make

division of suit property and 1/3 part possession be given to the Plaintiff.

E) During the hearing of the suit injunction order be passed in respect of the property not to create third party interest by the Defendants.

F) Plaintiff's suit be declared decreed with the expenses.

G) To grant any other relief which this Hon'ble Court may be fit in the interest of justice.

H) The forged will executed by Late Vimal Vaidya under influence of defendant No. 4 and his associates relatives Defendant No. 5 and 6 and other relatives of Kher family. Because, Late Babulal Vaidya was a member of undivided Hindu family. Therefore, Late. Vimal Vaidya was not authorized to execute that alleged will as per the Law. Therefore, the registered alleged will be declared null and void and be declared that it is not binding on the part of the Plaintiff."

2.4 The defendant Nos. 7 and 8 appeared in suit and filed an application with the heading "application for striking out pleadings and dismissing suit against defendants No.7 and 8 for want of it territorial jurisdiction and mis-joinder of parties and causes of action." The defendant Nos. 7 and 8 pleaded that for property being situated at Bandra East, Mumbai, the Court at Indore has no territorial jurisdiction. It was further pleaded by the defendant that suit suffers fatally from mis-joinder of parties as well as causes of action. The defendant Nos. 7 and 8 pleaded that there is no nexus at all between the two properties - one situate at Indore and other at Mumbai. Details of different causes of action and nature of the properties, details of purchasers for both different sale transactions have been explained in detail in Para No. 6 of the application. It was further pleaded that Mumbai property does not form asset of any Hindu Undivided Family. Mumbai property was acquired by Babulal in his own name and after his death on the basis of succession, it has come to his sole heir Smt. Vimal Vaidya in the year 1975. It was pleaded that no part of the cause of action for the Mumbai property took place in Indore. In the application, following reliefs has been prayed for by the defendant Nos. 7 and 8:-

"(a) All the pleadings and the relief clauses relating to the property situate at Mumbai may kindly be ordered to be struck off from the plaint, in exercise of powers conferred on this Hon'ble

Court under Order 6 Rule 16 of the Civil Procedure Code, and as a consequence the suit against the defendants No.7 and 8 may kindly be dismissed with costs for the answering defendants; while the Suit relating to the Indore property may be continued if otherwise round maintainable under the law;

OR in the alternative,

An order may kindly be passed declining to entertain the part of the suit relating to the property in Mumbai with costs for the answering defendants; and

(b) Such other order may kindly be passed as may be deemed appropriate in the circumstances of the case."

2.5 The trial court after hearing the parties on the application dated 19.03.2011 filed by the defendant Nos. 8 and 9 passed an order dated 17.08.2011 allowed the application. An order was passed deleting the property mentioned In Para No. 1B of the plaint and the relief sought with regard to the said property. The trial court held that separate cause of actions cannot be combined in a single suit.

2.6 Aggrieved by the order of the trial court, a writ petition was filed in the High Court, which too has been dismissed by the High Court vide its order dated 13.11.2013 affirming the order of the trial court. High Court referring to Section 17 of the Civil Procedure Code, 1908 held that for property situated at Mumbai, the trial court committed no error in allowing the application filed by defendant Nos. 7 and 8. The plaintiff-appellant aggrieved by the order of the High court has come up in this appeal.

3. We have heard Shri Vinay Navare for the appellant. Shri Chinmoy Khaladkar has appeared for respondent Nos. 7 and 8.

4. Learned counsel for the appellant submits that High Court did not correctly interpret Section 17 of the Code of Civil Procedure. The partition suit filed by the appellant with regard to Mumbai and Indore properties was fully maintainable. He submits that Order II Rule 2 of CPC mandates that the plaintiff must include the whole claim in respect of a cause of action in the suit. The cause of action claimed by the plaintiff was denial of the plaintiff's right to share in the Joint Family Property. Restrictive interpretation of Section 17 will do violence to the mandate of Order II Rule 2. Section 39(1)(c) of the CPC itself contemplate that there can be a decree of an immovable property, which is situated outside the local limits of the jurisdiction. The words "immovable property"' used in Section 17 is to be interpreted by applying Section 13 of the General Clauses Act. It

provides that in all Central Acts and Regulations, unless the context and subject otherwise requires, "any singular term shall include plural". In event, it is accepted that with regard to separate properties situated in different jurisdictions, separate suits have to be filed that shall result in conflicting findings of different Courts and shall involve the principles of res judicata.

5. Learned counsel appearing for defendant Nos. 8 and 9 refuting the submissions of learned counsel for the appellant contends that no error has been committed by trial court in deleting the property at Para No.1B in the plaint as well as pleadings and reliefs with regard to said property. It is submitted that Section 17 of the CPC contemplate filing of a suit with respect to immovable property situated in jurisdiction of different courts only when any portion of the property is situated in the jurisdiction of a Court, where suit has to be filed. The word "any portion of the property" indicate that property has to be one whose different portions may be situated in jurisdiction of two or more Courts. He further submits that there is no common cause of action with regard to property situate at Indore and property situate at Mumbai. Transfer deed with regard to Indore Property as well as transfer deeds of Mumbai property are different. The purchasers of both the properties, i.e. Indore property and Mumbai property are also different. According to pleadings in the plaint itself, the Mumbai property was purchased by Babulal, the husband of Smt. Vimla Vaidya in his own name, which after death of Babulal in the year 1975 was mutated in the name of Smt. Vimla Vaidya. The plaintiff has sought to club different cause of actions in one suit. There is mis-joinder of the parties also in the suit since the defendants pertaining to different transactions have been impleaded in one suit whereas there is no nexus with the properties, transactions and persons. Learned counsel for the defendant Nos. 8 and 9 submits that by order of Court of Civil Judge (Senior Division), Pune, the property is already mutated in the year 1975 in the name of Smt. Vimla Vaidya after death of her husband, which was rightfully transferred by her to defendant Nos. 8 and 9 on 15.10.2007. It is submitted that the Court at Indore might proceed with the property at Indore with the defendants, who are related to Indore property but suit pertaining to Mumbai property, transactions relating thereto and defendants relating to Mumbai property have rightly been struck off from the case.

6. Before we consider the submissions of the learned counsel for the parties, relevant provisions pertaining to place of suing as contained in Code of Civil Procedure needs to be noted. Section 15 to Section 20 contains a heading "place of suing". Section 16 provides that Suits to be instituted where subject-matter situate. Section 16 is as follows:-

> **16. Suits to be instituted where subject-matter situate.**--Subject to the pecuniary or other limitations prescribed by any law, suits-

(a) for the recovery of immovable property with or without rent or profits,

(b) for the partition of immovable property,

(c) for foreclosure, sale or redemption in the case of a mortgage of or charge upon immovable property,

(d) for the determination of any other right to or interest in immovable property,

(e) for compensation for wrong to immovable property,

(f) for the recovery of movable property actually under distraint or attachment, shall be instituted in the Court within the local limits of whose jurisdiction the property is situate:

Provided that a suit to obtain relief respecting, or compensation for wrong to, immovable property held by or on behalf of the defendant, may where the relief sought can be entirely obtained through his personal obedience, be instituted either in the Court within the local limits of whose jurisdiction the property is situate, or in the Court within the local limits of whose jurisdiction the defendant actually and voluntarily resides, or carries on business, or personally works for gain.

Explanation.- In this section "property" means property situate in India.

7. Section 17, which falls for consideration in the present case, deals with suits for immovable property situate within jurisdiction of different courts is as follows:-

17. Suits for immovable property situate within jurisdiction of different Courts.--Where a suit is to obtain relief respecting, or compensation for wrong to, immovable property situate within the jurisdiction of different Court, the suit may be instituted in any Court within the local limits of whose jurisdiction any portion of the property is situate :

Provided that, in respect of the value of the subject matter of the suit, the entire claim is cognizable by such Court.

8. We need to notice the Scheme under Code of Civil Procedure as delineated by Sections 16 and 17. Section 16 provides that suit shall be instituted in the Court within the local limits of whose jurisdiction the property is situated. Section 16(b) mentions "for the partition of immovable property".

9. Now, we look into Section 17, which deals with suits for immovable property situated within jurisdiction of different Courts. As per Section 17, the

suit may be instituted in any Court within the local limits of whose jurisdiction any portion of the property is situated. What is the meaning of the word "any portion of the property"? There may be a fact situation where immovable property is a big chunk of land, which falls into territorial jurisdiction of two courts in which fact situation in Court in whose jurisdiction any portion of property is situated can entertain the suit. Whether Section 17 applies only when a composite property spread in jurisdiction of two Courts or Section 17 contemplate any wider situation. One of the submissions of the learned counsel for the appellant is that the word "property" as occurring in Section 17 shall also include the plural as per Section 13 of General Clauses Act, 1897. Section 13 of the General Clauses Act provides:-

> **13. Gender and number**.-In all Central Acts and Regulations, unless there is anything repugnant in the subject or context.-
>
> (1) Words importing the masculine gender shall be taken to include females; and
>
> (2) words in the singular shall include the plural, and vice versa.

10. Applying Section 13 of General Clauses Act, the Bombay High Court explaining the word "property" used in Section 17 held that it includes properties. We are also of the same view that the word "property" used in Section 17 can be more than one property or properties.

11. The word "property" under Section 17 of the Civil Procedure code may also be properties, hence, in a schedule of plaint, more than one property can be included. Section 17 can be applied in event there are several properties, one or more of which may be located in different jurisdiction of courts. The word "portion of the property" occurring in Section 17 has to be understood in context of more than one property also, meaning thereby one property out of a lot of several properties can be treated as portion of the property as occurring in Section 17. Thus, interpretation of word "portion of the property" cannot only be understood in a limited and restrictive sense of being portion of one property situated in jurisdiction of two courts.

12. We now look into the decisions of various Courts in reference to Section 17 of Civil Procedure Code. How the word "property" and "portion of the property" occurring in Section 17 has been understood by different High Courts. There are few decisions of the Privy Council also where Section 17 of the Civil Procedure Code came for consideration. In *Nilkanth Balwant Natu and Others Vs. Vidya Narasinh Bharathi Swami and Others*, AIR 1930 PC 188, Privy Council had occasion to consider Section 17 of Civil Procedure Code. The properties in respect of which relief was sought by the plaintiff were situated in Satara, Belgaum and Kolhapur. Although Satara and Belgaum were situated in British

India but Kolhapur was not. The Privy Council after noticing the provision of Sections 17 and 16(c) laid down following:-

> "The learned Judge had jurisdiction to try the suit so far as it related to the mortgaged properties situate in Satara; and, inasmuch as the mortgaged properties in Belgaum are within the jurisdiction of a different Court in British India, he had jurisdiction to deal with those properties also."

13. The Privy Council, thus, held that Satara Court had jurisdiction to entertain suit with regard to property situated at Satara and Belgaum whereas it has no jurisdiction to entertain suit pertaining to Kolhapur, which was not in the British India. In another case of Privy Council, *Nrisingha Charan Nandy Choudhry Vs. Rajniti Prasad Singh and Others*, AIR 1936 PC 189, mortgage lands were in the Sonthal Parganas, State of Bihar and also in the Gaya district of State of Bihar. In Paragraph 9, following was laid down:-

> "9. Now, the mortgage deeds include, as already stated, lands situated, not only in the Sonthal Parganas, but also in the Gaya District. What is the ordinary rule for determining the court which can take cognizance of a suit for immovable property situated within the local limits of two or more tribunals? The answer is furnished by Section 17 of the Code of Civil Procedure (Act V. of 1908), which provides that where a suit is to obtain relief respecting immovable property situate within the jurisdiction of different courts, the suit may be instituted in any court within the local limits of whose jurisdiction any portion of the property is situate."

14. Different High Courts have also while interpreting Section 17 of Civil Procedure Code laid down that Section 17 is applicable in case where properties are situated in the jurisdiction of more than one court. In *Rajendra Kumar Bose Vs. Brojendra Kumar Bose,* AIR 1923 Calcutta 501, the Division Bench of the Calcutta High Court noticed following:-

> "Exceptions to the rule that a suit cannot lie for partition of a portion of the family property have been recognised when different portions of the family property are situated in different jurisdictions, aid separate suits for separate portions have sometimes been allowed, where different rules of substantive or adjective law prevail in the differed Courts; Hari v. Ganpat Rao, (1883) 7 Bom. 272; Ramacharia v. Anantacharia, (1894) 18 Bom. 389; Moti Ram v. Kanhaya Lal, AIR 1920 Lah. 474; Panchanon v. Sib Chandra, (1887) 14 Cal. 835; Balaram v. Ram Chandra, (1898) 22 Bom. 922; Abdul v. Badruddin, (1905) 28 Mad. 216; Padmani v. Jagadamba, (1871) 6 B.L.R. 134; Rammohan v. Mulchand, (1906)28 All. 39; Lachmana v. Terimul, 4 Mad. Jur. 241; Subba v. Rama, (1866-67) 3 Mad. H.C.R. 376; Jayaram v. Atmaram, (1879) 4 Bom. 482;"

15. A Full Bench of Allahabad High Court in *Kubra Jan Vs. Ram Bali and Others,* (1908) ILR 30 All. 560 had occasion to consider suit, which was filed at Bareilly with regard to Bareilly property as well as Bara Banki property situated in two different districts. The jurisdiction at Bareilly Court was upheld in Paragraph Nos. 1 and 8, in which it was laid down as follows:-

> **"1.** This appeal has been laid before a Full Bench by reason of a conflict in the authorities upon a question raised in the appeal. The suit is one by the daughter of one Bande Ali to recover from her brother Akbar Husain and a number of other defendants, transferees from him, her share in the property of her deceased father. This property is situate in the district of Bareilly and also in the district of Bara Banki in Oudh. It appears that Akbar Husain transferred the Bareilly property to the defendants Nos. 2 to 8 and the Bara Banki property to persons from whom the defendant respondent Ram Bali acquired it by virtue of a decree for pre-emption. The suit in regard to the Bareilly property was compromised, with the result that the claim in respect of that property was abandoned, and the suit proceeded as regards the Bara Banki property only.
>
> **8.** Again, it is said that after the compromise in respect of the Bareilly property the Court ceased to have any jurisdiction to deal with the plaintiff's claim, that is, that though the Bareilly Court bad jurisdiction, when the plaint was filed, to deal with the suit, it ceased to have jurisdiction when portion of the property claimed was withdrawn from the litigation. 'It seems to me that once jurisdiction is vested in a Court, in the absence of a provision of law to the contrary, that jurisdiction will not be taken away by any act of the parties. There is no allegation here that the plaint was filed in the Bareilly Court with any intention to defeat the provisions of the Code of Civil Procedure as regards the venue of suits for recovery of immovable property. If any fraud of that kind had been alleged and proved, other considerations would arise. But in this case, as I have said, no such suggestion has been made."

16. Similar view was taken in *Ramdhin and Others Vs. Thakuran Dulaiya and Others*, AIR 1952 Nag. 303 (Full Bench); *Basanta Priya Dei and Another Vs. Ramkrishna Das and Others*, AIR 1960 Ori. 159; *Laxmibai Vs. Madhankar Vinayak Kulkarni and Others*, AIR 1968 Kant. 82; *Prem Kumar and Others Vs. Dharam Pal Sehgal and Others*, AIR 1972 Delhi 90 and *Janki Devi Vs. Mannilal and Others*, AIR 1975 All. 91.

17. The views of the different High Courts as well as of the Privy Council, as noticed above, clearly indicate that Section 17 has been held to be applicable when there are more than one property situated in different districts.

18. The point to be noticed is that the permissibility of instituting suit in one Court, where properties, which are subject matter of the suit are situated in jurisdiction of different courts have been permitted with one rider, i.e., cause of action for filing the suit regarding property situated in different jurisdiction is one and the same. In a suit when the cause of action for filing the suit is different, the Courts have not upheld the jurisdiction of one Court to entertain suits pertaining to property situated in different courts. In this context, we need to refer to some judgments of High Courts as well as of the Privy Council, which has considered the issue. In *Sardar Nisar Ali Khan Vs. Mohammad Ali Khan*, AIR 1932 PC 172, Privy Council had occasion to consider the case where subject matter of the suit were several properties situated in jurisdiction of different courts. Suit was instituted in Oudh (which later became part of Uttar Pradesh). The Privy Council held that since there was different cause of actions, the same cannot be clubbed together. One of the properties, which was situated in Punjab was referred to in the suit as Khalikabad property. Although, suit with regard to the other three properties had similar cause of action but cause of action with regard to Khalikabad property being found to be different, the Court held that Section17 Civil Procedure Code was not applicable. Following was laid down in the case by the Privy Council:-

> "There remains the question of the Khalikabad estate. Here the respondent cannot succeed unless he shows that under the terms of the deed creating the wakf he is the trustee. That question depends upon the construction of the deed. It is a separate and different cause of action from these which found the proceedings in respect of the other three properties. Their Lordships are unable to find any jurisdiction for bringing the suit in respect of this property elsewhere than in the Court of the district where the property is situate. Such justification cannot in their Lordships' judgment be found in Section 17, Civil P.C. upon which the respondent relied."

19. A Two-Judge Bench judgment of Allahabad High Court has been heavily relied upon by the learned counsel for the respondent reported in AIR 1942 All. 387, *Karan Singh and Others Vs. Kunwar Sen and Others*. In the above case, suit properties were situated in Haridwar and Amritsar. Suit was filed in the Court of Civil Judge, Saharanpur. An application under Section 22, Civil P.C. was filed to determine as to whether a suit which is pending in the Court of the Civil Judge of Saharanpur should proceed in the corresponding Court having jurisdiction at Amritsar in the Punjab. The Court after noticing Section 17 held that plaintiffs were claiming two properties against two set of defendants, whom they alleged to be trespassers. The Court held that unless suit is filed on one cause of action, two properties situate in different jurisdiction cannot be clubbed. Following was laid down:-

"Having made these observations I must now return to the question whether in the suit with which we are dealing it can be said that the relief claimed against the Defendants in possession of the property at Hardwar and the Defendants in possession of the property at Amritsar arises out of the same series of acts or transactions and whether the two properties claimed can, for the purposes of Section 17, be described as a single entity. It must be admitted that there is no apparent connection between the transfer of the Amritsar property to Amar Nath under the will executed by Jwala Devi and the subsequent transfers made by him and his successors-in-interest on the one hand and the transfer made by Prem Devi of the Hardwar property on the other hand. It must be admitted also that the Plaintiffs are not claiming the estates of Badri Das as a whole against any rival claimant to the estate. They are claiming two properties against two sets of Defendants whom they allege to be trespassers and who, if they are trespassers, have absolutely no connection with each other. The only connecting link is that the Plaintiff's claim in both the properties arose at the time of the death of Prem Devi and that the claim is based on the assumption that the Defendants are in possession as the results of transfers made by limited owners who were entitled, during their lives, to the enjoyment of the whole estate and the properties comprised within it. It was held many years ago in the case of Mst. Jehan Bebee v. Saivuk Ram (1867) H.C.R. 1. 109, that unconnected transfers by a Hindu widow of properties comprised within the husband's estate did not give rise to one cause of action against the various transferees. The same rule was laid down in the case of Bindo Bibi v. Ram Chandra (1919) 17 A.L.J. 658. In that case a reference was made to the decision in Murti v. Bhola Ram (1893) 16 All 165 and it was pointed out that that was a case where a claim was made against one Defendant who had taken possession of different properties in execution of one decree. There is no doubt that that case is clearly distinguishable from the case with which we are dealing....."

20. The above judgment was subsequently relied and explained by Allahabad High Court in *Smt. Janki Devi Vs. Manni Lal and Others*, AIR 1975 All. 91. In Paragraph No.11, following was laid down:-

"11. Similar view was expressed in Smt. Kubra Jan v. Ram Bali, (1908)ILR 30 All 560 . This Full Bench decision does not appear to have been brought to the notice of the Division Bench hearing the case of Karam Singh v. Kunwar Sen AIR 1942 All 387. However, many observations made therein are not contrary to the law laid down in the above mentioned Full Bench case. The sum and substance of this Division Bench case also is that where in the facts and circumstances of the case all the properties can be treated as one entity a joint trial shall be permissible but not where they are more or less different properties with different causes of action. The material observations are as below:--

> "....and this implies, in my judgment, that the acts or transactions, where, they are different, should be so connected as to constitute a single series which could fairly be described as one entity or fact which would constitute a cause of action against all the defendants jointly. Whether this necessary condition exists in any particular case would, of course, depend upon the nature of the case but I am satisfied that this at least is necessary that the case should be such that it could be said that the Court in which the suit was instituted had local jurisdiction in the first instance to deal with the controversies arising between the plaintiffs and each of the defendants.....
>
> The property must, in the particular circumstances of the suit, be capable of being described as a single entity. Whether it can or cannot be so described will depend again upon the nature of the dispute between the parties. If there is a dispute, for instance about a single estate which both parties are claiming as a whole that estate is obviously for the purposes of that particular suit a single entity. If, on the other hand, the owner of an estate has a claim against unconnected trespassers who have trespassed upon different parts of the estate or different properties situated within it, those parts or those properties would not for the purposes of the dispute between him and the trespassers be one entity but several entities and the provisions of Section 17, would not apply"."

21. Thus, for a suit filed in a Court pertaining to properties situated in jurisdiction of more than two courts, the suit is maintainable only when suit is filed on one cause of action.

22. Justice Verma of Allahabad High Court in his concurring opinion in *Karan Singh v. Kunwar Sen* (supra) while considering Section 17 of C.P.C. has explained his views by giving illustration. Following was observed by Justice Verma:

> "I agree, Suppose a scattered Hindu dies possessed of immovable property scattered all over India at Karachi, Peshwar, Lahore, Allahabad, Patna, Dacca, Shillong, Calcutta, Madras and Bombay and is succeeded by his widow who, in the course of 40 or 50 years, transfers on different dates portions of the property situated at each of the places mentioned above, to different persons each of whom resides at the place where the property transferred to him is situated, and the transfers are wholly unconnected with, and independent of one another. Upon the widow's death the reversioner wants to challenge these various transfers. Learned counsel for the plaintiffs has argued that in such a case the reversioner is entitled to bring one suit challenging all the transfers at any one of the places mentioned above, impleading all the transferees, I find it very

> difficult to hold that such a result is contemplated by the provisions of the Code of Civil Procedure upon which reliance has been placed and which are mentioned in the judgment of my learned brother. I do not consider it necessary to pursue the matter any further. It is clear to my mind that, if the plaintiffs; argument mentioned above is accepted, startling results will follow."

23. Now, we come to submission of learned counsel for the appellant based on Section 39 sub-section (1) (c) of C.P.C. It is submitted that Section 39(1)(c) of C.P.C. is also a pointer to what is intended in Section 17. The scheme as delineated by Section 39 indicates that when a decree is passed by a Court with regard to sale or delivery of immovable property situated outside the local limits of the jurisdiction of that Court it may transfer the decree for execution to another Court. The provision clearly indicates that a decree of Court may include immovable property situate in local limits of that Court as well as property situated outside the local limits of the jurisdiction of the Court passing the decree. Section 39(1)(C) re-enforces our conclusion that as per Section 17 suit may be filed with regard to immovable property situated outside the local limit of the jurisdiction of the Court. We may, however, add that passing a decree by a Court with regard to immovable property situate outside the local jurisdiction of the Court passing the decree may not only confine to Section 17 but there may be other circumstances where such decree is passed. Section 20 of C.P.C. may be one of the circumstances where decree can be passed against the defendant whose property may situate in local jurisdiction of local limits of more than one Court.

24. We may further notice that Section 17 uses the words 'the suit may be instituted in any Court'. The use of word in Section 17 makes it permissive leaving discretion in some cases not to file one suit with regard to immovable property situated in local jurisdiction of more than one court. One of the exceptions to the rule is cases of partial partition where parties agree to keep some property joint and get partition of some of the properties.

25. The partial partition of property is well accepted principle with regard to a joint family. In Mayne's Hindu Law & Usage, 16th Edition in paragraph 485 following has been stated:

> **"485. Partition partial or total**.- Partition may be either total or partial. A partition may be partial either as regards the persons making it or the property divided.
>
> **Partial as to properties**.- It is open to the members of a joint family to severe in interest in respect to a part of the joint estate while retaining their status of a joint family and holding the rest as the properties of an undivided family. Until some positive action is taken to have partition of joint family property, it would remain joint family property."

26. Mulla on Hindu Law, 22nd Edition also refers to partial partition both in respect of the property and or in respect of the persons making it. In paragraph 327 following has been stated:

> ""**327. Partial partition**.-(1) A partition between coparceners may be partial either in respect of the property or in respect of the persons making it.
>
> After a partition is affected, if some of the properties are treated as common properties, it cannot be held that such properties continued to be joint properties, since there was a division of title, but such properties were not actually divided.
>
> (2) Partial as to property.- It is open to the members of a joint family to make a division and severance of interest in respect of a part of the joint estate, while retaining their status as a joint family and holding the rest as the properties of a joint and undivided family."

The issues arising in the present case being not related to subject of partial partition the issue need not to be dealt with any further.

27. Learned counsel for the appellant has also submitted that permitting filing of a separate suit with regard to property situate in different jurisdiction shall give rise to conflicting decision and decision in one suit may also be res judicata in another suit. We in the present case being not directly concerned with a situation where there are more than one suit or a case having conflicting opinion we need not dwell the issue any further.

28. Sections 16 and 17 of the C.P.C. are part of the one statutory scheme. Section 16 contains general principle that suits are to be instituted where subject-matter is situate whereas Section 17 engrafts an exception to the general rule as occurring in Section 16. From the foregoing discussions, we arrive at following conclusions with regard to ambit and scope of Section 17 of C.P.C.

(i) The word 'property' occurring in Section 17 although has been used in 'singular' but by virtue of Section 13 of the General Clauses Act it may also be read as 'plural', i.e., "properties".

(ii) The expression any portion of the property can be read as portion of one or more properties situated in jurisdiction of different courts and can be also read as portion of several properties situated in jurisdiction of different courts.

(iii) A suit in respect to immovable property or properties situate in jurisdiction of different courts may be instituted in any court within whose local limits of jurisdiction, any portion of the property or one or more properties may be situated.

(iv) A suit in respect to more than one property situated in jurisdiction of different courts can be instituted in a court within local limits of jurisdiction where one or more properties are situated provided suit is based on same cause of action with respect to the properties situated in jurisdiction of different courts.

29. Now, we revert to the facts of the present case and pleadings on record. The suit filed by the appellant contained three different sets of defendants with different causes of action for each set of defendants. Defendant Nos. four to six are defendants in whose favour Will dated 15.02.2000 was executed by late Smt. Vimal Vaidya. In the plaint, relief as claimed in paragraph 25(H)is the will executed by late Smt. Vimal Vaidya was sought to be declared as null and void. The second cause of action in the suit pertains to sale deed executed by late Smt. Vimal Vaidya dated 15.10.2007 executed in favour of defendant Nos.7 and 8 with regard to Bombay property. The third set of cause of action relates to transfer documents relating to Indore property which was in favour of defendant Nos.9 and 10. The transfer documents dated 21.10.1986, 21.11.1988 and 20.08.1993 are relating to Indore property. The plaint encompasses different causes of action with different set of defendants. The cause of action relating to Indore property and Bombay property were entirely different with different set of defendants. The suit filed by the plaintiff for Indore property as well as Bombay property was based on different causes of action and could not have been clubbed together. The suit as framed with regard to Bombay property was clearly not maintainable in the Indore Courts. The trial court did not commit any error in striking out the pleadings and relief pertaining to Bombay property by its order dated 17.08.2011.

30. Learned counsel for the appellant has also referred to and relied on order II Rule 2 and Order II Rule 3 C.P.C. Learned counsel submits that order II Rule 2 sub-clause (1) provides that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action. The cause of action according to Order II Rule 2 sub-clause (1) is one cause of action. What is required by Order II Rule 2 sub-clause (1) is that every suit shall include the whole of the claim on the basis of a cause of action. Order II Rule 2 cannot be read in a manner as to permit clubbing of different causes of action in a suit. Relying on Order II Rule 3 learned counsel for the appellant submits that joinder of causes of action is permissible. A perusal of sub-clause (1) of Order II Rule 3 provides that plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly. What is permissible is to unite in the same suit several causes of action against the same defendant, or the same defendants jointly. In the present case suit is not against the same defendant or the same defendants jointly. As noticed above there are different set of defendants who have different causes of actions.

31. Learned counsel has lastly submitted that defendant Nos. 7 and 8 in their application having not questioned the cause of action for which suit was filed, the submission raised on behalf of the counsel for the respondent that suit was bad for misjoinder of the causes of action cannot be allowed to be raised.

32. It is relevant to notice in the application filed by defendant Nos. 7 and 8, the heading of the application itself referred to "mis-joinder of parties and causes of action". In Para (1) of the application, it was categorically mentioned that there was mis-joinder of parties and causes of action. The trial court in its order dated 17.08.2011 has also clearly held that plaintiff has clubbed different causes of action which is to be deleted from the present suit. The trial court further held that the plaintiff is not justified in including different properties and separate cause of actions combining in single suit.

33. We, thus, are of the view that the trial court has rightly allowed the application filed by the defendant Nos.7 and 8. The High court did not commit any error in dismissing the writ petition filed by the appellant challenging the order of the trial court.

34. We do not find any merit in this appeal, the appeal is dismissed accordingly.

Appeal dismissed.

I.L.R. [2019] M.P. 1195 (SC)
SUPREME COURT OF INDIA
Before Mr. Justice Dr. Dhananjaya Y. Chandrachud &
Mr. Justice Hemant Gupta
Cr.A. No. 208/2019 decided on 8 February, 2019

STATE OF M.P. …Appellant

Vs.

VIKRAM DAS …Respondent

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), Section 3(1)(xi) and Constitution – Article 142 – Quantum of Punishment – Minimum Sentence **– Held – Where minimum sentence is provided for an offence, Court cannot impose less than the minimum sentence – Provisions of Article 142 of Constitution cannot be restored to impose sentence less than the minimum sentence contemplated by Statute – Appeal allowed. (Para 8 & 9)**

अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 3(1)(xi) एवं संविधान – अनुच्छेद 142 – दंड की मात्रा – न्यूनतम दण्डादेश – अभिनिर्धारित – जहां एक अपराध के लिए न्यूनतम दण्डादेश उपबंधित है, न्यायालय न्यूनतम दण्डादेश से कम अधिरोपित नहीं कर सकता – कानून द्वारा अनुध्यात न्यूनतम दण्डादेश से कम दण्डादेश अधिरोपित करने के लिए संविधान के अनुच्छेद 142 के उपबंधों का अवलंब नहीं लिया जा सकता – अपील मंजूर।

Cases referred:

(2012) 7 SCC 80, (1997) 8 SCC 713, (2004) 4 SCC 590, (1979) 2 SCC 279, (2017) 2 SCC 198, (1974) 4 SCC 222.

J U D G M E N T

The Judgment of the Court was delivered by : **HEMANT GUPTA, J.**:- The State is in appeal challenging the Order dated 08.05.2012 passed by the High Court of Judicature of Madhya Pradesh at Jabalpur, sentencing the respondent for an offence under Section 3(1)(xi) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989[1] to the sentence already undergone, but enhancing the fine from Rs. 500/- to Rs. 3000/-.

2. The aforesaid Order of the High Court was passed in appeal filed by the respondent herein against the Order dated 12.03.2007 passed by the trial court whereby the respondent was convicted for the offence under Section 3(1)(xi) of the Act and was sentenced to undergo rigorous imprisonment for six months with fine of Rs. 500/-.

3. In appeal, the High Court has recorded the statement of the counsel for the respondent that he does not wish to press the appeal on merit and confines his argument to the sentence part only. It was on such statement; the appeal was disposed of. The relevant extract from the order of the High Court reads as under:-

> "(2) Learned counsel for the appellant, at the outset, submitted that he does not wish to press the appeal on merit and confine his arguments to the sentence Part only. He has challenged only quantum of punishment. He has submitted that, appellant has deposited the fine amount of Rs. 500/- and has been undergone sentence for 11 days during the course of trial.....
>
> (5) Accordingly, the appeal filed by the appellant is partly allowed. The order of conviction passed against the appellant is maintained. However, the sentence of six months R.I. awarded to the appellant is modified to the extent of sentence already undergone by him. His jail sentence is hereby set aside. The fine of Rs. 500/- imposed by the trial court is hereby enhanced to Rs. 3,000/- (Rs. Three Thousand only)....."

[1] The Act

4. Section 3(1) of the Act provides for a punishment for a term which shall not be less than six months but which may extend to five years and with fine. Therefore, the only question is whether the High Court could award sentence less than the minimum sentence contemplated by the Statute. The relevant Section 3(1)(xi), as it existed prior to amendment by Central Act No. 1 of 2016, reads as under:-

> "3. Punishments for offences of atrocities.- (1) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe, --
>
> .....
>
> (xi) assaults or uses force to any woman belonging to a Scheduled Caste or a Scheduled Tribe with intent to dishonour or outrage her modesty;
>
> .....
>
> Shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to five years and with fine."

5. Learned counsel for the appellant relies upon judgment of this Court in *Narendra Champaklal Trivedi v. State of Gujarat*[2] wherein an argument raised by the appellant was rejected that sentence less than minimum sentence can be awarded in exercise of the powers conferred under Article 142 of the Constitution. The Court held as under:-

> "27. The submission of the learned counsel for the appellants, if we correctly understand, in essence, is that the power under Article 142 of the Constitution should be invoked. In this context, we may refer with profit to the decision of this Court in *Vishweshwaraiah Iron & Steel Ltd. v. Abdul Gani*[3] wherein it has been held that the constitutional powers under Article 142 of the Constitution cannot, in any way, be controlled by any statutory provision but at the same time, these powers are not meant to be exercised when their exercise may come directly in conflict with what has been expressly provided for in any statute dealing expressly with the subject. It was also made clear in the said decision that this Court cannot altogether ignore the substantive provisions of a statute.
>
> xxx xxx xxx

[2](2012) 7 SCC 80
[3](1997) 8 SCC 713

> 30. In view of the aforesaid pronouncement of law, where the minimum sentence is provided, we think it would not be at all appropriate to exercise jurisdiction under Article 142 of the Constitution of India to reduce the sentence on the ground of the so-called mitigating factors as that would tantamount to supplanting statutory mandate and further it would amount to ignoring the substantive statutory provision that prescribes minimum sentence for a criminal act relating to demand and acceptance of bribe. The amount may be small but to curb and repress this kind of proclivity the legislature has prescribed the minimum sentence. It should be paramountly borne in mind that corruption at any level does not deserve either sympathy or leniency. In fact, reduction of the sentence would be adding a premium. The law does not so countenance and, rightly so, because corruption corrodes the spine of a nation and in the ultimate eventuality makes the economy sterile."

6. In *State v. Ratan Lal Arora*[4], this Court was considering the grant of benefit of Probation of the Offenders Act, 1958[5] to a convict of the offences under Prevention of Corruption Act, 1988[6]. It was held that in cases where an enactment enacted after the Probation Act prescribes minimum sentence of imprisonment, the provisions of the Probation Act cannot be invoked. The Court held as under:-

> "12. That apart, Section 7 as well as Section 13 of the Act provide for a minimum sentence of six months and one year respectively in addition to the maximum sentences as well as imposition of fine. Section 28 further stipulates that the provisions of the Act shall be in addition to and not in derogation of any other law for the time being in force. In the case of *Supdt., Central Excise v. Bahubali*[7] while dealing with Rule 126-P(2)(*ii*) of the Defence of India Rules which prescribed a minimum sentence and Section 43 of the Defence of India Act, 1962 almost similar to the purport enshrined in Section 28 of the Act in the context of a claim for granting relief under the Probation Act, this Court observed that in cases where a specific enactment enacted after the Probation Act prescribes a minimum sentence of imprisonment, the provisions of the Probation Act cannot be invoked if the special Act contains any provision to enforce the same without reference to any other Act containing a provision, in derogation of the special enactment, there is no scope for extending the benefit of the Probation Act to the accused....." "

---

[4](2004) 4 SCC 590
[5]Probation Act
[6]Corruption Act
[7](1979) 2 SCC 279

7. In the case of *Mohd. Hashim v. State of Uttar Pradesh and Others*[8], the question examined was in relation to minimum sentence provided for an offence under Section 4 of the Dowry Prohibition Act, 1961[9], providing for minimum sentence of six months. It was held that benefit of the Probation Act cannot be extended where minimum sentence is provided. The Court held as under:-

> "19. The learned counsel would submit that the legislature has stipulated for imposition of sentence of imprisonment for a term which shall not be less than six months and the proviso only states that sentence can be reduced for a term of less than six months and, therefore, it has to be construed as minimum sentence. The said submission does not impress us in view of the authorities in *Arvind Mohan Sinha*[10] and *Ratan Lal Arora*[11]. We may further elaborate that when the legislature has prescribed minimum sentence without discretion, the same cannot be reduced by the courts. In such cases, imposition of minimum sentence, be it imprisonment or fine, is mandatory and leaves no discretion to the court. However, sometimes the legislation prescribes a minimum sentence but grants discretion and the courts, for reasons to be recorded in writing, may award a lower sentence or not award a sentence of imprisonment. Such discretion includes the discretion not to send the accused to prison. Minimum sentence means a sentence which must be imposed without leaving any discretion to the court. It means a quantum of punishment which cannot be reduced below the period fixed. If the sentence can be reduced to nil, then the statute does not prescribe a minimum sentence. A provision that gives discretion to the court not to award minimum sentence cannot be equated with a provision which prescribes minimum sentence. The two provisions, therefore, are not identical and have different implications, which should be recognised and accepted for the PO Act.
>
> XXX XXX XXX
>
> 24. At this juncture, the learned counsel for the respondents would submit that no arguments on merits were advanced before the appellate court except seeking release under the PO Act. We have made it clear that there is no minimum sentence, and hence, the provisions of the PO Act would apply. We have also opined that the court has to be guided by the provisions of the PO Act and the precedents of this Court. Regard being had to the facts and circumstances in entirety, we are also inclined to accept the submission of the learned counsel for the respondents that it will be open for them to raise all points before the appellate court on merits including seeking release under the PO Act."

---

[8](2017) 2 SCC 198
[9]Act of 1961
[10](1974) 4 SCC 222
[11](2004) 4 SCC 590

8. In view of aforesaid judgments that where minimum sentence is provided for, the Court cannot impose less than the minimum sentence. It is also held that provisions of Article 142 of the Constitution cannot be resorted to impose sentence less than the minimum sentence.

9. The conviction has not been disputed by the respondent before the High Court as the quantum of punishment alone was disputed. Thus, the High Court could not award sentence less than the minimum sentence contemplated by the Statute in view of the judgments referred to above.

10. Therefore, the present appeal is allowed. The order passed by the High Court is set aside. The respondent shall undergo the remaining sentence imposed by the trial court for an offence under Section 3(1)(xi) of the Act. The respondent shall surrender before the Court within four weeks.

Appeal allowed.

I.L.R. [2019] M.P. 1200 (SC)
SUPREME COURT OF INDIA

Before Ms. Justice R. Banumathi & Mr. Justice R. Subhash Reddy

Cr.A. No. 1115/2010 decided on 19 February, 2019

BALVIR SINGH …Appellant

Vs.

STATE OF M.P. …Respondent

(Alongwith Cr.A. Nos. 1116/2010 & 1119/2010)

A. Penal Code (45 of 1860), Section 302 & 341 r/w 34 and Arms Act (54 of 1959), Section 25(1A) & 27 – Eye Witnesses & Medical Evidence – Minor Contradictions **– Held – Alleged inconsistencies between evidence of eye witnesses and medical evidence are minor contradictions – Consistent version of eye witnesses cannot be decided/doubted on touchstone of medical evidence – Oral evidence has to get primacy since medical evidence is basically opinionative – Further, when case is based on eye witnesses, indecisive opinion given by experts (FSL Report) regarding arms, would not effect prosecution case – Conviction of A-1 affirmed. (Paras 25 to 27 & 30)**

क. दण्ड संहिता (1860 का 45), धारा 302 व 341 सहपठित धारा 34 एवं आयुध अधिनियम (1959 का 54), धारा 25(1ए) व 27 – चक्षुदर्शी साक्षीगण व चिकित्सीय साक्ष्य – मामूली विरोधाभास – अभिनिर्धारित – चक्षुदर्शी साक्षीगण के साक्ष्य तथा चिकित्सीय साक्ष्य के मध्य अभिकथित असंगतियाँ मामूली विरोधाभास हैं – चक्षुदर्शी साक्षीगण के संगत कथन पर चिकित्सीय साक्ष्य की कसौटी पर विनिश्चय/संदेह नहीं किया जा सकता है – मौखिक साक्ष्य को प्रधानता प्राप्त करना होती है क्योंकि चिकित्सीय साक्ष्य मूल रूप से अभिमत की अभिव्यक्ति होता है – इसके अतिरिक्त, जब प्रकरण चक्षुदर्शी

साक्षीगण पर आधारित है, आयुधों के संबंध में विशेषज्ञों द्वारा दी गई अनिर्णायक राय (एफ. एस.एल. प्रतिवेदन), अभियोजन प्रकरण को प्रभावित नहीं करेगी – ए–1 की दोषसिद्धि अभिपुष्ट।

***B. Penal Code (45 of 1860), Section 302 & 341 r/w 34 – Common Intention – Conduct of Accused* – Held – Regarding money transactions, previous enmity between A-1 and deceased and 2-3 days prior to incident there was arguments and quarrel between them – During incident, A-2 and A-3 only alleged to caught hold of deceased – They have not attacked the deceased – Inference of common intention is to be drawn from conduct of accused – No evidence by prosecution that there was prior meeting of minds and that A-2 and A-3 were having knowledge that their brother A-1 was armed with Katta and would be committing murder of deceased – Conviction of A-2 and A-3 u/S 302/34 & 341 IPC is set aside. (Paras 37 to 39)**

ख. दण्ड संहिता (1860 का 45), धारा 302 व 341 सहपठित धारा 34 – सामान्य आशय – अभियुक्त का आचरण – अभिनिर्धारित – धन संव्यवहारों के संबंध में ए–1 और मृतक में पूर्व वैमनस्यता थी तथा घटना के 2–3 दिन पहले उनके मध्य बहस और झगड़ा हुआ था – घटना के दौरान, ए–2 और ए–3 पर मृतक को केवल पकड़े रखने का अभिकथन – उन्होंने मृतक पर हमला नहीं किया – सामान्य आशय का निष्कर्ष अभियुक्त के आचरण से निकाला जाना है – अभियोजन द्वारा कोई साक्ष्य नहीं कि मस्तिष्कों का पूर्व मेल था तथा यह कि ए–2 और ए–3 को यह ज्ञान था कि उनका भाई ए–1 कट्टा लिये हुए था तथा मृतक की हत्या कारित करेगा – भारतीय दंड संहिता की धारा 302/34 व 341 के अंतर्गत ए–2 और ए–3 की दोषसिद्धि अपास्त।

***C. Criminal Practice – Eye Witnesses – Discrepancies* – Held – Power of observation differs from person to person witnessing an attack – While the prime event of attack and weapon are observed by a person, other minute details of number of blows, the distance from which fire was shot might go unnoticed – Truthfulness of evidence of eye witnesses cannot be doubted on ground of minor contradictions and discrepancies.**

(Para 14 & 16)

ग. दाण्डिक पद्धति – चक्षुदर्शी साक्षीगण – विसंगतियाँ – अभिनिर्धारित – अवलोकन की शक्ति, हमले के साक्षी एक व्यक्ति से दूसरे व्यक्ति में भिन्न होती है – जिस समय हमले की मुख्य घटना और शस्त्र का एक व्यक्ति द्वारा अवलोकन किया गया, वार की संख्या, दूरी जिससे गोली चलाई गई थी, जैसे अन्य बारीक विवरण पर शायद ध्यान नहीं गया हो – चक्षुदर्शी साक्षीगण के साक्ष्य की सत्यता पर मामूली विरोधाभासों और विसंगतियों के आधार पर संदेह नहीं किया जा सकता।

Cases referred:

1988 Supp SCC 241, (2009) 12 SCC 546, (1999) 8 SCC 649, (2017) 14 SCC 614, (2003) 12 SCC 606, (1988) 4 SCC 302, (2004) 11 SCC 305, (2016) 15 SCC 471, (1996) 10 SCC 79.

J U D G M E N T

The Judgment of the Court was delivered by:-

R. BANUMATHI, J.:- These appeals arise out of the judgment dated 26.08.2008 passed by the High Court of Judicature at Madhya Pradesh at Jabalpur in and by which the High Court affirmed the conviction of the appellants (Accused No.1 to 4) under Sections 341, 302 and 302 read with 34 IPC and the sentence of imprisonment for life imposed upon each of the accused. The High Court also affirmed the conviction of the appellant/accused Harnam Singh under Section 25(1A) read with Section 27 of the Arms Act and the sentence of three years rigorous imprisonment imposed upon him.

2. Briefly stated case of the prosecution is that on 11.03.1998 at about 05.30 PM, Mohan Mehtar belonging to Scheduled Caste was going on motor cycle along with Santosh Rai (PW-2) and Kamal @ Kamlesh (PW-13) to Railway Colony. When they reached near Advocate Mishra's lane, accused Harnam Singh, Balvir Singh, Bhav Singh and Bharat Thakur stopped the motor cycle driven by Santosh Rai (PW-2). Accused Harnam Singh asked Mohan Mehtar to come down as they wanted to talk with him. When Mohan Mehtar came down from motorcycle, accused Bharat Thakur attacked Mohan with *lathi* on his back. When Mohan Mehtar ran towards Advocate Mishra's lane to save himself, he was caught hold by accused Balvir Singh and Bhav Singh and at that time, accused Harnam Singh fired with the country made pistol on the face of Mohan from very close distance and the bullet hit the brain and cornea of the left eye and Mohan died instantaneously on the spot. The incident was witnessed by Santosh Rai (PW-2), Devendra Rai (PW-3) and Kamal @ Kamlesh (PW-13) and others.

3. Informant Santosh (PW-2) lodged the complaint before the Police Station Bina on the basis of which FIR No.114/98 was lodged on 11.03.1998 at 06.00 PM against the appellants for the offence punishable under Sections 341, 294, 323, 302, 506B, 34 IPC and under Section 3(2)(V) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act. Dr. P.K. Jain (PW-9) conducted the post-mortem of deceased Mohan Mehtar and opined that the death was due to gun-shot injury. The bullet hit the brain and cornea of left eye and remaining portion was completely missing. Gun powder was also found present in the eyes. Dr. Jain (PW-9) opined that death was caused due to brain centre present in the skull damaged due to the injuries sustained from the above cartridge which stopped the heart and respiration.

4. The accused persons were arrested and on the basis of their disclosure statement recorded under Section 27 of the Evidence Act, country made pistol of 0.315 bore was seized from the bottom shelf of the almirah in the house of accused Harnam Singh. The blood-stained clothes of Harnam Singh were also recovered. The seized pistol was sent to Forensic Science Laboratory, Sagar. Upon

examination of the weapon, the pistol was found to be in operative condition. The damaged copper cartridge which was recovered from the body of the deceased did not have barrel marks. The ballistic expert therefore opined that the barrel marks were not sufficient for decisive matching. Upon completion of investigation, charge sheet was filed against the accused for the offences punishable under Sections 147, 148, 149, 341, 294, 323, 506B, 302 IPC and under Section 25 read with Section 27 of the Arms Act and under Section 3(2)(V) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act in the court of Special Judge, Sagar, M.P.

5. To bring home the guilt of the accused, prosecution has examined fourteen witnesses and marked number of documents. On the side of the accused, Babu Lal (DW-1) was examined who had stated that the occurrence took place at 03:30 PM on 11.03.1998 and he had not seen any of the accused on the spot at the relevant point of time. All the accused were questioned under Section 313 Cr.P.C. about the incriminating evidence and circumstances and the accused denied all of them stating that a false case has been filed against them.

6. Upon consideration of oral and documentary evidence, the trial court convicted the accused and sentenced them to undergo imprisonment as under:-

Accused	Conviction	Sentence
Harnam Singh (A1)	Section 341 IPC Section 302 IPC Section 25(1A)/27 of Arms Act	R.I. for one month Life imprisonment with fine of Rs.1,000/- R.I for three years with fine of Rs.1,000/-
Balvir (A2) Bhav Singh (A3) Bharat Singh (A5)	Section 341 IPC Section 302/34 IPC	One month R.I. Life imprisonment with fine of Rs.1,000/- each

The accused were acquitted of the charge under Sections 147, 148, 506B IPC and Section 3(2)(V) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act. The trial court acquitted accused Suraj from all the charges. Being aggrieved, the appellants have preferred appeal before the High Court which came to be dismissed by the impugned judgment. Being aggrieved, the appellants are before us. Accused Bharat Singh have not preferred any appeal before us.

7. The learned counsel for the appellants *inter alia* submitted that it is a case of blind murder and that the FIR is ante dated as it contains the Inquest No.10/98 and the eye witnesses were introduced in the FIR which suffers from manipulations. It was submitted that the medical evidence is completely contrary to the evidence adduced by eye witnesses on two counts namely:- (i) number of

weapons used and the injuries; and (ii) distance from which the shot was fired. It was urged that as per the FSL Report, there was no sufficient barrel marks in the cartridge for decisive matching with the pistol allegedly recovered from the appellant Harnam Singh and this raises serious doubts about the occurrence and the involvement of appellant Harnam Singh. It was further submitted that as per the evidence of Babu Lal (DW-1), the incident took place at 03.30 PM and it was a blind murder and the High Court and the trial court failed to take into consideration the evidence of Babu Lal (DW-1). The learned counsel appearing for the appellants Balvir Singh and Bhav Singh urged that the eye witnesses PWs 2, 3 and 13 are not reliable witnesses and the courts below erred in invoking Section 34 IPC for convicting appellants Balvir Singh and Bhav Singh under Section 302 IPC read with Section 34 IPC.

8. Taking us through the impugned judgment and other materials on record, the learned counsel appearing for the State submitted that the conviction of the appellants is based upon the evidence of eye witnesses Santosh Rai (PW-2), Devendra Rai (PW-3) and Kamal (PW-13) which is corroborated by the medical evidence and FSL Report and the conviction of the appellants-accused does not warrant any interference.

9. We have carefully considered the submissions of the learned counsel for the appellants and the State and perused the impugned judgment and the evidence and materials on record.

10. Santosh Rai (PW-2) and Kamal (PW-13) who were going along with deceased Mohan on the motor cycle, are the eye witnesses. The prosecution has also examined Devendra Rai (PW-3) as another eye witness. In his evidence, PW-2 stated that on 11.03.1998 at 05.30 PM, he was riding the motor cycle and deceased Mohan and Kamal (PW-13) were with him on the motor cycle. PW-2 had stated that on being stopped by appellant Harnam Singh, Mohan got down from the motor cycle and accused Bharat gave him a blow of *lathi* on his back. After the deceased was so attacked with blow of *lathi*, there was scuffle and the deceased ran away towards Advocate Mishra's lane to save himself. PW-2 further stated that at that time appellant Harnam Singh exhorted to catch hold of Mohan and accused Balvir (A2) and Bhav Singh (A3) caught hold of Mohan. Appellant Harnam Singh went close to Mohan and shot him on his face with his country made pistol. PW-13 who was sitting behind Mohan on the motor cycle has also clearly spoken about the occurrence and thus corroborated the evidence of PW-2.

11. Devendra Rai (PW-3) had also corroborated the evidence of PW-2 that he saw the motor cycle being stopped by appellant Harnam Singh and that he took Mohan towards the street. PW-3 stated that when Mohan got down, first blow of *lathi* was hit at his waist by accused Bharat and when Mohan ran towards the street, on being exhorted by Harnam Singh, accused Balvir Singh and Bhav Singh

caught hold of Mohan and appellant Harnam Singh fired at the face of Mohan from country made pistol. PW-3 had spoken about the presence of PW-2 and PW-13 at the scene of occurrence along with deceased Mohan.

12. Case of prosecution is assailed on the ground that it was a blind murder and that there were actually no eye witness and the eye witnesses were introduced in the FIR which was prepared subsequently. There is no merit in the contention that there were no eye witnesses for the occurrence and that it was a blind murder. Santosh Rai (PW-2) and Kamal (PW-13) have explained as to how they happened to be with deceased Mohan by going along with him on the motor cycle. Likewise, PW-3 has also stated that at about 05.00 PM-06.00 PM, he had gone to the Jhansi Gate which is on the other side of the railway line and at that time, he saw PW-2, PW-13 and Mohan coming on the motor cycle. The presence of all the three witnesses as spoken by them is natural and both the courts below held that their evidence inspires confidence. It is pertinent to note that the FIR registered at 06.00 PM on 11.03.1998 also contains the names of PW-2, PW-3 and PW-13.

13. PWs 2, 3 and 13 had given a consistent and clear account of the incident. All the three eye witnesses have attributed specific overt act of beating the deceased with *lathi* to accused Bharat Singh, specific overt act of chasing the deceased and holding him by accused No.2-Balvir Singh and accused No.3-Bhav Singh and the specific overt act of firing at the deceased to accused No.1-Harnam Singh. Upon consideration of the evidence of eye witnesses PWs 2, 3 and 13, the trial court found that the evidence of the eye witnesses is credible and trustworthy.

14. Contention of the appellants is that the occurrence was a blind murder and testimony of the eye witnesses PWs 2, 3 and 13 are not reliable as the same suffers from material contradictions and inconsistencies. The alleged contradictions in the testimony of the eye witnesses that are being urged by the appellants are trivial i.e. with respect to the number of blows given to the deceased with *lathi* by accused Bharat Singh, part of the body where the bullet was shot and the distance from where Harnam Singh fired at Mohan etc. Such contradictions pointed out in the evidence of the three eye witnesses are minor which do not affect the core of the prosecution case. The discrepancies pointed out in the evidence of eye witnesses regarding the number of blows, the distance between appellant Harnam Singh and deceased Mohan and the part of the body of deceased where the bullet hit are may be due to normal errors of observation narrating the occurrence, which they have witnessed. The power of observation differs from person to person witnessing an attack. While the prime event of attack and the weapon are observed by a person, other minute details of number of blows, the distance from which the fire was shot might go unnoticed. So long as the evidence of eye witnesses is found credible and trustworthy, their evidence cannot be doubted on the ground of minor contradictions.

15. It is fairly well settled that the minor discrepancies in the evidence of the eye-witnesses do not shake their trustworthiness. In *Appabhai and Another v. State of Gujarat* 1988 Supp SCC 241, the Supreme Court held as under:-

> "13. ..... The discrepancies which do not shake the basic version of the prosecution case may be discarded. The discrepancies which are due to normal errors of perception or observation should not be given importance. The errors due to lapse of memory may be given due allowance. The court by calling into aid its vast experience of men and matters in different cases must evaluate the entire material on record by excluding the exaggerated version given by any witness. When a doubt arises in respect of certain facts alleged by such witness, the proper course is to ignore that fact only unless it goes into the root of the matter so as to demolish the entire prosecution story. The witnesses nowadays go on adding embellishments to their version perhaps for the fear of their testimony being rejected by the court. The courts, however, should not disbelieve the evidence of such witnesses altogether if they are otherwise trustworthy .....".

16. The well-settled principle that minor discrepancies in the oral testimony of the witnesses do not affect the trustworthiness of the witnesses, has been reiterated in *Annareddy Sambasiva Reddy and Others v. State of Andhra Pradesh* (2009) 12 SCC 546 and *Rammi alias Rameshwar v. State of M.P.* (1999) 8 SCC 649. In the present case, the contradictions pointed out in the evidence of Santosh Rai (PW-2), Devendra Rai (PW-3) and Kamal (PW-13) are only normal discrepancies which are due to normal errors of observation which, in our view, do not affect the trustworthiness of these witnesses.

17. Credibility of Devendra Rai (PW-3) is assailed on the ground that he is involved in about 10-15 criminal cases including a murder case. During his cross-examination, a suggestion was put to him that accused No.2-Balvir Singh had given testimony against PW-3 and he has enmity towards Balvir Singh and his family and therefore, he is falsely deposing against the accused Nos.1 to 3 who are real brothers. It was also suggested to PW-3 that his father has registered a case against accused Harnam Singh and Balvir Singh and that they were acquitted in the said case about which PW-3 denied having any knowledge. PW-3 has denied being involved in any criminal case; however, he has admitted that proceedings under Section 110 Cr.P.C. were initiated against him. Testimony of PW-3 cannot be doubted on the ground that he is involved in criminal cases or that he is inimical towards Balvir Singh and Harnam Singh. It is pertinent to note that name of PW-3 has been mentioned even in the FIR that he had gone with deceased Mohan on the motor cycle. The antecedents of the prosecution witnesses cannot be the ground for doubting their version. This is all the more so, when the courts below have recorded concurrent findings of fact holding that the testimony of the witnesses is credible and acceptable.

18. **Re: Contention - Mention of Inquest Number in the FIR** The learned counsel appearing for appellant Harnam Singh has drawn our attention to the FIR - Column No.11, Inquest Report - Case No.10/98 and contended that the FIR contains the Inquest No.10/98 whereas the number of FIR has not been mentioned in the Inquest Report. It was urged that the very mention of Inquest Number in the FIR and non-mentioning of FIR Number in the Inquest Report raises serious doubt about the time and the manner of occurrence as alleged by the prosecution. Refuting the said contention, the learned counsel appearing for the State submitted that the FIR which gives an option to mention inquest number as against that column in the printed form, inquest number was handwritten and it cannot be said that the FIR was registered subsequent to the inquest.

19. FIR is a printed format which contains Column No.11 - "Inquest Report". Column No.11 of the FIR, of course, contains the Inquest No.10/98. Merely because the FIR contains inquest number, it cannot be said that the FIR was registered subsequent to the inquest. In *State of Uttar Pradesh v. Ram Kumar and others* (2017) 14 SCC 614, the Supreme Court held that *"the mere fact that on the inquest report FIR No. was written by different ink cannot be the basis for observing that the FIR was ante-timed or ante-dated"*. On being questioned, Investigating Officer S.D. Khan (PW-14) has stated that he has registered the Inquest Report 10/98 with regard to the death of deceased Mohan under Section 174 Cr.P.C. As seen from the evidence of PW-2, after the occurrence, dead body of Mohan was lying twenty yards away from the road and he went to the police station to lodge the complaint via Lallu fourway and Sarvodya fourway. The inquest being done at the spot and FIR being registered at the Police Station under Sections 302, 506B, 341, 294, 323, 34 IPC and Section 3(2)(V) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, mention of inquest number in the FIR does not affect the prosecution case nor does it affect the credibility of the eye witnesses.

20. **Delay in FIR** - For the occurrence on 11.03.1998 at 05.30 PM, FIR No.114/98 was registered on the same day at 06.00 PM. As per the evidence of Constable Radhey Shyam (PW-10), FIR was handed over before the Court of JMFC, Bina on 12.03.1998. So far as the contention regarding delay in receipt of the FIR in the court, the trial court held that not sending the FIR immediately to the Court after its registration, cannot be put against the prosecution case since after 05.30 PM, the court timing gets over and in these circumstances, production of FIR before the Court on the next day during the court timings does not indicate that the FIR is ante dated. The case of prosecution, in our view, cannot be doubted on the ground of delay in receipt of the FIR in the court.

21. **Re: Contention - Inconsistency between the Medical Evidence and Oral Evidence** - In his evidence, PW-2 has stated that Harnam Singh fired shot at Mohan's face and PWs 3 and 13 stated that Harnam Singh fired at the left eye of

Mohan. As pointed out earlier, in his evidence, Dr. P.K. Jain (PW-9) stated that the cornea and remaining part of the left eye was completely missing and a bullet was found near the cerebellum. Gun powder was found present in the eyes of the deceased. PW-9 opined that the cause of death was due to damage of brain centre present in the skull due to injuries caused by the cartridge which resulted in stoppage of heart beat and respiration. As per the opinion of Dr. Jain (PW-9), death was caused mainly due to bullet hit in the brain. On being questioned, PW-9 stated that the fire was from a close distance as seen from the presence of gun powder in the left eye of the deceased. Dr. Jain has opined that since there were marks of gunshot around the left eye, the shot must have been fired from very close distance of about one foot.

22. Contention of the appellant is that PW-2 in his evidence stated that Harnam Singh was about 1-2 yards away from deceased Mohan at the time when the bullet was fired. It was therefore contended that the contradictions regarding the distance from which the accused Harnam Singh fired at Mohan raises serious doubts about the prosecution case.

23. Of course, PW-2 has stated that when Harnam Singh fired, he was at a distance of 1-2 yards away from Mohan; but PWs 3 and 13 have clearly stated that the deceased was held by appellants Balvir Singh and Bhav Singh and Harnam Singh fired at the deceased from a close distance. As pointed out earlier, accused Balvir Singh and Bhav Singh were said to be holding the hands of the deceased and it is possible that the gun shot hit at the eyes of Mohan. All three eye witnesses have consistently stated that Harnam Singh fired the gunshot at the face of Mohan. The variation in the evidence of PW-2 as to the distance from which the bullet was fired cannot be said to be fatal affecting the prosecution case.

24. It has been urged by the learned counsel for the appellant Harnam Singh that the doctor who conducted the post-mortem had not marked the track of the bullet in his report. It was submitted that when the deceased was shot, the position of his face was upwards and when the face is up, it is doubtful that Harnam Singh could have fired at the eyes of the deceased. As pointed out by the trial court, during the course of scuffle and when the deceased was running away to save himself, the position of the face of deceased cannot be ascertained as being upwards or not so as to doubt the prosecution version that the gunshot hit at the left eye of Mohan. The above contention advanced on the basis of the opinion of the doctor cannot affect the oral evidence of the eye witnesses.

25. Apart from the gunshot injuries which caused the death, there were nine other injuries found on the body of deceased Mohan. Mohan sustained bruise on the left arm, left side of the chest; contusion and lacerated wound in the middle of the head and incised wound on the left side of the chin. Dr. Jain (PW-9) opined that the injuries sustained by the deceased on his back and arms were of different

shapes and therefore, there is a possibility that they must have been caused by different weapons. In an attack on the person, the nature of injuries sustained depends upon the manner of attack and how the person was positioned and the resistance offered by him. Mohan was indiscriminately attacked by accused Bharat Singh with *lathi* and there is possibility of the deceased sustaining injuries of different shapes. Merely because deceased Mohan sustained injuries of different shapes, on the opinionative medical evidence, the consistent evidence of eye witnesses cannot be doubted.

26. It is well settled that the oral evidence has to get primacy since medical evidence is basically opinionative. In *Ramanand Yadav v. Prabhu Nath Jha and others* (2003) 12 SCC 606, the Supreme Court held as under:-

> "**17**. So far as the alleged variance between medical evidence and ocular evidence is concerned, it is trite law that oral evidence has to get primacy and medical evidence is basically opinionative. It is only when the medical evidence specifically rules out the injury as is claimed to have been inflicted as per the oral testimony, then only in a given case the court has to draw adverse inference."

The same principle was reiterated in *State of U.P. v. Krishna Gopal and another* (1988) 4 SCC 302, where the Supreme Court held "that *eyewitnesses' account would require a careful independent assessment and evaluation for their credibility which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touchstone for the test of such credibility.*"

27. The inconsistencies pointed out in the evidence of eye- witnesses *inter se* and the alleged inconsistencies between the evidence of eye-witnesses and that of the medical evidence are minor contradictions and they do not shake the prosecution case. The evidence of eye witnesses are the eyes and ears of justice. The consistent version of PWs 2, 3 and 13 cannot be decided on the touchstone of medical evidence.

28. **Recovery of pistol and FSL report** - Based on the confessional statement of appellant-Harman Singh, a country made pistol (Article 'A') was recovered from the bottom shelf of the almirah in the house of appellant-Harman Singh. Recovery of country made pistol from the house of appellant-Harman Singh is proved by the evidence of IO S.D. Khan (PW-14).

29. Ext.-P30 is the FSL report as per which the pistol (Article 'A') is a country made pistol which was found to be in operative condition and the testing was successfully done. The bullet recovered from the body of deceased Mohan was marked as EB1. In the FSL report, expert opined that the barrel marks found on the cartridge were not sufficient for decisive matching. The FSL report reads as under:-

> "Exhibit A1 is one Country Made Pistol, which is made to fire 0.315" bore Cartridge. It is in working condition. It's Barrel is found to have remnants of firing. It is not possible to say with scientific certainty the last time this was fired. It can be fired to cause injury likely to cause death.
>
> Exhibit EB1 is one 0.315" bore cartridge like bullet. It is copper jacketed/of soft point and is partially damaged. It does not have marks of regular firing. It has barrel marks which are not sufficient. Thus in absence of matching it is not possible to say whether this is fired from Exhibit A1 or any other similar pistol like Exhibit A1." **[underlining added]**

From the FSL report (Ext.-P30), it is made clear that the pistol recovered from accused Harnam Singh was in working condition and that the fatal injuries could be caused from using the said country made pistol (Article 'A') recovered from appellant-Harman Singh.

30. Learned counsel appearing for the appellant-Harnam Singh submitted that as per the FSL report, the experts could not give a definite opinion that whether the bullet has been fired from the country made pistol recovered from appellant-Harman Singh or any other similar pistol like the said pistol. It was therefore, submitted that the prosecution has failed to prove that the recovered bullet from the body of deceased has been fired from the pistol (Article 'A') and therefore, the overt-act of firing cannot be attributed to appellant-Harnam Singh. In the FSL report, it is stated that bullet was "*a fired and partially damaged Copper Cartridge/Soft Point Bullet with blood like substance on the same"*. The FSL report further states that the cartridge does not have marks of regular rifling and the barrel marks found are not sufficient for decisive matching. All that the FSL report states is that the barrel marks are not sufficient to give decisive matching. When the case of the prosecution is based on the eye-witnesses, the indecisive opinion given by the experts would not affect the prosecution case.

31. The next point falling for consideration is whether the trial court and the High Court were right in convicting the accused Nos.2 and 3 under Section 302 IPC read with Section 34 IPC that they have acted in furtherance of common intention in committing the murder of Mohan.

32. **Common intention of Accused Nos.2 and 3**:- As discussed earlier, eye witnesses PWs 2, 3 and 13 have consistently stated that on being attacked by accused Bharat with *lathi* on the back, when deceased Mohan ran towards the street, accused No.2-Balvir Singh and accused No.3-Bhav Singh ran after him and said to have caught hold of Mohan and at that time, Harnam Singh fired from the country made pistol on the face of Mohan. Case of the prosecution is that accused Nos.2 and 3 were present along with Harnam Singh and accused Bharat

who were armed with pistol and *lathi* respectively. The appellants Balvir Singh and Bhav Singh were unarmed and when Mohan ran towards the street, on exhortation by Harnam Singh, accused Nos.2 and 3 ran after Mohan and caught hold of him.

33. To invoke Section 34 IPC, it must be established that the criminal act was done by more than one person in furtherance of common intention of all. It must, therefore, be proved that: (*i*) there was common intention on the part of several persons to commit a particular crime, and (*ii*) the crime was actually committed by them in furtherance of that common intention. The essence of liability under Section 34 IPC is simultaneous conscious mind of persons participating in the criminal action to bring about a particular result. Minds regarding sharing of common intention gets satisfied when an overt act is established qua each of the accused. Common intention implies pre-arranged plan and acting in concert pursuant to the pre-arranged plan. Criminal act mentioned in Section 34 IPC is the result of the concerted action of more than one person and if the said result was reached in furtherance of common intention, each person is liable for the offence as if he has committed the offence by himself.

34. Observing that the inference of common intention is to be drawn from the conduct of the accused, in *Ramesh Singh alias Phooti v. State of A.P.* (2004) 11 SCC 305, the Supreme Court held as under:-

> "**12.** .....As a general principle in a case of criminal liability it is the primary responsibility of the person who actually commits the offence and only that person who has committed the crime can be held guilty. By introducing Section 34 in the Penal Code the legislature laid down the principle of joint liability in doing a criminal act. The essence of that liability is to be found in the existence of a common intention connecting the accused leading to the doing of a criminal act in furtherance of such intention. Thus, if the act is the result of a common intention then every person who did the criminal act with that common intention would be responsible for the offence committed irrespective of the share which he had in its perpetration. Section 34 IPC embodies the principle of joint liability in doing the criminal act based on a common intention. Common intention essentially being a state of mind it is very difficult to procure direct evidence to prove such intention. Therefore, in most cases it has to be inferred from the act like, the conduct of the accused or other relevant circumstances of the case. The inference can be gathered from the manner in which the accused arrived at the scene and mounted the attack, the determination and concert with which the attack was made, and from the nature of injury caused by one or some of them. The contributory acts of the persons who are not responsible for the injury can further be inferred from the subsequent conduct after the attack. In this regard even an illegal omission on the part of such accused can

> indicate the sharing of common intention. In other words, the totality of circumstances must be taken into consideration in arriving at the conclusion whether the accused had the common intention to commit an offence of which they could be convicted. (See *Noor Mohammad Mohd. Yusuf Momin v. State of Maharashtra* (1970) 1 SCC 696)"

The decision in *Ramesh Singh* was referred to in *Balu @ Bala Subaramaniam and another v. State (UT of Pondicherry)* (2016) 15 SCC 471.

35. In the light of above principles, let us consider whether the prosecution has proved that accused Nos.2 and 3 had the common intention and acted in furtherance of the common intention. Initially, there were five accused and the accused were charged under Sections 147 and 149 IPC along with other charges. Since accused Suraj was acquitted of the charges, placing reliance upon *Dhanna v. State of M.P.* (1996) 10 SCC 79, the trial court invoked Section 34 IPC to convict accused Nos.2 and 3 under Section 302 IPC read with Section 34 IPC.

36. Whether the courts below were right in convicting accused Nos.2 and 3 by invoking Section 34 IPC, is the point falling for consideration?

37. Deceased Mohan and accused Harnam Singh were working in the railways and regarding the money transactions, there was enmity between them. It is brought in evidence through PW-2 that 2-3 days prior to the incident, there were arguments and quarrel between accused Harnam Singh and deceased Mohan near the house of PW-2. Accused No.2-Balvir Singh and accused No.3-Bhav Singh are the real brothers of accused No.1-Harnam Singh. Though it is stated that accused Nos.2 and 3 were present along with accused Harnam Singh, the fact remains that they were not armed. After being hit by accused Bharat on the back when Mohan ran, accused Nos.2 and 3 are alleged to have followed him and accused Balvir Singh allegedly caught the right arm of Mohan and accused Bhav Singh held the left arm of Mohan. It is also brought in evidence that accused Bharat was giving *lathi* blows to Mohan even when he was running. If accused Nos.2 and 3 have shared the common intention, they would also have attacked the deceased; but they were only alleged to have caught hold of the deceased. The prosecution did not bring in evidence that there was prior meeting of minds and that accused Nos.2 and 3 were having knowledge that their brother accused Harnam Singh was armed with *katta*. The evidence adduced by the prosecution is not convincing to hold that accused Nos.2 and 3 also shared the common intention with the accused Harnam Singh and other accused Bharat in committing the murder of Mohan. Conviction of accused Nos. 2 and 3 under Section 302 read with Section 34 IPC is, therefore, liable to be set aside.

38. Conviction of the appellant/accused No.1 Harnam Singh under Sections 302 IPC, 341 IPC and Section 25(1A) read with Section 27 of the Arms Act and the sentence of life imprisonment imposed upon him is affirmed and Criminal

Appeal No.1119 of 2010 is dismissed. Accused Harnam Singh shall surrender himself within four weeks from the date of this judgment to serve the remaining sentence, failing which, he shall be taken into custody.

39. Conviction of accused No.2-Balvir Singh and accused No.3-Bhav Singh under Section 302 IPC read with Section 34 IPC and Section 341 IPC is set aside and they are acquitted of the charges under Section 302 IPC read with Section 34 IPC and Section 341 IPC and their appeals Criminal Appeal No.1115 of 2010 and Criminal Appeal No.1116 of 2010 are allowed. Bail bonds of the accused Balvir Singh and Bhav Singh shall stand discharged.

Order accordingly.

I.L.R. [2019] M.P. 1213 (DB)
WRIT APPEAL

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

W.A. No. 565/2019 (Gwalior) decided on 16 April, 2019

RUKSANA PATEL …Appellant

Vs.

STATE OF M.P. & ors. …Respondents

***Municipalities (Election of Vice-President) Rules, M.P., 1998, Rule 3(3) – Seven Days Notice Period – Non-Compliance of Provision – Effect* – Held – Petitioner participated in the meeting, thus has waived the condition as provided under Rule 3(3) of the Rules of 1998 – Non-compliance of such mandatory provision of dispatching seven days clear prior notice, has not caused any prejudice to petitioner who actually participated in election and lost the same – No irregularity nor illegality – Appeal dismissed. (Para 8)**

नगरपालिका (उपाध्यक्ष का निर्वाचन) नियम, म.प्र., 1998, नियम 3(3) – सात दिनों की नोटिस अवधि – उपबंध का अननुपालन – प्रभाव – अभिनिर्धारित – याची ने बैठक में भाग लिया, इस प्रकार 1998 के नियमों के नियम 3(3) के अंतर्गत दिये गये उपबंध अनुसार शर्त का अधित्यजन किया – सात दिनों पूर्व स्पष्ट नोटिस प्रेषित करने के उक्त आज्ञापक उपबंध के अननुपालन ने याची जिसने वास्तविक रूप से निर्वाचन में भाग लिया तथा उसे हार गया, पर कोई प्रतिकूल प्रभाव कारित नहीं किया है – न कोई अनियमितता न ही कोई अवैधता – अपील खारिज।

Cases referred:

1968 M.P.L.J. 638, 2015 (4) M.P.L.J. 450, 2001 (2) M.P.L.J. 372, 1964 AIR 1300, 1971 (1) SCC 619, AIR 1998 SC 492, (2004) 8 SCC 229.

S.K. Sharma, for the appellant.
Pratip Visoria, G.A. for the respondent Nos. 1 & 2/State.
D.S. Raghuvanshi, for the respondent No. 3.

O R D E R

The Order of the Court was passed by : **VIVEK AGARWAL, J**:- This Writ Appeal under Section 2 of Madhya Pradesh Uchcha Nyalaya (Khand Nyayapeeth Ko Appeal) Adhiniyam, 2005 has been filed by the appellant/petitioner being aggrieved by the order dt.18.02.2019 passed in Writ Petition No.1118/2015, whereby the Writ Petition filed by the petitioner/appellant challenging the first meeting of Municipal Council, Ashok Nagar held on 06.01.2015, in which respondent No.4 was elected as Vice President on the ground that clear seven days' notice was not given, as required under Rule 3 of Madhya Pradesh Municipalities (Election of Vice-President) Rules, 1998 (hereinafter shall be referred to as the 'Rules of 1998') has been dismissed.

2. It is submitted by the learned counsel for appellant that Chief Municipal Officer had issued notice dt.02.01.2015 informing the members for holding meeting to elect Vice President of the Municipality on 06.01.2015 and this notice is not in compliance of the provisions of law as Rule 3 (3) of the Rules of 1998 provides as under :-

> "Notice of the meeting shall be dispatched to every councilor and exhibited at the council office at least seven clear days before the meeting."

3. It is submitted that since there is violation of such provision, therefore, in terms of the judgment of the Division Bench of this High Court in the case of *Awadh Behari Pandey Vs. State of M.P. and others* as reported in 1968 M.P.L.J. 638, wherein it has been held that provisions of Rule 3 of the Rules of 1998 are mandatory, the election of respondent No.4 is bad in law.

4. Reliance has also been placed on the Full Bench judgment of this High Court in the case of *Farooq Mohammad Vs. State of M.P. and others* as reported in 2015 (4) M.P.L.J. 450, wherein relying on the judgment of the Division Bench of this High Court in the case of *Awadh Bihari Pandey* (supra), it has been held that dispatch of notice to every councilor seven clear days before is mandatory.

5. Placing reliance on such judgments it is submitted that since there was no clear notice of seven days, therefore, the proceedings to elect Vice President were vitiated and therefore the election of respondent No.4 is bad in law.

6. On the other hand, learned counsel for the respondent State submits that learned Single Judge has dealt with the issue, inasmuch as the petitioner/appellant after having participated in the election process had waived her right and she is stopped from challenging the election of respondent No.4 in the light of the judgment of the Full Bench of this court in the case of *Bhulin Dewangan Vs. State of M.P.* as reported in 2001 (2) M.P.L.J. 372 in the following terms :-

> "15. The general rule is that non-compliance of mandatory requirement results in nullification of the Act. There are, however, several exceptions to the same. If certain requirements or conditions are provided by statute in the interest of a particular person, the requirements or conditions, although mandatory, may be waived by him if no public interest are involved and in such a case the act done will be valid even if the requirements or conditions have not been performed. This appears to be the reason for learned C.K.Perasad, J. in ***Dhumadhandin vs. State of M.P., 1997 (2) MPLJ 175 = 1997*** **(1) Vidhi Bhasvar** ***49*** which was followed by R.S.Garg, J., in ***Mahavir Saket vs. Collector, Rewa, 1998 (2) JLJ 113*** for holding that mere non-compliance of the motion of no-confidence would not invalidate the whole proceedings."

7. This view finds support from the judgments of the Hon'ble Supreme Court in the case of *Dhirendra Nath Gorai Vs. Sudhir Chandra Ghosh and others* as reported in 1964 AIR 1300*, Lachoo Mal Vs. Radhe Shyam* as reported in 1971 (1) SCC 619*, Martin and Harris Ltd. Vs. Vith Addl. Dist. Judge* as reported in *AIR* 1998 SC 492*, Krishna Bahadur Vs. M/s Purna Theatre* as reported in (2004) 8 SCC 229, wherein it has been held that there are two exceptions to the general rule that non compliance of mandatory requirement results in nullification of the Act. One exception is when performance of the requirement is impossible; performance is then excused. Another exception is of waiver. In *Dhirendra Nath Gorai* (supra), Supreme Court has observed as under :-

> "(7) Even then, the question arises whether an act done in breach of the mandatory provision is per force a nullity. In Ashutosh Sikdar v. Behari Lal Kirtania, ILR 35 Cal 61 at p.72 Mookerjee, J., after referring to Macnamara on "Nullity and Irregularities", observed :
>
> > "....no hard and fast line can be drawn between a nullity and an irregularity; but this much is clear, that an irregularity is a deviation from a rule of law which does not take away the foundation or authority for the proceeding, or apply to its whole operation, whereas a nullity is a proceeding that is taken without any foundation for it, or is so essentially defective as to be of no avail or effect whatever, or is void and incapable of being validated."
>
> Whether a provision falls under one category or the other is not easy of discernment, but in the ultimate analysis it depends upon the nature, scope and object of a particular provision. A workable test has been laid down by Justice Coleridge in Holmes v. Russell, (1841) 9 Dowl 487, which reads:
>
> > "It is difficult sometimes to distinguish between an irregularity and a nullity; but the safest rule to determine what is an irregularity and what is a nullity is to see whether the party can

> waive the objection; if he can waive it, it amounts to an irregularity; if he cannot, it is a nullity."

A waiver is an intentional relinquishment of a known right but obviously an objection to jurisdiction cannot be waived, for consent cannot give a court jurisdiction where there is none. Even if there is inherent jurisdiction, certain provisions cannot be waived. Maxwell in his book "On the Interpretation of Statutes", 11th Edn., at p. 375, describes the rule thus:

> "Another maxim which sanctions the non-observance of a statutory provision is that cuilibet licet renuntiare juri pro se introducto. Everyone has a right to waive and to agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity, which may be dispensed with without infringing any public right or public policy."

The same rule is restated in "Craies on Statute Law", 6th Edn., at p. 269, thus :

> "As a general rule, the conditions imposed by statutes which authorise legal proceedings are treated as being indispensable to giving the court jurisdiction. But if it appears that the statutory conditions were inserted by the legislature simply for the security or benefit of the parties to the action themselves, and that no public interests are involved, such conditions will not be considered as indispensable, and either party may waive them without affecting the jurisdiction of the court."

8. In the present case since petitioner had participated in the meeting, thus had waived the condition as provided under Sub Rule (3) of Rule 3 of Rules of 1998, non- compliance of such mandatory provision can not be said to have caused any prejudice to the petitioner who had actually participated in the election of Vice President and lost such election. Therefore, we do not find any irregularity or illegality in the impugned order passed by the learned Single Judge calling for any interference. Writ Appeal fails and is dismissed.

Appeal dismissed.

I.L.R. [2019] M.P. 1217 (DB)
WRIT PETITION

Before Mr. Justice Sujoy Paul & Mr. Justice Mohd. Fahim Anwar

W.P. No. 18372/2018 (Jabalpur) decided on 9 May, 2019

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

Vs.

STATE OF M.P. & ors. …Respondents

(Alongwith W.P. Nos. 4918/2019, 14432/2018, 14433/2018, 16588/2018, 17918/2018, 17920/2018, 17937/2018, 17939/2018, 17941/2018, 17996/2018, 18000/2018, 18057/2018, 18060/2018, 18085/2018, 18092/2018, 18097/2018, 18127/2018, 18299/2018, 18303/2018, 18306/2018, 18307/2018, 18371/2018, 18374/2018, 18376/2018, 18378/2018, 25282/2018, W.A. Nos. 1858/2018, 1734/2018, 1859/2018, 1837/2018, 1101/2018, 1860/2018, 1099/2018, 1097/2018, 1098/2018, 1839/2018, 1836/2018, 1840/2018, 1625/2018, 1853/2018, 1857/2018, 1735/2018 & 1835/2018)

***A. Working Journalists and Other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act, (45 of 1955), Section 17(1) & (2) and Industrial Disputes Act (14 of 1947), Section 10 – Reference to Labour Court – Jurisdiction* – State Government made reference for adjudication of dispute to Labour Court – Held – Section 17 is a Code in itself, if upon considering the claim of employee and response from employer, the question arises regarding the 'amount due' or 'employer-employee relationship', matter needs to be referred by State Government for adjudication before Labour Court – No fault with impugned orders – Petitions and appeals dismissed. (Paras 11, 14 & 21)**

क. श्रमजीवी पत्रकार और अन्य समाचार–पत्र कर्मचारी (सेवा की शर्तें) और प्रकीर्ण उपबंध अधिनियम, (1955 का 45), धारा 17(1) व (2) एवं औद्योगिक विवाद अधिनियम (1947 का 14), धारा 10 – श्रम न्यायालय को निर्देश – अधिकारिता – राज्य सरकार ने विवाद के न्यायनिर्णयन हेतु श्रम न्यायालय को निर्देश प्रस्तुत किया – अभिनिर्धारित – धारा 17 अपने आप में एक संहिता है, यदि कर्मचारी के दावे तथा नियोक्ता से प्रतिक्रिया को विचार में लेने पर, 'देय राशि' अथवा 'नियोक्ता–कर्मचारी संबंध' से संबंधित प्रश्न उठता है, मामले को न्यायनिर्णयन के लिए राज्य सरकार द्वारा श्रम न्यायालय के समक्ष निर्दिष्ट करने की आवश्यकता है – आक्षेपित आदेशों में कोई दोष नहीं – याचिकाएं एवं अपीलें खारिज।

***B. Working Journalists and Other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act, (45 of 1955), Section 17(2) and Industrial Disputes Act (14 of 1947), Section 33(C)(2)* – Held – On account of different language employees and mechanism provided in Section 17(2) of Act of 1955, it is not *pari materia* to Section 33(C)(2) of the Act of 1947. (Para 19)**

ख. श्रमजीवी पत्रकार और अन्य समाचार–पत्र कर्मचारी (सेवा की शर्तें) और प्रकीर्ण उपबंध अधिनियम, (1955 का 45), धारा 17(2) एवं औद्योगिक विवाद अधिनियम (1947 का 14), धारा 33(सी)(2) – अभिनिर्धारित – 1955 के अधिनियम की धारा 17(2) में प्रयुक्त भिन्न भाषा तथा उपबंधित तंत्र के कारण, यह 1947 के अधिनियम की धारा 33(सी)(2) के समविषय नहीं है।

***C. Industrial Disputes Act (14 of 1947), Section 10 – Reference – Nature & Scope* – Held – Order of reference is in realm of an administrative act – Apex Court concluded that in making a reference u/S 10, appropriate government is doing an administrative act and not a judicial or quasi judicial act – Any factual foundation in order of Dy. Labour Commissioner or in reference order will not create any right in favour of any party – Labour Court will be free to adjudicate the matter on its own merits. (Para 20)**

ग. औद्योगिक विवाद अधिनियम (1947 का 14), धारा 10 – निर्देश – स्वरूप एवं विस्तार – अभिनिर्धारित – निर्देश का आदेश एक प्रशासनिक कार्य के दायरे में है – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि धारा 10 के अंतर्गत निर्देश करते समय, समुचित सरकार एक प्रशासनिक कार्य कर रही है तथा न कि एक न्यायिक अथवा अर्धन्यायिक कार्य – उप–श्रम आयुक्त के आदेश अथवा निर्देश आदेश में कोई भी तथ्यात्मक आधार, किसी पक्षकार के पक्ष में कोई अधिकार सृजित नहीं करेगा – श्रम न्यायालय, मामले को उसके अपने गुण–दोषों के आधार पर न्यायनिर्णीत करने हेतु स्वतंत्र होगा।

Cases referred :

AIR 1958 SC 507, 1993 (1) LLN 373, CWP No. 16275/2018 decided on 25.03.2019 (High Court of Punjab and Haryana), 1987 (3) SCC 507, MP-311-1980 decided on 28.07.1980 (DB), 1980 Lab IC 684, 2000 (3) MPHT 240, 2017 (8) SCC 435, 1977 (2) SCC 256, 2016 (3) MPLJ 15, 2009 (10) SCC 293, AIR 1953 SC 53, (1978) 3 SCC 353.

Sanjay Kaushal assisted by *Uttam Maheshwari*, appearing in W.A. No. 1101/2018.

Mohd. Ali with *Lalji Kushwaha*, appearing in W.P. No. 16588/2018.

Sankalp Kochar, for the employer.

Praveen Dubey, Dy. A.G. with *J.K. Pillai*, Govt. & *S.P. Mishra*, G.A.

Navnidhi Parharya, for the employee in W.P. No. 18085/2018.

Ashok Shrivastava, for the respondent No. 3 in W.P. No. 17920/2018.

Ketan Vishwnar, for the respondent No. 3 in W.P. No. 18091/2018.

O R D E R

The Order of the Court was passed by :

SUJOY PAUL, J.:- Regard being had to the similitude of the questions involved, on the joint request of the parties, the matters are analogously heard on admission

and decided by this common order. The writ appeals are arising out of orders passed by learned Single Judge affirming the reference order passed by State Government in exercise of power under Section 17(2) of the Working Journalists and Other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act, 1955 **(Act of 1955)**, whereas writ petitions are filed questioning the reference order passed in exercise of said power.

2. Draped in brevity, the newspaper employees filed application claiming the benefit of Majithia Wage Board **(Board)** before the Deputy Labour Commissioner. The employer was put to notice. The claim of employee was resisted on various grounds. The Deputy Labour Commissioner apprised the State Government about the dispute and in turn the Government sent the reference for adjudication before the labour Court.

3. Shri Sanjay Kaushal, learned senior counsel assisted by Shri Uttam Maheshwari, Advocate appearing in WA-1101-2018 for the employer urged that the learned Single Judge has erred in affirming the reference order of the Government. He urged that validity of Clause 20(j) of the award of the Board was upheld by the Supreme Court. As per the award, it is open to the employee to continue with existing pay and forego the higher wages flowing from the Board. The employee, in the instant case, had foregone the higher benefits by exercising an option. Hence, there existed no dispute which requires any adjudication. The Deputy Labour Commissioner and appropriate Government treated the story narrated by employee as gospel truth and presupposed that he is entitled for an amount based on the Board award.

4. Learned senior counsel submits that: **(i)** Section 17 (1) & (2) are almost *pari materia* to Sections 33 (C)(1) and 33(C)(2) of Industrial Disputes Act, 1947 **(ID Act)**. The provisions are in the nature of execution proceedings. Thus, in absence of prior determination and adjudication of claim of employee, power under Section 17(2) cannot be invoked. Reliance is placed on AIR 1958 SC 507*, [M/s. Kasturi and Sons (Private) Ltd. vs. Shri N. Salivateeswaran & anr.]* & 1993(1) LLN 373*, [Keshvlal M. Rao vs. State of Gujarat & ors.];* **(ii)** in absence of quantification and decision on the entitlement of employee, reference is bad in law; **(iii)** learned Single Judge erred in holding that employer can raise objection before the Labour Court regarding validity of the reference. The labour Court itself assumes jurisdiction on the basis of reference and therefore labour Court cannot decide the validity of reference. Moreso, when question of competence of Government/authority in making the reference is involved. The question of competence of authority/Government to refer the matter to labour Court cannot be treated to be an ancillary question. To elaborate, it is contended that apart from point (i) above as per Section 10(1)(c) of ID Act, such disputes can be referred for adjudication to labour Court which relates to any matter

specified in the Second Schedule. Clause (d) of this provision enables the Tribunal to adjudicate the disputes which are related with Second & Third Schedules. By taking this Court to the Second & Third Schedules of the ID Act, Shri Kaushal, learned senior counsel urged that demand of wages is not covered under Second Schedule. Indeed, it is part of the Third Schedule. Hence, the reference to a labour Court in place of a Tribunal is clearly bad in law.

5. Shri Mohd. Ali, Advocate appearing in WP-16588-2018 submitted that in the application for demand of wages submitted by the applicant there is no averment that he is an employee of the petitioner/employer. In the response filed by the petitioner before the Deputy Labour Commissioner, the employer made it clear that he is employee of a difference (sic: different) agency. Hence, question of granting him wages as per Board does not arise. Unless employee-employer relation is established, reference is impressible.

6. Shri Sankalp Kochar, Advocate appearing for the employer relied on the judgment of High Court of Punjab and Haryana passed in CWP No.16275/2018 decided on 25.03.2019, *(Jagran Parkashan Limited vs. State of Punjab and others)*.

7. *Per-contra*, Shri Praveen Dubey, learned Deputy AG supported the reference and the orders passed by learned Single Judges. He submitted that (reference orders are in consonance with Section 17(2) of the Act of 1955. The labour Court will determine whether any amount is due in favour of the newspaper employees. Employer will get full opportunity to putforth its case before the Court. After determination as to the amount due only, the amount can be recovered as per Sub-section (3) r/w (1) of Section 17 of the Act of 1955.

8. Shri Navnidhi Parharya, Advocate appearing for the employee in WP-18085-2018 also supported the reference and almost borrowed the arguments of learned Deputy AG. In addition, she placed reliance on the judgment of Supreme Court which is at Page No.87 of the petition. Similarly, Shri Ashok Shrivastava and Shri Ketan Vishwnar supported the impugned reference/order of Single Judge. Shri Vishnar placed reliance on condition of license (Annexure-P/5) filed with WP-18091-2018 and stated that as per the terms and conditions of license, the principal employer is under an obligation to pay the wages as per the Board. He relied on judgment of Supreme Court in Civil Apeal (sic : Appeal)No. 678 of 2006*, (BCPP Mazdoor Sangh & anr. vs. NTPC & ors.)*.

9. The parties confined their arguments to the extent indicated above. The legal authorities cited by them are already referred hereinabove.

10. We have heard the learned counsel for the parties to a great length and perused the relevant record.

11. In the case of *M/s. Kasturi* (supra) the Apex Court considered the unamended provision of Section 17 of the Act of 1955. In the unamended Section 17, there was no provision for making reference to the labour Court for adjudication of the dispute. In this backdrop, in *M/s. Kasturi* (supra) certain findings were given, on which heavy reliance is placed by learned senior counsel. After the amendment in Section 17 aforesaid, the matter again travelled to Supreme Court in 1987 (3) SCC 507, *[Samarjit Ghosh vs. M/s. Bennett Coleman & Company & anr.]*. The Apex Court expressed its view as under:

> "**6**. When all the provisions of Section 17 are considered together it is apparent that they constitute a single scheme. In simple terms the scheme is this. A newspaper employee, who claims that an amount due to him has not been paid by his employer, can apply to the State Government for recovery of the amount. If no dispute arises as to the amount due the Collector will recover the amount from the employer and pay it over to the newspaper employee. If a question arises as to the amount due, it is a question which arises on the application made by the newspaper employee, and the application having been made before the appropriate State Government it is that State Government which will call for an adjudication of the dispute by referring the question to a Labour Court. When the Labour Court has decided the question, it will forward its decision to the State Government which made the reference, and thereafter the State Government will direct that recovery proceedings shall be taken. In other words the State Government before whom the application for recovery is made is the State Government which will refer the question as to the amount due to a Labour Court, and the Labour Court upon reaching its decision will forward the decision to the State Government, which will then direct recovery of the amount."
>
> **[Emphasis Supplied]**

A plain reading of this para makes it clear like noon day that Section 17 is a Code in itself. If upon considering the claim application of the employee and its response by the employer, the question arises regarding the amount due the State Government can call for an adjudication of the dispute by referring the question to a labour Court.

12. Before a Division Bench of this Court in MP-311-1980*, [M/s. Nav Bharat Press vs. State of M.P.]* decided on 28.07.1980 a question cropped up relating to interpretation of Wage Board recommendations and Section 17(2) aforesaid. The Division Bench opined as under:

> "From the facts stated above, it is clear that a dispute did arise within the meaning of Section 17(2) of the Act relating to the interpretation of the Wage Board Recommendations in the context of dearness allowance payable to the employees. The dispute cannot be decided without properly interpreting the Wage Board Report in the light of the Census

> Report of 1971. Such a matter could not have been determined by the Labour Commissioner under Section 17(1). In our opinion, the State Government was bound to make a reference under Section 17(2)."
>
> **[Emphasis Supplied]**

13. In 1980 Lab IC 684*, [M/s. Newspapers and Perodical, Banglore vs. State of Karnatak]* their Lordships opined as under:

> "The above observations of the Supreme Court apply equally even while construing the ambit and scope of Section 17 as it stands now (after its substitution by Central Act No. 65 of 1962). The position has not changed except for the fact that under sub-section (2), as it stands now, the State Government has been conferred with powers to refer the question, the question being as to what amount, if any, is due to a working journalist from his employer, to an appropriate Labour Court for adjudication. The amount due under the Act means wages, which the newspaper employee claims he is entitled to get from his employer,-as fixed by the Wage Board constituted under the Act to that category of employees to which he claims that he belongs. As observed by the Supreme Court in Kasturi & Sons [AIR 1958 SC 507.] case that it is only if and after the amount due to the employee has been duly determined that the stage is reached to recover that amount invoking Section 17."
>
> **[Emphasis Supplied]**

The Karnataka High Court considered the change in Section 17 of the Act [after pronouncement of judgment in the case of *M/s. Kasturi* (supra)] and clearly held that State Government has now been conferred with the power to refer the question as to what amount is due to an employee from his employer. This adjudication needs to be done by labour Court.

14. Justice Dipak Mishra (as his Lordship then was) speaking for this Court in 2000 (3) MPHT 240, *[Nav Bharat Press (Pvt. Ltd.) vs. State of M.P.]* considered the legislative changes in Section 17 right from the era of *M/s. Kasturi* (supra) to the present day. The Court also considered the aforesaid judgment of Karnataka High Court and Division Bench judgment of this Court. After taking stock of said judgments, this Court opined as under:

> "On a reading of the amended provisions and keeping in view the decisions governing the field, it is graphically clear that a dispute arising with regard to amount due under the Act has to be referred to the appropriate Labour Court constituted under the industrial Disputes Act, 1947. When the due is disputed on one ground or other the authority cannot adjudicate that lis and determine the rights. In the case at hand on a perusal of Annex. D, it is absolutely dear that the claim of the petitioner was resisted on the ground that he was never an employee of the petitioner. This stand has also been taken note of by the Dy. Labour Commissioner but he proceeded to adjudicate the matter. In the opinion

of this Court when a dispute of this nature was raised before the Dy. Labour Commissioner he could not have adjudicated the controversy under Section 17(1) of the Act and the matter could have been referred for adjudication under Section 17(2) of the Act.

In view of the aforesaid analysis, the order passed vide Annex. I is untenable and is liable to be quashed and accordingly, I do so. However, it is directed that the State Government shall make a reference of the dispute to the competent Labour Court constituted under the Industrial Disputes Act, 1947 within a period of 2 months from receipt of this order."

[Emphasis Supplied]

A plain glance of this judgment shows that when employee and employer were at loggerheads on the question of "amount due", this Court opined that Deputy Labour Commissioner erred in passing the impugned order and the State Government shall make a reference to the labour Court. The *ratio decidendi* flowing from this judgment is that when there exists a dispute about "amount due" or about existence of employee-employer relationship, matter needs to be referred by the State Government to appropriate labour Court. In 2017 (8) SCC 435, *[Avishek Raja v. Sanjay Gupta]* the Supreme Court poignantly held as under:

"**26**. Insofar as the highly contentious issue of Clause 20(j) of theAward read with the provisions of the Act is concerned, it is clear that what the Act guarantees to each "newspaper employee" as defined in Section 2(c) of the Act is the entitlement to receive wages as recommended by the Wage Board and approved and notified by the Central Government under Section 12 of the Act. The wages notified supersedes all existing contracts governing wages as may be in force. However, the legislature has made it clear by incorporating the provisions of Section 16 that, notwithstanding the wages as may be fixed and notified, it will always be open to the employee concerned to agree to and accept any benefits which is more favourable to him than what has been notified under Section 12 of the Act. Clause 20(j) of the Majithia Wage Board Award will, therefore, have to be read and understood in the above light. The Act is silent on the availability of an option to receive less than what is due to an employee under the Act. Such an option really lies in the domain of the doctrine of waiver, an issue that does not arise in the present case in view of the specific stand of the employees concerned in the present case with regard to the involuntary nature of the undertakings allegedly furnished by them. The dispute that arises, therefore, has to be resolved by the fact-finding authority under Section 17 of the Act, as adverted to hereinafter.

28. There is nothing either in the provisions of the Act or in the terms of the Wage Board Award which would enable us to hold that the

benefits of the Award would be restricted to the regular employees and not contractual employees. In this regard, we have taken note of the definition of "newspaper employees", "working journalist" and "non-journalist newspaper employees" as defined in Sections 2(c), 2(f) and 2(dd) of the Act. Insofar as "variable pay" is concerned, as already noticed and extracted in para 10 above, this Court while dealing with the concept of variable pay has taken the view that the said relief has been incorporated in the Majithia Wage Board Award in order to give fair and equitable treatment to employees of newspapers. Therefore, no question of withholding the said benefit by taking any other view with regard to "variable pay" can arise. In fact, a reading of the relevant part of the Award would go to show that the concept of "variable pay" which was introduced in the Award stems from grade pay contained in the Report of the Sixth Pay Commission and was intended to bring the working journalist and non-journalist employees covered by the Act on a par with the Central Government employees to the extent possible. So far as the concept of heavy cash losses is concerned, we are of the view that the very expression itself indicates that the same is different from mere financial difficulties and such losses apart from the extent of being crippling in nature must be consistent over the period of time stipulated in the Award. This is a question of fact that has to be determined from case to case.

29. Having clarified all doubts and ambiguities in the matter and upon holding that none of the newspaper establishments should, in the facts of the cases before us, be held guilty of commission of contempt, we direct that henceforth all complaints with regard to non-implementation of the Majithia Wage Board Award or otherwise be dealt with in terms of the mechanism provided under Section 17 of the Act. It would be more appropriate to resolve such complaints and grievances by resort to the enforcement and remedial machinery provided under the Act rather than by any future approaches to the courts in exercise of the contempt jurisdiction of the courts or otherwise."

[Emphasis Supplied]

15. In view of this judgment also, it is the mechanism provided under Section 17 of the Act which will address the claim of the employee regarding demand of wages as per the Board. Since Act of 1955 was held to be silent about option of an employee to still get lesser wages then what was due to an employee under the Act, it was poignantly held that it is in the domain of doctrine of waiver. Whether undertaking/auction is submitted by employee voluntary or under compelling circumstances is a question of fact which needs adjudication by labour Court. Para 28 of the judgment of *Avishek Raja* (supra) makes it clear that benefit of Wage Board Award is applicable to contractual employees also. Existence of employee-employer relation, existence of an option by an employee whether given on his own volition or not are disputed questions of fact which needs adjudication by

labour Court. These questions, in our opinion can be gone into by labour Court while deciding the reference.

16. The argument of learned senior counsel based on Section 10(1)(c) & (d) referred hereinabove appears to be attractive at the first blush but lost its complete shine on a deeper scrutiny of the matter. In the Central Act (ID Act, 1947) the Second Schedule contains six entries, whereas the Third Schedule is pregnant with eleven entries. By MP Labour Laws (Amendment) & Miscellaneous Provisions Act, 2003 (28 of 2003) Second Schedule of Central Act is renumbered as "Part-A" and "Part-B" was inserted. Entry No.7 of Part-B covers the Act of 1955. Even otherwise, Entry Nos.1 & 2 of the main Second Schedule provides jurisdiction to labour Court to examine propriety, legality of an order passed by the employer under the standing order and interpretation of standing order. It is a matter of common knowledge in industrial jurisprudence normally service conditions of industrial workers are governed by provisions popularly called as "standing order". The "standing order" is not defined in the ID Act, 1947. The expression "standing order", in our considered view has to be given a wide meaning. Any binding provision which governs any of the service conditions of the employee must be equated with "standing order".

17. Any narrow or technical interpretation will lead to an absurd result and will not be as per legislative intent ingrained in aforesaid entries of Second Schedule. This is trite law that while considering a statutory provision the Court must consider the text and the context both {See: 1977 (2) SCC 256, *[Board of Mining Examination vs. Ramjee]* & 1987 (1) 424, *[RBI vs. Peerless General Finance and Investment Co. Ltd.]}*. In the context, "standing order" is used in Second Schedule, it will cover the conditions envisaged in the Wage Board Award. Reference may be made to the judgment of Supreme Court in *Huawei Technologies Company Ltd. vs. Sterlite Technologies Ltd.,* 2016(3) MPLJ 15 and 2009 (10) SCC 293*, [SBP & Co. (2) vs. Patel Engg. Ltd.]* (wherein expression 'Rules' appearing in Section 15(2) of Arbitration and Conciliation Act, 1996 was directed to be understood with reference to provisions for appointment contained in arbitration agreement. The term 'Rules' appearing in Section 15(2) of the Act will have to be understood with reference to the provisions for appointment contained in the relevant contract. This judgment can be used for the purpose of analogy. Thus, we are unable to persuade ourselves with the line of argument advanced by learned senior counsel that reference order itself suffers from a jurisdictional error. In the result, the argument that jurisdictional error and validity of reference cannot be gone into by labour Court pales into insignificance.

18. So far judgment in *Jagran Parkashan* (supra) cited by Shri Kochar is concerned, suffice it to say in the said case impugned order was passed by Assistant Labour Commissioner referring two disputes for adjudication before

the labour Court. As per the statutory provision prevailing in the concerned State, the High Court opined that ALC has passed the impugned order dated 13.12.2016 without jurisdiction. The State was directed to consider making a reference of dispute under Section 17(2) of the Act for adjudication before appropriate Labour Court. In the instant case, reference is made by the State Government and, therefore, the said judgment has no application in the instant case.

19. So far as judgment of *Keshvlal M. Rao* (supra) is concerned, in our considered view on account of different language employed and mechanism provided in Section 17(2) of the Act of 1955, it cannot be treated as *pari materia* to Section 33(C)(2) of the ID Act. We respectfully recorded our disagreement with the view taken in *Keshavlal M. Rao* (supra). Apart from this, in view of judgments of *Samarjit Ghosh* (supra), *Navbharat* (supra) and recent judgment of Supreme Court in the case of *Avishek Raja* (supra), otherwise the judgment of *Keshvlal M. Rao* (supra) cannot be pressed into service.

20. Apart from this, it is relevant to mention that order of reference is in the realm of an administrative act. [See: Constitution Bench judgment reported in AIR 1953 SC 53*, (State of Madras vs. C.P. Sarathy)]*. Similarly in *Shambhu Nath Goyal vs. Bank of Baroda, Jullundur*, (1978) 3 SCC 353, it was held that in making a reference under Section 10 of the ID Act, the appropriate government is doing an administrative act and not a judicial or quasi judicial act. Hence, any factual foundation in the order of Deputy Labour Commissioner or in the reference order will not create any right in favour of the parties. The Labour Court will be free to adjudicate the matter on its own merits in accordance with law.

21. As analyzed above, no fault can be found in the orders of reference passed by State Government and impugned orders of learned Single Judges. Resultantly, the writ appeals and writ petitions are **dismissed**. No cost.

22. A typed copy of this order be kept in all the connected matters.

Petition dismissed.

I.L.R. [2019] M.P. 1227 (DB)
WRIT PETITION

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

W.P. No. 10111/2013 (PIL)(Indore) decided on 17 June, 2019

SANJAY GANGRADE …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

***A. Constitution – Article 226 and Municipal Corporation Act, M.P. (23 of 1956), Sections 293, 294 & 296 – Public Interest Litigation – Illegal Constructions – Departmental Permissions – Legality* – Held – Respondents raised construction when there was no development permission from department of T & CP – Building permission has also been revoked by Municipal Corporation – Diversion order for land use for commercial purpose also cancelled – Entire construction of Hotel on residential plot is an illegal construction – State authorities, granting permission *de hors* statutory provisions – Development permission, building permission and diversion order are quashed – Municipal Corporation shall proceed for removal of entire illegal construction – Petition allowed. (Paras 37 to 44 & 46 to 48)**

क. संविधान – अनुच्छेद 226 व नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धाराएँ 293, 294 व 296 – लोक हित वाद – अवैध निर्माण – विभागीय अनुज्ञा – वैधता – अभिनिर्धारित – प्रत्यर्थीगण ने निर्माण तब खड़ा किया जब टी एंड सी.पी. विभाग से विकास की कोई अनुज्ञा नहीं थी – नगर निगम द्वारा निर्माण की अनुज्ञा भी प्रतिसंहृत की गई – वाणिज्यिक प्रयोजन के उपयोग के लिए भूमि का अपयोजन आदेश भी रद्द किया गया – आवासिक भूखंड पर होटल का संपूर्ण निर्माण एक अवैध निर्माण है – राज्य प्राधिकारियों द्वारा अनुज्ञा प्रदान किया जाना कानूनी उपबंधों से बाहर है – विकास अनुज्ञा, निर्माण अनुज्ञा तथा अपयोजन आदेश अभिखंडित – नगर निगम संपूर्ण अवैध निर्माण को हटाने के लिए कार्यवाही करेगा – याचिका मंजूर।

***B. Constitution – Article 226 – Public Interest Litigation – Illegal Constructions – Enquiry* – Held – Illegal Construction (Hotel) by obtaining loan from nationalized banks, is wastage of public money – Economic Offence Wing directed to probe the matter. (Para 48 & 49)**

ख. संविधान – अनुच्छेद 226 – लोक हित वाद – अवैध निर्माण – जांच – अभिनिर्धारित – राष्ट्रीयकृत बैंकों से ऋण प्राप्त करके अवैध निर्माण (होटल) करना, लोक–धन का दुर्व्यय है – आर्थिक अपराध प्रकोष्ठ को मामले की जांच करने हेतु निदेशित किया गया।

***C. Nagar Tatha Gram Nivesh Adhiniyam, M.P. (23 of 1973), Section 30 A – Merger of Residential Plot* – Held – Section 30 A does not empower the authority for merger of plots, meant for residential purposes, to**

be used for commercial purposes – After merger of residential plots, Hotel has been constructed – Building permission granted after merger of plots was certainly illegal, which was rightly revoked by Municipal Corporation. (Paras 42 to 44)

ग. नगर तथा ग्राम निवेश अधिनियम, म.प्र. (1973 का 23), धारा 30 ए – आवासिक भूखंड का विलयन – अभिनिर्धारित – धारा 30ए प्राधिकारी को आवासिक प्रयोजन हेतु बने भूखंडों का, वाणिज्यिक प्रयोजनों के लिए उपयोग किये जाने हेतु विलयन करने के लिए सशक्त नहीं करती – आवासिक भूखंडों के विलयन के पश्चात्, होटल का निर्माण किया गया है – भूखंडों के विलयन के पश्चात् प्रदान की गई निर्माण की अनुज्ञा निश्चित रूप से अवैध थी, जिसे कि नगर निगम द्वारा उचित रूप से प्रतिसंहृत किया गया था।

D. Nagar Tatha Gram Nivesh Adhiniyam, M.P. (23 of 1973), Sections 30, 31, 32 & 33 – Lapse of Permission **– Held – Permission granted shall be valid for 3 years and can be extended from year to year basis, but such extension shall not exceed five years. (Para 31 & 32)**

घ. नगर तथा ग्राम निवेश अधिनियम, म.प्र. (1973 का 23), धाराएँ 30, 31, 32 व 33 – अनुज्ञा का व्यपगत होना – अभिनिर्धारित – प्रदान की गई अनुज्ञा 3 वर्षों के लिए विधिमान्य रहेगी तथा वर्ष दर वर्ष के आधार पर विस्तार किया जा सकता है परंतु उक्त विस्तार 5 वर्षों से अधिक नहीं होगा।

Case referred :

(2013) 5 SCC 336.

Vijay Assudani, for the petitioner.
Kailash Vijayvargiya, for the respondent Corporation.
Sanjay Kumar Rawat, for the respondent Nos. 14, 15 & 16.
Abhishek Tugnawat, for the respondent State.

O R D E R

The Order of the Court was passed by :
S. C. SHARMA, J. :- The present petition has been filed as Public Interest Litigation by the petitioner who is claiming himself to be a public spirited person.

2. Facts of the case, as stated in the Writ Petition, reveal that the respondents No.11, 12 and 13 are the Housing Cooperative Societies and the land was purchased by the Cooperative Housing Societies bearing Survey No. 81/1/1, 81/1/2 and 81/1/3, situated at village Nanakheda, Tehsil & District Ujjain and plots were carved out for allotting them to the members of the Societies. The land was purchased by the Cooperative Societies on 5-2-2004 / 27-8-2004, 28-8-2004 and 23-8-2004 vide registered sale deeds. All the three Cooperative Societies obtained development permission from the Joint Director, Town & Country

Planning Department and residential colony was to be developed by the Cooperative Societies. The cooperative societies, in turn, executed sale deeds to its members. Some of the sale deeds executed by the cooperative societies dated 28/12/2006 and 31/3/2012 are on record as Annexure P/2 and Annexure P/3. The Joint Director, Town & Country Planning Department, respondent No.6, granted permission in favour of respondent No.11 Cooperative Society for development of the residential colony over the land bearing Survey No. 81/1/1/2 on 5/2/2004. The Joint Director, Town & Country Planning Department, respondent No.6, granted permission in favour of respondent No.13 Cooperative Society for developing residential colony over the land bearing Survey No. 81/2/1/1 on 23/8/2004. The Joint Director, Town & Country Planning Department granted development permission in favour of respondent No.11 again on 27/8/2004 for developing residential colony over the land bearing Survey No. 81/2/1/2. The Joint Director, Town & Country Planning Department also granted development permission in favour of respondent No.12 again, a Housing Cooperative Society for developing residential colony over the land bearing in Survey No. 81/2/1/3 on 28/8/2004.

3. That the respondent No.13 Cooperative Society executed a sale deed in favour of one Gurubaksh Singh and it was categorically mentioned in the sale deed that the plots will be non-transferable for a period of ten years and the construction over the plot shall be done within three years from the date of execution of sale deed or the plot will be surrendered back to the society. The sale deed was executed in favour of one Gurubaksh Singh on 8/8/2006.

4. That the respondent No.11 Society executed a sale deed on 25/11/2006 in favour of Hotel Shanti Palace, respondent No.14, in respect of residential Plot No. 66, 67 and 68.

5. That the respondent No.12 Society executed a sale deed in favour of Hotel Shanti Palace, respondent No.14, in respect of Plot No. 64 and it was again mentioned in the sale deed that the plot shall be exclusively used for residential purposes. The sale deed was executed on 31/3/2007.

6. That on 24/4/2007 development permission for construction of a Hotel was granted by the respondent No.6 Dy. Director, Town & Country Planning Department (Annexure P/6) and in the aforesaid permission it was mentioned, as per Clause 4, that in case there is any illegal construction, the same shall be removed within 60 days and the permission was valid only for a period of three years. The contention of the petitioner is that the development permission granted by the Town & Country Planning Department expired due to efflux of time on 24/4/2010.

7. That the respondent No. 12 Society after completing the development work, sold part of Survey No. 81/1/1/3 by executing a sale deed in favour of

Prashant Jain, Navin Pathak, Prakash Bothra, Gopal Alia, Suresh Dagga and others. The respondent No.11 Society on 31/3/2012 after completing the development work sold part of Survey no. 81/2/1/2 showing it to be undiverted and undeveloped land in favour of Bharat Shrivas, Amarchand Roy, Hukumchand Roy, Gulabchand Chhatani etc.,

8. That on 31/3/2012 the respondent No.13 Society, after completing the development work sold part of Survey No. 81/1/1/1 showing it to be undiverted and undeveloped land in favour of Chintamal Padiyal, Sushil Shrivas, Nitin Singh, Rahul Shrivas, Ramswaroop Verma and others.

9. The contention of the petitioner is that plots of the society should have been sold to its members for construction of residential houses only. It has been further stated that on 23/2/2013, the Ujjain Municipal Corporation granted building permission in favour of respondent No. 15 and 16 and at the relevant point of time when the building permission was granted, there was no development permission in existence granted by the Joint Director, Town & Country Planning Department and there was no diversion order diverting the land use for construction of hotel or other activities.

10. That on 31/3/2013 some persons who have been sold piece of land by the Cooperative Societies namely; Bharat Shrivas, Amarchand Roy, Hukumchand, Gulabchand chattani and others, have executed sale deed in favour of private respondents, to be more specific, in favour of respondent No. 15- Chandrashekhar Shrivas.

11. That on 31/3/2013 again sale deeds were executed by Chintaman Padyal, Sushil Shriwas, Rahul Shriwas, Nitin Singh and others in favour of respondent No. 15.

12. That the respondent Nos. 15 and 16 applied for diversion and a diversion order was issued on 17/6/2013 for using the land for Hotel purposes. It has been further stated by the petitioner that the diversion order dated 17/6/2013 was cancelled by the Sub Divisional Officer (Revenue) by order dated 11/9/2013, against which an appeal was preferred and the Collector, Ujjain by order dated 30/9/2013 affirmed the order cancelling the grant of diversion permission. The contention of the petitioner is that the Dy. Director, Town & Country Planning Department, respondent No.6, could not have granted development permission in absence of any order of consolidation of the plots in respect of the land purchased by respondent Nos. 14 to 16 and an illegality was committed by respondent No.6 in granting development permission dated 24/4/2007. The petitioner has further stated that the State Government has issued executive instructions dated 26/11/2005, which prohibits consolidation of plots. It has been further stated that the State Government has issued another executive instructions dated 5/10/2000 restraining the Joint Director, Town & Country Planning Department from

making any amendment / modification in the development permissions already granted and in the present case the development permission was already granted in favour of all the three cooperative societies and, therefore, no such permission could have been granted by the Dy. Director, Town & Country Planning Department, respondent No.6, as has been done on 24/4/2007. It has been further stated that the development permission granted on 24/4/2007 is contrary to Rule 16 and 17 of the M. P. Bhumi Vikas Rules, 1994 as no site plan showing exact Khasra Number by division, position of site in relation to neighbouring streets, details of contiguous land, existing building and proper proof of title was not submitted. It has been further stated that no development permission could have been granted in respect of the Housing Cooperative societies exclusively meant for development of residential colony for construction of a Hotel.

13. Petitioner has further stated that the respondents on the strength of development permission granted on 24/4/2017 applied for diversion of the land for using it for commercial purposes and unholy haste was shown by the respondents in passing diversion order on 17/6/2013. It has also been stated that the entire exercise of passing diversion order was done within 13 days from the date of execution of sale deeds. The petitioner has also stated that the diversion order was passed without obtaining No Objection Certificate from the Ujjain Municipal Corporation, Ujjain, for developing the aforesaid and the same was a mandatory requirement, as required under Rule 5 of the MP Cooperative Societies Rules, 1962. It has also been stated that no No Objection Certificate was obtained from the National Highway Authority as required under Rule 6 of the Rules of 1962.

14. That the petitioner has further stated that the building permission granted in the matter is also contrary to the statutory provisions and no such building permission could have been granted in the matter, as the development permission dated 24/4/2007 which was valid for three years, came to an end by efflux of time on 24/4/2010. The petitioner has also stated that the respondent No.14 to 16 have raised construction over Marginal Open Space (MOS), OTS and have not left parking area as per the sanctioned map. Various other irregularities have also been stated in the Writ Petition. The petitioner has stated that the land belonging to the Cooperative Housing societies could not have been transferred in the manner and method it has been done by the respondent Nos. 14, 15 and 16 and no Hotel could have been constructed over the plots which were originally the property of the Cooperative Housing Societies. The petitioner has prayed for the following reliefs :

> **(1)** quash and set aside the development permission dated 24/4/2007 (Annexure P/6) granted by respondent No. in favour of respondents No. 14 to 16.

(2) quash and set aside the building permission dated 23/2/2013 (Annexure P/10) passed by respondent No.10 in favour of respondents No. 14 to 16.

(3) quash and set aside the diversion order dated 17/6/2013 passed by respondent No.9 (Annexure P/9) in favour of respondents No.14 to 16.

(4) quash and set aside the sale deeds collectively marked as Annexure P/2 and p/3 respectively, executed in favour of respondent Nos. 14 to 16.

(5) allow this petition with costs

(6) any other further orders as deemed fit by this Hon'ble Court in the facts and circumstances of the case.

15. The respondent Nos. 1, 5, and 6 have filed a reply through Officer-in-Charge of the case, Joint Director, Town & Country Planning Department and it has been stated by the respondents that their reply is only confined in respect of grant of development permission dated 24/4/2007 (Annexure P/6). The respondents on affidavit have stated that the development permission granted on 24/4/2007 was valid for a period of three years and the same expired on 23/4/2010 and thereafter no fresh development permission was granted in favour of respondent Nos. 14 to 16 and the entire construction has been raised after grant of building permission dated 23/3/2013. The respondents have stated that the entire construction is illegal, as it has been raised during the period when there was no development permission in existence and the Ujjain Municipal Corporation could not have granted building permission in the matter. The respondents have also stated that in the development permission dated 24/4/2007 it was categorically mentioned that respondent No. 14 to 16 will remove the illegal construction within 60 days and respondent No. 14 to 16 have also submitted an Affidavit that they will remove the illegal construction within 60 days. However, no such construction was removed and they have sought information from the Ujjain Municipal Corporation in that behalf. The respondents have also stated that the matter relating to consolidation of plots as always been a matter of concern and initially a circular was issued on 21/11/2005 for consolidation of plots situated in a residential colony. It has been further stated that subsequently a clarifications were issued on 8/6/2007 and on 26/3/2009 and the permission granting consolidation of plots was set aside, hence after 26/3/2009 all development permissions relating to consolidation of plots automatically stands revoked.

16. The respondents have further stated that respondent No. 4 to 16 have not submitted complete information to them that the bye-laws of the society prohibits sale of plots for a period of 10 years and, therefore, they were kept in dark. The

respondent Nos. 5 and 6 have further stated that respondent No. 14 to 16 have submitted false information, however, no proceedings were initiated against them under Rule 25 of the Bhumi Vikas Rules, as the development permission came to an end by efflux of time. The respondents have stated that the entire building has been constructed illegally without there being any development permission and as development permission came to an end after 3 years ie., on 24/4/2010, the question of revoking the same also does not arise.

17. The respondent Nos. 14, 15 and 16 (the persons who have constructed the Hotel) have also filed a detailed and exhaustive reply and it has been stated that in respect of the same subject matter one Mohanlal Waswani has also filed a Writ Petition and the same was registered as W.P.No. 9548/2013 and this Court by order dated 23/9/2013 has disposed of the Writ Petition. It has been further stated that against the order dated 23/9/2013 a Writ Appeal was preferred ie., W.A.No. 898/2013 and, therefore, on the same subject matter the present Writ Petition which is a Public Interest Litigation, is not maintainable and it is barred by the principles of *res-judicata*, hence deserves to be dismissed.

18. The respondents have also stated that the petitioner in the present case is working in the Shop of Mohanlal Waswani as a servant and the present Public Interest Litigation is being used as a tool to score personal vendatta, hence, it deserves to be dismissed summarily. The respondents have also stated that the petitioner is not an aggrieved party. No fundamental right of the petitioner has been violated and he has got no right for seeking relief of cancellation of sale deed as well as for cancellation of various permissions granted in the matter from time to time. The respondents have also stated that as per the provision of Sec. 293 of the M. P. Municipal Corporation Act, in respect of any building permission granted by the Municipal Corporation, a person aggrieved can prefer appeal before the District Court and as the petitioner has not preferred any appeal before the District Court, the petition is not maintainable. The respondents have further stated that in case a person is aggrieved by diversion order passed by the Revenue Authorities ie., the Sub Divisional Officer, u/S. 172(1) of the M. P. Land Revenue Code, 1959, an aggrieved party does have a right to file an appeal before the appellate forum and as the petitioner has not preferred an appeal, the present petition deserves to be dismissed on this count alone.

19. The respondents have also stated that the allegation of the petitioner in respect of the Housing Societies and in respect of the transfer of residential plots to the respondents for construction and establishment of the Hotel are of no help to the petitioner as he was not a party to the sale deeds, he was not a Member of the Housing Society and he does not have any *locus* to raise any objection in the matter. The respondents have further stated that in case the petitioner is aggrieved in the matter in respect of execution of sale deeds, the remedy available to him is

to approach the Registrar of Cooperative Societies under the provisions of the M. P. Cooperative societies Act, 1960. The respondents have further stated that there are cases pending between the petitioner and the respondents in the revenue courts, in Civil Courts and the petition has been filed with oblique and ulterior motive. It has been further stated that after getting the sale deeds executed in their favour, they have applied for sanction of layout plan for establishment of Hotel and the Joint Director, Town & Country Planning Department has approved their layout with certain conditions by order dated 24/4/2007 for construction of a Hotel over the land admeasuring 7257.58 sqm., of Survey No. 81/1/1, 81/2/1 and 81/1. It has been further stated that in respect of the time limit of extension for year to year, the respondents have also within specified time limit obtained for extension for year to year on 9/6/2011 to 24/6/2012. The respondents have also stated that after the layout was sanctioned by the Joint Director, Town & Country Planning Department, Ujjain, they have applied for diversion of land for using it for commercial purposes and the Sub Divisional Officer, Ujjain has passed a diversion order on 17/6/2013 changing the land use from residential to commercial by redeterming and fixing the premium of land use at commercial rate. It has been stated that two diversion orders were passed ie., on 17/6/2013 and 27/6/2013 by the Competent Authority, Sub Divisional Officer. The respondents have stated that they have applied for building permission for establishment of Hotel to the Commissioner, Municipal Corporation, Ujjain and the Commissioner, Municipal Corporation, Ujjain sought permission in the shape of No Objection Certificate from the Town & Country Planning Department. The Joint Director, Town & Country Planning Department has issued a letter on 21/12/2012 directing the Municipal Commissioner for compliance of already approved layout plan u/S. 30 of the Nagar Tatha Gram Nivesh Adhiniyam, 1973 and for grant of building permission by the Municipal Corporation, Ujjain and thereafter the permission was granted to construct the Hotel building on 20/2/2013.

20. The respondents have further stated that a part of the land belonging to respondents was purchased by them and they were having title over a part of the land which was not a diverted land and as it was being used by them, they applied for diversion for a part of the land for using it for commercial purposes. The Sub Divisional Officer, Ujjain has passed an order on 17/6/2013 keeping in view Sec. 172 (1) of the M. P. Land Revenue Code, 1959 in favour of the respondents.

21. The respondents have also stated that after getting the building permission, they have availed financial assistance from the Nationalised Banks to the tune of Rs.10.00 Crores and after obtaining a loan they have completed the Hotel which is functioning. The respondents have stated that they have constructed the buidling in accordance with various permissions granted to them from time to time and there is already a Writ Appeal pending before this Court ie.,

W.A.No. 898/2013 and they have also given an undertaking that they will demolish the construction if ultimately they lose. The respondents have prayed for dismissal of the Writ Petition and for imposition of exemplary costs.

22. An affidavit has also been filed by the petitioner dated 7/3/2015 wherein he has denied his relationship with Mohanlal Waswani and he has stated that he is not at all working for Mohanlal Waswani and he has filed the petition challenging the development permission dated 24/4/2007, building permission dated 22/2/2013 as well as diversion order dated 17/6/2013. In the affidavit it has also been stated that the diversion order passed in the matter was cancelled by the Sub Divisional Officer against which an appeal was submitted before the Collector and the Collector has dismissed the appeal and even the second appeal preferred before the Commissioner, Ujjain has been dismissed by order dated 24/2/2015. In the affidavit it has also been mentioned that the diversion order which has been brought on record by respondent Nos. 14 to 16 has already been cancelled. There are various replies to the interlocutory applications filed in the matter by the parties and one such reply dated 22/4/2015 filed by respondent Nos. 4 to 10 reveals that an order was passed in the present case on 26/3/2015 by which this Court has directed respondent Nos. 3, 4, l6, 8, 9 and 10 to take appropriate steps in the matter regarding removal of illegal construction and at the same time respondent Nos. 14 to 16 were directed not to carry out any construction activities based upon various permission granted to them from time to time. The Collector, Ujjain as well as the Commissioner Ujjain Municipal Corporation were also directed to file compliance report and in that backdrop it has been stated by respondent Nos. 4 to 10 that respondent Nos. 14 to 16 have preferred Special Leave Petition before the Hon'ble Supreme Court ie., SLP No. 11472/2015 and the Hon'ble Supreme Court has passed an order in the matter on 16/4/2015. It has been further stated that the Ujjain Municipal Corporation on 13/1/2014 has cancelled the building permission dated 23/2/2013 and Notice was also issued for removing the illegal construction and aggrieved by the aforesaid notice a Civil Suit was preferred by respondent Nos. 14 to 16 before the 4th Addl. Civil Judge, Class II, Ujjain ie., Civil Suit No. 37-A/2014. In the Civil Suit the learned Judge has directed the parties to maintain status quo. It has also been stated that in the aforesaid Civil Suit that the present petitioner has filed an application under Order 1 Rule 10 of the Code of Civil Procedure, 1908 for impleadment.

23. There is a rejoinder also on record filed by the respondent Nos. 14, 15 and 16. Again in the aforesaid rejoinder it has been stated that the present petition is a sponsored Writ Petition and the diversion order once passed in favour of the respondents could not have been cancelled in the manner and method it has been done. There was a proper building permission granted in the matter and the Civil Suit is also pending in respect of the same subject matter. It has also been stated that the respondent Nos. 14, 15 and 16 has obtained loan from the Bank and they

will be suffering irreparable loss. It has also been stated that in respect of the same construction which was over the MOS, the same has been removed by them. It has also been stated that the Civil Judge, later on, vacated the injunction order on 18/8/2015 against which an appeal was preferred and the Addl. District Judge, Ujjain Appeal No. 9/2015 has passed an order on 27/8/2015 affirming the order of the Civil Judge, meaning thereby, there was no injunction in existence and a prayer has been made for granting an injunction to the present petitioner. There is again an application filed by the petitioner along with order of the Hon'ble Supreme Court wherein the apex Court has directed this Court to decide the present matter at an early date.

24. Heard learned counsel for the parties at length and perused the record.

25. The present petition is certainly a Public Interest Litigation filed by one Sanjay Gangrade and he has prayed for the following reliefs :

> **(1)** quash and set aside the development permission dated 24/4/2007 (Annexure P/6) granted by respondent No. in favour of respondents No. 14 to 16.
>
> **(2)** quash and set aside the building permission dated 23/2/2013 (Annexure P/10) passed by respondent No.10 in favour of respondents No. 14 to 16.
>
> **(3)** quash and set aside the diversion order dated 17/6/2013 passed by respondent No.9 (Annexure P/9) in favour of respondents No.14 to 16.
>
> **(4)** quash and set aside the sale deeds collectively marked as Annexure P/2 and p/3 respectively, executed in favour of respondent Nos. 14 to 16.
>
> **(5)** allow this petition with costs
>
> **(6)** any other further orders as deemed fit by this Hon'ble Court in the facts and circumstances of the case.

26. Facts of the case reveal that the respondent Nos.11, 12 and 13 are the Cooperative Societies. The Cooperative Societies are having their bye-laws and the Cooperative Societies were constituted in order to provide residential plots to their members as per the bye-laws of the society. The land was purchased by the Cooperative Housing Societies bearing Survey No. 81/1/1, 81/1/2 and 81/1/3, situated at village Nanakheda, Tehsil & District Ujjain for carving out plots and for allotting them to the members of the society. The land was purchased by the cooperative societies on 5/2/2004, 27/8/2004, 28/8/2004 and 23/8/2004 vide

registered sale deeds. All the three cooperative societies obtained development permission from the Joint Director, Town & Country Planning Department for developing residential colonies. The Joint Director, Town & Country Planning Department- respondent No.6 granted development permission in favour of respondent No.11 -cooperative society for developing a residential colony over the land bearing Survey No. 81/1/1/2 on 5/2/2004. The development permission was in respect of residential colony.

27. The Joint Director, Town & Country Planning Department - respondent No.6 again granted development permission in favour of respondent No.13 Cooperative Society for developing a residential colony over the land bearing Survey No. 81/2/1/1. The Joint Director, Town & Country Planning Department - respondent No.6 again granted development permission in favour of respondent No.11 Cooperative Society for developing a residential colony over the land bearing Survey No. 81/2/1/2. Similarly, in respect of respondent No. 12 Cooperative Society, the development permission was granted by the Joint Director, Town & Country Planning Department for development of a residential colony over Survey No. 81/2/1/3 by order dated 28/8/2004.

28. The respondent No.13 Society executed a sale deed in favour of one Gurubaksh Singh on 8/8/2006. The sale deed is at page 299 of the paper book and the relevant pages are 305, 306 and 307. The following terms and conditions were mentioned in the sale deed as it was a plot allotted by the Cooperative Society :

> (a) plots will be non-transferable for a period of ten years;
>
> (b) the construction of plot should be made within 3 years. Failing which the plots will be surrendered back to the society; and,
>
> (c) the plots will be used only for residential purposes and for no other purposes.

29. Respondent No.11 Cooperative Society executed a sale deed in favour of Hotel Shanti Palace - respondent No.14 in respect of residential plots bearing No. 66, 67 and 68. The plots sold were part of the layout approved by the Joint Director, Town & Country Planning Department in respect of which the development permission was given only to develop a residential colony. The most important aspect of the case is that the Cooperative Society could not have sold the plot to Hotel Shanti Palace - respondent No.14, as plots were meant for allotment to members of the society that too for construction of residential building (page 104 of the paper book).

30. The respondent No.12 Cooperative Society on 31/3/2007 executed a sale deed in favour of Hotel Shanti Palace - respondent No.14 in respect of plot No. 64 and again in the sale deed it was categorically mentioned that the plot is meant for residential purposes (page 246 of the paper book). Again the aforesaid plot could not have been sold to Hotel Shanti Palace, as it was meant for allotment to the members of the society that too for residential purposes.

31. The Joint Director, Town & Country Planning Department who has earlier granted development permission for developing residential colony over the land in question, again granted development permission for construction of a Hotel on 24/4/2007 (page 310 Annexure P/6). In the development permission at Clause 4, it was categorically mentioned that in case there is an illegal construction, the same shall be removed within 60 days. The development permission was valid for a period of 3 years. At this point of time, the relevant statutory provision of law which deals with the lapse of permission, as contained under the M. P. Nagar Tatha Gram Nivesh Adhiniyam, 1973, reads as under :

> 33. **Lapse of permission.**- Every permission granted under Section 30 or Section 31 or Section 32 shall remain in force for a period of [three years] from the date of such grant and thereafter it shall lapse :
>
> Provided that the Director may, on an application, extend such period from year to year but the total period shall in no case exceed [five years] from the date on which the permission was initially granted :
>
> Provided further that such lapse shall not bar any subsequent application for fresh permission under this Act.

32. The aforesaid statutory provision of law makes it very clear that the permission granted by the authority shall be valid for a period of 3 years and can be extended from year to year basis, but such extension shall not exceed 5 years and, therefore, by virtue of the aforesaid statutory provision of law, the development permission expired by efflux of time on 24/4/2010.

33. The another important aspect of the case is that the respondent No. 12 Society, after completing the development work, sold part of Survey No. 81/1/1/3 vide registered sale deed dated 21/12/2011 on 31/3/2012 showing it to be undiverted and undeveloped land in favour of Prashant Jain, Naveen Pathak, Prakash Bothra, Gopal, Suresh and others. Similarly, the respondent No.11 housing cooperative society on 31/3/2012 after completing the development work sold part of Survey No. 81/2/1/2 showing it to be undiverted and undeveloped land in favour of Bharat Shrivas, Amarchand Roy, Hukumchand Roy, Gulabchand Chhatani etc.. The respondent No.13 Cooperative Society on

31/3/2012 after completing the development work sold part of Survey No. 81/1/1/1 showing it to be undiverted and undeveloped land in favour of Chintanmal Padiyal, Sushil Shrivas, Nitin Singh, Rahul Shrivas, Ramswaroop Verma and others.

34. The Ujjain Municipal Corporation on 23/2/2013 granted building permission to respondent No. 15 and 16 even though there was no development permission in existence granted by the Department of Town & Country Planning and in absence of any diversion order changing the land use from residential to commercial (for the purposes of establishing a Hotel). The another important aspect of the case is that in the building permission, the land use for which the permission was granted was not mentioned. The relevant statutory provision of law which deals with grant of building permission as contained u/Ss. 293, 294 and 296 of the M. P. Municipal Corporation Act, 1956 reads as under :

> **293. Prohibition of Erection or re-erection of buildings. -**
>
> (1) No person shall- (i) erect or re-erect any building; or (ii) commence to erect or re-erect any building; or (iii) make any material external alteration to any building; or (iv) construct or re-construct any projecting portion of a building which the Chief Executive Officer is empowered by section---- to require to be set back or is empowered to give permission to construct or reconstruct,- (a) unless the Chief Executive Officer has either by an order in writing granted permission or has failed to intimate within the prescribed period his refusal of permission for the erection or re-erection of the building or for the construction or re-construction of the projecting part of the building; or (b) after the expiry of one year from the date of the said permission or such longer period as the Chief Executive Officer may allow or from the end of the prescribed period, as the case may be: Provided that nothing in this section shall apply to any work, addition or alteration which the Municipality may by byelaw declare to be exempt. (2) If a question arises whether a particular alteration in or addition to an existing building is or is not a material alteration the matter will be determined by the Commissioner. (3) Any person aggrieved by the order of the Commissioner in this behalf may appeal to the district court within thirty days of such order in the manner prescribed therefore and the decision of the district court shall be final.
>
> **294. Notice of Buildings.**- Every person who intends to erect or re-erect a building shall submit to the Commissioner- (a) an application in writing for a approval of the site together with a site plan of the land; and in the case of land which is the property

of the Government or of the Corporation a certified copy of the documents authorizing him to occupy the land, and if so required by the Commissioner the original document or documents; and (b) an application in writing for permission to build together with a ground plan, elevation and section of the building and a specification of the work to be done. (2) Every plan of any building to be constructed wholly or partly of masonry, submitted under sub-section (1) shall, in token of its having been prepared by him or under his supervision, bear the signature of a licensed surveyor. (3) Every document submitted under sub-section (1) shall be prepared in such manner and shall contain such particulars as may be prescribed by byelaws. (4) Nothing herein contained shall require a person to comply with the provisions of clause (b) of sub-section (1) until such time as the site has been approved by the Commissioner or such person as he may appoint.

296. Grounds on which site of proposed building may be disapproved.- The Commissioner may refuse to approve the site on which an applicant proposes to erect or reerect any building- (a) that the erection or re-erection of the proposed building on such site would be in contravention of a town-planning scheme under section 291 or of any other provision of this Act or of any other enactment for the time being in force; or (b) the site is in a portion within the limits of the City in which the position and direction of the streets have not been determined, and that the building which it is proposed to erect on such site will, in the opinion of the Commissioner, obstruct or interfere with the construction in future of suitable streets in such portion or with the drainage, water-supply or ventilation thereof: Provided that any person to whom permission to erect or re-erect a building on such a site has been refused may, by written notice to the Chief Executive Officer require that the position and direction of streets to be laid down in future in the vicinity of the proposed building should be forthwith determined, and if such requisition is not complied with within one year from the date thereof, may, subject to all other provisions of this Act applicable there to, proceed with the erection of his building; or (c) that the site has been re-claimed or used as a place for depositing sewage, offensive matter rubbish or then carcasses of dead animals or is otherwise in sanitary or dangerous to health ; or (d) that the site is in a portion within the limits of the City for which a town-planning scheme has not been sanctioned by the Government and that the building which it is proposed to erect or re-erect on such site will, in the opinion of the Commissioner, be likely to conflict in

> a manner, to be communicated in writing to the applicant, with the provisions of a town-planning scheme: Provided that any person to whom permission to erect or re-erect a building on such a site has been refused may, by written notice to the Chief Executive Officer, require that the preparation of a town-planning scheme for the portion in which the site is situated shall be proceeded with as early as possible; and if the applicant is not informed in writing within twelve months of the date of the requisition that the Government have sanctioned the said townplanning scheme, he may subject to all the other provisions of this Act applicable there to proceed with the erection or re-erection of the building in respect of which the application was made.

The aforesaid statutory provisions of law makes it very clear that the building permission can be granted in consonance with the provisions as contained under the M.P. Nagar Tatha Gram Nivesh Adhiniyam, 1973.

35. On 31/3/2013, the persons in favour of whom the cooperative societies have executed sale deeds namely; Bharat Shrivas, Amarchand Roy, Hukumchand, Gulabchand Chhatani and others executed sale deed in favour of respondent No. 15 - Chandrashekhar Shrivas on 31/3/2013 and similar sale deeds were executed by Chintaman Padyal, Sushil Shrivas, Rahul Shrivas, Nitin Singh and others in favour of respondent No. 15 on 31/3/2013.

36. Respondent No. 14, 15 and 16 applied for diversion order for changing the land use and the diversion order was passed on 17/6/2013 for using the land for the purposes of Hotel.

37. By order dated 11/9/2013 diversion order was cancelled by the Sub Divisional Officer (Revenue) against which an appeal was preferred and the Collector, Ujjain by order dated 30/9/2013 has affirmed the cancellation of the said diversion order. Thus, the important aspect of the case is that initially diversion order which is not in existence now was passed on 17/6/2013 and the building permission was granted by the Ujjain Municipal Corporation on 23/2/2013, meaning thereby, prior to the order of diversion passed by the Sub Divisional Officer, the building permission was granted by the Ujjain Municipal Corporation. As on date, it has been informed to this Court that the diversion order was cancelled by the SDO and the cancellation was affirmed by the Collector and the Commissioner. The matter is now pending before the Board of Revenue. Thus, in short, this is no diversion order in existence.

38. The Ujjain Municipal Corporation, when all such irregularities were brought to the notice of the authorities, has also revoked the building permission by order dated 13/1/2014, meaning thereby, there is no diversion order in

existence and there is no building permission in existence. Otherwise also, the initial diversion order which was passed in the matter ignoring the fact that the land in question is exclusively meant for residential house, could not have been passed by the revenue authorities, in the light of the order passed by the Joint Director, Town & Country Planning Department dated 5/2/2004, 23/8/2004 and 27/8/2004 by which permission was granted to the cooperative societies for developing the residential colonies only. The map sanctioned by the Ujjain Municipal Corporation was also an illegal act. There was no development permission, there was no diversion order and inspite of the aforesaid in respect of the residential land, permission was granted to construct a Hotel and, therefore, the Ujjain Municipal Corporation has rightly cancelled the building permission on 13/1/2014. The Ujjain Municipal Corporation has not issued service certificate, completion certificate and occupancy certificate to private respondents till date.

39. The reply filed by respondent No.1 Director, Town & Country Planning Department on affidavit establishes that the development permission was valid till 23/4/2010 and as the entire construction has been completed thereafter it is illegal. The salient points mentioned on affidavit in the reply of the Director, Town & Country Planning Department, reads as under :

> (1) that the development permission was valid till 23/4/2010 and as the entire construction has been made thereafter, the entire construction is illegal;
>
> (2) that the private respondents have not complied with the affidavit on the basis of which development permission dated 24/4/2007 was granted and said illegal construction has not been removed;
>
> (3) that after 26/3/2009 all development permissions granted on the basis of consolidation of plots stand automatically cancelled;
>
> (4) that in ignorance to cooperative rules and bye-laws which prohibits sale of 10 years, construction of residential accommodation within time bound manner, the development permission was granted; and,
>
> (5) that the private respondents No. 14 to 16 have not submitted complete information before the respondents while applying for grant of development permission.

40. In the light of the aforesaid reply on affidavit by the Town & Country Planning Department by the State of Madhya Pradesh - respondent No.1 and respondent No. 5 and 6, the entire construction is an illegal construction.

41. The Ujjain Municipal Corporation has also filed a return and has stated that they have revoked the building permission and the structure in question has to be demolished. Thus, it is established that there is no building permission as on date, the permission which was granted has been revoked.

42. In the present case, the Hotel has been constructed by consolidating the plots. Sec. 30A of the M. P. Nagar Tatha Gram Nivesh Adhiniyam deals with the consolidation of plots and the same reads as under :

> 30A - Merger of division of a plot (1) The State Government or an officer so authorised by it may, subject to the provisions of this Act and such conditions as may be prescribed, allow merger or division of the plot :
>
> Provided that where the purpose of land use is residential;
>
> (a) plots for economically weaker sections and low income groups shall not be merged;
>
> (b) division of plots shall not be permitted;
>
> (c) only continuous plot shall be merged and the size of such merged plot shall not exceed 500 sq. mtrs.; and,
>
> (2) An application under sub-section (1) shall contain such details, documents and accompanied by such fee as may be prescribed.

43. The aforesaid statutory provision of law deals with merger or division of plots and the aforesaid statutory provision of law does not empower the Competent Authority for merger of plots meant for residential purposes to be used for commercial purposes, meaning thereby, to be used for any other purpose except for residential purpose.

44. In the present case, after merger of plots, a Hotel has been constructed and, therefore, the building permission which was granted after merger of the plots was certainly illegal and has rightly been revoked by the Ujjain Municipal Corporation.

45. The apex Court while dealing with illegal / unauthorised constructions has directed demolition as illegal constructions affects planned development of the area meant for public benefit. It causes public hazards and violates fundamental rights of other citizens. In the case of *Dipak Kumar Mukherjee Vs. Kolkata Municipal Corporation and others* reported in (2013) 5 SCC 336. The apex Court has dealt with various illegal constructions, violation of development laws and

has observed that such illegal constructions are acquiring monstrous proportion in different parts of the country. Paragraphs 2 to 9 and 29 reads as under :

> 2. In last four decades, the menace of illegal and unauthorised constructions of buildings and other structures in different parts of the country has acquired monstrous proportion. This Court has repeatedly emphasized the importance of planned development of the cities and either approved the orders passed by the High Court or itself gave directions for demolition of illegal constructions - (1) K.Ramadas Shenoy v. Chief Officers, Town Municipal Council (1974) 2 SCC 506; (2) Virender Gaur v. State of Haryana (1995) 2 SCC 577; (3) Pleasant Stay Hotel v. Palani Hills Conservation Council(1995) 6 SCC 127; (4) Cantonment Board, Jabalpur v. S.N. Awasthi 1995 Supp. (4) SCC 595; (5) Pratibha Coop. Housing Society Ltd. v. State of Maharashtra (1991) 3 SCC 341; (6) G.N. Khajuria (Dr) v. Delhi Development Authority (1995) 5 SCC 762; (7) Manju Bhatia v. New Delhi Municipal Council (1997) 6 SCC 370; (8) M.I. Builders Pvt. Ltd. v. Radhey Shyam Sahu (1999) 6 SCC 464; (9) Friends Colony Development Committee v. State of Orissa (2004) 8 SCC 733; (10) Shanti Sports Club v. Union of India (2009) 15 SCC 705 and (11) Priyanka Estates International Pvt. Ltd. v. State of Assam (2010) 2 SCC 27.
>
> 3. In K. Ramadas Shenoy v. Chief Officers, Town Municipal Council (supra), the resolution passed by the Municipal Committee authorising construction of a cinema theatre was challenged on the ground that the site was earmarked for the construction of Kalyan Mantap-cum-Lecture Hall and the same could not have been used for any other purpose. The High Court held that the cinema theatre could not be constructed at the disputed site but declined to quash the resolution of the Municipal Committee on the ground that the theatre owner had spent huge amount. While setting aside the High Court's order, this Court observed:
>
> "An illegal construction of a cinema building materially affects the right to or enjoyment of the property by persons residing in the residential area. The Municipal Authorities owe a duty and obligation under the statute to see that the residential area is not spoilt by unauthorised construction. The Scheme is for the benefit of the residents of the locality. The Municipality acts in aid of the Scheme. The rights of the residents in the area are invaded by an illegal construction of a cinema building. It has to be remembered that a scheme in a residential area means planned orderliness in accordance with the requirements of the residents. If the scheme is nullified by arbitrary acts in excess

and derogation of the powers of the Municipality the courts will quash orders passed by Municipalities in such cases.

The Court enforces the performance of statutory duty by public bodies as obligation to rate payers who have a legal right to demand compliance by a local authority with its duty to observe statutory rights alone. The Scheme here is for the benefit of the public. There is special interest in the performance of the duty. All the residents in the area have their personal interest in the performance of the duty. The special and substantial interest of the residents in the area is injured by the illegal construction."

4.In Pratibha Coop. Housing Society Ltd. v. State of Maharashtra (supra), this Court approved the order passed by the Bombay Municipal Corporation for demolition of the illegally constructed floors of the building and observed: "Before parting with the case we would like to observe that this case should be a pointer to all the builders that making of unauthorised constructions never pays and is against the interest of the society at large. The rules, regulations and bye-laws are made by the Corporations or development authorities taking in view the larger public interest of the society and it is the bounden duty of the citizens to obey and follow such rules which are made for their own benefits."

5.In Friends Colony Development Committee v. State of Orissa (supra), this Court noted that large number of illegal and unauthorised constructions were being raised in the city of Cuttack and made the following significant observations:

".....Builders violate with impunity the sanctioned building plans and indulge in deviations much to the prejudice of the planned development of the city and at the peril of the occupants of the premises constructed or of the inhabitants of the city at large. Serious threat is posed to ecology and environment and, at the same time, the infrastructure consisting of water supply, sewerage and traffic movement facilities suffers unbearable burden and is often thrown out of gear. Unwary purchasers in search of roof over their heads and purchasing flats/apartments from builders, find themselves having fallen prey and become victims to the designs of unscrupulous builders. The builder conveniently walks away having pocketed the money leaving behind the unfortunate occupants to face the music in the event of unauthorised constructions being detected or exposed and threatened with demolition. Though the local authorities have the staff consisting of engineers and inspectors whose duty is to keep a watch on building activities and to promptly stop the illegal constructions or deviations coming up, they often fail in

discharging their duty. Either they don't act or do not act promptly or do connive at such activities apparently for illegitimate considerations. If such activities are to stop some stringent actions are required to be taken by ruthlessly demolishing the illegal constructions and non-compoundable deviations. The unwary purchasers who shall be the sufferers must be adequately compensated by the builder. The arms of the law must stretch to catch hold of such unscrupulous builders.....

In all developed and developing countries there is emphasis on planned development of cities which is sought to be achieved by zoning, planning and regulating building construction activity. Such planning, though highly complex, is a matter based on scientific research, study and experience leading to rationalisation of laws by way of legislative enactments and rules and regulations framed thereunder. Zoning and planning do result in hardship to individual property owners as their freedom to use their property in the way they like, is subjected to regulation and control. The private owners are to some extent prevented from making the most profitable use of their property. But for this reason alone the controlling regulations cannot be termed as arbitrary or unreasonable. The private interest stands subordinated to the public good. It can be stated in a way that power to plan development of city and to regulate the building activity therein flows from the police power of the State. The exercise of such governmental power is justified on account of it being reasonably necessary for the public health, safety, morals or general welfare and ecological considerations; though an unnecessary or unreasonable intermeddling with the private ownership of the property may not be justified.

The municipal laws regulating the building construction activity may provide for regulations as to floor area, the number of floors, the extent of height rise and the nature of use to which a built-up property may be subjected in any particular area. The individuals as property owners have to pay some price for securing peace, good order, dignity, protection and comfort and safety of the community. Not only filth, stench and unhealthy places have to be eliminated, but the layout helps in achieving family values, youth values, seclusion and clean air to make the locality a better place to live. Building regulations also help in reduction or elimination of fire hazards, the avoidance of traffic dangers and the lessening of prevention of traffic congestion in the streets and roads. Zoning and building regulations are also legitimised from the point of view of the control of community

development, the prevention of overcrowding of land, the furnishing of recreational facilities like parks and playgrounds and the availability of adequate water, sewerage and other governmental or utility services.

Structural and lot area regulations authorise the municipal authorities to regulate and restrict the height, number of storeys and other structures; the percentage of a plot that may be occupied; the size of yards, courts and open spaces; the density of population; and the location and use of buildings and structures. All these have in our view and do achieve the larger purpose of the public health, safety or general welfare. So are front setback provisions, average alignments and structural alterations. Any violation of zoning and regulation laws takes the toll in terms of public welfare and convenience being sacrificed apart from the risk, inconvenience and hardship which is posed to the occupants of the building."

(emphasis supplied)

6. In Shanti Sports Club v. Union of India (supra), this Court approved the order of the Delhi High Court which had declared the construction of sports complex by the appellant on the land acquired for planned development of Delhi to be illegal and observed:

"In the last four decades, almost all cities, big or small, have seen unplanned growth. In the 21st century, the menace of illegal and unauthorised constructions and encroachments has acquired monstrous proportions and everyone has been paying heavy price for the same. Economically affluent people and those having support of the political and executive apparatus of the State have constructed buildings, commercial complexes, multiplexes, malls, etc. in blatant violation of the municipal and town planning laws, master plans, zonal development plans and even the sanctioned building plans. In most of the cases of illegal or unauthorised constructions, the officers of the municipal and other regulatory bodies turn blind eye either due to the influence of higher functionaries of the State or other extraneous reasons. Those who construct buildings in violation of the relevant statutory provisions, master plan, etc. and those who directly or indirectly abet such violations are totally unmindful of the grave consequences of their actions and/or omissions on the present as well as future generations of the country which will be forced to live in unplanned cities and urban areas. The people belonging to this class do not realise that the constructions made in violation of the relevant laws,

master plan or zonal development plan or sanctioned building plan or the building is used for a purpose other than the one specified in the relevant statute or the master plan, etc., such constructions put unbearable burden on the public facilities/amenities like water, electricity, sewerage, etc. apart from creating chaos on the roads. The pollution caused due to traffic congestion affects the health of the road users. The pedestrians and people belonging to weaker sections of the society, who cannot afford the luxury of air-conditioned cars, are the worst victims of pollution. They suffer from skin diseases of different types, asthma, allergies and even more dreaded diseases like cancer. It can only be a matter of imagination how much the Government has to spend on the treatment of such persons and also for controlling pollution and adverse impact on the environment due to traffic congestion on the roads and chaotic conditions created due to illegal and unauthorised constructions. This Court has, from time to time, taken cognizance of buildings constructed in violation of municipal and other laws and emphasised that no compromise should be made with the town planning scheme and no relief should be given to the violator of the town planning scheme, etc. on the ground that he has spent substantial amount on construction of the buildings, etc. Unfortunately, despite repeated judgments by this Court and the High Courts, the builders and other affluent people engaged in the construction activities, who have, over the years shown scant respect for regulatory mechanism envisaged in the municipal and other similar laws, as also the master plans, zonal development plans, sanctioned plans, etc., have received encouragement and support from the State apparatus. As and when the Courts have passed orders or the officers of local and other bodies have taken action for ensuring rigorous compliance with laws relating to planned development of the cities and urban areas and issued directions for demolition of the illegal/unauthorised constructions, those in power have come forward to protect the wrongdoers either by issuing administrative orders or enacting laws for regularisation of illegal and unauthorised constructions in the name of compassion and hardship. Such actions have done irreparable harm to the concept of planned development of the cities and urban areas. It is high time that the executive and political apparatus of the State take serious view of the menace of illegal and unauthorised constructions and stop their support to the lobbies of affluent class of builders and others, else even the rural areas of the country will soon witness similar chaotic conditions."

7. In Priyanka Estates International Pvt. Ltd. v. State of Assam (supra), this Court refused to order regularisation of the illegal construction raised by the appellant and observed:

"It is a matter of common knowledge that illegal and unauthorised constructions beyond the sanctioned plans are on rise, may be due to paucity of land in big cities. Such activities are required to be dealt with by firm hands otherwise builders/colonisers would continue to build or construct beyond the sanctioned and approved plans and would still go scot-free. Ultimately, it is the flat owners who fall prey to such activities as the ultimate desire of a common man is to have a shelter of his own. Such unlawful constructions are definitely against the public interest and hazardous to the safety of occupiers and residents of multistoreyed buildings. To some extent both parties can be said to be equally responsible for this. Still the greater loss would be of those flat owners whose flats are to be demolished as compared to the builder."

8.What needs to be emphasised is that illegal and unauthorised constructions of buildings and other structure not only violate the municipal laws and the concept of planned development of the particular area but also affect various fundamental and constitutional rights of other persons. The common man feels cheated when he finds that those making illegal and unauthorised constructions are supported by the people entrusted with the duty of preparing and executing master plan/development plan/zonal plan. The reports of demolition of hutments and jhuggi jhopris belonging to poor and disadvantaged section of the society frequently appear in the print media but one seldom gets to read about demolition of illegally/unauthorisedly constructed multi-storied structure raised by economically affluent people. The failure of the State apparatus to take prompt action to demolish such illegal constructions has convinced the citizens that planning laws are enforced only against poor and all compromises are made by the State machinery when it is required to deal with those who have money power or unholy nexus with the power corridors.

9. We have prefaced disposal of this appeal by taking cognizance of the precedents in which this Court held that there should be no judicial tolerance of illegal and unauthorized constructions by those who treat the law to be their sub-servient, but are happy to note that the functionaries and officers of Kolkata Municipal Corporation (for short, 'the Corporation') have been extremely vigilant and taken steps for enforcing the provisions of the Kolkata Municipal Corporation Act, 1980 (for

> short, 'the 1980 Act') and the rules framed thereunder for demolition of illegal construction raised by respondent No.7. This has given a ray of hope to the residents of Kolkata that there will be zero tolerance against illegal and unauthorised constructions and those indulging in such activities will not be spared.
>
> 29. Reports showing compliance of the aforesaid directions be filed by the Corporation and respondent No.7 in the Registry of the Kolkata High Court within six months. Thereafter, the matter be placed before the learned Single Judge who had passed order dated 28.7.2010. If the learned Single Judge finds that any of the aforesaid directions has not been implemented then he shall initiate proceedings against the defaulting officers and/or respondent No.7 under the Contempt of Courts Act, 1971 and pass appropriate order.

46. In the light of the aforesaid, this Court is of the considered opinion that the present Writ Petition (PIL) deserves to be allowed. The impugned development permission dated 25/4/2007 (Annexure P/6) is quashed. The building permission dated 23/2/2013 (Annexure P/10) is also quashed. The diversion order dated 17/6/2013 (Annexure P/9), though it has been cancelled, is also quashed. The respondent - authorities shall be free to take appropriate action in accordance with law. It is made clear that there is no interim order restraining the authorities to proceed ahead in the matter, in accordance with law.

47. The Ujjain Municipal Corporation has already by an order dated 13/1/2014 has cancelled the permission dated 23/2/2013 and has issued a notice to respondent Nos. 14, 15 and 16 to remove the unauthorised construction and, therefore, the Municipal Corporation shall proceed ahead in the matter of removal of the entire construction which is subject matter of the dispute and shall report compliance to the Principal Registrar of this Court.

48. The another important aspect of the case is that the authorities under the M. P. Nagar Tatha Gram Nivesh Adhiniyam and under the Municipal Corporation Act, 1961 have granted various permissions *de-hors* the statutory provisions. It is a serious matter. The Hotel was constructed by obtaining loan, as stated on record. It is wastage of public money and, therefore, the matter requires a probe in respect of the role of the cooperative societies and all the persons related, by the Director General, Economic Offence Wing to arrive at a conclusion in respect of the involvement of the officers and other persons, if any, in the matter of grant of various permissions from time to time.

49. Resultantly, the Director General of Economic Offence Wing shall enquire into the matter with quite promptitude and shall be free to proceed ahead in the matter in accordance with law.

The Writ Petition is allowed. No order as to costs.

Petition allowed

I.L.R. [2019] M.P. 1251
MISCELLANEOUS PETITION
Before Mr. Justice G.S. Ahluwalia
M.P. No. 1435/2017 (Gwalior) decided on 9 January, 2019

JITENDRA SINGH KAURAV …Petitioner

Vs.

SMT. RAJKUMARI KAURAV …Respondent

***Hindu Marriage Act (25 of 1955), Section 13 and Evidence Act (1 of 1872), Section 45 – DNA Test – Ground* – Held – Where husband did not have access to his wife inspite of that wife got pregnant and he claims that he is not the biological father of the child, then DNA test can be ordered to resolve the dispute – In absence of DNA test, it would not be possible to establish and confirm the assertions in respect of infidelity – *Prima facie*, even according to reply filed by wife, there is serious dispute regarding paternity – Trial Court directed to proceed for DNA test – Petition allowed. (Para 12)**

हिन्दू विवाह अधिनियम (1955 का 25), धारा 13 एवं साक्ष्य अधिनियम (1872 का 1), धारा 45 – डी.एन.ए. जांच – आधार – अभिनिर्धारित – जहां पति की अपनी पत्नी तक पहुंच नहीं थी, उसके बावजूद पत्नी गर्भवती हो गई और उसने यह दावा किया कि वह बच्चे का जैविक पिता नहीं है, तब विवाद का समाधान करने के लिए डी.एन.ए. जाँच कराने का आदेश दिया जा सकता है – डी.एन.ए. जांच की अनुपस्थिति में, व्यभिचार के संबंध में प्राख्यानों को स्थापित करना तथा उनकी पुष्टि करना संभव नहीं होगा – प्रथम दृष्ट्या, यहां तक कि पत्नी द्वारा प्रस्तुत जवाब के अनुसार भी, पितृत्व को लेकर गंभीर विवाद है – विचारण न्यायालय को डी.एन.ए. जांच के लिए आगे कार्यवाही करने हेतु निदेशित किया गया – याचिका मंजूर।

Case referred:

AIR 2014 SC 418.

Prashant Sharma, for the petitioner.
Anurag Saxena, for the respondent.

(Supplied: Paragraph numbers)

O R D E R

G.S. AHULUWALIA, J.:- This petition under Article 227 of the Constitution of India has been filed against the order dated 17/11/2017 (Annexure P1) passed by Additional District Judge, Lahar, District Bhind in Case No.249-A/2014 (HMA), by which the application filed by the petitioner for conducting the DNA Test of the petitioner with that of the child delivered by the respondent, has been rejected.

2. The necessary facts for the disposal of the present petition in short are that the petitioner has filed an application for grant of divorce under Section 13 of the Hindu Marriage Act on various grounds. It appears that the reconciliation proceedings were taken up on 07/09/2015. On the said date, both the parties were present before the Court. After the conciliation proceedings, the petitioner agreed to take the respondent with him on the same day only, whereas the respondent submitted that she is pregnant and the petitioner is alleging that the child does not belong to him and, therefore, she does not want to go with the petitioner. It is further mentioned in the order that thereafter, the petitioner admitted that he is the father of the child and he wants to take the respondent with him and would keep her with full dignity and even after persuasion by the trial Court, the respondent expressed that she wants to go to Lahar and from Lahar she would go to the house of the petitioner and thus, it was directed that on the next date of hearing, both the parties shall come together and the case was adjourned for 09/09/2015.

3. On 09/09/2015, it was disclosed by the petitioner that the respondent has not come to his house, whereas the respondent did not appear before the trial Court and an adjournment was sought by the counsel for the respondent that as she is not well, therefore, she could not appear. Thus, it is clear that even after the reconciliation proceedings on 07/09/2015, the respondent did not go to her matrimonial house in spite of willingness expressed by the petitioner in the said reconciliation proceedings, the respondent had herself stated that the petitioner is denying that he is the father of the child, which the respondent is carrying. However, it appears that in order to resolve the dispute, the petitioner admitted that he is the father of the child.

4. Thereafter, the petitioner filed an application under Section 151 of CPC, in which it was mentioned that after the reconciliation proceedings took place in the Court of JMFC, the petitioner had come to her matrimonial house on 29/04/2015 and they had physical relations on 25/05/2015. Thereafter, when the respondent was taken to the doctor for medical examination, then it was found in the ultrasound conducted on 27/07/2015 that the respondent is carrying the pregnancy of 14 months. Thus, it is clear that when the petitioner did not have physical relations with the respondent prior to 25/05/2015, then how she became pregnant. It was further mentioned that on the next day i.e. on 28/06/2015, the

respondents went back to her matrimonial home and gave birth to a boy child on 12/01/2016. It was mentioned that the petitioner is not the biological father of the child born on 12/01/2016 and accordingly, it was prayed that the DNA test of the petitioner with that of the child may be conducted so as to do complete justice.

5. The application was opposed by the counsel for the respondent. It was submitted in the reply that in fact, the respondent had gone to her matrimonial home on 29/04/2015 and on the said date only, she had physical relations with the petitioner and as a result of the said physical relations, the respondent became pregnant. On 25/08/2015, the ultrasound of the respondent was got done and as per the said report, the estimated age of the fetus was 18-19 weeks. Thereafter, on 12/01/2016, the respondent had given birth to a boy child, however, on several occasions, premature delivery can take place. Therefore, merely because the boy was born prior to expiry of nine months from 29/04/2015, it cannot be said that the petitioner is not the biological father of the child.

6. The trial Court by order dated 17/11/2017 rejected the application filed by the petitioner only on the ground that since during reconciliation proceedings, the petitioner had accepted that he is the father of the child which the respondent was carrying, therefore, in view of the admission made by the petitioner, there is no need of getting the DNA test conducted.

7. Challenging the order passed by the trial Court, it is submitted by the counsel for the petitioner that according to the reply filed by the respondent to the application under Section 151 of CPC, it is clear that even according to the respondent, the estimated age of the fetus on 25/08/2015 was 18-19 weeks. Thus, as per the medical evidence also, on 25/08/2015, the fetus was at least four months two weeks or three weeks old and if the age of the fetus is considered, then it is clear that the respondent had become pregnant at least two weeks prior to 29/04/2015. Thus, even according to the respondent herself, there is a serious dispute with regard to the paternity of the child. It is further submitted that it is clear from the reconciliation proceedings dated 07/09/2015 that the petitioner was denying his paternity from the very beginning and, therefore, it was expressed by the respondent herself that since the petitioner is denying that he is the father of the child, which the respondent was carrying, therefore, she does not want to go to her matrimonial house. In order to save his married life, the petitioner had accepted that he is the father of the child and he is ready and willing to take the respondent along with him on the very same day, but the respondent deliberately did not go along with the petitioner and expressed that she would go to her matrimonial home at a later stage and thereafter, she never went to her matrimonial house. Thus, it is clear that the respondent was trying to avoid any further medical examination while staying in her matrimonial house as she was apprehensive of the fact that the paternity of the child has come under cloud. Therefore, the bona fide submission made by the petitioner should not be treated as an admission.

8. Per contra, it is submitted by the counsel for the respondent that as the petitioner had admitted on 07/09/2015 that he is the father of the fetus (child), which the respondent was carrying, therefore, there is no need to get the DNA test conducted.

9. Heard the counsel for the parties.

10. The Supreme Court in the case of *Dipanwita Roy vs. Ronobroto Roy,* reported in AIR 2014 SC 418 has held as under:-

> "**9.** All the judgments relied upon by the learned counsel for the appellant were on the pointed subject of the legitimacy of the child born during the subsistence of a valid marriage. The question that arises for consideration in the present appeal, pertains to the alleged infidelity of the appellant-wife. It is not the husband's desire to prove the legitimacy or illegitimacy of the child born to the appellant. The purpose of the respondent is, to establish the ingredients of Section 13(1)(ii) of the Hindu Marriage Act, 1955, namely, that after the solemnisation of the marriage of the appellant with the respondent, the appellant had voluntarily engaged in sexual intercourse, with a person other than the respondent. There can be no doubt, that the prayer made by the respondent for conducting a DNA test of the appellant's son as also of himself, was aimed at the alleged adulterous behaviour of the appellant. In the determination of the issue in hand, undoubtedly, the issue of legitimacy will also be incidentally involved. Therefore, insofar as the present controversy is concerned, Section 112 of the Indian Evidence Act would not strictly come into play. A similar issue came to be adjudicated upon by this Court in *Bhabani Prasad Jena vs. Convenor Secretary, Orissa State Commission for Women and another, (2010) 8 SCC 633*, wherein this Court held as under:
>
> > "**21.** In a matter where paternity of a child is in issue before the court, the use of DNA test is an extremely delicate and sensitive aspect. One view is that when modern science gives the means of ascertaining the paternity of a child, there should not be any hesitation to use those means whenever the occasion requires. The other view is that the court must be reluctant in the use of such scientific advances and tools which result in invasion of right to privacy of an individual and may not only be prejudicial to the rights of the parties but may have devastating effect on the child. Sometimes the result of such scientific test may bastardise an innocent child even though his mother and her spouse were living together during the time of conception.
> >
> > **22.** In our view, when there is apparent conflict between the right to privacy of a person not to submit himself forcibly to medical examination and duty of the court to reach the truth, the court must exercise its discretion only after balancing the interests of the parties

and on due consideration whether for a just decision in the matter, DNA test is eminently needed. DNA test in a matter relating to paternity of a child should not be directed by the court as a matter of course or in a routine manner, whenever such a request is made. The court has to consider diverse aspects including presumption under Section 112 of the Evidence Act; pros and cons of such order and the test of "eminent need" whether it is not possible for the court to reach the truth without use of such test.

23. There is no conflict in the two decisions of this ourt, namely, Goutam Kundu vs. State of West Bengal (1993) 3 SCC 418 and Sharda vs. Dharmpal (2003) 4 SCC 493. In Goutam Kundu, it has been laid down that courts in India cannot order blood test as a matter of course and such prayers cannot be granted to have roving inquiry; there must be strong prima facie case and the court must carefully examine as to what would be the consequence of ordering the blood test. In Sharda, while concluding that a matrimonial court has power to order a person to undergo a medical test, it was reiterated that the court should exercise such a power if the applicant has a strong prime facie case and there is sufficient material before the court. Obviously, therefore, any order for DNA test can be given by the court only if a strong prima facie case is made out for such a course.

24. Insofar as the present case is concerned, we have already held that the State Commission has no authority, competence or power to order DNA test. Looking to the nature of proceedings with which the High Court was concerned, it has to be held that the High Court exceeded its jurisdiction in passing the impugned order. Strangely, the High Court overlooked a very material aspect that the matrimonial dispute between the parties is already pending in the court of competent jurisdiction and all aspects concerning matrimonial dispute raised by the parties in that case shall be adjudicated and determined by that court. Should an issue arise before the matrimonial court concerning the paternity of the child, obviously that court will be competent to pass an appropriate order at the relevant time in accordance with law. In any view of the matter, it is not possible to sustain the order passed by the High Court. " (emphasis is ours) It is therefore apparent, that despite the consequences of a DNA test, this Court has concluded, that it was permissible for a Court to permit the holding of a DNA test, if it was eminently needed, after balancing the interests of the parties. Recently, the issue was again considered by this Court in Nandlal Wasudeo Badwaik vs. Lata Nandlal Badwaik and another, (2014) 2 SCC 576, wherein this Court held as under:

"**15**. Here, in the present case, the wife had pleaded that the husband had access to her and, in fact, the child was born in the said wedlock, but the husband had specifically pleaded that after his wife left the matrimonial home, she did not return and thereafter, he had no access to her. The wife has admitted that she had left the matrimonial home but again joined her husband. Unfortunately, none of the courts below have given any finding with regard to this plea of the husband that he had not any access to his wife at the time when the child could have been begotten.

16. As stated earlier, the DNA test is an accurate test and on that basis it is clear that the appellant is not the biological father of the girl child. However, at the same time, the condition precedent for invocation of Section 112 of the Evidence Act has been established and no finding with regard to the plea of the husband that he had no access to his wife at the time when the child could have been begotten has been recorded. Admittedly, the child has been born during the continuance of a valid marriage. Therefore, the provisions of Section 112 of the Evidence Act conclusively prove that Respondent 2 is the daughter of the appellant. At the same time, the DNA test reports, based on scientific analysis, in no uncertain terms suggest that the appellant is not the biological father. In such circumstances, which would give way to the other is a complex question posed before us.

17. We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancement and DNA test were not even in contemplation of the legislature. The result of DNA test is said to be scientifically accurate. Although Section 112 raises a presumption of conclusive proof on satisfaction of the conditions enumerated therein but the same is rebuttable. The presumption may afford legitimate means of arriving at an affirmative legal conclusion. While the truth or fact is known, in our opinion, there is no need or room for any presumption. Where there is evidence to the contrary, the presumption is rebuttable and must yield to proof. The interest of justice is best served by ascertaining the truth and the court should be furnished with the best available science and may not be left to bank upon presumptions, unless science has no answer to the facts in issue. In our opinion, when there is a conflict between a conclusive proof envisaged under law and a proof based on scientific advancement accepted by the world community to be correct, the latter must prevail over the former.

18. We must understand the distinction between a legal fiction and the presumption of a fact. Legal fiction assumes existence

> of a fact which may not really exist. However, a presumption of a fact depends on satisfaction of certain circumstances. Those circumstances logically would lead to the fact sought to be presumed. Section 112 of the Evidence Act does not create a legal fiction but provides for presumption.
>
> **19**. The husband's plea that he had no access to the wife when the child was begotten stands proved by the DNA test report and in the face of it, we cannot compel the appellant to bear the fatherhood of a child, when the scientific reports prove to the contrary. We are conscious that an innocent child may not be bastardised as the marriage between her mother and father was subsisting at the time of her birth, but in view of the DNA test reports and what we have observed above, we cannot forestall the consequence. It is denying the truth. "Truth must triumph" is the hallmark of justice." (emphasis is ours) This Court has therefore clearly opined, that proof based on a DNA test would be sufficient to dislodge, a presumption under Section 112of the Indian Evidence Act."

11. It is borne from the decisions rendered by this Court in *Bhabani Prasad Jena* (supra), and *Nandlal Wasudeo Badwaik* (supra), that depending on the facts and circumstances of the case, it would be permissible for a Court to direct the holding of a DNA examination, to determine the veracity of the allegation(s), which constitute one of the grounds, on which the concerned party would either succeed or lose. There can be no dispute, that if the direction to hold such a test can be avoided, it should be so avoided. The reason, as already recorded in various judgments by this Court, is that the legitimacy of a child should not be put to peril."

12. Thus, it is clear that where the husband did not have access to his wife in spite of that his wife got pregnant and he claims that he is not the biological father of the child, then the DNA can be ordered to resolve the dispute because under these circumstances, in order to substantiate the allegations of infidelity, it would not possible for the respondent to establish and confirm the assertions in absence of DNA test. If the facts of the present case are considered, even according to the respondent, on 25/08/2015 when ultrasound was done, then it was found that she was carrying 18- 19 weeks. Thus, it is clear that on 25/08/2015, the respondent was carrying the pregnancy of at least four months two weeks or four months three weeks and if this period is calculated back from 25/08/2015, then it is clear that on 29/04/2015 (as claimed by the respondent that she had physical relations with the petitioner) only four months would pass, whereas on 25/08/2015 the respondent was found to be carrying the pregnancy of four months two weeks or four months three weeks. Thus, prima facie, even according to the reply filed byzz the respondent, it is clear that there is a serious dispute with regard to the paternity

of the child, which was delivered by the respondent on 12/01/2016. So far as the admission made by the petitioner on 07/09/2015 is concerned, it was the case of the respondent herself that the petitioner is disputing the paternity of the child, which she was carrying, therefore, she does not want to go with the petitioner. It appears that as the petitioner was interested in saving his married life, therefore he accepted that he is the father of child which the respondent was carrying and, therefore, he wants to take her to his house with him. However, in spite of that, the respondent did not agree to go along with the petitioner and as per the record, thereafter she did not go to her matrimonial house. Even otherwise, it is clear that the respondent had given birth to a boy child on 12/01/2016 i.e. prior to nine months from 29/04/2015. Where there is a serious dispute with regard to the paternity of the child, under these circumstances, this Court is of the considered opinion that the trial Court committed material illegality by rejecting the application filed by the petitioner under Section 151 of CPC for holding the DNA test of the petitioner with that of the child delivered by the respondent.

13. Accordingly, the order dated 17/11/2017 passed by the Additional District Judge, Lahar, District Bhind in Case No. 249-A/2014 (HMA) so far as it relates to rejection of the application filed under Section 151 of CPC, is hereby set aside.

14. The Court below is directed to proceed in accordance with law for getting the DNA test, as prayed by the petitioner.

15. The petition succeeds and is hereby **allowed**.

Petition allowed

I.L.R. [2019] M.P. 1258
APPELLATE CIVIL
Before Mr. Justice Vivek Rusia

S.A. No. 356/2016 (Indore) decided on 19 March, 2019

SHEELA & anr. …Appellants

Vs.

BHAGUDIBAI & anr. …Respondents

A. Civil Procedure Code (5 of 1908), Order 22 Rule 3 & 5 – Legal Representative – Rights over the title of suit property **– Held – Appellants were brought on record as LRs by virtue of will but after becoming a party, they ought to have established their right over suit property – By allowing application under order 22 Rule 3 CPC, appellants were given limited rights to continue the suit – In pleadings also, appellants did not claim any relief by way of amendment that they have succeeded ½ share of the original plaintiff – No error by courts below while dismissing the suit – Appeal dismissed.**

(Para 11 & 15)

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 22 नियम 3 व 5 – विधिक प्रतिनिधि – वाद संपत्ति के स्वत्व पर अधिकार – अभिनिर्धारित – अपीलार्थीगण को वसीयत के आधार पर विधिक प्रतिनिधियों के रूप में अभिलेख पर लाया गया परंतु एक पक्षकार बनने के पश्चात् उन्हें वाद संपत्ति पर उनके अधिकार को स्थापित करना चाहिए – आदेश 22 नियम 3 सि.प्र.सं. के अंतर्गत आवेदन मंजूर करके, अपीलार्थीगण को वाद जारी रखने के सीमित अधिकार दिये गये थे – अभिवचनों में भी अपीलार्थीगण ने संशोधन के जरिए किसी अनुतोष का दावा नहीं किया कि वे मूल वादी के 1/2 हिस्से के उत्तराधिकारी हो गये हैं – वाद खारिज करते हुए निचले न्यायालयों ने कोई त्रुटि नहीं की – अपील खारिज।

B. Land Revenue Code, M.P. (20 of 1959), Section 178 & 250 – Partition – Jurisdiction – Competent Authority **– Held – Suit land is agricultural land and u/S 178, Tehsildar is competent authority to pass order of partition – Jurisdiction of Civil Court is barred – Suit is not maintainable for relief of partition. (Para 6 & 16)**

ख. भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 178 व 250 – विभाजन – अधिकारिता – सक्षम प्राधिकारी – अभिनिर्धारित – वाद भूमि, कृषि भूमि है और धारा 178 के अंतर्गत, विभाजन का आदेश पारित करने के लिए, तहसीलदार सक्षम प्राधिकारी है – सिविल न्यायालय की अधिकारिता वर्जित है – विभाजन के अनुतोष हेतु वाद पोषणीय नहीं है।

Cases referred:

AIR 2007 SC 2083, AIR 1954 SC 575, M.P.W.N. 1990 (II) 246, 1999 RN 56, AIR 2008 SC 2866, (2010) 2 SCC 162.

A.S. Garg with *Satish Jain*, for the appellants.
Mohanlal Patidar, for the respondent No. 1.

J U D G M E N T

VIVEK RUSIA, J.:- Appellants have filed the present appeal being aggrieved by the judgement and decree dated 17/08/2015 passed by 1st Civil Judge, Class-I, Neemuch and judgement dated 18/03/2016 passed by Additional District Judge, Neemuch whereby the suit as well as first appeal both have been dismissed.

2. The appellants are legal heirs of Rami Bai who died during the pendency of the suit. Late Rami Bai and defendant No.1 Bhagudi Bai are real sisters and they jointly owned the land survey No.799 area 0.03 Hectare and land survey No.800 area 0.78 Hectare, in total 0.81 Hectare situated at village Chaldu, Tehsil Neemuch (hereinafter referred to as "suit land"). Late Rami Bai filed a civil suit against the defendant No.1 for permanent injunction and partition alleging that she is having 1/2 share in the suit land and the defendant No.1 is trying to raise a construction over the part of the land attached to the highway and the remaining portion is leaving for the plaintiff which is having lesser value. It has been alleged

that on 05/02/2009, the defendant No.1 has started construction and because of which the dispute arose. The plaintiff filed a suit on 10/02/2009 seeking relief of permanent injunction that the defendant No.1 be restrained to raise any construction without partition and she be given 1/2 share in the suit land by way of partition.

3. The defendant No.1 filed the written statement by submitting that the partition between them had already been taken 22 years back and she is in possession of her share by constructing a house and residing in it with her family. The plaintiff is also in possession over the part of suit land of her share. The defendant No.1 had filed an application before the Tehsildar in which order of partition dated 08/07/2009 was passed. The Sub Divisional Officer remanded the case to the Tehsildar for deciding afresh but later-on, the same has been dismissed in default due to non-appearance, but the fact remains that the plaintiff and defendant No.1 are in possession over the land of their respective shares.

4. During the pendency of the plaint, the plaintiff has expired on 16/02/2012 and the present appellants filed an application under Order 22 Rule 3 read with Section 151 of the CPC on 19/04/2012 for bringing their name as legal heirs of the plaintiff on the basis of registered will dated 11/03/2011. The said application was opposed by the defendant No.1 but vide order dated 28/07/2012, the learned trial Court allowed the application and they have been permitted to continue the litigation as legal representatives (Hereinafter they are referred as plaintiffs). By order dated 31/07/2012, the plaintiff No.1(A) was permitted to act as a guardian of plaintiff No.2(B).

5. The plaintiff No.1 examined herself as PW/1, Balvindar Singh as PW/2, Bhanwarlal Jain as PW/3 and Deepak Kumar as PW/4. The plaintiffs got exhibited 14 documents as Exhibit P/1 to Exhibit P/14. In defence, the defendant No.1 examined herself.

6. After appreciating the evidence came on record, learned Civil Judge, Class-I has dismissed the suit vide judgment and decree dated 17/08/2015 with a findings that the civil suit is barred under Section 250 of M.P.L.R. Code and without claiming the relief of declaration, the decree of partition cannot be granted. The plaintiffs have been permitted to continue the suit as legal representatives but their rights and title on the basis of will over the property cannot be decided in this suit.

7. Being aggrieved by the aforesaid judgement and decree, the plaintiffs preferred a first appeal before the District Judge and vide judgement dated 18/03/2015, the District Judge has dismissed the appeal affirming the findings recorded by the learned Civil Judge.

8. Hence, the present appeal before this Court on the ground that both the Courts below have wrongly held that the suit is not maintainable under Section 250 of the M.P.L.R. Code.

The plaintiff No.1 is having registered will in her favour, therefore, she succeeded 1/2 share in the suit property and entitled to claim the partition. The original plaintiff Late Rami Bai was co-owner of the property, therefore, she was not required to claim the decree of title and the suit for partition and permanent injunction is maintainable.

9. Shri A.S. Garg, learned senior counsel appearing for the appellants in support of the aforesaid ground has placed reliance over the judgement passed by the Apex Court in case of *Jagraj Singh Vs. Birpal Kaur* reported in AIR 2007 SC 2083, in which the Apex Court has held that once the Court holds that it has no jurisdiction in matter, it should not consider the matter on merits. He has further placed reliance over the judgement of Apex Court in case of *Chhote Khan and others Vs. Mal Khan and others* reported in AIR 1954 SC 575, in which it has been held that right of co-owner to claim the partition cannot be resisted by the defendant. He has also placed reliance over the judgement passed by the Apex Court in the case of *Sardar Singh Vs. Dardar Singh reported in M.P.W.N.* 1990 (II) 246 in which it has been held that jurisdiction of Civil Court cannot be barred under Section 9 of the CPC. In the case of *Mahtab Singh and another Vs. Nandlal and another* reported in 1999 RN 56, this Court has been held that the Civil Court is having jurisdiction to grant the relief of perpetual injunction. No revenue Court can try such suit. He further submitted that if the trial Court was of the opinion that the suit is not maintainable, then it ought to have been returned to the plaintiffs for presentation before the revenue Court.

Appellants have proposed following substantial questions of law involved in the appeal:-

"i. Whether, the Learned Courts below committed legal error in by not holding tat (sic : that) the suit for partition, possession and injunction was maintainable especially when the joint ownership was admitted?

ii. Whether, the learned Courts below committed legal error by not considering the section 8 and 10 of hindu succession act wherein the appellants and deceased plaintiff became owner by operation of law?

iii. Whether the Learned Courts below committed error of law in not considering the admission of respondent?

iv. Whether the Learned Courts below committed error of law in recording the finding of facts against the record and evidence produced?

v. Whether, the learned Courts below committed legal error by not holding that the appellants are not only the legal representatives but became owner by survivorship and operation of law?

vi. Whether the findings of the Lower Courts suffer from misreading of evidence adduced either by the parties?

vii. Whether the judgement and decree passed by the learned Courts below are illegal, perverse and against the evidence and facts on the record?

vii. Whether under the facts and circumstances of the case learned Lower Court while passing the judgement and decree considered all the issues and evidence produced?"

10. Shri M.L. Patidar, learned counsel appearing for the respondent / defendant submitted that Late Rami Bai remained unmarried during her life time and in plaint, she had mentioned the name of her father. PW/2 Balvindar Singh was not married to her and the plaintiff No.1 Sheela, plaintiff No.2 Neelu are the daughters of Balvindar Singh but not the daughters of Rami Bai. The plaintiffs have failed to prove the factum of marriage of Rami Bai and Balvindar Singh. He further emphasised that both the Courts below have rightly dismissed the suit as well as the appeal and there is no substantial question of law involved in this appeal.

11. I have perused the records of both the Courts below and considered the arguments of both the counsel. It is not in dispute that the original plaintiff Rami Bai and defendant No.1 Bhagudi Bai are the real sisters and they jointly owned the suit land. After the death of Rami Bai, the only issue survive that whether the plaintiffs have succeeded right in the property left by Late Rami Bai. In the pending suit plaintiffs did not claim any relief by way of amendment that now they have succeeded the 1/2 share of Late Rami Bai in suit land. By allowing the application under Order 22 Rule 3, they were given limited right to continue the suit.

12. The Apex Court in the case of *Jaladi Suguna (dead) through L.R.s Vs. Satya Sai Central Trust & others* reported in AIR 2008 SC 2866 has held that the determination as to who is the legal representative under Order 22 Rule 5 will be for the limited purpose of representation of the estate of the deceased for objection of that case. Such determination for such limited purpose will not confer on the person held to be a legal representative, any right to the property which is subject matter of the suit. Para 10 is reproduced below:-

> "10. Filing an application to bring the legal representatives on record, does not amount to bringing the legal representatives on record. When an LR application is filed, the court should consider it and decide whether the persons named therein as the legal representatives, should be brought

> on record to represent the estate of the deceased. Until such decision by the court, the persons claiming to be the legal representatives have no right to represent the estate of the deceased, nor prosecute or defend the case. If there is a dispute as to who is the legal representative, a decision should be rendered on such dispute. Only when the question of legal representative is determined by the court and such legal representative is brought on record, it can be said that the estate of the deceased is represented. The determination as to who is the legal representative under Order 22 Rule 5 will of course be for the limited purpose of representation of the estate of the deceased, for adjudication of that case. Such determination for such limited purpose will not confer on the person held to be the legal representative, any right to the property which is the subject matter of the suit, vis-...-vis other rival claimants to the estate of the deceased."

13. In case of *Suresh Kumar Bansal Vs. Krishna Bansal and another* reported in (2010) 2 SCC 162, the Apex Court has held that the determination of question as to who is legal representative of deceased plaintiff or defendant under Order 22 Rule 5 of the CPC is only for the purpose of bringing legal representative on record for conducting those legal proceedings only and does not operate as *res-judicata* in an *interse* dispute between the rival legal representative. Para 20 is reproduced below:-

> "It is now well settled that determination of the question as to who is the legal representatives of the deceased plaintiff or defendant under Order 22 Rule 5 of the Code of Civil Procedure is only for the purposes of bringing legal representatives on record for the conducting of those legal proceedings only and does not operate as *res judicata* and the *inter se* dispute between the rival legal representatives has to be independently tried and decided in probate proceedings. If this is allowed to be carried on for a decision of an eviction suit or other allied suits, the suits would be delayed, by which only the tenants will be benefited."

14. In a recent judgement in the case of *Mahanth Satyanand @ Ramjee Singh Vs. Shyam Lal Chuhan and others* passed in civil appeal No.6318/2010, the Apex Court has also held that the determination by the Court would be limited to the question, as to who should be brought on record in place of deceased for the purpose of continuing the suit alone and nothing beyond that. The inquiry under 225 of CPC (sic : under order 22 rule 5 CPC) is summary in nature and for limited purpose. Para 12 is reproduced below:-

> "Although we are apprised of the fact that alleged legal representatives relying on certain customs to prove whether a Grihastya could be a Guru under the relevant sampradaya. We need not concern our self with the aforesaid findings on merit given by the trial court at this stage. It is for the High Court to consider the aforesaid report of the trial Court and

> determine the disputed question of fact. It may not be out of context to note that the determination under Order XXII Rule 5 of the CPC is summary in nature and for limited purpose. Order passed on the impleadment applications, determining a particular person as legal representative has no effect of final decision or operates as *res-judicata* between the legal representatives as to the question of who should ascend as Guru. At the cost of repetition, we may note that the determination by the High Court would be limited to the question, as to who should be brought on record in the place of deceased for the purpose of continuing the suit alone, and nothing beyond that."

15. In view of the above, it is clear that the present appellants/plaintiffs were brought on record as legal representatives of Late Rami Bai by virtue of will, but after become a party, they ought to have established their right over the suit property. Execution of will in favour of plaintiff No.1 and marriage of Rami Bai with PW/2 were specifically denied by the defendant No.2 by way of reply to the application filed under Order 22 Rule 3 of CPC. The suit property was a joint property of plaintiff Late Rami Bai and defendant No.1 and after death of one co-owner, Bhagudi Bai being a real sister has become the exclusive owner of the suit property until and unless the will is proved by the plaintiffs. Therefore, both the Courts below have not committed any error while dismissing the suit on the ground that the present appellants are not entitled to claim any relief in the suit.

16. Admittedly, the suit land is an agricultural land and under Section 178 of the M.P.L.R. Code, the Tehsildar is a competent authority to pass the order of partition. Therefore, both the Courts below have rightly held that the suit is not maintainable for the relief of partition. Both the Courts below have also rightly held that the plaintiffs have made contradictory pleadings in one way, she was making averments for implementation of the undertaking given by the defendant No.1 in earlier suit filed by her and in other hand she is pleading that there was no partition between them.

17. In view of above, I do not find any question of law involved in this appeal, which is accordingly **dismissed**.

Appeal dismissed.

I.L.R. [2019] M.P. 1265 (DB)
APPELLATE CRIMINAL

Before Mr. Justice J.K. Maheshwari & Smt. Justice Anjuli Palo

Cr.A. No. 458/2019 (Jabalpur) decided on 17 May, 2019

AFJAL KHAN …Appellant

Vs.

STATE OF M.P. …Respondent

(Alongwith Cr.Ref. No. 02/2019)

***A. Penal Code (45 of 1860), Sections 302, 376(2)(F), 376(2)(I), 376(2)(N), 377 & 201 – Circumstantial Evidence – DNA Report* – Held – Appellant raped and murdered his own 6 yrs. old minor daughter – DNA taken from the source of deceased matched with the DNA profile of appellant – FSL report duly corroborated by testimony of the Doctor – Appellant had refused for postmortem of the deceased to be conducted and intentionally demolished the room where offence was committed – Appellant rightly convicted. (Para 15 & 28)**

क. दण्ड संहिता (1860 का 45), धाराएँ 302, 376(2)(एफ), 376(2)(आई), 376(2)(एन), 377 व 201 – परिस्थितिजन्य साक्ष्य – डी.एन.ए. प्रतिवेदन – अभिनिर्धारित – अपीलार्थी ने अपनी 6 वर्षीय अवयस्क पुत्री के साथ बलात्संग किया और उसकी हत्या कर दी – मृतिका के स्त्रोत से लिये गये डी.एन.ए. का अपीलार्थी के डी.एन.ए. प्रोफाईल से मिलान किया गया – न्यायालयिक विज्ञान प्रयोगशाला प्रतिवेदन चिकित्सक के परिसाक्ष्य द्वारा सम्यक् रूप से संपुष्ट – अपीलार्थी ने मृतिका के शव परीक्षण करवाने से मना किया तथा था आशयपूर्वक उस कमरे को नष्ट कर दिया जहां अपराध कारित किया गया था – अपीलार्थी उचित रूप से दोषसिद्ध।

***B. Penal Code (45 of 1860), Sections 302, 376(2)(F), 376(2)(I), 376(2)(N), 377 & 201 – Death Sentence – "Rarest of Rare" test* – Held – Murder not committed with extreme brutality or that the same involves exceptional depravity – There is every possibility of reformation and rehabilitation – Death Sentence converted to life imprisonment with a minimum of 30 yrs. imprisonment (without remission) – Appeal partly allowed. (Para 31 & 43)**

ख. दण्ड संहिता (1860 का 45), धाराएँ 302, 376(2)(एफ), 376(2)(आई), 376(2)(एन), 377 व 201 – मृत्यु दण्डादेश – ''विरल से विरलतम'' जांच – अभिनिर्धारित – हत्या अत्यंत निर्दयता के साथ नहीं की गई है अथवा यह कि उक्त में असाधारण दुराचारिता अंतर्वलित है – सुधार तथा पुनर्वास की पूरी संभावना है – मृत्यु दण्डादेश को न्यूनतम 30 वर्ष के कारावास के साथ (बिना परिहार) आजीवन कारावास में परिवर्तित किया गया – अपील अंशतः मंजूर।

***C. Penal Code (45 of 1860), Sections 302, 376(2)(F), 376(2)(I), 376(2)(N), 377 & 201 – Death Sentence – Mitigating & Aggravating Circumstances* – Held – Mitigating factors has outweighed the aggravating factors, thus possibility of reformation cannot be ruled out as well as the possibility and options of other punishment are open – Mitigating and aggravating circumstances discussed and enumerated. (Paras 30 to 43)**

ग. दण्ड संहिता (1860 का 45), धाराएँ 302, 376(2)(एफ), 376(2)(आई), 376(2)(एन), 377 व 201 – मृत्यु दण्डादेश – कम करने वाली व गुरूतरकारी परिस्थितियाँ – अभिनिर्धारित – कम करने वाले कारकों का भार गुरूतरकारी कारकों से अधिक है, अतः सुधार की संभावना को नकारा नहीं जा सकता, साथ ही साथ अन्य दंड की संभावना और विकल्प खुले हैं – कम करने वाली एवं गुरूतरकारी परिस्थितियाँ विवेचित और प्रगणित।

Cases referred:

AIR 1997 SC 221, 1995 Supp (3) SCC 217, (1997) 10 SCC 44, AIR 1994 SC 117, (2010) 8 SCC 747, (2010) 9 SCC 747, 2018 (4) Crimes 372 (SC), (1980) 2 SCC 684, (2014) 4 SCC 69, (2013) 5 SCC 549, (2015) 1 SCC 67, 2018 SCC Online SC 2570, (2009) 6 SCC 498.

Surendra Singh with *Siddharth Sharma*, for the accused/appellant in Cr.A. No. 458/2019.

Som Mishra, G.A. for the State.

Siddharth Sharma, Amicus Curiae for the non-applicant/accused in Cr.Ref. No. 02/2019.

J U D G M E N T

The Judgment of the Court was delivered by :

SMT. ANJULI PALO, J :- Being aggrieved by the judgment dated 22.12.2018, passed by the 18th Additional Sessions Judge, Bhopal (MP) in Session Trial No. 609/2017 convicting the accused as mentioned below, the Criminal Appeal No. 458/2019 has been filed under Section 374(2) of the Code of Criminal Procedure (hereinafter shall be referred to as "Cr.P.C.") by the accused/appellant and for confirmation of the death sentence, Criminal Reference No. 02/2019 has been made by Eighteenth Additional Sessions Judge, Bhopal under Section 366(1) of the Cr.P.C. The appellant has been convicted and sentenced as under :

Section	Act	Sentence	Fine	In default of fine
302	Indian Penal Code	Death penalty (to be hanged till death)	Nil	Nil
201	Indian Penal Code	R.I. for 10 years	Rs. 5,000/-	R.I. for 6 months
377	Indian Penal Code	R.I. for life imprisonment	Rs. 5,000/-	R.I. for 6 months

376(2)(F)	Indian Penal Code	R.I. for life imprisonment	Rs. 5,000/-	R.I. for 6 months
376(2)(I)	Indian Penal Code	R.I. for life till death	Rs. 5,000/-	R.I. for 6 months
376(2)(N)	Indian Penal Code	R.I. for life till death	Rs. 5,000/-	R.I. for 6 months
5(l)(m)(n) r/w 6	Protection of Children from Sexual Offences Act	-	-	-

2. As per the prosecution case, the prosecutrix (since deceased) aged six years was the younger daughter of the appellant. She was residing with her mother and the appellant. The appellant was annoyed and having suspicion on his wife-Farida of questionable character. He wanted to take revenge from his wife and her former husband. Therefore, he allured the prosecutrix with chocolates and was in occupation to commit unnatural intercourse and rape with her. On the date of incident i.e. 15.03.2017 at about 4:00 pm. After committing rape with the prosecutrix, he murdered her and then hanged her from the ceiling with the help of a *dupatta* in the upper floor of his house, and he fled away from the spot. The other daughters of the appellant came to the room and saw the body of the deceased hanging from the ceiling. They informed other persons about the incident and brought down the body on floor. On receiving information about the incident, Police Station Koh-e-fiza registered merg under Section 174 of Cr.P.C. After conducting the postmortem, doctors found that, the deceased died due to asphyxia caused by strangulation. They also found that, the deceased had some bodily injuries. They opined that looking to the circumstances of the case and evidence available on record, there is a possibility of homicidal death and the possibility of commission of sexual violence also cannot be ruled out. Police registered offence under Sections 376(2)(i), 376(a), 377, 302 and 201 of IPC and Section 5(m) read with Section 6 of the Protection of Children from the Sexual Offences Act 2012 against unknown person.

3. After receiving the DNA test report, it was found that the DNA profile of the appellant matched with the DNA profile present in the vaginal swab of the prosecutrix and sperms were also present in the vaginal swab. Some samples were collected from the frock of the deceased in which DNA profile of the appellant was found. Due to the aforesaid evidence, police filed charge-sheet against the appellant under Sections 376(2)(i), 376(a), 377, 302 and 201 of IPC and Section 5(m) read with Section 6 of the Protection of Children from the Sexual Offences Act 2012.

4. After committal of the case, learned trial Court framed charges under Sections 377, 376(2)(f)(i)(n)(k), 302 and 201 of the Indian Penal Code and

Section 5(l)(m)(n) read with Section 6 of Protection of Children from Sexual Offences Act 2012. Appellant abjured guilt and pleaded that he has been falsely implicated by the police to protect the actual culprit. He also took the plea of alibi and examined defence witnesses in his support.

5. Learned trial Court mainly relied upon the testimony of Dr. Geeta Rani Gupta (PW-2) and came to the conclusion that reddish discoloration was present on the labia majora. There was contusion on the vaginal opening, vestibule and labia minora. All the injuries were recent, the anus of the deceased was dilated and its margins were irregular. Notching was present at 3 o'clock position and rugosity (anul folds) were partially lost. Some other external injuries were also present on her cheeks, mouth including the ligature mark on her neck and the tongue was pressed between her teeth. Thus, the doctors opined that the deceased was subjected to sexual violence and her death was homicidal in nature. The DNA sample taken from the deceased matched with the DNA profile of the appellant. In her vaginal swab, sperms were present. During the investigation, it was also found that the appellant had removed the structure where the offence was committed with the deceased with intent to disappear the evidence.

6. After considering the aforesaid facts and circumstances, the trial Court convicted the appellant and sentenced him as mentioned hereinabove and referred the matter to this Court for confirmation of the death sentence under Section 366 (I) of Cr.P.C. The appellant has challenged the findings of guilt recorded by learned trial Court by filing the separate appeal, listed for analogous hearing.

7. Learned Senior Counsel appearing for the appellant contends that the FIR has been lodged after undue delay without assigning any reason. At the time of preparing *naksha panchayatnama*, police has not mentioned any marks of injuries over the dead body. It is submitted that the circumstances of the case indicate that, the deceased herself committed suicide due to shame about the sexual assault caused to her by some unknown person. He relied upon the judgments of the Hon'ble Supreme Court in case of *" Prem Singh vs. State of Punjab AIR 1997 SC 221", " Amarjit Singh vs. State of Punjab,* 1995 Supp (3) SCC 217" and *State of Punjab vs. Bimal Kaur,* AIR 1997 SC 221". Appellant is her father, hence, there is no possibility of committing rape with his own daughter. It is further argued by the learned counsel for the appellant that, the *dupatta* which was used by the deceased for hanging herself was not examined at the time of postmortem. Appellant tried to indicate that the real culprit was one Sunil, who is the tenant of the appellant, residing on the floor just below where the incident took place. It is also argued on behalf of the appellant that there are many other material lacunae in this case. There is no material evidence to prove that blood samples were properly taken and kept in safe custody. The evidence has been manipulated in this case to falsely implicate the appellant. It was further contended that conviction cannot be based

only on the DNA and FSL reports. Hence, the impugned judgement is liable to be set aside and the appellant is entitled to be acquitted from the charges levelled against him.

8. Learned Government Advocate for the respondent/State vehemently opposed the contentions of the counsel for the appellant, and argued in support of the findings recorded by the trial Court. It was contended that the learned trial Court has properly evaluated the entire evidence available on record and rightly convicted the appellant and awarded sentence befitting the crime. Hence, appeal filed by the appellant is liable to be dismissed and allowing the criminal reference, the death sentence may be confirmed.

9. Heard rival contentions of the learned counsel for the parties at length and perused the record. Now the question that arise for consideration is -

> "Whether the finding proving the charge by the trial Court to convict the appellant is just. If so, what sentence may be awarded in the facts of the case."

10. This case is purely based on circumstantial evidence collected by the prosecution. It is not in dispute that the deceased was aged six years only. Her mother Farida is married with the appellant who is the second wife. It is pertinent to note that she was not examined by any of the parties as a witness either by the prosecution or by the defence. She could be the best witness to testify the behaviour of the appellant towards the prosecutrix (since deceased) and the presence of the appellant at the time of incident.

11. Raju Yadav (PW-1), Arjun (PW-3), Reshma (PW-4), Ube-ur-Rehman (PW-5) are the witnesses and neighbours who knew the appellant and his family. All these witnesses did not support the case of prosecution and declared hostile.

12. Ajay Rajput (PW-11), neighbour of the appellant has stated that on 15.03.2017 at about 7:00 pm, he heard screams of hue and cry from the appellant's house. When he reached on the scene of occurrence, he came to know that something has happened to the younger daughter of the appellant. With the help of a boy, he brought her to Tripti Hospital at Lalghati, where Doctors have refused to admit and referred her to Hamidia Hospital. He took her to the Hamidia Hospital and telephonically called the appellant, who reached at the hospital. In the meantime, it was informed that the prosecutrix had died. Later, Ajay Rajput (PW-11) came to know that the appellant himself had sexually assaulted her and committed murder of the prosecutrix. This testimony indicates that the deceased was brought to the hospital by Ajay Rajput (PW-11) and not by her own family members.

13. Arif Ali (PW-14) Head Constable has deposed that on 15.03.2017, he received a telephonic call about hanging of the deceased at her own residence.

Thereafter, he registered the information in *rojnamcha sanha* (Ex. P/18). He said that in the information, it was mentioned that the appellant took the deceased to the hospital. Thereafter, he informed the incident to Incharge Police Station. Anil Bajpai (PW-16), Incharge, Police Station, Jahangirabad has corroborated the testimony of Arif Ali (PW-14) and stated that he received information from Hamidia Hospital that the appellant had brought the deceased prosecutrix to the hospital. Thereafter, her body was kept in the mortuary. He registered FIR (Ex. P/19) on 04.07.2017 against unknown persons. He has further stated that, appellant refused to conduct autopsy of the deceased due to which he came under the sphere of suspicion. On 21.03.2017, Anil Bajpai (PW-16) received short postmortem report wherein the doctor had opined that the deceased was subjected to sexual violence. Later, he received the complete postmortem report and after receiving the anul & vaginal swab (Ex. P/20) & (Ex. P/21) and the clothes of the deceased, sent those articles to RFSL, Bhopal and FSL Sagar through the Superintendent of Police, Bhopal for chemical examination. Ex. P/22 are the FSL reports which confirms the presence of human sperms on the slide of vaginal swab of the deceased. Thereafter, he interrogated the suspected persons including the appellant and duly taken blood samples for DNA with the help of doctors and sent it for further examination to FSL, Sagar. On 15.09.2017, DNA report (Ex. P/25) has been received. The Experts have given the opinion that in the source of DNA taken from the deceased, Y chromosomes, STR DNA profile of the appellant were present. Accordingly, the appellant was interrogated by Anil Bajpai (PW-16) Incharge, PS Koh-e-fiza.

14. Memorandum (Ex. P/13) of the appellant was recorded wherein it was disclosed by him, that he wanted to take revenge with the wife Farida and the person whom he suspected to be the father of the deceased. Therefore, he was in search of opportunity since last 3 months. On getting opportunities, he sexually exploited the deceased (prosecutrix) and in return he used to give her money and chocolates to keep mum. He used to perform unnatural sex with her and felt satisfied to his lust of revenge with wife. 8-9 days prior to the date of incident, he had a quarrel with his wife Farida. A day prior to the incident, he was sleeping in his room on the upper floor when the deceased came there and he sexually exploited her and gave her some money. At that time, he was so angry at his wife that he planned to kill the deceased. Appellant further stated in his memorandum that on the date of incident, at about 4:30 pm, he came to his house. His elder daughters were busy in singing and dancing on the first floor. He took the prosecutrix to the upper floor into his room. He further stated that he later prepared a *chabutra* (platform) on the bed using clothes so that it would appear that the prosecutrix herself climbed on the *chabutra* and committed suicide. Thereafter, he flee away from the spot and reached at his shop. After sometime, his daughter Kulsum telephonically informed him that the deceased has committed suicide. He reached his house, but someone had taken the deceased to

Hamidia Hospital.

15. This version of Anil Bajpai (PW-16) is corroborated by the testimony of Ajay Rajput (PW-11) to some extent. In his memorandum, the appellant said that he did not want the autopsy of the deceased be conducted, therefore, he refused for the same. Appellant also demolished the structure of room during investigation where he committed the offence with the deceased. Investigating Officer Anil Bajpai (PW-16) found *malba* (debris) of the demolished room on the spot. It is a very material and incriminating circumstance which was not challenged by the learned counsel for the appellant in his cross-examination. Such an act of the appellant is relevant to connect him with the crime, under Section 8 of the Evidence Act.

16. It is also a relevant issue, that what was the reason for the appellant to demolish the room in such a hurry, where the incident took place. It is a matter of investigation. Police may have got some clues about the possibility whether the deceased herself committed suicide or not, what was the height of the ceiling, whether it was possible for the deceased to climb on the heap of clothes *chabutra* to reach the ceiling and hang herself. Therefore, it is indicative of the fact that the room was demolished with intent to disappear the cogent evidence. We can not ignore such material circumstance helpful in establishing the intention of the appellant to the place where offence was committed with the deceased.

17. Dr. Geeta Rani Gupta (PW-2) who conducted autopsy of the deceased found the following external injuries on the body of the deceased :

(1) Reddish discolouration present over left cheek without any ecchymosis.

(2) Abrasion present over right side of back extending from 8 cm right to midline and from 2 cm below the inferior angle of scapula going upwards and tappered. It is broad at lower end side and tapper at upper end side, size 6x0.3 cm with reddish brown scab and marginal inflammation is present at upper end region, the scab is falling off at places. Duration of injury is approximately 4 to 10 days.

(3) Abrasion is present over right side of maxillary prominence size 0.5x0.2 cm convexity is going upwards and laterally and concavity is directed downwards and medially. It is semi-lunar in shape.

(4) Two abrasion present over left side extending from 2.5 cm left to

midline and 1 cm below the body of mandible size 0.2 cm in diameter and 0.5 cm apart.

(5) An abrasion is present over right cheek size 0.2 cm in diameter.

(6) An abrasion is present over right forearm on flexor aspect extending 9 cm above the wrist joint size 0.2 cm diameter.

(7) Multiple superficial abrasion present over right forearm or flexor aspect extending from 1 cm above the wrist joint in an area of 3.5 x 1 cm vertical directed downwards and laterally, size varies from pinhead to 0.8x0.2 cms. The uppermost is biggest in size 0.8x0.2 cm semi-lunar in upward.

(8) Abrasion present over left shoulder joint size 2x1 cm sagital extending from 5 cm right to midline.

(9) Abrasion present over right side of back extending from 4 cm right to midline and at 10th thoresic vertibra level size 1 x 0.2 cm directed downwards and laterally.

(10) Abrasion present over left side of back extending from 8 cm left to midline and 2 cm below the inferior angle of scapula size 2 x 0.5 cm vertical.

(11) Abrasion present over right side of superior angle of scapula size 1x0.3cm transverse.

(12) Ligature mark present over neck on full extension of neck.

Duration of injury No. 3 to 11 are fresh and red in colour, within 24 hours of the postmortem and simple in nature.

Dr. Geeta Rani Gupta (PW-2) found the following injuries on internal examination of the body of the deceased :

(1) The anal opening is dilated. Fecal matter is visible on left side, margins are irregular and scarred with notching at 3 o' clock position.

(2) Reddish dicolouration present over labia minora, contusion present at vaginal opening and its adjacent part of vestibule and labia minora, red in color, inflamed and fresh.

(3) Tongue was protruded between the teeth with marking of teeth.

18. The testimony of Dr. Geeta Rani Gupta (PW-2) clearly indicates that deceased died due to asphyxia as a result of hanging. The deceased had more than ten abrasions, of which some were large and some were small on several parts of

her body, which shows that just before her death she was assaulted due to which she sustained those injuries. In addition to the aforesaid external injuries, there were injuries over her private parts. Swelling and the injuries were fresh which establish that just before her death, rape was committed with her. Her postmortem report (Ex. P/2) duly establish the commission of unnatural intercourse. Her anul part was badly affected. She was only six years old. Such type of injuries cannot be caused to her accidentally nor it can be imagined that she herself caused such type of injuries. We are not inclined to accept the contentions of learned counsel for the appellant that a minor girl of this age committed suicide due to shame. Her bodily injuries are sufficient to disagree with the contention of learned counsel.

19. Learned Senior Counsel for the appellant strongly contended that there is no evidence against the appellant available on record to connect him with the crime. He further contended that DNA report is not sufficient to convict the appellant because there is no proof that the sample taken by the police were kept safely and securely in accordance with the procedure prescribed. he (sic : The) prosecution has failed to establish that semen found on the frock of the deceased belongs to the appellant. In the accused statement, appellant had specifically taken the plea that at night, he had some discharge which was later collected by the police and implanted the same with crime. In that context, learned Senior Counsel for the appellant has relied upon the judgment of Hon'ble Supreme Court in case of " *Mohd. Aman vs. State of Rajasthan* (1997) 10 SCC 44" and " *Valsala vs. State of Kerala,* AIR 1994 SC 117".

20. After considering the procedures and rules which were produced by the learned Government Advocate to establish the procedure for taking the DNA samples and its preservation, we come to the conclusion that in the present case there is no reason to ignore the DNA profile report Ex. P/25, which is against the appellant. In case of " *Santosh Kumar Singh vs. State through CBI,* (2010) 8 SCC 747", the Hon'ble Supreme Court has observed as under with regard to the DNA test report :

> "We feel that the trial court was not justified in rejecting the DNA report, as nothing adverse could be pointed out against the two experts who had submitted it. We must, therefore, accept the DNA report as being scientifically accurate and an exact science as held by this Court in *Smt. Kamti Devi v. Poshi Ram AIR 2001 SC 2226*. In arriving at its conclusions the trial court was also influenced by the fact that the semen swabs and slides and the blood samples of the appellant had not been kept in proper custody and had been tampered with, as already indicated above. We are of the opinion that the trial court was in error on this score. We, accordingly, endorse the conclusions of the High Court on circumstance No.9."

21. In FSL report (Ex. P/22) of the vaginal slide, vaginal swab, anul slide and anul swab, clothes of the deceased (Article A) to (Article F) semen and human sperm were found. On the *dupatta* and bed sheet (Article G) and (Article H) particles of saliva were found, On the skirt (Article F), *dupatta* (Article G) and bed sheet (Article H) human blood was found. On the bed sheet (Article H) human blood of group-B was found. This FSL report is duly corroborated by the testimony of Dr. Geeta Rani Gupta (PW-2). DNA Report Ex.-P/25 established that the genetic marker Y chromosomes STR DNA taken from the source of the deceased (Ex.F) matched with the Y chromosomes STR DNA profile of the appellant. Whereas, the DNA profile and other suspects Devendra Yadav, Sunil Gavli and Rajat Rajput did not tally with the DNA taken from the frock of the deceased.

22. We find that the DNA sample has been duly/properly and procedurely taken and kept in safe custody. The procedures were rightly followed as mentioned in (Ex. P/23), (P/24), (P/25). Learned counsel strongly contended to create suspicion about the procedure for obtaining DNA sampling. It is pertinent to note that during cross-examination of Investigating Officer Anil Bajpai (PW-16) and expert Dr.Anil Kumar Singh (PW-18) and other concerned police personnel, no question has been asked by the counsel for the appellant about the safe custody of the samples and the procedure adopted by them. Such defence cannot be taken for the first time at this stage by the learned Senior counsel for the appellant without showing any cogent evidence to support the contention to create a maze. It was established by the prosecution that when all the sample reached FSL Sagar and RFSL, Bhopal for DNA profile test, they found that the seals were intact. No suggestion was made during cross-examination of Experts from FSL and Police Officials that seals of the package/containers were tampered with. Hence, in our view the genuineness of samples could not be doubted. It cannot be ignored that scientists are eminent persons and that the laboratory is an esteemed institution in the country. Hence, the trial Court has rightly accepted the DNA report. In case of *Santosh Kumar Singh vs. State* (2010) 9 SCC 747, the Hon'ble Apex Court has held as under:

> "It is significant that not a single question was put to PW Dr. Lalji Singh as to the accuracy of the methodology or the procedure followed for the DNA profiling. The trial court has referred to a large number of text books and has given adverse findings on the accuracy of the tests carried out in the present case. We are unable to accept these conclusions as the court has substituted its own opinion ignoring the complexity of the issue on a highly technical subject, more particularly as the questions raised by the court had not been put to the expert witnesses. In Bhagwan Das & Anr. vs. State of Rajasthan AIR 1957 SC 589 it has been held that it would be a dangerous doctrine to lay down that the report of an expert

> witness could be brushed aside by making reference to some text on that subject without such text being put to the expert."

23. Further that the Investigating Officer Anil Bajpai (PW-16) strongly deposed that the appellant refused the postmortem of the body of the prosecutrix to be conducted. This statement has not been challenged by the appellant in the cross-examination nor he offered any explanation why he had not wanted the autopsy of the deceased to be conducted knowing that his daughter was subjected to such a heinous crime.

24. The learned counsel for the appellant repeatedly submitted that the police manipulated the case to falsely implicate the appellant with the crime but nowhere he explained why the police was interested in falsely implicating the appellant, what may be the object behind such implication or on whose insistence. Police is the investigating agency and is duty bound to conduct fair investigation. Under Section 114 of Evidence Act, there is a presumption in favor of a public servant such particularly, police that :

> "Court may presume existence of certain facts. —The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

25. In catena of cases, it was held that police personells (sic : personnels) perform their duty with utmost sincerity and honesty. The act of police cannot be questioned without any justification or cause. If in all cases, the proceedings of police be treated as doubtful the prevention of crime would not be possible. Therefore, we are not inclined to accept the contentions raised by the learned Senior Counsel to disbelieve the police investigation.

26. Learned Senior Counsel for the appellant further contented that the trial Court wrongly ignored the defence evidence which proves that without any cogent evidence the appellant has wrongly convicted by the trial Court. The defence witness Anay Khan (DW-1) daughter of the appellant, deposed that at the time of the incident, the appellant was not present at their house. In the last line of the cross-examination, she admitted that now she was residing with her grand-mother and not with her parents. From the memorandum of the appellant, it shows that the appellant hated his wife because he suspect on her character and due to this reason he committed crime with his own daughter-prosecutrix. He also suspected that the prosecutrix was not his daughter.

27. Looking to the aforesaid circumstances it seems that Anay Khan (DW-1) has given false evidence to save her father. Her testimony is not reliable. She also admitted that at the time she was doing household chores, therefore, she would not

be aware if someone climbed up her house. Similarly, other defence witnesses Emran (PW-2) admitted that he was not present with the appellant 24 hours. Neither he was aware as to when did the appellant left the shop, went anywhere and when did he returned back to his shop. Such type of evidence is not sufficient to establish the plea of alibi taken by the appellant.

28. In our opinion, the defence evidence is not sufficient to discard or disbelieve the DNA report Exhibit-P/25 which is against the appellant. The learned Trial Court rightly convicted the appellant under Sections 302, 201, 377, 376(2)(F), 376 (2)(I) and 376(2)(N) of the IPC.

29. Now, question arises whether the act of the appellant is liable to be punished with death sentence or some other sentence.

30. In the present case, the appellant has been convicted and sentenced with capital punishment under Section 302 of IPC. He has not been punished with death sentence for committing offence punishable under Section 5(m) read with Section 6 of the Protection of Children from the Sexual Offences Act 2012. Recently, in the case of *Prahalad vs. State of Rajasthan*, 2018(4) Crimes 372 (SC), the Hon'ble Supreme Court has held that appellant does not have any criminal background, nor is he a habitual offender. Motive for the offence of murder is not clear and of course it is generally hidden, known to the accused only. Under such circumstances, the court will have to see as to whether the case at hand falls under the 'rarest of the rare' case category. In that case, the accused was also young during the relevant point of time. Hence, the Hon'ble Supreme Court held that the duty is on the State to that there is no possibility of reform or re-habilitation of the accused. When the offence is not gruesome, not cold- blooded murder, nor is committed in a diabolical manner, the court will impose life imprisonment. In the case at hand, the mitigating factors outweigh the aggravating factors. The only aggravating factor in the matter is that the accused took advantage of his position in the victim's family for committing the murder of the minor girl in as much as the minor girl was treating the accused as her Mama (uncle).

31. We do not find that the murder has been committed with extreme brutality or that the same involves exceptional depravity. On the other hand, as mentioned in case of *Prahalad* (supra), the accused was young and the probability that he would commit criminal acts of violence in the future is not available on record. There is every probability that the accused can be reformed and rehabilitated. In this context, the observations made by the Honble Supreme Court in the case of *Bachan Singh v. State of Punjab* (1980) 2 SCC 684, is reproduced as follows:

> "209. 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 overemphasised 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 infrequencya 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 the 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."

32. Sentence has always been a vexed question as part of the principles of proportionality.

33. Learned Government Advocate has relied upon various judgments of the Hon'ble Supreme Court. In *Anil vs. State of Maharashtra,* (2014) 4 SCC 69, the Apex Court relying upon the judgment in case of *Shankar Kisanrao Khade vs. State of Maharastra,* (2013) 5 SCC 549 has observed as under :

> "22. We have dealt with the various principles to be applied while awarding death sentence. In that case, we have referred to the cases wherein death penalty was awarded by this Court for murder of minor boys and girls and cases where death sentence had been commuted in the cases of murder of minor boys and girls. In *Shankar Kisanrao Khade* we have also extensively referred to the principles laid down in *Bachan Singh vs. State of Punjab,* (1980) 2 SCC 684 and *Macchi Singh vs. State of Punjab,* (1983) 3 SCC 470 and the subsequent decisions. Applying the tests laid down in *Shankar Kisanrao Khade*, we are of the view that in the instant case the crime test and criminal test have been fully satisfied against the accused. Still, we have to apply the R-R test and examine whether the society abhors such crimes and whether such crimes shock the conscience of the society and attract intense and extreme indignation of the community.
>
> 27. The R-R test, we have already held in *Shankar Kisanrao Khade* case, 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 minor girls, minors suffering from physical disability, old and infirm women, etc."
>
> In *Bachan Singh* (supra), the Supreme Court has categorically stated, "the probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to the society", is a relevant circumstance, that must be given great weight in the determination of sentence. This was further expressed in *Santosh Kumar Satish bhushan Bariyar* (supra). Many-a-times, while determining the sentence, the Courts take it for granted, looking into the facts of a particular case, that the accused would be a menace to the society and there is no possibility of reformation and rehabilitation, while it is the duty of the Court to ascertain those factors, and the State is obliged to furnish materials for and against the possibility of reformation and rehabilitation of the accused. Facts, which the Courts, deal with, in a given case, cannot be the foundation for reaching such a conclusion, which, as already stated, calls for additional materials. We, therefore, direct that the criminal courts, while dealing with offences like Section 302 IPC, after conviction, may, in appropriate cases, call for a report to determine, whether the accused could be reformed or rehabilitated, which depends upon the facts and circumstances of each case.

34. In the present case photographs and other evidence undisputably establish that the aforesaid frock was worn by the deceased at the time of the incident. Therefore, presence of allele of genetic marker from the DNA profile of the appellant duly connects the appellant with the crime. It is sufficient to establish that only the appellant committed repeatedly rape and unnatural intercourse with the prosecutrix and thereafter, he intentionally demolished the room where the aforesaid offence was committed.

35. In case of "*Mofil Khan vs. State of Jharkhand* (2015) 1 SCC 67", the Hon'ble Supreme Court relying upon various judgments has observed as under with regard to the approach and consideration for awarding sentence:

> "45. In Haresh Mohandas Rajput v. State of Maharashtra (2011) 12 SCC 56, Dara Singh v. Republic of India (2011) 4 SCC 80 and Sudam v. State of Maharashtra (2011) 7 SCC 125, this Court has opined that the death sentence must be awarded where the victims are innocent children and helpless women, especially when the crime is committed in the most cruel and inhuman manner which is extremely brutal, grotesque, diabolical and revolting.
>
> 46. The Crime Test, Criminal Test and the "Rarest of the Rare" Test are certain tests evolved by this Court. The Tests basically examine whether

> the society abhors such crimes and whether such crimes shock the conscience of the society and attract intense and extreme indignation of the community. The cases exhibiting a premeditation and meticulous execution of the plant to murder by levelling a calculated attack on the victim to annihilate him, have been held to be fit case for imposing death penalty. Where innocent minor children, unarmed persons, helpless women and old and infirm persons have been killed in a brutal manner by persons in dominating position, and where after ghastly murder displaying depraved mentality, the accused have shown no remorse, death penalty has been imposed. Where it is established that the accused is a hardened criminal and has committed murder in a diabolic manner and where it is felt that reformation and rehabilitation of such a person is impossible and if let free, he would be a menace to the society, this Court has not hesitated to confirm death sentence. Many a time, in cases of brutal murder, exhibiting depravity and callousness, this Court has acknowledged that need to send a deterrent message to those who may embark on such crimes in future. In some cases involving brutal murders, society's cry for justice has been taken note of by this Court, amongst other relevant factors. While deciding whether death penalty should be awarded or not, this Court has in each case, realising the irreversible nature of the sentence, pondered over the issue many times over. This Court has always kept in mind the caution sounded by the Constitution Bench in *Bachan Singh* case that Judges should never be bloodthirsty but wherever necessary in the interest of society identify the rarest of the rare case and exercise the tougher option of death penalty."

36. In case of *Santosh Kumar Singh* (supra), the Hon'ble Supreme Court has observed as under with regard to the sentence awarded in the case:

> "Undoubtedly the sentencing part is a difficult one and often exercises the mind of the Court but where the option is between a life sentence and a death sentence, the options are indeed extremely limited and if the court itself feels some difficulty in awarding one or the other, it is only appropriate that the lesser sentence should be awarded. This is the underlying philosophy behind 'the rarest of the rare' principle."

37. Looking to the nature of offence, particularly in such type of cases, direct evidence is not available, as the crime is committed by the culprit in a planned and clandestine manner, so that no witness or evidence remains against the culprit, particularly in a case where father has committed the heinous crime followed by murder of his 6 years old minor daughter.

38. Learned counsel for the appellant requested that the appellant has no criminal antecendent and would not be a menace to the society. There is a possibility of reformation and rehabilitation of accused. In case of *Anil* (supra), the Hon'ble Supreme Court has held as under :

> "The legislative policy is discernible from Section 235(2) read with Section 354(3) of the Cr.P.C., that when culpability assumes the proportions of depravity, the Court has to give special reasons within the meaning of Section 354(3) for imposition of death sentence. Legislative policy is that when special reasons do exist, as in the instant case, the Court has to discharge its constitutional obligations and honour the legislative policy by awarding appropriate sentence, that is the will of the people. We are of the view that incarceration of a further period of thirty years, without remission, in addition to the sentence already undergone, will be an adequate punishment in the facts and circumstances of the case, rather than death sentence."

39. In recent judgment, in the case of " *Sachin Kumar Singraha vs. State of MP* in Criminal Appeal No. 473-474 of 2019", the Hon'ble Supreme Court imposed a sentence of life imprisonment with a minimum of 25 years of imprisonment (without remission) considering the judgment rendered in case of "*Parsuram vs. State of MP* (Criminal Appeal Nos. 314-315 of 2013)" wherein it was observed as under :

> "19..... keeping in mind the aggravating circumstances of the crime as recounted above, we feel that the sentence of life imprisonment *simpliciter* would be grossly inadequate in the instant case."

40. Recently in the case of *Channulal Verma vs. State of Chhattisgarh* reported in 2018 SCC Online SC 25 70, 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 Satish Bariya vs. State of Maharashtra* reported in (2009) 6 SCC 498 and S*hankar Kisanrao Khade* and also considering the 262th Report of the Law Commission of the year 2015, which is as under:

"CHAPTER-I

INTRODUCTION

A. Reference from the Supreme Court

> 1.1.1. In Shankar kisanrao Khade v. State of Maharashtra ('Khade') (2013) 5 SCC 546 the Supreme Court of India, while dealing with an appeal on the issue of death sentence, expressed its concern with the lack of a coherent and consistent purpose and basis for awarding death and granting clemency. The Court specifically called for the intervention of the Law Commission of India ('the Commission') on these two issues, noting that :
>
> > It seems to me that though the courts have been applying the rarest of rare principle, the executive has taken into consideration some factors not known to the courts for

converting a death sentence to imprisonment for life. It is imperative, in this regard, since we are dealing with the lives of people (both the accused and the rape-murder victim) that the courts lay down a jurisprudential basis for awarding the death penalty and when the alternative is unquestionably foreclosed so that the prevailing uncertainty is avoided. Death penalty and its execution should not become a matter of uncertainty nor should converting a death sentence into imprisonment for life become a matter of chance. **Perhaps the Law Commission of India can resolve the issue by examining whether death penalty is a deterrent punishment or is retributive justice or serves an incapacitative goal.** ***(Shankar Kisanrao Khade v. State of Maharashtra*** **(2013) 5 SCC 546 -para 148** (Emphasis supplied)

It does not 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 a given case 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. This may also need to be considered by the Law Commission of India. (2013) 5 SCC 546-para 149. (Emphasis supplied)

1.1.2. Khade was not the first recent instance of the Supreme Court referring a question concerning the death penalty to the Commission. In Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra ('Bariyar') (2009) 6 SCC 498 lamenting the lack of empirical research on this issue, the Court observed :

We are also aware that on 18.12.2007, the United Nations General Assembly adopted Resolution 62/149 calling upon countries that retain the death penalty to establish a worldwide moratorium on executions with a view to abolishing the death penalty. India is, however, one of the 59 nations that retain the death penalty. Credible research, perhaps by the Law Commission of India or the National Human Rights Commission may allow for an up-do-date and informed discussion and debate on the subject. (Emphasis supplied)

1.1.3. The present Report is thus largely driven by these references of the Supreme Court and the need for re-examination of the Commission's own recommendations on the death penalty in the light of changed circumstances."

23. 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 *S*hatrughan 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 we 5 (2013) 5 SCC 546 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)

41. In the aforesaid cases, the Hon'ble Apex Court found that as per the recommendation of the Law Commission, reformative approach ought to be adopted and commuted sentence setting aside the death penalty.

42. As discussed hereinabove, in the rarest of the rare cases, death sentence ought to be awarded. In case the other sentence as prescribed in the law are inappropriate. In this regard, the balance-sheet regarding aggravating and mitigating circumstances ought to be drawn in the facts of the individual cases. If we see in the facts of the present case, then *aggravating circumstances are*:

1. Extremely brutal, diabolic and cruel act.
2. Victim being six years was a minor and helpless.
3. There may not be any provocation because the accused was in a dominating position.
4. Injuries were grievous with respect to sexual assault particularly in a case where the victim was the daughter of the appellant.

***Mitigating circumstances*:**

1. It is a case of circumstantial evidence.
2. No evidence has been brought that the accused had the propensity of committing further crimes causing continuous threat to the society.
3. Nothing has been brought on record to show that the accused cannot be reformed or rehabilitated.
4. Other punishment options are unquestionably foreclosed.

5. Accused is not a professional killer or offender having any criminal antecedent.

6. The accused being a major having family with him, the possibility of reformation cannot be ruled out.

43. After perusal of the aforesaid balance-sheet of the aggravating and mitigating circumstances and looking to the facts of this case, where the possibility and options of other punishment are open, while upholding the conviction for the offence under Section 302 of the Indian Penal Code, however, in place of death penalty, the appellant is sentenced to undergo life imprisonment with a minimum of 30 years of imprisonment (without remission) and fine of Rs. 20,000/-, in default of payment of fine the appellant has to undergo further RI for six months. The conviction and sentences awarded under Sections 201, 377, 376(2)(F), 376(2)(I) and 376(2)(N) of Indian Penal Code as awarded by the trial Court are just and hence, hereby maintained. The period of sentence already served by the appellant shall be set off.

44. Accordingly, the criminal appeal filed by the appellant is **partly allowed**. The criminal reference is answered accordingly.

45. Before parting with the case, we would like to record words of appreciation for the assistance provided by Shri Siddharth Sharma, *Amicus Curiae* who assisted this Court in disposal of the case. His assistance is duly acknowledged.

46. Let a copy of this judgment along with the record be sent back to the trial Court for communication.

Order accordingly.

I.L.R. [2019] M.P. 1286 (DB)
APPELLATE CRIMINAL

Before Mr. Justice J.K. Maheshwari & Smt. Justice Anjuli Palo

Cr.A. No. 228/2010 (Jabalpur) decided on 17 May, 2019

NAVAL SINGH …Appellant

Vs.

STATE OF M.P. …Respondent

A. Penal Code (45 of 1860), Sections 302, 304 Part I & II and 300 Exception 4 – Motive & Intention **– Held – Appellant, a patient of "Epileptic Psychosis" all of a sudden, provoked by anger assaulted the deceased without premeditation in the heat of passion and without having taken undue advantage in unusual manner though his act was cruel, the act would fall u/S**

304 Part I IPC because his case is covered under Exception 4 of Section 300 IPC – After committing murder, he did not flee away but was wandering in the courtyard – Conviction converted to one u/S 304 Part I IPC – Appeal partly allowed. (Paras 10, 13 & 16)

क. *दण्ड संहिता (1860 का 45), धाराएँ 302, 304 भाग I व II एवं 300 अपवाद 4 – हेतु व आशय – अभिनिर्धारित* – अपीलार्थी, जो कि ''मिरगी से उत्पन्न मनोविक्षिप्ति'' का एक मरीज है, ने अचानक से क्रोध द्वारा प्रकोपित होकर, बिना पूर्व चिंतन के आवेश की तीव्रता में तथा बिना अनुचित लाभ उठाये असामान्य ढंग से मृतक पर हमला किया, यद्यपि उसका कृत्य क्रूर था, यह कृत्य भा.दं.सं. की धारा 304 भाग I के अंतर्गत आएगा क्योंकि उसका प्रकरण भा.दं.सं. की धारा 300 के अपवाद 4 के अंतर्गत आच्छादित है – हत्या कारित करने के पश्चात्, वह भागा नहीं बल्कि वह आंगन में घूम रहा था – दोषसिद्धि भा.दं.सं. की धारा 304 भाग I में परिवर्तित की गई – अपील अंशतः मंजूर।

B. ***Penal Code (45 of 1860), Sections 302, 304 Part I & II – Sentence* – Held – Since conviction is converted from Section 302 to Section 304 Part I IPC, sentence of life imprisonment commuted to period already undergone i.e. more than 10 yrs. (Paras 14 to 16)**

ख. *दण्ड संहिता (1860 का 45), धाराएँ 302, 304 भाग I व II– दण्डादेश* – अभिनिर्धारित – चूंकि दोषसिद्धि भा.दं.सं. की धारा 302 से धारा 304 भाग I में परिवर्तित की गई, आजीवन कारावास का दण्डादेश, पहले भुगताई जा चुकी अवधि अर्थात् 10 वर्ष से अधिक में लघुकृत किया गया।

C. ***Penal Code (45 of 1860), Sections 302, 304 Part I & II – Mental Disorder* – Epileptic Psychosis; Pre Epileptic Mental Ill health and Post Epileptic Mental Ill-health – Discussed and explained. (Para 8 & 9)**

ग. दण्ड संहिता (1860 का 45), धाराएँ 302, 304 भाग I व II – मनोविकार – मिरगी से उत्पन्न मनोविक्षिप्ति; मिरगी के पूर्व मानसिक अस्वस्थता तथा मिरगी के पश्चात् मानसिक अस्वस्थता – विवेचित तथा स्पष्ट।

Cases referred:

Cr.A. No. 203/2008 decided on 02.04.2013 (High Court of Bombay), AIR 1998 SC 1007.

Abhishek Tiwari, *Amicus Curiae* for the appellant.
Som Mishra, G.A. for the State.

J U D G M E N T

The Judgment of the Court was delivered by:
J.K. MAHESHWARI, J.:-This appeal under Section 374 (2) of the Code of Criminal Procedure (hereinafter referred to as the Cr.P.C.) arises out of the judgment of conviction dated 21.12.2009 passed by the Sessions Judge, Dindori

in Session Trial No. 17/2009 convicting the appellant for the charge under Section 302 of the Indian Penal Code (hereinafter referred to as the IPC) and sentencing him to Imprisonment for life with fine of Rs. 1000/-, in default, one year's further R.I.

2. The case of the prosecution, in brief, is that on 5.3.2009 at about 12:00 noon at Village Nighori Imli Tola when Ram Singh (since deceased), was passing through front of the house of the appellant, he asked him that why did he oust his father from the house. At that time, the sister of the appellant came there and said that Ram Singh owes Rs.10/- towards her. When Ram Singh was giving Rs. 10/- to her, at that time the appellant assaulted him firstly by lathi and thereafter by an Axe, which was lying there, on his neck, as a result of which the neck of Ram Singh got almost detached from the body and it was clung with the skin only. Ram Singh died on the spot. Nameshwar (PW-1), who was residing in front of the house of the appellant witnessed the incident and informed to the Kotwar of the village. After reaching of the Police, Nameshwar (PW-1) lodged *Dehati Nalisi* on the spot. Panchanama of the dead body was prepared and other investigation was conducted by the Police. Thereafter, an offence was registered at Crime No. 30/2009 at P.S. Samnapur against the appellant. Dr. Manoj Singh (PW-8) conducted the autopsy and opined as per report Ex. P-9 that injuries were caused over the neck of the deceased by means of sharp cutting weapon, which were homicidal in nature and sufficient to cause death.

3. After completion of investigation, Challan was filed in the competent Court under Section 302 of the IPC against the appellant. Because the case was triable by the Court of Session, therefore, it was committed to the Session Court where charge under Section 302 of the IPC was framed against the appellant. The appellant abjured his guilt. In his defence it was stated that the mental condition of the appellant is not fit and he is a patient of epilepsy.

4. Learned trial Court relied upon the testimony of eye witnesses Nameshwar (PW-1), neighbour, Parvati Bai (PW-2) sister of the appellant, Ram Bai (PW-3) and Gulbas Bai (PW-4), which was corroborated by the medical evidence and arrived at the conclusion that the prosecution has proved the charge under Section 302 of the IPC against the appellant beyond reasonable doubt. The Court disbelieved the defence of the appellant that he is a patient of Epilepsy and at the time of incident, he was not in fit mental condition and observed that the medical report regarding illness has not been produced, therefore, the defence as taken by the appellant is not worthy to rely and convicted and sentenced the appellant as described hereinabove.

5. Learned *Amicus Curiae* appearing on behalf of the appellant referring the Medical Jurisprudence by Modi, 25th Edition, has urged that the appellant is a patient of Epileptic Psychosis. At the time of the incident, he was not in a fit mental condition. Learned counsel has further urged that in the facts of the present

case, as per the statement Nameshwar (PW-1), neighbour, it is clear that the appellant was suffering from epileptic psychosis and at the time of epileptic attack, he becomes unconscious. At the time of the incident, all of a sudden, he assaulted Ram Singh in a fit of anger. It is admitted that if Ram Singh would not have repeatedly asked the appellant about his father, he would not have assaulted him. The conduct of the appellant has also been clarified that after the incident, inspite of fleeing away from the spot, he remained there and was wandering here and there. The allegation of creating fear by abuse, was found omission in his Court statement. Similar are the statements of Parvati Bai (PW-2) sister of the appellant and the statement of Ram Bai (PW-3) and Gulbas Bai (PW-4) regarding presence and assault. Thus, looking to the aforesaid evidence, it can safely be gathered that the accused was not a man of normal prudence and at the time of incident, without any premeditation of mind or without having any intention to commit the murder, in a fit of anger, he assaulted to Ram Singh without taking undue advantage, therefore, the case of the appellant comes within the purview of Exception 4 of Section 300 of the IPC and it would be a case of culpable homicide not amounting to murder. In view of the aforesaid, the conviction of the appellant for the charge under Section 302 of the IPC be set aside and appellant may be convicted for the charge under Section 304 II of the IPC.

6. Learned Government Advocate appearing on behalf of the State has contended that in the facts of the case where the appellant inflicted repeated blows on the neck of the deceased by means of an Axe, which is a vital part, as a result of which his neck was almost detached with the body and it was clung with the skin only, it is a case of full fledged murder. The trial Court has rightly convicted the appellant for the charge under Section 302 of the IPC, therefore, this appeal is liable to be dismissed.

7. After hearing learned counsel for both the parties, the star witnesses of the case are Nameshwar (PW-1), Parvati Bai (PW-2) sister of the appellant, Ram Bai (PW-3) and Gulbas Bai (PW-4). It has come in the testimony of all the aforesaid witnesses that Ram Singh, who was cousin of appellant, was passing through front of the house of the appellant. He asked to appellant why did he oust his father from the house, at that time Parwati Bai (PW-2) sister of the appellant came there and asked Rs. 10 towards her and when Ram Singh was giving the money to Parwati, the appellant assaulted him. The testimony of aforesaid witnesses remained inocular to that extent but in their cross-examination, it is admitted by them that the appellant was a patient of epilepsy and he use to suffer epilepsy fits and become unconscious. It is also admitted in cross-examination that the appellant assaulted the deceased all of a sudden in a fit of anger by means of an Axe, which was lying there and thereafter he remained on the spot and wandering here and there but did not flee away. From the aforesaid testimony, it is clear that the incident took place all of a sudden and he assaulted Ram Singh in a fit of anger

without taking any undue advantage in an unusual manner though such an act may cruel. There was no pre-meditation or motive for the appellant to commit the murder of Ram Singh. At the time of the incident, the appellant was under the control of Epileptic Psychosis, as a result of which the incident occurred.

8. As per the Medical Jurisprudence by Modi, 25th Edition, there are two stages of *Epileptic Psychosis* viz; *Pre-Epileptic Mental Ill-health* and *Post-Epileptic Mental Ill-health*. Epileptic psychosis is associated with epileptic fits. This may occur before or after the fits, or may replace them, and is known as pre-epileptic, post-epileptic and asked or psychic phases (psychomotor epilepsy). In a psychomotor seizure, a patient may become dangerous and can make violent attacks and remain oblivious of his actions. There may be clouding of consciousness and reduced powers of comprehension. There may even be complete amnesia for these periods. Epileptic Psychosis has been defined in Medical Jurisprudence by Modi, 25th Edition as under:-

> ***Epileptic Psychosis***.- Epilepsy usually occurs from early infancy, though it may occur at any period of life. Individuals, who have had epileptic fits for years, do not necessarily show any mental aberration, but quite a few of them suffer from mental deterioration. Religiosity is a marked feature in the commencement, but the feeling is only superficial. Such patients are peevish, impulsive and suspicious, and are easily provoked to anger on the slightest cause.
>
> The disease is generally characterised by short transitory fits of uncontrollable mania followed by complete recovery. The attacks, however, become more frequent. There is a general impairment of the mental faculties, with loss of memory and self-control. At the same time, hallucinations of sight and hearing occur and are followed by delusions of a persecuting nature. They are deprived of all moral sensibility, are given to the lowest forms of vice and sexual excesses, and are sometimes dangerous to themselves as well as to others. In many long-standing cases, there is a progressive dementia or mental deficiency.
>
> True epileptic psychosis is that which is associated with epileptic fits. This may occur before or after the fits, or may replace them, and is known as pre-epileptic, post-epileptic and masked or psychic phases (psychomotor epilepsy). In a psychomotor seizure, a patient may become dangerous and can make violent attacks and remain oblivious of his actions. There may be clouding of consciousness and reduced powers of comprehension. There may even be complete amnesia for these periods.

9. Pre-Epileptic Mental Ill-health and Post-Epileptic Mental Ill-health are also relevant for adjudication of this case, therefore, they are reproduced as under:-

> **Pre-Epileptic Mental Ill-health**.- Pre-epileptic mental ill-health is very common and may replace the epileptic aura, lasing in some cases for hours or even days. It is characterised by violent fits of maniacal excitement or by depression, fussiness, suspiciousness and general malaise. Hallucinations of various kinds are experienced and, owing to delusions, the patient may commit violent assault, or may bring flse charges against innocent persons. Sometimes, the patient may refuse to take any food.
>
> **Post-Epileptic Mental Ill-health**-In this condition, stupor following the epileptic fits is replaced by automatic acts of which the patient has no recollections. The patient is confused, fails to recognise his own relatives and wanders aimlessly. He is terrified by visual and auditory hallucinations of a religious character and delusions of persecution, and consequently, may commit crimes of a horrible nature, such as thefts, incendiarism, sexual assaults and brutal murders. The patient never attempts to conceal them at the time of perpetration but on regaining consciousness may try to conceal them out of fear.

10. The eye witnesses Nameshwar (PW-1) neighbour, Parvati Bai (PW-2) sister of the appellant, Ram Bai (PW-3) and Gulbas Bai (PW-4), have admitted the fact that the appellant is a patient of epileptic psychosis. It is also admitted that at the time of epileptic attack, the appellant used to become unconscious. It is also admitted that at the time of incident, all of a sudden the accused was provoked by anger and in a fit of anger he assaulted the deceased. It is also said that after committing the murder, he did not flee away from the spot but was wandering in the courtyard, therefore, looking to the conduct of the appellant, evidence brought on record by the prosecution and the symptoms of Pre epileptic mental ill-health and post epileptic mental ill-health as quoted hereinabove, it can be crystallized that at the time of incident, the appellant lost his self control due to epileptic disorder and assaulted the deceased without premeditation in the heat of passion and without having taken undue advantage in unusual manner though his act was cruel, therefore, the act of the appellant would not come within the purview of murder rather it would come within the purview of culpable homicide not amounting to murder and it would fall under Exception 4 of Section 300 of the IPC.

11. Now looking to the facts and circumstances in which the assault was made by the appellant by means of an Axe over the neck of the deceased, which is a vital part, the question arises for consideration is whether the case of the appellant would come within the purview of Section 304 Part I or Section 304 Part II of the IPC. In similar circumstances, the High Court of Bombay in Criminal Appeal No. 203/2008 *(Ashok Ganpati Shinde Versus State of Maharashtra)* decided on 2.4.2013 has observed as under:-

25. Now considering the moot question in light of the submission advanced by the learned Counsel for the appellant regarding the offence occurred at the hands of the appellant, we find that the said submission cannot be said to be devoid of merit. We are of such opinion that because the evidence of PW5 as well as the matters from the complaint Exh. 20 reveals that ensuing of quarrel on the day of incident after receipt of phone call from the house of the parents of the deceased, the evidence of PW5 has remained unshattered regarding occurrence of quarrels. The said evidence itself denotes that the said phone call was unexpectedly received on said day. The same denotes the quarrel having occurred not due to any premeditation or a plan made by the appellant. It is the prosecution case that during said quarrel deceased has used singular unrespected words to the appellant. The said aspect considered on the backdrop of the relationship in between the couple clearly reveals that the appellant ws fed-up with repeated occurrence of such events. It also reveals that the said phone call was received in spite of the fadt that the deceased has returned to the house immediately after deceased has returned to the house of the appellant after 4-5 days of the said facts clearly denotes that the facts occurred on the relevant day was outcome of a sudden quarrel ensued in between the couple and during the said quarrel the appellant in a heat of anger used the axe for assaulting deceased. Now taking into consideration the number of injuries of the corpse of the deceased and nature of the said injuries also make it difficult to believe that the appellant had acted in a undue cruel or unusual manner. The aforesaid inference is further fortified from the facts of the appellant thereafter having not fled away and reported the matters to the police. All the said facets in our opinion justifies the submission of the learned Counsel for the appellant that the case of the appellant would be covered by exception No. 4 of Section 300 of I.P.C. Needless to add that the same would denote that offence occurred at the hands of the appellant cannot be covered within the four clauses of Section 300 of I.P.C. and would be covered by the provisions of Section 304, Part-I of I.P.C. We are of such a opinion as we are unable to agree with the submission canvassed that the act occurred on part of the appellant would be covered by the provisions of Section 304, Part-II of I.P.C. We are of such a view as user of weapon like axe for causing an injury on vital part like a neck would definitely reflected the intention of the appellant being of causing an injury likely to cause a death.

12. The Apex Court in the case of *State of U.P. Versus Lakhmi* reported in AIR 1998 SC 1007 has considered the same issue wherein the accused inflicted blows with a Phali (a spade like agricultural implement) on the head of the deceased, as a result of which skull of the deceased was smashed and she died on the spot. The Apex Court after considering all the facts and circumstances found that it is a fit case wherein benefit of Exception I of Section 300 may be given to the appellant.

13. Considering the aforesaid judgments of the Apex Court and the High Court of Bombay and also looking to the facts and circumstances of the case where the appellant assaulted the deceased over his neck by means of an Axe, which is a vital part, without premeditation in the heat of passion and without having taken undue advantage in unusual manner though his act was cruel, the act of the appellant would fall under Section 304 Part I of the IPC because his case is covered under Exception 4 of Section 300 of the IPC.

14. Learned counsel for the appellant has submitted that the appellant is in custody since the date of the incident i.e. 9.3.2009 and by now he has suffered the jail sentence of more than 10 years, therefore, his sentence may be reduced to the period already undergone.

15. Considering the overall facts and circumstances of the case and since the conviction of the appellant is converted from Section 302 of IPC to Section 304 Part I of the IPC, in our considered opinion, the jail sentence already served by the appellant would be sufficient in the facts and circumstances of the case to meet the ends of justice.

16. Accordingly, this appeal is allowed in part. The conviction of the appellant recorded by the trial Court under Section 302 of the IPC for committing murder of Ram Singh is set aside instead the appellant is convicted for the charge under Section 304 Part I of the IPC. The sentence of Life Imprisonment awarded to the appellant is commuted to the period already undergone i.e. more than 10 years.

17. The appellant is in jail, he be released forthwith, if not required in any other offence. Let a copy of this judgment be sent to the trial Court as well as to the Jail Authorities for compliance.

18. At the end, it our duty to record words of appreciation in favour of learned Amicus Curiae, who assisted this Court in disposal of this appeal, which was pending since 2010. His assistance is acknowledged.

Appeal partly allowed.

I.L.R. [2019] M.P. 1294
ARBITRATION CASE
Before Mr. Justice Sujoy Paul

Arb. Case No. 80/2018 (Jabalpur) order passed on 13 May, 2019

ZAM ZAM REFRIGERATION & AIR CONDITINING (M/S) …Applicant

Vs.

CHIEF ENGINEER (ELECTRICAL) BSNL, BHOPAL …Non-applicant

(Alongwith A.C. Nos. 82/2018 & 83/2018)

Arbitration and Conciliation Act (26 of 1996), Section 11(6-A) – Appointment of Arbitrator – Limitation – Cause of Action **– Held – Final bill settled on 12.05.2014 – Aggrieved by less payment, applicant made representation whereby respondent directed to submit details in proper format and finally rejected the same on 17.07.2018 – This fresh rejection revives the cause of action, thus period of limitation is not a hurdle for applicant – Cause of action is to be constituted by whole bundle of essential facts – Arbitrator appointed – Application allowed. (Paras 8 & 10 to 12)**

माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 11(6–ए) – मध्यस्थ की नियुक्ति – परिसीमा – वाद हेतुक – अभिनिर्धारित – दिनांक 12.05.2014 को अंतिम बिल का निपटान/भुगतान किया गया – कम भुगतान से व्यथित होकर, आवेदक ने अभ्यावेदन दिया जिस पर प्रत्यर्थी को उचित प्रारूप में विवरण प्रस्तुत करने हेतु निदेशित किया गया तथा दिनांक 17.07.2018 को उक्त को अंतिम रूप से अस्वीकार किया गया – ये नयी अस्वीकृति वाद हेतुक को पुनः प्रवर्तित करती है, अतः परिसीमा की अवधि आवेदक के लिए एक बाधा नहीं है – वाद हेतुक, संपूर्ण आवश्यक तथ्यों द्वारा गठित किया जाना है – मध्यस्थ नियुक्त – आवेदन मंजूर।

Cases referred:

(2017) 9 SCC-729, (1993) 4 SCC-338, Civil Misc. Petition No. 04/2017 decided on 13.04.2018 (Karnataka High Court), A.C. No. 24/2018 decided on 22.06.2018 (Himachal Pradesh High Court), A.C. No. 56/2016 decided on 11.01.2018, CARAP No. 107/2018 decided on 22.11.2018 (Bombay High Court), (1989) 2 SCC 163, (1978) 2 SCC-91.

J.B. Singh, for the applicant.
Sapan Usrethe, for the non-applicant.

O R D E R

SUJOY PAUL, J:- This order will govern disposal of AC No.80/18, 82/18 and 83/18 which were analogously heard on the joint request of the parties and during the course of hearing, learned counsel for the parties stated that matters are similar in nature and, therefore, can be decided by a common order. The facts are taken from AC No.80/18.

2. The applicant submits that a work contract was approved for Rs.7,27,200/- based on an agreement of 2009-2010 (Annx.A-1). The formal agreement was arrived at between the Executive Engineer (E), Jabalpur and the applicant firm on 4.5.2009 (Annx.A-2). The work started on 1.6.2009 and was completed on 30.09.2011. The applicant contends that the work was completely satisfactorily and 4-RA bills were paid to the applicant but 5th, 6th and final bills were not paid upto 2014. The repeated requests made through Annx.A-3 to A-7 could not fetch any result. As per clause-7 of CPWD-8, payment ought to have been made within six months. The final bill was settled on 12.05.2014 for an amount of Rs.6,28,395/-. Before settling the bill, the applicant was not put to notice. When applicant came to know about it in May, 2014, he preferred representation before EE(E) on 31.5.2014 (Annx.A-8) within 90 days as per clause 25 but this representation also went in vain.

3. Shri J.B.Singh, learned counsel for the applicant submits that on 20.03.2018 (Annx.A-9), the applicant requested to appoint a sole arbitrator as per clause-25 of the agreement. In turn, respondent directed the applicant to furnish proper details as per their letter dated 20.04.2018 (Annx.A-10) which information was submitted by the applicant on 4.5.2018 (Annx.A-11). Ultimately, the request of applicant was turned down only on 17.7.2018 (Annx.A-12). Shri Singh submits that rejection of request of appointment of arbitrator is unjustifiable. Since existence of agreement, arbitration clause and dispute cannot be doubted, it is a fit case for appointment of arbitrator. In the light of (2017) 9 SCC-729 *M/s Duro Felguera, S.A Vs. M/s Gangavaram Port Limited,* it was submitted that in view of Section 11 (6-A) of the Arbitration Act, once existence of arbitration agreement is established, a suitable arbitrator may be appointed. Any other issue including question of limitation may be left open to be decided by learned arbitrator. Reliance is placed on (1993) 4 SCC-338 *Panchu Gopal Bose Vs. Board of Trustees for Port of Calcutta and* (1988) 2 *Major (Retd). Inder Singh Rekhi Vs. Delhi Development Authority*. Lastly, judgment of Karnataka High Court in *ABM Buildtech Pvt. Ltd. Vs. Innovative Leisures And Entertainment Pvt. Ltd* passed on 13.4.2018 in Civil Misc. Petition No.4/2017 and judgment of Himachal Pradesh High Court in *Ascend World Wide Services Ltd. Vs. Himachal Pradesh Road Transport Corporation and another* passed on 22.06.2018 in A.C.No.24/18 were relied upon which were on the aspect of limitation in the light of section 11(6-A) of Arbitration Act.

4. *Per contra*, Shri Sapan Usrethe, learned counsel for BSNL opposed the said contention. He submits that the application is hopelessly barred by time. After passing the final bill, the present application is not filed within time as per section 43 of the Arbitration Act read with Article 137 of the Limitation Act. Reliance is placed on order of this court passed in A.C.No.56/2016 *(M/s*

Uttarakhan Purv Sainik Kalyan Nigam Ltd. Vs. Northern Coal Field Ltd.) decided on 11.1.2018. Learned counsel for the BSNL submits that contention of the applicant about limitation is based on section 21 of the Arbitration Act. If limitation is to be counted from the date of demand notice to appoint an arbitrator is served, there will be no limitation for filing an application for appointment of arbitrator. In order to revive a stale claim, an application demanding appointment of arbitrator, can be filed and limitation can be claimed on the basis of said application. This is clearly contrary to the judgment of this court in *M/s Uttarakhan* (supra).

5. Shri Usrethe, in addition to the oral submission, filed written submissions and urged that judgment of *M/s Duro Felguera* (supra) has no application in the present case. Reliance is placed on the judgment of Bombay High Court in *Deepdharshan Builders Pvt. Ltd. Vs. Saroj and others* passed on 22.11.2018 in CARAP No.107/18.

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

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

8. The factual matrix of this case shows that final bill was settled on 12.5.2014. The applicant, feeling aggrieved by less payment than his entitlement, sent a representation on 31.5.2014. The respondent responded to the communication dated 31.5.2014 and 20.3.2018 and directed the applicant to provide all details in proper format as per his letter dated 20.4.2018. It is not a case where after passing the final bill, the applicant was sending letters after letters one sidedly and respondents were not responding. Indeed, it is a case where respondents themselves sent the letter dated 17.7.2018 and rejected the request of the applicant. Thus, cause of action revived in the present case on 20.4.2018 and 17.7.2018. This is trite that cause of action is is constituted by the whole bundle of essential facts *{See :A.B.C.Laminart (P) Ltd. and another Vs. A.P.Agencies, Salem* (1989) 2 SCC163 *and M/s Ganesh Trading Co. Vs. Moji Ram*-(1978) 2 SCC-91}. In a case of this nature where cause of action has revived, the aspect of limitation is to be examined in a different way and limitation cannot be counted from 12.5.2014, the date when final bill was passed. In *M/s Uttarakhan* (supra), the applicant was trying to raise a stale claim which was settled in 2011 itself. In that backdrop, limitation became hurdle for the applicant. In the said case, the court had no occasion to consider section 11(6-A) of the Act.

9. In the instant case, the arbitration proceedings commenced section 11(6-A) became part of the statute book. The impact of section 11(6-A) was considered in *M/s Duro Felbuera* (supra). The relevant paras reads as under :-

> **"59**. The scope of the power under Section 11(6) of the 1996 Act was considerably wide in view of the decisions in SBP and Co. *[SBP and Co.*

v. Patel Engg. Ltd., (2005) 8 SCC 618] and *Boghara Polyfab [National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.,* (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117] . This position continued till the amendment brought about in 2015. After the amendment, all that the courts need to see is whether an arbitration agreement exists—nothing more, nothing less. The legislative policy and purpose is essentially to minimise the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11(6-A) ought to be respected.

(Emphasis supplied)

This judgment of Supreme Court was considered by Karnataka High Court in *ABM Buildtech Pvt. Ltd.* (supra). The relevant part reads as under :-

4. On the other hand, learned counsel for the Respondent-company Mr.D.Prabhakar through the Statement of Objections filed by the Respondent in this Date of Order 13-04-2018 C.M.P.No.4/2017 M/s. ABM Buildtech Pvt Ltd Vs. M/s. Innovative Leisures & Entertainment Pvt. Ltd., Court today, has submitted before the Court that the claim of the petitioner-company is time barred and a stale claim, since the petitioner having entered into the Agreement in the year 2009, has raised a demand of appointment of an Arbitrator for the first time by terminating the Contract vide Annexure-C dated 17.09.2016 and Annexure-D Notice demanding appointment of an Arbitrator sent by a Registered Post on 05.11.2016, much after the limitation period of 3 years for recovery of the said amount and therefore, the claim being ex-facie time barred, deserves to be rejected and no Arbitrator deserves to be appointed in the present case.

He has relied upon the decision of the Hon'ble Supreme Court in the case of Indian Oil Corporation Ltd., vs. M/s.SPS Engineering Ltd., (2011 AIR SCW 3715) and para-11 of the said judgment is quoted below for ready reference:-

"11. To find out whether a claim is barred by res judicata, or whether a claim is "mala fide", it will be necessary to examine the facts and relevant documents. What is to be decided in an application under section 11 of the Act is whether there is an arbitration agreement between parties. The Chief Justice or his designate is not expected to go into the merits of the claim or examine the tenability of the claim, in an application under section 11 of the Act. The Chief Justice or his Designate may however choose to decide whether the claim is a dead (long-barred) claim or whether the parties have, by recording satisfaction, exhausted all rights, obligations and remedies under the contract, so that neither the contract nor the arbitration agreement survived. When it is said that the Chief Justice or his Designate may choose to decide whether the claim is a dead claim, it is implied that he will do so only when the claim is evidently and patently a long time

barred claim and there is no need for any detailed consideration of evidence. We may elucidate by an illustration : If the contractor makes a claim a decade or so after completion of the work without referring to any acknowledgement of a liability or other factors Date of Order 13-04-2018 C.M.P.No.4/2017 M/s. ABM Buildtech Pvt Ltd Vs. M/s. Innovative Leisures & Entertainment Pvt. Ltd., that kept the claim alive in law, and the claim is patently long time barred, the Chief Justice or his Designate will examine whether the claim is a dead claim (that is, a long time barred claim). On the other hand, if the contractor makes a claim for payment, beyond three years of completing of the work but say within five years of completion of work, and alleges that the final bill was drawn up and payments were made within three years before the claim, the court will not enter into a disputed question whether the claim was barred by limitation or not. The court will leave the matter to the decision of the Tribunal. If the distinction between apparent and obvious dead claims, and claims involving disputed issues of limitation is not kept in view, the Chief Justice or his designate will end up deciding the question of limitation in all applications under section 11 of the Act".

5. Having heard the learned counsels for the parties, this Court is of the opinion that the objection raised by the learned counsel for the Respondent is not sustainable and deserves to be rejected.

6. The question of claim being barred by limitation or not is always a mixed question of facts and law and depends upon the several factors, viz. When the debt was given to the Respondent, when it was claimed back, what are the terms of contract in that regard, whether there was any acknowledgement on the part of the Respondent or not, etc., are all questions, which require adjudication based on relevant evidence.

7. While dealing with the application u/S.11 of the Act, particularly after its amendment by Act No.23 of 2016 w.e.f.23.10.2015, the only factors to be considered by the Court are:-

(i) Existence of valid Arbitration Agreement between the parties and

(ii) Existence of an arbitral dispute between the parties.

8. The merits of the claim, the possible defences of the Respondent, are not the subject matters to be adjudicated by the Court dealing with the application u/S.11 of the Act.

9. Para-11 of the judgment relied upon by the learned counsel for the Respondent himself very clearly states that the Court may leave such contentions to be decided by the Arbitral Tribunal, unless on the basis of material placed before the Court, the Court itself comes to the conclusion that the claim is long time barred ex- facie and does not deserves to be adjudicated upon by the concerned Arbitral Tribunal. No such facts are either available on the record of the case, nor this Court

can adjudicate the issue of claim being barred by time in the present facts at this stage.

10. More over, this Court is of the clear opinion that such defence on the part of the Respondent, cannot be brought in at the stage of Section 11 of the Application being decided by the Court. Even prior to the aforesaid judgment in the case of Indian oil, the Date of Order 13-04-2018 C.M.P.No.4/2017 M/s. ABM Buildtech Pvt Ltd Vs. M/s. Innovative Leisures & Entertainment Pvt. Ltd., Hon'ble Supreme Court took a similar view in the case of National Insurance Co., Ltd., vs. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267, in para-22, which is quoted below for ready reference, the Hon'ble Supreme Court made three categories of issues, which can arise in the application filed u/S.11 of the Act and observed that while the issues on first category must be decided by the Designated Court u/S.11 of the Act, the issues in second category can either be decided by the Court or can be left to be decided by the Arbitral Tribunal, while issue of third category should be left to be decided by the Arbitral Tribunal itself. The issue relating to debt (long term claim or dead claim) was kept in second category.

11. Para-22 of the said judgment is also quoted below for ready reference:-

"22. Where the intervention of the Court is sought for appointment of an Arbitral Tribunal under Section 11, the duty of the Chief Justice or his designate is defined in SBP & Co. This Court identified and segregated the preliminary issues that may arise for consideration in an application under Section 11 of the Act into three categories, that is, (i) issues which the Chief Justice or his designate is bound to decide; (ii) issues which he can also decide, that is, issues which he may choose to decide; and (iii) issues which should be left to the Arbitral Tribunal to decide.

22.1 The issues (first category) which the Chief Justice/his designate will have to decide are:

(a) Whether the party making the application has approached the appropriate High Court.

(b) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement.

22.2. The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the Arbitral Tribunal) are:

(a) Whether the claim is a dead (long- barred) claim or a live claim.

(b) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.

22.3. The issues (third category) which the Chief Justice/his designate should leave exclusively to the Arbitral Tribunal are:

(i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).

(ii) Merits or any claim involved in the arbitration.

12. Thus, even taking the cue from the aforesaid judgments of the Apex Court, it is clear that the question of limitation need not be decided as a condition precedent for invoking Section 11 of the Act, while one of the parties of the dispute seeks the appointment of an Arbitrator. Admittedly, in the present case, despite existence of the Arbitration Agreement between the parties and dispute arising between them, the parties Date of Order 13-04-2018 C.M.P.No.4/2017 M/s. ABM Buildtech Pvt Ltd Vs. M/s. Innovative Leisures & Entertainment Pvt. Ltd., have failed to appoint mutually agreed Arbitrator in the matter."

(Emphasis supplied)

Same view is taken by Himachal Pradesh High Court in *Ascend World Wide Services Ltd.* (supra). The relevant part reads as under :-

"**13**. It is quite apparent from the aforesaid provision of law and the law laid down by the Hon'ble apex Court supra, that after the amendment in Section 11(6)(A), whereby Section 11(6)(A) came to be incorporated, Court is only required to see whether an agreement exists or not. Necessarily, it is not required to take into consideration all other ancillary issues raised on behalf of the opposite party, who is opposing the appointment of an Arbitrator.

14. This Court after having carefully perused material available on record finds substantial force in the argument of learned counsel representing the petitioner that since in the case at hand, respondent despite having received communications Annexures P-3 to 6, failed to refer the matter to the Arbitration in terms of Clause 46 of the agreement, petitioner rightly approached this Court in the instant proceedings for appointment of an Arbitrator."

(Emphasis supplied)

10. No doubt, Bombay High Court has taken a different view in *Deepdharshan Builders Pvt. Ltd.* (supra) but the said judgment is based on different factual scenario. In that case, claim was clearly barred by time. There was no revival of cause of action because of any communication etc. of the

respondents. Hence, I deem it proper to follow the view taken by the Karnataka and Himachal Pradesh High Court. Considering the aforesaid cases, at the cost of repetition, in my view, the period of limitation is not a hurdle for the applicant at this stage. In the peculiar factual backdrop of this case, it is clear that the cause of action has revived in the instant case when applicant's prayer was responded to by the respondents by issuance of Annx.A-10 dated 20.4.2018 but it was ultimately rejected by Annex.A-12 dated 17.7.2018.

11. It is noteworthy that during the course of hearing, learned counsel for the parties otherwise agreed that there exists an arbitration agreement pregnant with an arbitration clause. The only objection raised by the other side was regarding limitation.

12. Since, necessary ingredients for appointment of an arbitrator are satisfied, I deem it proper to appoint Hon'ble Shri Justice S.S.Jha, former judge of this court as provisional arbitrator to resolve the dispute between the parties. The Registry of this court shall obtain consent/ declaration from the Hon'ble provisional arbitrator under sub-section 8 of section 11 of the Act and place these matters before the court **on 16.05.2019**. Needless to mention, the learned provisional arbitrator will be required to give three consents/ declarations and, if appointed, will be entitled to get separate fee for each of the matters.

Order accordingly.

I.L.R. [2019] M.P. 1301 (DB)
CRIMINAL REFERENCE

Before Mr. Justice J.K. Maheshwari & Smt. Justice Anjuli Palo

Cr.Ref. No. 18/2018 (Jabalpur) decided on 13 May, 2019

IN REFERENCE …Applicant

Vs.

SHYAM SINGH @ KALLU RAJPUT …Non-applicant

(Alongwith Cr.A. No. 247/2019)

***A. Penal Code (45 of 1860), Sections 302, 363, 376(2)(i) & 201 and Protection of Children from Sexual Offences Act, (32 of 2012), Section 5 & 6 – Rape and Murder of Minor Girl – Circumstantial Evidence – DNA Test* – Held – For offence u/S 302/201 IPC, last seen evidence to an extent is established – Blood found on shirt of accused matched with DNA profile of deceased – Chain of circumstances established by prosecution beyond reasonable doubt but not one of the rarest of rare case – Life imprisonment awarded instead of death sentence – Reference is answered in negative while appeal partly allowed. (Paras 14 to 16)**

क. दण्ड संहिता (1860 का 45), धाराएँ 302, 363, 376(2)(i) व 201 एवं लैंगिक अपराधों से बालकों का संरक्षण अधिनियम, (2012 का 32), धारा 5 व 6 – अवयस्क बालिका का बलात्संग एवं हत्या – परिस्थितिजन्य साक्ष्य – डी.एन.ए. जांच – अभिनिर्धारित – भारतीय दंड संहिता की धारा 302/201 के अपराध हेतु, अंतिम बार देखे जाने का साक्ष्य एक सीमा तक स्थापित हुआ है – अभियुक्त की शर्ट पर पाये गये रक्त का मृतक के डी.एन.ए. प्रोफाईल से मिलान किया गया – अभियोजन द्वारा परिस्थितियों की श्रृंखला युक्तियुक्त संदेह से परे स्थापित की गई है परंतु यह विरल से विरलतम प्रकरण में से एक नहीं – मृत्यु दण्डादेश के बजाय आजीवन कारावास अधिनिर्णीत किया गया – निर्देश नकारात्मक में उत्तरित जबकि अपील अंशतः मंजूर।

***B. Penal Code (45 of 1860), Section 363* – Held – No evidence on record to establish that appellant took away the deceased from the lawful guardianship of the parents – In absence thereto, conviction u/S 363 set aside. (Para 13)**

ख. दण्ड संहिता (1860 का 45), धारा 363 – अभिनिर्धारित – यह स्थापित करने हेतु अभिलेख पर कोई साक्ष्य नहीं है कि अपीलार्थी मृतिका को उसके माता–पिता की विधिपूर्ण संरक्षकता से दूर ले गया – इसकी अनुपस्थिति में, धारा 363 के अंतर्गत दोषसिद्धि अपास्त।

***C. Penal Code (45 of 1860), Section 376(2)(i) & 201 and Protection of Children from Sexual Offences Act, (32 of 2012), Section 5 & 6 – Sexual Assault* – Held – No evidence on record to establish any penetrative sexual assault or commission of rape on minor girl – No sign of internal or external injury on private part of deceased – As per FSL and DNA report, ingredients of commission of offence not proved – Conviction u/S 376(2)(i) IPC and u/S 5/6 of the Act of 2012 are set aside. (Para 12)**

ग. दण्ड संहिता (1860 का 45), धारा 376(2)(i) व 201 एवं लैंगिक अपराधों से बालकों का संरक्षण अधिनियम, (2012 का 32), धारा 5 व 6 – लैंगिक हमला – अभिनिर्धारित – अवयस्क बालिका पर कोई भेदक (भेदने वाला) लैंगिक हमला अथवा बलात्संग कारित होना, स्थापित करने हेतु अभिलेख पर कोई साक्ष्य नहीं है – मृतिका के गुप्तांगों पर आंतरिक या बाहरी चोट का कोई निशान नहीं – न्यायालयिक विज्ञान प्रयोगशाला एवं डी.एन.ए. प्रतिवेदन के अनुसार, अपराध किये जाने के घटक साबित नहीं – भारतीय दंड संहिता की धारा 376(2)(*i*) तथा 2012 के अधिनियम की धारा 5/6 के अंतर्गत दोषसिद्धि अपास्त।

Premlata Lokhande and *Rakesh Sahu*, for the applicant/accused.
Som Mishra, G.A. for the non-applicant-State.

J U D G M E N T

The Judgment of the Court was delivered by:-

J.K. MAHESHWARI, J.:- Criminal Appeal No. 247/2019 has been filed by the appellant-accused being aggrieved by the judgment dated 10.12.2018 passed by the Special Judge/6th Additional Sessions Judge, Katni, in Special Case No. 56/2018 whereby he has been convicted and sentenced as follows:

Conviction	Sentence
Under Section 363 of IPC	RI for five years and fine of Rs.2000/-. In default of payment of fine, additional RI for four months.
Under Section 376(2)(i) of IPC	Life Imprisonment with fine of Rs.2000/-. In default of payment of fine, RI for four months.
Under Section 5 read with Section 6 of the Protection of Children from Sexual Offences Act, 2012.	Life imprisonment with fine of Rs. 2000/-. In default of payment of fine, RI for four months.
Under Section 302 of the IPC	Death Sentence with fine of Rs.2000/-. In default of payment of fine, RI for four months.
Under Section 201 of the IPC	RI for five years with fine of Rs.2000/-. In default of payment of fine, RI for four months.

2. Criminal Reference has been sent by the trial court under Section 366(1) of the code of Criminal Procedure to this Court for confirmation of the death penalty. As criminal reference and the criminal appear (sic : appeal) both arise out of the common judgment, they are being decided by this common judgment.

3. The case of the prosecution in brief is that on 6.6.2018 complainant Pankaj @ Changa lodged a report in Police Station Slimnabad that he is a resident of village Chargavan and does the cultivation. He has four daughter namely Sapna aged 15 years, victim aged 7 years, Anamika aged 3 years and Astha aged 1 year. He stated that on 5.6.2018 he had gone in the field alongwith his eldest and youngest daughter and wife. He left the victim, Anamika and Astha at home. In the evening, at about 5.00 pm, when he came back to his home alongwith wife Longbai (PW-2) and daughter Sapna, victim was not found in the home. When they enquired in the vicinity, Laxmibai (PW-8) told them that the victim was playing alongwith other children till 12.00 noon in front of the house of Bhanga Kachi and thereafter where the victim had gone, she did not know. Search was made in the vicinity, family, village and relation, but she could not be traced out. On the basis of the said oral report, Sub Inspector Rajendra Upadhyay (PW-16) of Police Station Slimnabad registered a missing report Ex.P/1. On the basis of said missing report, on the same date at about 12.56 noon, Missing Registration No. 23/2018 of missing girl was registered. On 6.6.2018, on the basis of dehati nalishi,

Crime No. 205/2018 Ex.P/2 under Section 363 of IPC was registered in respect of missing girl and the matter was taken under investigation.

4. Sub Inspector Indresh Tripathi (PW-23), on receiving the investigation of the said crime, reached on the spot on the same date at about 12.00 noon and enquired about the victim from her mother, father and daughter Anamika (PW-1) and in the presence of witnesses Pankaj @ Changa (PW-3) and Tulsiram (PW-14) prepared the spot map. On the same date the statement of daughter of Pankaj @ Changa namely Anamika aged four years (PW-1) was also recorded. Anamika (PW-1) stated that one Shyam Singh @ Kallu (appellant-accused herein) gave a coin of five rupees to victim and sent her to bring *Rajshri Gutka* from the shop to him. Witness Anant Kumar Kushwaha (PW-4) stated that accused Kallu was standing near the Jamun tree and they both eaten *Gutka*, later he went back to his home, but the accused was staying alongwith the victim near the Jamun tree. Witness Laxmibai (PW-8) stated that victim was playing alongwith the children in front of the house of Bhanga Kachi till 12.00 noon and thereafter where she went she did not know. Witness Ram Prasad Kushwaha (PW-5) also stated that he saw accused alongwith the victim at about 11-12 O'clock when the accused was going towards his house from the front of the house of Malgujar.

5. On the basis of the aforesaid information and suspicion, when appellant-accused was searched, he was found near village Kodhiya Gram Panchayat. On being asked about the incident, he told that he killed the victim and after tying the dead body in the sacks he thrown it into a Well. On the memorandum of appellant-accused, in the presence of witnesses Arvind @ Anant Dubey (PW-6) and Tulsiram (PW-14), the dead body of victim was pulled out from the Well. The identification of the dead body was got done. The father of the victim Pankaj @ Changa (PW-3) identified that the dead body was of his daughter (victim). Recovery Panchnama Ex. P/15 of the dead body was prepared in the presence of Pankaj @ Changa (PW-3) and Tulsiram (PW-14). The dead body of the victim was handed over to father of the deceased Pankaj @ Changa (PW-3). Thereafter, Murg regarding death was registered and the dead body was sent for postmortem. Dr. S.K. Pathak (PW-7) and Dr.Varsha Batra (PW-10) preserved the vaginal slide of deceased for examination though not found any injury on the private parts of the body. The investigating officer initially conducted investigation under Section 302/201 of IPC and arrested the appellant-accused. Dr. Narendra Jhamnani (PW-12) prepared the semen slide of the accused and sent the same for examination through Superintendent of Police to RFSL Jabalpur. In the report of RFSL Ex.P/39 it has come that in the vaginal slide of victim spermatozoa were found, therefore, offence under Section 376(2)(i) of IPC and Section 5/6 of the POCSO Act was also registered against the appellant-accused. During investigation, blood sample of appellant-accused was taken for DNA test and sent to FSL Sagar Ex.P/40 for examination to which report Ex.P/41 has been received.

6. After completion of the investigation challan was filed in the competent court. As the case was triable by the Court of Sessions, therefore, it was sent to the competent sessions court having jurisdiction i.e. Additional Sessions Judge for trial. Thereafter, charges were framed against the appellant-accused under Sections 363, 302, 201, 376 (2)(i) of IPC and Section 5/6 of Protection of Children from Sexual Offences Act, 2012 (for short 'POCSO Act'). The accused abjured his guilt and taken a defence of false implication in the case.

7. Learned trial court relying upon the statements of prosecution witnesses and the statements of Dr. S.K. Pathak (PW-7), Dr. Varsha Batra (PW-10), Dr. Narendra Jhamnani (PW-12), Scientist doctor Dr. Avnish Kumar (PW-22), Investigating Officer Indresh Tripathi (PW-23), FSL as well as DNA test reports and also the other evidence brought on record regarding last seen concluded that the accused committed the offence under Sections 363, 376(2)(i), 302/201 of IPC and Section 5 read with Section 6 of the POCSO Act and accordingly convicted and sentenced him as described hereinabove.

8. Learned counsel for the appellant-accused contended that it is a case of false implication by the parents of the deceased. It is nowhere alleged by them that the appellant made any penetrative sexual assault on the deceased co-relating same with the FSL and DNA report. It is a case of circumstantial evidence wherein there is no cogent evidence of last seen of the accused with the deceased to prove his connection in commission of the said offence. There is no motive also to commit the murder of deceased. It is urged that as per the testimony of the Dr. S.K. Pathak (PW-7) and Dr. Varsha Batra (PW-10) no external or internal injuries were found on the private part of the deceased, however, the allegation of rape merely relying upon the FSL report creates a serious doubt particularly when it is not corroborated by the DNA test, therefore, in a case of circumstantial evidence, the conviction of the appellant-accused for the offence under Section 5/6 of the POCSO Act and Section 376(2)(i) of IPC is wholly unwarranted. So far as the allegation of commission of murder is concerned, the statements of some of the last seen witnesses have been relied upon by the trial court, though their testimony is of ocular nature, but it is merely co-relating the same with the FSL and connecting the sacks in which the dead body of the deceased was kept and thereafter the same was recovered from a Well on his instance. There was no motive in the case to commit murder of the deceased, therefore, charge under Section 302/201 of IPC is also not made out. It is a case wherein as per the prosecution allegation, the victim was playing in an open place and no cogent evidence has been brought on record to establish that deceased was last seen with the appellant. In such circumstances, in absence of having any evidence that the appellant took away a minor girl from the lawful guardianship, the conviction and sentence of the appellant-accused under Section 363 of IPC is wholly unwarranted. In view of the foregoing submission, it is urged that the conviction

of the appellant for the said charge and the sentence as directed may be set aside. It is said that it is not a rarest of rare case in which the death penalty may be awarded, therefore, the judgment of the trial court awarding capital punishment to the appellant-accused without considering the aggravating and mitigating circumstances of the case is wholly unwarranted and deserves to be set aside.

9. *Per contra*, learned Government Advocate appearing on behalf of the respondent-State submitted that sufficient evidence has been brought by the prosecution to prove that the appellant accused was last seen with the deceased and as per the FSL report also, on examination of the vaginal swab slide of the deceased, spermatozoa was found, therefore, it has been proved that the rape was committed with deceased. In addition to the aforesaid, the accused killed the deceased causing injuries on her neck by knife and thereafter strangulated her because the father of the deceased saw him alongwith daughter of Preetam Kol, with whom he was having affinity and love, who informed to the wife of Preetam Kol, therefore, to take revenge, he had motive to commit murder of the daughter of the complainant Pankaj @ Changa (PW-3). In view of the foregoing, it is urged that the trial court has rightly convicted and sentenced the appellant-accused relying upon the evidence and other material brought on record and also on the basis of reports of FSL and the DNA. Accordingly, the conviction and sentence as directed by the trial court is in accordance with law. It is said that this is rarest of rare case in which a girl of seven years was kidnapped and murdered after committing rape and thereafter her dead body was thrown in a dry well, which was recovered at the instance of the accused, therefore, the conviction and sentence as directed by the trial court do not warrant interference in these cases.

10. After having heard learned counsel appearing on behalf of both the sides and on perusal of the record and the impugned judgment it is clear that in the present case the charge under Sections 363, 376(2)(i) of IPC read with Section 5/6 of the POCSO Act has been framed against the appellant-accused, which were found proved by the trial court relying upon the FSL report to the allegation of commission of rape, because on the vaginal swab slide Ex.D spermatozoa was found. While awarding the sentence, the trial court observed that the intestine of the deceased was coming out from her private part. The said finding is required to be analyzed from the evidence brought on record by the prosecution.

11. If we examine the basic case of the prosecution then it would be clear that on 5.6.2018 in the morning the complainant Pankaj @ Changa (PW-3) had gone to his field alongwith his wife and elder daughter and small son leaving his two daughters at home. When he came back in the evening at about 5.00 pm, the deceased was not found in the home. On search made by him, the deceased could not be traced out in the village or in the relation, therefore, on the next day i.e. on 6.6.2018 he lodged a missing report alleging that his seven years minor daughter is missing and some one persuading her took away. After registration of the Murg the

police started investigation and on the next day on 7.6.2018 police reached in the village and recorded the statements of the parents of the deceased and other persons. During recording statements of the witnesses it was gathered that appellant-accused was the suspect in the case. In this regard statement of Anant Kumar Kushwaha (PW-4) was recorded who stated that appellant-accused gave a coin of five rupees to deceased and sent her to bring *Gutka*. When deceased brought the *Gutka* he and the accused eaten the same, later he went back to his home. Anamika (PW-1) and Laxmibai (PW-8) also disclosed the said fact to the father of deceased Pankaj @ Changa (PW-3). On perusal of the testimony of the aforesaid witnesses, it reveals that when the deceased was playing alongwith other children the appellant-accused gave her a coin of five rupees and sent her to bring *Gutka* for him which he eaten at that place. Thereafter, the deceased was missing. On suspicion, the accused was taken into custody and his memorandum was recorded on 7.6.2018. In his memorandum the accused stated that he was having affinity and love with the daughter of one Preetam Kol. The father of the deceased saw them together and informed the mother of his fiancee. Because of that he was not able to meet the said girl, therefore, to take revenge, on 5.6.2018, when he saw that the deceased i.e. daughter of Pankaj @ Changa (PW-3) was playing outside his home, he took her in a room of lonely house of Annu Thakur where he used to kept fodder and assaulted by knife on her neck. When she cried, he strangulate her and committed her murder. Because the blood was oozing from the neck of the deceased and her dead body was slipping when he was keeping the same in the sack, he removed her slax and underwear and holding her legs kept the dead body in the sack, and tied up the same by the rope and thrown into a Well. Therefore, if we perused the memorandum of the accused, the allegation of commission of rape is not found in his disclosure.

12. In addition, in none of the evidence of the prosecution witnesses it has come on record that the appellant made any penetrative sexual assault to which he has been dealt with for the offence under Section 5/6 of the POCSO Act or any other evidence brought by the prosecution to say that any sexual assault with intent to commission of rape has been done by the appellant-accused. In this context, if we perused the testimony of Dr. Varsha Batra (PW-10) then it would be clear that no sign of any injury on the private part of the deceased was found, but as a precautionary measure, the vaginal swab slide was prepared by the doctors and sent for FSL and DNA examination. Thus, from the statement of the medical experts Dr. S.K. Pathak (PW-7) and Dr. Varsha Batra (PW-10) it is established that there was no sign of penetrative sexual assault or commission of rape as alleged by the prosecution. It is true that in the FSL report Ex. P/41 of vaginal swab slide-D the spermatozoa was found, but, if we co-relates the same with the DNA report then it is clear that because the Y-chromosome STR DNA profile of the sources Frock-A, underwear-B, legging-C and vaginal swab slide-D of the deceased has not been received, therefore, the comparison of Y-Chromosome STR received

from the source of blood-N of the accused was not possible. Meaning thereby, the FSL report, in which, on vaginal swab slide, the spermatozoa was is not concurred by the DNA report. In view of the foregoing evidence brought on record by the prosecution, and in absence of any oral evidence regarding sexual assault, it cannot be concluded that there was any penetrative sexual assault as defined in Section 3 of the POCSO Act for which the accused may be charged or dealt with for an offence under Section 5/6 of the POCSO Act. Simultaneously no material has been brought by the prosecution on record to prove the act of penetrative sexual assault or commission of rape with a minor girl. Even as per the memorandum of accused, which was recorded while he was in custody, he has not made any confession regarding rape, though it is inadmissible in evidence, however, it may be a source for the prosecution to investigate the said crime. The statements of Dr. S.K. Pathak (PW-7) and Dr. Varsha Batra (PW-10) make it clear that no sign of internal or external injury was found on the private part of the deceased. They have merely taken the sample of vaginal swab of the deceased as a precautionary measure. Thus, considering the FSL and DNA report, as discussed above, we are of the considered view that ingredients of commission of offence under Section 5/6 of the POCSO Act read with Section 376(2)(i) of IPC have not been proved by the prosecution beyond reasonable doubt. The finding recorded by the trial court while awarding capital punishment that intestine was coming out from the private part of the deceased is absolutely on the basis of misreading of the statements of the doctors and without any basis looking to the postmortem report, therefore, such finding stands set aside and the conviction of the appellant-accused for the charge under Section 376(2)(i) of IPC and Section 5/6 of the POCSO Act is hereby set aside. He is acquitted for the said charges.

13. So far as the offence under Section 363 of IPC is concerned, in this regard the primary evidence is required to be shown by the prosecution regarding kidnapping. In this regard, if we examine the prosecution case and the evidence brought on record, it would be clear that a girl aged 7 years was playing in an open place. The appellant-accused called her, gave her coin of five rupees for bringing *Rajshri Gutka*, which she brought, which was eaten by the accused and Anant Kumar Kushwaha (PW-4). Thereafter, no evidence has been brought on record to establish that the appellant took away the deceased from the lawful guardianship of the parents. In absence thereto, the conviction of the appellant for the offence under Section 363 of IPC as directed by the trial court is without any cogent evidence. Consequently, the conviction and sentence of the appellant under Section 363 of IPC is hereby set aside. He is acquitted of the said charge.

14. So far as the finding of conviction of appellant for the charge under Section 302/201 of IPC is concerned, in this regard, in a case of circumstantial evidence, the motive, last seen, recovery and the circumstances must co-relate with each other, which are required to be proved by the prosecution forming

complete chain. Therefore, to analyze the said issue, we have gone through the testimony of Laxmibai (PW-8). This witness has stated that at about 11.00 am she saw the deceased playing with other girls. Thereafter she went back to her home. After half an hour when she came out of her house, she did not find the deceased playing alongwith the children and she had informed the said fact to the father of the deceased Pankaj @ Changa (PW-3). Anamika (PW-1) (a child witness), sister of the deceased stated that when she was playing near the Jamun tree alongwith the deceased, accused came there and gave a coin of five rupees to deceased for bringing *Gutka*. On being asked that when the deceased was returned back to home, she stated that deceased did not return thereafter. Anant Kumar Kushwaha (PW-4) stated that he saw that appellant-accused had given a coin of five rupees to deceased for bringing *Rajshri Gutka*, which she brought and they had eaten the *Gutka*. Thereafter he went to his home. The said fact has been narrated by the father of the deceased Pankaj @ Changa (PW-3) in his testimony, however, the last seen evidence to such extent has been established by the prosecution. The evidence regarding motive has not been brought by the prosecution except a confessional statement of the accused, though the said confessional statement has been recorded in front of Ram Prasad Kushwaha (PW-5) and Tulsiram (PW-14). They have supported the case of the prosecution in the court. In addition to the aforesaid, on recovery of the dead body it was found that the deceased was tied in two sacks of white colour, which were seized at the instance of the accused from a Well. Those sacks and the clothes of the deceased were sent for FSL and DNA examination. The knife used for commission of offence was sent for FSL, but, due to disintegration the blood was not found on it, but, on the shirt of the accused i.e. Source-F, human blood of 'B' group was found which was matched with the DNA profile of the Sources-O bone, sacks-H & I of the deceased, therefore by this scientific evidence the accused can safely be connected with the commission of the murder of the deceased, hence, relying upon the circumstantial evidence, as discussed hereinabove, the motive, which is apparent from the confessional statement recorded under Section 27 of the Evidence Act and the evidence brought in the court coupled with the FSL and DNA reports, the charge of commission of murder of deceased and to disappear the evidence may be found proved. In addition to the aforesaid, if we examine the evidence of Dr. S.K. Pathak (PW-7) and Dr. Varsha Batra (PW-10) it would be clear that after causing injury by knife when deceased was not found dead, the strangulation was done, the body was kept in two sacks and tied up by rope and thrown into a Well. Due to fall in the Well, fracture over the left temporal region was found. The recovery of the dead body was made at the instance of appellant-accused. Therefore it forms the chain of circumstances connecting the accused with the commission of murder of a minor girl aged 7 years and thereafter throwing the dead body in a Well with intent to disappear the evidence. Therefore, the charges levelled against the appellant-accused under Section 302/201 of IPC has been proved by the prosecution beyond

reasonable doubt. Consequently, the finding of the trial court convicting the appellant-accused under Section 302/201 of IPC is hereby affirmed.

15. In view of the foregoing facts, it can safely be concluded that it is not one of the rarest of rare case in which the capital punishment can be awarded. It is also not a case in which alternative punishment in the facts of the case may not be offered. Therefore, considering the overall evidence, material brought on record and the facts of the case, the capital punishment as awarded by the trial court on account of proving the charges only under Sections 302 and 201 of IPC stand set aside. Now on the point of sentence, if we go through the nature of offence and the manner in which it has been committed and as proved by the prosecution beyond reasonable doubt to establish the charge under Section 302/201of IPC, we deem it appropriate that the sentence of life imprisonment to the appellant-accused for the charge under Section 302 of IPC is just and proper and for the offence under Section 201 of IPC the sentence of five years as directed by the trial court is proper in the facts of the case respectively with fine of Rs. 2000/- and 1000/- and in default of payment of fine, two months rigorous imprisonment and one month's rigorous imprisonment respectively.

16. Accordingly, the Criminal Reference Capital (CRRFC) sent by the trial court for confirmation of death penalty is answered in negative while the appeal filed by appellant-accused is allowed in part. The conviction and sentence of appellant-accused under Section 363, 376(2)(i) of IPC read with Section 5/6 of the POCSO Act stands set aside. He is acquitted from the said charge. The appellant is convicted for the charge under Section 302/201 of IPC to which he has to undergo the sentence of life imprisonment with fine of Rs.2000/- and five years rigorous imprisonment with fine of Rs.1000/- respectively. In default of payment of fine, sentence of two months and one months respectively shall be served by him.

Order accordingly

I.L.R. [2019] M.P. 1311
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice Anand Pathak
M.Cr.C. No. 5161/2019 (Gwalior) decided on 7 February, 2019

PUSPA BAI …Applicant

Vs.

STATE OF M.P. …Non-applicant

A. Criminal Procedure Code, 1973 (2 of 1974), Section 438 and Penal Code (45 of 1860), Section 306/34 – Anticipatory Bail – Grounds – **Incident on 03.09.2018, FIR registered on 11.10.2018 whereas applicant's name introduced in list of accused on 07.01.2019 – Held – Although deceased was daughter-in-law of applicant but she was living separately with her husband – Independent witnesses including family members of deceased nowhere stated against applicant – Allegations are in respect of abetment and not of homicide or some heinous nature of crime – Applicant, a lady of 55 yrs. and does not bear any criminal antecedents – Application was filed much before *farari* panchnama was prepared– Application allowed.**

(Paras 13, 16 & 17)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 438 एवं दण्ड संहिता (1860 का 45), धारा 306/34 – अग्रिम जमानत – आधार – घटना 03.09.2018 को हुई, 11.10.2018 को प्रथम सूचना प्रतिवेदन दर्ज किया गया जबकि 07.01.2019 को आवेदिका का नाम अभियुक्त की सूची में लाया गया – अभिनिर्धारित – यद्यपि मृतिका आवेदिका की बहु थी परंतु वह अपने पति के साथ पृथक रह रही थी – मृतिका के परिवार के सदस्यों समेत स्वतंत्र साक्षीगण ने कहीं पर भी आवेदिका के विरूद्ध कथन नहीं किये हैं – अभिकथन दुष्प्रेरण के संबंध में हैं तथा न कि मानव वध अथवा अपराध के किसी जघन्य स्वरूप के संबंध में – आवेदिका, 55 वर्षीय एक महिला है तथा कोई आपराधिक पूर्ववृत्त नहीं रखती – फरारी पंचनामा तैयार हो जाने के काफी पूर्व आवेदन प्रस्तुत किया गया था – आवेदन मंजूर।

B. Criminal Procedure Code, 1973 (2 of 1974), Sections 438(1)(iii), 82 & 83 – Proclaimed Offender – **Held – Unless a person against whom warrant has been issued or if such warrant could not be executed because of his abscondance or concealment, then he can be proclaimed as Absconder – In present case, said process has not been given effect to – It cannot be said that applicant was a proclaimed offender or was avoiding arrest. (Para 15)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 438(1)(iii), 82 व 83 – उद्घोषित अपराधी – अभिनिर्धारित – जब तक कि एक व्यक्ति जिसके विरूद्ध वारंट जारी किया गया है अथवा यदि उसकी फरारी अथवा छिपाव के कारण उक्त वारंट का निष्पादन नहीं किया जा सकता है, तब उसे फरार उद्घोषित किया जा सकता है – वर्तमान प्रकरण

में, कथित प्रक्रिया को प्रभाव में नहीं लाया गया – यह नहीं कहा जा सकता है कि आवेदिका उद्घोषित अपराधी थी अथवा गिरफ्तारी से बच रही थी।

***C. Criminal Procedure Code, 1973 (2 of 1974), Section 438(1) – Filing of Charge-sheet – Effect* – Held – Anticipatory bail is available to accused even after filing of charge-sheet, if accused is not a proclaimed offender and is not deliberately avoiding his arrest and if factors enumerated in Section 438(1) Cr.P.C. are satisfied – In present case, said factors are satisfied. (Para 22)**

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 438(1) – आरोप–पत्र प्रस्तुत किया जाना – प्रभाव – अभिनिर्धारित – अभियुक्त को आरोप–पत्र प्रस्तुत किये जाने के पश्चात् भी अग्रिम जमानत उपलब्ध है, यदि अभियुक्त एक उद्घोषित अपराधी नहीं है तथा जानबूझकर गिरफ्तारी से नहीं बच रहा है एवं यदि दं.प्र.सं. की धारा 438(1) में प्रगणित कारकों की संतुष्टि होती है – वर्तमान प्रकरण में, उक्त कारक संतुष्ट हैं।

Cases referred:

(2014) 8 SCC 273, (2011) 1 SCC 694, AIR 2003 SC 4662, (2012) 8 SCC 730, (2014) 2 SCC 171, (1980) 2 SCC 565.

S.K. Shrivastava, for the applicant.
Ravindra Sharma, P.P. for the non-applicant-State.

O R D E R

ANAND PATHAK, J.:- This is first application preferred by the applicant under Section 438 of Cr.P.C. wherein she is apprehending her arrest in a case registered at Crime No.116/2018 at Police Station Deepnakheda Tehsil, Sironj, District-Vidisha for the offence under Section 306 and 34 of IPC.

2. It is the submission of learned counsel for the applicant that although charge-sheet has been filed against the present applicant under Section 299 of Cr.P.C., but still anticipatory bail is maintainable because as per the FIR it appears that deceased Smita (daughter-in-law of applicant) committed suicide by hanging on 03/09/2018 on which marg was registered and enquiry was conducted. Thereupon FIR was registered vide Crime No.116/2018 on 11/10/2018 only against husband of the deceased Dharmendra Singh Rajput and he was arrested on 12/11/2018. Marriage was solemnized on 01/06/2009. Initially statements were taken of witnesses, mainly family members (and some other witnesses) of the deceased namely Monika, Monu, Sooraj, Kishore, Sonu, Ajab Singh, Divyansh, Kiran, Nirpat, Chironja, Jaipal, Dhan Bai, Sanjeev, Meera Bai (statements of them are placed with the application), in which they all alleged against Dharmendra, the husband of deceased and no allegations were raised against the present applicant. Allegation against the co-accused Dharmendra was about the fact of beating deceased Smita that too after consuming liquor. The said fact also surfaced

specifically in the statements of those witnesses that due to bad conduct of co-accused Dharmendra, his parents (present applicant is Dharmendra's mother) disowned him and were living separately.

3. On 07/01/2019, supplementary statements of Monu, Kishore Singh, Sarju, Monika were taken in which these family members raised allegation for the first time against father-in-law Bhogiram, Mother-in-law Puspa Bai (present applicant) and brother-in-law Neelesh about the fact regarding physical abuse for fulfillment of dowry demand. On 08/01/2019, statements of Ranjeet and Hakam were recorded and on the same date statements under Section 164 of Cr.P.C. of witness Kishore Singh, Smt. Sarju and Monu were also recorded before JMFC, Sironj. Interestingly, on 07/01/2019 itself Farari Panchnama was prepared and the process was repeated on 08/01/2019 and thereafter on 09/01/2019. Charge-sheet was filed on 10/01/2019.

4. It appears that meanwhile, bail application under Section 438 of Cr.P.C. has been preferred by the applicant apprehending her arrest (before supplementary statement) but the same was decided by the trial Court on 04/01/2019 and got rejected.

5. It is the submission of learned counsel appearing for the applicant that on 04/01/2019, name of the present applicant was not even mentioned by any of the witnesses as accused, but the trial Court relying upon some complaint (which is not part of the charge-sheet) made by father of the deceased to higher authorities, rejected the bail application of the present applicant. Since the date of incident is 03/09/2018 and till 07/01/2019, absolutely no allegations against the present applicant were levelled at any stage including the statements of the prosecution witnesses (including the statement under Section 161 of Cr.P.C.) and no incriminating material was available against her, therefore, it is apparent that on the basis of supplementary statements u/s 161 of Cr.P.C. and statements recorded under Section 164 of Cr.P.C as referred above that too in undue haste, applicant was implicated and immediately thereafter charge-sheet has been filed on 10/01/2019 under Section 299 of Cr.P.C.

6. It is further submitted that conduct of the police authorities indicates nexus with the complainant party and they did not act fairly. No custodial interrogation is required, no new fact is to be discovered and no weapon is to be seized. Reliance is placed on the judgment of the Apex Court in the case of *Arnesh Kumar Vs. State of Bihar,* (2014) 8 SCC 273 as well as judgment rendered by the Apex Court in the case of *Siddharam Satlingappa Mhetre Vs. State of Maharashtra and Others,* (2011) 1 SCC 694 to advance argument regarding grant of anticipatory bail.

7. Learned counsel for the applicant also relied upon the judgment rendered by the Apex Court in the case of *Bharat Chaudhary and Another Vs. State of Bihar*

and Another, AIR 2003 SC 4662 wherein the Hon'ble Apex Court has held that filing of charge-sheet cannot be a bar for the Court to consider grant of anticipatory bail.

8. It is further submitted that judgment rendered by the Apex Court in the case of *Lavesh Vs. State (NCT of Delhi),* (2012) 8 SCC 730 and *State of M.P. Vs. Pradeep Sharma,* (2014) 2 SCC 171 are not attracted in the present case as they can be distinguished on facts because in those cases, the seekers of the bail were proclaimed offenders and repeatedly avoided appearance before the Investigating Officer. Here such exigency does not exist.

9. On the other hand, learned counsel for the respondent-State opposed the prayer made by the applicant on the ground of judgment rendered by the Apex Court in the case of *Lavesh* (supra) and *Pradeep Sharma* (supra) and prayed for dismissal of the bail application. It is submitted that charge-sheet has already been filed and therefore application be dismissed.

10. Heard the learned counsel for the parties and perused the case diary.

11. Before proceeding with the case, it is apposite to refer Section 438 of Cr.P.C., which is reproduced for ready reference as under:-

> ***" 438. Direction for grant of bail to person apprehending arrest.****(l) When any person has reason to believe that he may be arrested on an accusation of having committed a non- bailable offence, he may apply to the High Court or the Court of Session for a direction under this section; and that Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail.*
>
> *(2) When the High Court or the Court of Session makes a direction under sub- section (1), it may include such conditions in such directions in the light of the facts of the particular case, as it may think fit, including-*
>
> *(i) a condition that the person shall make himself available for interrogation by a police officer as and when required;*
>
> *(ii) a condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;*
>
> *(iii) a condition that the person shall not leave India without the previous permission of the Court;*
>
> *(iv) such other condition as may be imposed under sub- section (3) of section 437, as if the bail were granted under that section. "*
>
> *3. If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at*

the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail, and if a Magistrate taking cognizance of such offence decides that a warrant should issue in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court under sub-section (1). "

12. Perusal of the provision itself indicates that four aspects as referred in section 438 (I) of Cr.P.C. need to be considered while granting anticipatory bail under Section 438 of Cr.P.C. The instant application is to be decided on the anvil of such factors as referred in Section 438 (I) of Cr.P.C..

13. Here the nature of offence is regarding section 306 and 34 of IPC. Although deceased was applicant's daugther-in-law but at the same time, facts indicate that the deceased and her husband i.e. son of present applicant were living separately (and not with applicant) as stated by the independent witnesses as well as family members of the deceased. Coupled with this case, allegations are in respect of abetement and not of homicide or some heinous nature of crime therefore, nature and gravity of the acquisition (sic : accusation) does not bear heinousness or gory details. Since the applicant is a lady aged 55 years and she does not bear any criminal antecedents therefore, factor II contained in Section 438 (I) of Cr.P.C. also comes to the rescue of applicant. So far as the factor No.III is concerned, it appears that the said factor wherein apprehension of possibility of the applicant to flee from justice (normally, in majority of anticipatory bail applications) is concerned, the said factor is to be seen alongwith Sections 82 and 83 of Cr.P.C. which deals in respect of proclamation for person absconding because statutory result of flee from justice or Abscondance is reflected through section 82 and 83 of Cr.P.C.

14. The word "Abscond" has been explained in the Black's Law Dictionary 10th Edition as under:-

*" **Abscond:- 1.** To depart secretly or suddenly, esp. to avoid arrest, prosecution, or service of process.*

2. To leave a place, usu. Hurriedly, with another's money or property."

15. The definition of word "Abscond" innately describes the attitude of a person to depart secretly to avoid arrest or service of process and if it is seen in juxtaposition to sections 82 and 83 alongwith Section 438 (I) (iii) of Cr.P.C. then it appears that unless a person against whom warrant has been issued or against whom warrant cannot be executed because of his abscondance (sic : abscondence) or concealment, then he can be proclaimed as Absconder. Here the said process has not given effect to. In undue haste, only Farari Panchnama (arrest panchnama) has been prepared, without making real efforts to arrest the applicant. Therefore, it cannot be said that the applicant was a proclaimed offender or avoiding her arrest.

16. Although as per the submission advanced, on 07/01/2019, supplementary statements of some of the witnesses were recorded under Section 161 of Cr.P.C. wherein for the first time, name of the present applicant referred by them and on the same day at 5 pm, Farari Panchnama was prepared. Again on 08/01/2019 and 09/01/2019, two different Farari Panchnamas were prepared and immediately thereafter on 10/01/2019, charge-sheet was filed. The undue haste shown by the Investigating Officer regarding recording of supplementary statements under Section 161 of Cr.P.C. and thereafter under Section 164 of Cr.P.C. (on 08/01/2019) and meanwhile issuance of Farari Panchnama, all cumulatively indicate that in utter haste, investigation was proceeded. Application for bail u/s 438 of Cr.P.C. by applicant was filed before the Court of law much before Farari Panchnama was prepared (on 07/01/2019) because vide order dated 04/01/2019, anticipatory bail application was rejected by the trial Court but on some different grounds because at that point of time, no incriminating material existed against the applicant.

17. In the case of *Lavesh* (supra), the facts were such wherein definite allegations existed against the husband of the deceased from the very beginning and then appellant was a proclaimed offender in that case and even when interim protection was granted, he did not visit the Investigating Officer and misused the liberty. Therefore, his conduct and declaration of status as absconder were the relevant factors for dismissal of his application by the Hon'ble Apex Court. Similarly, in the case of *Pradeep Sharma* (supra) also, accused was a proclaimed offender under Section 82 of Cr.P.C. and did not cooperate in the investigation. Here, the applicant came into the list of accused on 07/01/2019 for the first time, whereas the incident took place on 03/09/2018, marg inquiry was conducted and thereafter, FIR was registered on 11/10/2018. Statements of witnesses, including family members of the deceased were taken by the police, they all nowhere referred the role of the applicant in any manner. They only alleged against the husband of the deceased Dharmendra and specifically mentioned the fact that applicant and her husband separated her son from them because of his bad habit (consuming liquor) but on 07/01/2019 things changed drastically and supplementary statements and undue haste shown by the police resulted into filing of charge-sheet and before that Farari Panchnama was prepared. Police Officer may resort to Section 41 of Cr.P.C. if they have suspicion against a person regarding commission of offence but same has never been resorted to because applicant never implicated or referred as an accused prior to 07/01/2019. Before that, she already preferred anticipatory bail before the trial Court.

18. Scope of Section 438 of Cr.P.C. has been dealt with by the Hon'ble Apex Court in the case of *Shri Gurbaksh Singh Sibbia and Others Vs. State of Punjab,* (1980) 2 SCC 565 and thereafter reiterated in the case of *Siddharam Satlingappa*

Mhetre (supra). In both the judgments, concept and contours of personal liberty were explained in detail.

19. In *Bharat Chaudhary* (supra), the Apex Court has delineated the law in following words:-

> *" 7. From the perusal of this part of Section 438 of the Cr.P.C. We, find no restriction in regard to exercise of this power in a suitable case either by the Court of Sessions High Court or this Court even when cognizance is taken or charge-sheet is filed. The object of S.438 is to prevent undue harassment of the accused persons by pre-trial arrest and detention. The fact, that a Court has either taken cognizance of the complaint or the investigating agency has filed a charge-sheet, would not by itself. In our opinion, prevent the concerned Courts from granting anticipatory bail in appropriate cases. The gravity of the offence is an important factor to be taken into consideration while granting such anticipatory bail so also the need for custodial interrogation but these are only factors that must be borne in mind by the concerned Courts while entertaining a petition for grant of anticipatory bail and the fact of taking cognizance or filing of charge-sheet cannot by themselves be construed as a prohibition against the grant of anticipatory bail. In our opinion, the Courts i.e. the Court of Sessions, High Court or this Court has the necessary power vested in them to grant anticipatory bail in non-bailable offences under S. 438 of the Cr.P.C. even when cognizance is taken or charge-sheet is filed provided the facts of the case require the Court to do so."*

20. Considering the fact situation as well as nature of allegations, it appears that undue haste has been shown by the Investigating Officer to prepare Farari Panchnama and to prepare the charge-sheet *prima facie*, ignoring the fact that offence alleged is not heinous and applicant without criminal antecedents, has no chance to flee from justice, therefore, personal liberty of the applicant cannot lie at the mercy of such disposition of investigation.

21. Here it appears that acquisition (sic : accusation) has been made with object of injecting and humiliating the applicant by having her so arrested therefore, factor No.IV enumerated in Section 438 of Cr.P.C. and the law laid down by the Apex Court as referred above furthers the cause of applicant for grant of anticipatory bail under Section 438 of Cr.P.C.

22. Anticipatory bail u/s 438 of Cr.P.C. is available to an accused even after filing of charge-sheet if he/ she is not a proclaimed offender or if he/ she is not deliberately avoiding his arrest and if factors as enumerated in section 438 (I) of Cr.P.C., are satisfied. In the present case, said factors are satisfied.

23. Resultantly, application for anticipatory bail is allowed. It is hereby directed that in the event of arrest, the applicant shall be released on bail on his

furnishing a bail bond of **Rs.50,000/-** with two solvent sureties **each of 50,000/-** of the like amount to the satisfaction of Arresting Authority.

24. This order will remain operative subject to compliance of the following conditions by the applicant :-

1. The applicant will comply with all the terms and conditions of the bond executed by her;

2. The applicant will participate and cooperate in the investigation / trial, as the case may be as and when required;

3. The applicant will not indulge herself in extending inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or to the Police Officer, as the case may be;

4. The applicant shall not commit an offence similar to the offence of which she is accused;

5. The applicant will not seek unnecessary adjournments during the trial;

6. The applicant will not leave India without previous permission of the trial Court/Investigating Officer, as the case may be.

7. The bail is provided only for a period of 45 days from today to the applicant, meanwhile, she can approach the trial Court for regular bail in accordance with law.

25. A copy of this order be sent to the Court concerned for compliance.

C.C. as per rules.

Application allowed.

I.L.R. [2019] M.P. 1318
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice S.A. Dharmadhikari
M.Cr.C. No. 19309/2019 (Gwalior) decided on 23 May, 2019

VEERENDRADAS BAIRAGI …Applicant

Vs.

SHREEKANT BAIRAGI & ors. …Non-applicants

***Criminal Procedure Code, 1973 (2 of 1974), Section 311 – Recall of Witness – Scope & Grounds* – Held – Applicant filed application seeking recall of witnesses on the ground that senior counsel has been engaged in place of**

junior counsel – Mere change of counsel cannot be a ground to recall the witnesses for cross examination and is outside the scope of Section 311 Cr.P.C. - Application dismissed. (Para 9)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 311 – साक्षी को पुनः बुलाना – विस्तार व आधार – अभिनिर्धारित – आवेदक ने इस आधार पर साक्षीगण को वापस बुलाया जाना चाहते हुए आवेदन प्रस्तुत किया, कि कनिष्ठ अधिवक्ता के स्थान पर वरिष्ठ अधिवक्ता को नियोजित किया गया है – अधिवक्ता का परिवर्तन मात्र, साक्षीगण को पुनः बुलाने का आधार नहीं हो सकता तथा दं.प्र.सं. की धारा 311 की परिधि से बाहर है – आवेदन खारिज।

Cases referred:

JT 2007 (9) SC 552, (2016) 2 SCC 402.

Anand Gupta, for the applicant.
Vijay Sundaram, P.L. for of the non-applicant No. 3-State.

O R D E R

S.A. DHARMADHIKARI, J.:-In this petition, under section 482 of the Code of Criminal Procedure, petitioner has challenged the order dated 2/4/19 passed by V ASJ, Guna in S.T. No.265/18, whereby the trial Court has rejected his application under section 311 of the Cr.P.C. for recalling and re-examining the witnesses already examined.

2. Necessary facts for disposal of this case are that an application under section 311 of the Cr.P.C. was filed on 9/3/2019 stating that on 26/12/2018, complainant Shrikant Bairagi and eye-witnesses Shivnarayan and Ku. Jyoti had been examined. The said witnesses were cross-examined by a Junior Advocate namely Rakesh Sharma. However, he could not effectively cross-examine them on points such as cross-case, medical report etc, which may occasion into miscarriage of justice. Therefore, it was prayed that the aforesaid witnesses may be re-crossexamined by a senior Advocate for fair decision in the case. It was also pleaded therein that the parties had entered into a compromise.

3. The application was opposed by learned counsel for the respondents contending that mere change of counsel could not be a ground for re-examination of witnesses.

4. The trial Court after hearing both the parties rejected the application on the ground that complainant and other witnesses had already been cross-examined by a Junior Advocate and only because a Senior Advocate had been engaged, witnesses could not be summoned for further cross-examination.

5. Learned counsel for the petitioner submits that the order passed by the trial Court is bad in law, inasmuch as it may result in miscarriage of justice. It is crystal

clear that under section 311 of Cr.P.C., the Court has been empowered to summon a witness at any stage of an inquiry, trial or other proceeding. The power is not confined to a particular class of persons. It is also settled in law that if all the conditions under this section are satisfied, the Court can call the witnesses not only on the motion of either prosecution or defence, but also it can do so on its own motion. It is further submitted that power of a Court to recall any witness or witnesses already examined or to summon any witness, can be invoked even if evidence of both sides is closed so long as the Court retains *seisin* of the criminal proceedings. To buttress his submissions, reliance has been placed on a decision of the Apex Court in the case of *Iddar and Others Vs. Aabida and another* (JT 2007 (9) SC 552).

6. *Per contra*, learned Panel Lawyer has supported the order passed by the trial Court and submits that the findings recorded therein being cogent, no interference is warranted therewith.

7. Heard, learned counsel for the parties.

8. The Supreme Court in the case of *State (NCT of Delhi) Vs. Shiv Kumar Yadav* (2016) 2 SCC 402 has held as under:-

> "10. It can hardly be gainsaid that fair trial is a part of guarantee under Article 21 of the Constitution of India. Its content has primarily to be determined from the statutory provisions for conduct of trial, though in some matters where statutory provisions may be silent, the court may evolve a principle of law to meet a situation which has not been provided for. It is also true that principle of fair trial has to be kept in mind for interpreting the statutory provisions.
>
> 11. It is further well settled that fairness of trial has to be seen not only from the point of view of the accused, but also from the point of view of the victim and the society. In the name of fair trial, the system cannot be held to ransom. The accused is entitled to be represented by a counsel of his choice, to be provided all relevant documents, to cross-examine the prosecution witnesses and to lead evidence in his defence. The object of provision for recall is to reserve the power with the court to prevent any injustice in the conduct of the trial at any stage. The power available with the court to prevent injustice has to be exercised only if the Court, for valid reasons, feels that injustice is caused to a party. Such a finding, with reasons, must be specifically recorded by the court before the power is exercised. It is not possible to lay down precise situations when such power can be exercised. The Legislature in its wisdom has left the power undefined. Thus, the scope of the power has to be considered from case to case. The guidance for the purpose is available in several decisions relied upon by the parties. It will be sufficient to refer to only some of the decisions for the principles laid down which are relevant for this case.

12. In Rajaram Prasad Yadav v. State of Bihar (2013) 14 SCC 461, the complainant was examined but he did not support the prosecution case. On account of subsequent events he changed his mind and applied for recall under Section 311 Cr.P.C. which was declined by the trial court but allowed by the High Court. This Court held such a course to be impermissible, it was observed : (SCC pp. 468-69, paras 13-14)

"13. .. In order to appreciate the stand of the appellant it will be worthwhile to refer to Section 311 CrPC, as well as Section 138 of the Evidence Act. The same are extracted hereunder:

Section 311, Code of Criminal Procedure

"311. Power to summon material witness, or examine person present.—Any court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case."

Section 138, Evidence Act

"138. Order of examinations.—Witnesses shall be first examined-in-chief then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.

The examination and cross-examination must relate to relevant facts but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

Direction of re-examination.—The re-examination shall be directed to the explanation of matters referred to in cross-examination; and if new matter is, by permission of the court, introduced in re-examination, the adverse party may further cross-examine upon that matter."

14. A conspicuous reading of Section 311 CrPC would show that widest of the powers have been invested with the courts when it comes to the question of summoning a witness or to recall or re-examine any witness already examined. A reading of the provision shows that the expression "any" has been used as a prefix to "court", "inquiry", "trial", "other proceeding", "person as a witness", "person in attendance though not summoned as a witness", and "person already examined". By using the said expression "any" as a prefix to the various expressions mentioned above, it is ultimately stated that all that was required to be satisfied by the court was only in relation to such evidence

that appears to the court to be essential for the just decision of the case. Section 138 of the Evidence Act, prescribed the order of examination of a witness in the court. The order of re-examination is also prescribed calling for such a witness so desired for such re-examination. Therefore, a reading of Section 311 CrPC and Section 138 Evidence Act, insofar as it comes to the question of a criminal trial, the order of re-examination at the desire of any person under Section 138, will have to necessarily be in consonance with the prescription contained in Section 311 CrPC. It is, therefore, imperative that the invocation of Section 311 CrPC and its application in a particular case can be ordered by the court, only by bearing in mind the object and purport of the said provision, namely, for achieving a just decision of the case as noted by us earlier. The power vested under the said provision is made available to any court at any stage in any inquiry or trial or other proceeding initiated under the Code for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or re-examine any person already examined. Insofar as recalling and re-examination of any person already examined is concerned, the court must necessarily consider and ensure that such recall and re-examination of any person, appears in the view of the court to be essential for the just decision of the case. Therefore, the paramount requirement is just decision and for that purpose the essentiality of a person to be recalled and re-examined has to be ascertained. To put it differently, while such a widest power is invested with the court, it is needless to state that exercise of such power should be made judicially and also with extreme care and caution."

13. After referring to earlier decisions on the point, the Court culled out following principles to be borne in mind : (Rajaram Prasad Yadav v. State of Bihar, (2013) 14 SCC 461, SCC pp. 473-74)

"17.1. Whether the court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the court for a just decision of a case?

17.2. The exercise of the widest discretionary power under Section 311 CrPC should ensure that the judgment should not be rendered on inchoate, inconclusive and speculative presentation of facts, as thereby the ends of justice would be defeated.

17.3. If evidence of any witness appears to the court to be essential to the just decision of the case, it is the power of the

court to summon and examine or recall and re-examine any such person.

17.4. The exercise of power under Section 311 CrPC should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.

17.5. The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.

17.6. The wide discretionary power should be exercised judiciously and not arbitrarily.

17.7. The court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.

17.8. The object of Section 311 CrPC simultaneously imposes a duty on the court to determine the truth and to render a just decision.

17.9. The court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.

17.10. Exigency of the situation, fair play and good sense should be the safeguard, while exercising the discretion. The court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified.

17.11. The court should be conscious of the position that after all the trial is basically for the prisoners and the court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

17.12. The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

> 17.13. The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.
>
> 17.14. The power under Section 311 CrPC must therefore, be invoked by the court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. The court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right."

14. In Hoffman Andreas v. Inspector of Customs, (2000) 10 SCC 430, the counsel who was conducting the case was ill and died during the progress of the trial. The new counsel sought recall on the ground that the witnesses could not be cross-examined on account of illness of the counsel. This prayer was allowed in peculiar circumstances with the observation that normally a closed trial could not be reopened but illness and death of the counsel was in the facts and circumstances considered to be a valid ground for recall of witnesses. It was observed : (SCC p. 432, para 6)

> "6. Normally, at this late stage, we would be disinclined to open up a closed trial once again. But we are persuaded to consider it in this case on account of the unfortunate development that took place during trial i.e. the passing away of the defence counsel midway of the trial. The counsel who was engaged for defending the appellant had cross-examined the witnesses but he could not complete the trial because of his death. When the new counsel took up the matter he would certainly be under the disadvantage that he could not ascertain from the erstwhile counsel as to the scheme of the defence strategy which the predeceased advocate had in mind or as to why he had not put further questions on certain aspects. In such circumstances, if the new counsel thought to have the material witnesses further examined the Court could adopt latitude and a liberal view in the interest of justice, particularly when the Court has unbridled powers in the matter as enshrined in Section 311 of the Code. After all the trial is basically for the prisoners and courts should afford the opportunity to them in the fairest manner possible."

15. The above observations cannot be read as laying down any inflexible rule to routinely permit a recall on the ground that cross-examination was not proper for reasons attributable to a counsel. While advancement of justice remains the prime object of law, it cannot be understood that recall can be allowed for the asking or reasons related to

mere convenience. It has normally to be presumed that the counsel conducting a case is competent particularly when a counsel is appointed by choice of a litigant. Taken to its logical end, the principle that a retrial must follow on every change of a counsel, can have serious consequences on conduct of trials and the criminal justice system. Witnesses cannot be expected to face the hardship of appearing in court repeatedly, particularly in sensitive cases such as the present one. It can result in undue hardship for victims, especially so, of heinous crimes, if they are required to repeatedly appear in court to face cross-examination.

16. The interest of justice may suffer if the counsel conducting the trial is physically or mentally unfit on account of any disability. The interest of the society is paramount and instead of trials being conducted again on account of unfitness of the counsel, reform may appear to be necessary so that such a situation does not arise. Perhaps time has come to review the Advocates Act and the relevant Rules to examine the continued fitness of an advocate to conduct a criminal trial on account of advanced age or other mental or physical infirmity, to avoid grievance that an Advocate who conducted trial was unfit or incompetent. This is an aspect which needs to be looked into by the concerned authorities including the Law Commission and the Bar Council of India.

17. In State (NCT of Delhi) vs. Navjot Sandhu, (2005) 11 SCC 600, this Court held: (SCC pp. 726-27, para 167)

"167. ..... **we do not think that the Court should dislodge the counsel and go on searching for some other counsel to the liking of the accused. The right to legal aid cannot be taken thus far. It is not demonstrated before us as to how the case was mishandled by the advocate appointed as amicus except pointing out stray instances pertaining to the cross-examination of one or two witnesses. The very decision relied upon by the learned counsel for the appellant, namely, Strickland v. Washington 1984 SCC Online US SC 100 makes it clear that judicial scrutiny of a counsel's performance must be careful, deferential and circumspect as the ground of ineffective assistance could be easily raised after an adverse verdict at the trial. It was observed therein: (SCC OnLine US SC para 44)**

> **"44. Judicial scrutiny of the counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess the counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining the counsel's defence after it has proved unsuccessful, to conclude that a particular act of omission of the counsel was unreasonable. Engle v. Isaac 1982 SCC Online SC 66 [US at pp. 133-134). A fair assessment of attorney performance requires that every effort be made to eliminate the**

distorting effects of hindsight, to reconstruct the circumstances of the counsel's challenged conduct, and to evaluate the conduct from the counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge in a strong presumption that the counsel's conduct falls within the wide range of reasonable professional assistance;...."

"22. The aforesaid proceedings clearly bely the claim of the accused/applicant that the case has been proceeding at a "hurried pace" or that he was not duly represented by a defence counsel of his choice. The claim of the applicant that he was unwilling to continue with his earlier counsel is also nothing but a bundle of lie in as much as the accused never submitted before the court that he wants to change his counsel. Rather, it is revealed from the record that the earlier counsel, Sh. Alok Kumar was acting as per his instructions and having legal interview with him. The accused cannot be permitted to take advantage of his submissions made on the first date i.e. 13/01/2015 that he wants to engage a new counsel as his subsequent conduct does not support this submission. I may also add that before proceeding with the case further, I had personally asked the accused in the open court whether he wants to continue with his counsels and only on getting a reply in the affirmative, were the proceedings continued further. It thus appears that the endeavor of the accused by filing this application is only to delay the proceedings despite the fact that all along the trial his request for adjournment have been duly considered and allowed and he has been duly represented by a private counsel of his choice.

23. I am also unable to accept the plea of the accused that the counsel representing him earlier was incompetent, being a novice and that he is entitled to recall all the prosecution witnesses now that he has engaged a new counsel. Although, Sh. Alok Kumr Dubey and Sh. Ankit Bhatia, both have enrolment number of 2014 as per the Power of Attorney executed by the accused in their favour, however, to my mind the competence of a Lawyer is subjective and the date of his enrolment with the Bar Council can certainly not be said to be a yardstick to measure his competence.

24. Moreover, the competence of the new counsel may again be questioned by another counsel, who the accused may choose to engage in future. This fact was also admitted by Sh. D.K. Mishra during the course of arguments on the application under consideration.

* * *

27. At this stage, to judge as to whether certain questions should have been put to the witnesses in cross examination or should not have been put to them, would in my view result in pre-judging as to what are the material portions of the evidence and would also amount to re-appraising the entire cross examination conducted by the earlier counsel to conclude whether he had done a competent job or not. This certainly is not within the scope and power of the court u/s. 311 Cr.P.C. I am supported in my view by the observations of Hon'ble Delhi High Court in its order dated 20/02/2008 in case titled as Raminder Singh vs. State, Criminal MC 8479/2006, where it has been held as under :

> **"In the first place, it requires to be noticed that scope of Section 311 CrPC does not permit a court to go into the aspect whether material portions of the evidence on record should have been put to the witness in cross-examination to elicit their contradictions. If the court is required to perform such an exercise every time an application is filed under Section 311 then not only would it be pre-judging what according to it are "material portions' of the evidence but it would end up reappraising the entire cross-examination conducted by a counsel to find out if the counsel had done a competent job or not. This certainly is not within the scope of the power of the trial court under Section 311 CrPC. No judgment has been pointed out by the learned Counsel for the petitioner in support of such a contention. Even on a practical level it would well nigh be impossible to ensure expeditious completion of trials if trial courts were expected to perform such an exercise at the conclusion of the examination of prosecution witnesses every time."**

28. It may also be relevant to mention that Article 22(1)of the Constitution of India confers a Fundamental Right upon an accused, who has been arrested by the police to be defended by a legal practitioner of his choice. This Fundamental Right has been duly acknowledged by the Hon'ble Superior Courts in numerous pronouncements including the case of State of Madhya Pradesh vs. Shobharam, AIR 1966 SC 1910 wherein it has been observed as under:

> "Under Art. 22, a person who is arrested for whatever reason, gets three independent rights. The first is the right to be told the reasons for the arrest as soon as an

arrest's made, the second is the right to be produced before a Magistrate within 24 hours and the third is right to be defended by advocate of his choice. When the Constitution lays down in absolute terms a right to be defended by one' own counsel, it cannot be taken away by ordinary law, and, it is not sufficient to say that the accused was so deprived, of the right, did not stand in danger of losing his personal liberty."

29. In the case of State vs. Mohd. Afzal & Ors. 2003 SCC Online Del 935, the Hon'ble Delhi High Court addressed the issue of Fundamental Right of the accused to be represented by a counsel from the point of his arrest especially in a case involving capital punishment. The case of US Supreme Court in Strickland vs. Washington 1984 SCC Online US SC 100 was cited before the Delhi High Court and the learned Counsel for the accused in that case had argued that the law required a conviction to be set aside where counsel's assistance was not provided or was ineffective. Hon'ble Delhi High Court took note of the observations in the said case as well as the Rulings of the Hon'ble Supreme Court in the case of Kishore Chand vs. State of Himachal Pradesh (1991) 1 SCC 286, Khatri & Ors. vs. State of Bihar & Ors. (1981) 1 SCC 627, Hussainara Khatoon Vs. State of Bihar, (1980) 1 SCC 108, Rajan Dwivedi vs. Union of India, (1983) 3 SCC 307, Madhav Hayawadanrao Hoskot vs. State of Maharashtra (1978) 3 SCC 544, while dealing with this issue. It was however observed that from hindsight it is easy to pick wholes in the cross examination conducted but applying the test in Strickland's case, it cannot be said that it was the constructive denial of the counsels to accused Mohd. Afzal. The observations of the Hon'ble Delhi High Court were met with the approval by Hon'ble Supreme Court when the matter was decided by the Hon'ble Apex Court by its ruling titled as State vs. Navjot Sandhu & Ors. AIR 2005 SC 3820.

30. The Hon'ble Apex Court, after considering the facts of the case, nutshell that: (State vs. Navjot Sandhu & Ors. AIR 2005 SC 3820, SCC p. 726, para 167)

"167. ....we do not think that the court should dislodge the Counsel and go on searching for some other counsel to the liking of the accused. The right to legal aid cannot be taken thus far."

While relying upon the ruling in the case Strickland's (supra), the Hon'ble Supreme Court observed that scrutiny of performance of a counsel who has conducted trial should be highly deferential.

x x x x x

34. It may be noted that the recall of IO and prosecutrix has been sought on the ground besides others, that she has to be questioned as to why she did not give her sim of her mobile to the IO and why the IO did not ask her for the same. Similarly, it has been submitted that the accused though admitted his potency report but has not admitted the time and process of the potency test as stated by the IO and thus the 10 needs to be recalled.

Further, SI Sandeep is required to be recalled for cross examination in order to cross examine him with regard to the document given by the Transporter, who brought the cab in question from Mathura to Delhi. It may also be mentioned that in his zest to seek recall of all the prosecution witnesses, the applicant has also sought recall of one lady constable Manju, who as per record was not even examined as a prosecution witness.

35. It is further necessary to mention that on 04/02/2015 accused had moved an application u/s 311 Cr.P.C., thereby seeking recall of prosecutrix PW-2 and PW-23 Ayush Dabas. The application was dismissed. The present application has been filed now seeking recall of all Pws, including PW-2 and PW-23, while the order dated 04/02/2015 still remains unchallenged.

36. The application under consideration is thus nothing but an attempt to protract the trial and in fact seek an entire retrial. There is no change in circumstances except change of Counsel, which, to my mind, is no ground to allow the application. Interestingly, in para 17 of the application, it has been contended that the present counsel is not aware of the scheme and design of defence of the previous counsel and is thus at a loss and disadvantageous position to defend the accused and for conducting the case as per his acumen and legal expertise, the recalling of PWs are necessary. It may be noted that the defence of an under trial is not expected to vary from counsel to counsel and irrespective of change of counsel, an under trial is expected to have a single and true line of defence which cannot change every time he changes a counsel. Nor can a new counsel defend the case of such an under trial as per the new scheme and design in accordance with his acumen and legal expertise."

23. The High Court made a reference to the Criminal Law Amendment Act, 2013 providing for trial relating to offences under Section 376 and other specified offences being completed within two months from the date of filing of the charge sheet. Reference has also been made to circular issued by the Delhi High Court drawing the

attention of the judicial officers to the mandate of speedy disposal of session cases. The High Court also referred to the decisions of this Court in Lt. Col. S.J. Chaudhary vs. State (Delhi Administration) (1984) 1 SCC 722, State of U.P. vs. Shambhu Nath Singh (2001) 4 SCC 667, Akil @ Javed vs. State of NCT of Delhi (2013) 7 SCC 125 and Vinod Kumar vs. State of Punjab (2015) 3 SCC 220, requiring the trials to be conducted on day to day basis keeping in view the mandate of Section 309 Cr.P.C.

24. After rejecting the plea of the accused that there was any infirmity in the conduct of the trial after detailed reference to the proceedings, the High Court concluded: (Shiv Kumar Yadav v. State, 2015 SCC OnLine Del 7734, para 31)

> "31. The aforesaid narration of proceedings before the learned Additional Sessions Judge clearly reflects that while posting the matter on day to day basis, the Court's only endeavour was to comply with the provisions of Section 309 Cr.P.C. as far as possible while ensuring the right of the accused to a fair trial. The earlier counsel had been seeking adjournment for consulting the petitioner which was duly granted and under these circumstances the submission of learned counsel for the petitioner that justice hurried is justice buried, deserves outright rejection."

25. It was then observed that competence of a counsel was a subjective matter and plea of incompetence of the counsel could not be easily accepted. It was observed : (Shiv Kumar Yadav v. State, 2015 SCC OnLine Del 7734, para 32-33)

> "32. The other submission of learned counsel for the petitioner that Sh. Alok Dubey, Advocate was not competent to appear as an Advocate inasmuch as he had not even undergone screening test as required by Bar Council of Delhi Rules and was not issued practice certificate, this submission is not fortified by any record. Much was said against the competency of the earlier counsel representing the petitioner. However, learned standing counsel for the State was right in submitting that competency of an Advocate is a subjective issue which should not have been attacked behind the back of the concerned Advocate. .....
>
> 33. Learned Additional Standing counsel for the State has furnished details of the number of questions put by the earlier counsel to the prosecution witnesses for showing the performance of the earlier counsel. Moreover, one cannot lose sight of the fact that the Advocate was appointed by the petitioner of his own choice."

26. Inspite of the High Court not having found any fault in the conduct of the proceedings, it held that "although recalling of all the

prosecution witnesses is not necessary" recall of certain witnesses was necessary for the reasons given in para 15 (a) to (xx) on the application of the accused. It was observed that the accused was in custody and if he adopted delaying tactics it is only he who would suffer.

27. It is difficult to approve the view taken by the High Court. Undoubtedly, fair trial is the objective and it is the duty of the court to ensure such fairness. Width of power under Section 311 Cr.P.C. is beyond any doubt. Not a single specific reason has been assigned by the High Court as to how in the present case recall of as many as 13 witnesses was necessary as directed in the impugned order. No fault has been found with the reasoning of the order of the trial court. The High Court rejected on merits the only two reasons pressed before it that the trial was hurried and the counsel was not competent. In the face of rejecting these grounds, without considering the hardship to the witnesses, undue delay in the trial, and without any other cogent reason, allowing recall merely on the observation that it is only the accused who will suffer by the delay as he was in custody could, in the circumstances, be hardly accepted as valid or serving the ends of justice. It is not only matter of delay but also of harassment for the (and) witnesses to be recalled which could not be justified on the ground that the accused was in custody and that he would only suffer by prolonging of the proceedings. Certainly recall could be permitted if essential for the just decision but not on such consideration as has been adopted in the present case. Mere observation that recall was necessary "for ensuring fair trial" is not enough unless there are tangible reasons to show how the fair trial suffered without recall. Recall is not a matter of course and the discretion given to the court has to be exercised judiciously to prevent failure of justice and not arbitrarily. While the party is even permitted to correct its bona fide error and may be entitled to further opportunity even when such opportunity may be sought without any fault on the part of the opposite party, plea for recall for advancing justice has to be bona fide and has to be balanced carefully with the other relevant considerations including uncalled for hardship to the witnesses and uncalled for delay in the trial. Having regard to these considerations, we do not find any ground to justify the recall of witnesses already examined."

(Emphasis supplied)

9. In the present case, it appears from the application filed under section 311, Cr.P.C. that request for re-examination has been made solely on the ground that Senior Counsel has been engaged in place of a Junior Counsel as the Junior Counsel, according to the petitioner, has not conducted the cross-examination of witnesses in an effective manner. However, in the light of the legal position, as discussed above, it is certainly not within the scope of section 311 Cr.P.C. to countenance such a prayer. No illegality or perversity has been committed by the trial Court in passing the impugned order.

The petition fails and is, accordingly, dismissed.

Application dismissed.

I.L.R. [2019] M.P. 1332
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice Rajeev Kumar Shrivastava
M.Cr.C. No. 18779/2017 (Gwalior) decided on 19 June, 2019

SUMIT JAISWAL & anr. …Applicants

Vs.

SMT. BHAWANA JAISWAL …Non applicant

***A. Protection of Women from Domestic Violence Act (43 of 2005), Section 2(e) & 12 and Criminal Procedure Code, 1973 (2 of 1974), Section 190 – Domestic Incident Report – Cognizance by Magistrate* – Held – Cognizance taken by Magistrate on basis of Domestic Incident Report (DIR) submitted by Protection Officer, who is a legally authorized officer, cannot be said to be unlawful – Application dismissed. (Para 10)**

क. घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम (2005 का 43), धारा 2(ई) व 12 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 190 – घरेलू घटना रिपोर्ट – मजिस्ट्रेट द्वारा संज्ञान – अभिनिर्धारित – संरक्षण अधिकारी जो कि विधिक रूप से प्राधिकृत एक अधिकारी है, द्वारा प्रस्तुत घरेलू घटना रिपोर्ट के आधार पर मजिस्ट्रेट द्वारा लिये गये संज्ञान को अवैध नहीं कहा जा सकता – आवेदन खारिज।

***B. Criminal Procedure Code, 1973 (2 of 1974), Section 190 – Cognizance by Magistrate* – Held – Cognizance means when Court or Magistrate takes judicial notice of offence with a view to initiate proceedings – Taking cognizance is entirely different thing from initiation of proceedings, it is a condition precedent to initiation of proceeding by Magistrate – Cognizance is taken of cases and not of persons. (Para 9)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 190 – मजिस्ट्रेट द्वारा संज्ञान – अभिनिर्धारित – संज्ञान का अर्थ है कि जब न्यायालय अथवा मजिस्ट्रेट कार्यवाहियां आरंभ करने की दृष्टि से अपराध की न्यायिक अवेक्षा करता है – संज्ञान लेना कार्यवाहियां आरंभ करने से भिन्न बात है, यह मजिस्ट्रेट द्वारा कार्यवाही आरंभ करने से पुरोभाव्य शर्त है – संज्ञान प्रकरणों का लिया जाता है तथा न कि व्यक्तियों का।

Case referred:

AIR 2012 SC 1747.

Vikash Saxena, for the applicants.
Sudha Shrivastava, for the non-applicant.

O R D E R

RAJEEV KUMAR SHRIVASTAVA, J. :- The present petition has been preferred by the petitioners under Section 482 of CrPC against the order dated 02/6/2017 passed by the Judicial Magistrate First Class, Gwalior in MJC-R No.975/2017, whereby cognizance has been taken against the petitioners for the offence punishable under Section 12 of Protection of Women from Domestic Violence Act.

2. Learned counsel for the petitioners has submitted that the cognizance is taken only on the basis of Domestic Incident Report (DIR) preferred by the Project Officer/Protection Officer, Integrated Child Development Project, Urban No.1, District Gwalior, in which there is no sufficient evidence showing involvement of the present petitioners in any manner. The present petitioners are brother-in-law and sister-in-law of the respondent. There were disputes and quarrels between the respondent and her husband. One information was also published with regard to dissolution of relations between the respondent and her husband in the daily newspaper Dainik Bhaskar. Despite that, present petitioners have been falsely implicated in this case. Therefore, prayed for quashing of the proceedings pending against the present petitioners.

3. On the contrary, learned counsel for the respondent prays for dismissal of the petition on the ground that sufficient material is available against the petitioners to connect them with the offence.

4. Heard learned counsel for the rival parties and perused the material available on record.

5. In the present case, an objection is raised that the case was registered on the basis of Domestic Incident Report (DIR) only produced by the person appointed by the State Government, whose primary duty is to help the Magistrate in the protection of women from domestic violence. He also helps victims lodging complaint in proper format which is known as Domestic Incident Report or DIR. Besides the same, the Protection Officer shall prepare a list of shelter homes having liaseu (sic : liaise) with the local police station for compliance of any order/protection of victims, getting proper medical attention to the victims. DIR is prepared in a format which is provided under the Act. Domestic Violence may be of physical abuse, economic abuse or sexual abuse. That means any act or conduct shall constitute domestic violence that harms or creates danger for life, limb or health of the complainant or relates to emotional abuse as insult, torture, taunting etc, which creates havoc with the victim would be emotional abuse whereas economic abuse can be deprivation of economic or financial resources and not giving enough money to run house held expenses and even preventing the woman from earning. It also includes prohibition or restriction to access to resources or

use facilitates which the aggrieved person is entitled to by virtue of the domestic relationship with the respondent.

6. The "Domestic Incident Report" is defined in sub-Section (e) of Section 2 of Domestic Violence Act. "Domestic Incident Report" means a report made in the prescribed form on receipt of a complaint of domestic violence from an aggrieved person.

7. Section 9 of Domestic Violence Act runs as under:-

> **"9. Duties and functions of Protection Officers.** - (1) It shall be the duty of the Protection Officer—
>
> (a) to assist the Magistrate in the discharge of his functions under this Act;
>
> (b) to make a domestic incident report to the Magistrate, in such form and in such manner as may be prescribed, upon receipt of a complaint of domestic violence and forward copies thereof to the police officer in charge of the police station within the local limits of whose jurisdiction domestic violence is alleged to have been committed and to the service providers in that area;
>
> (c) to make an application in such form and in such manner as may be prescribed to the Magistrate, if the aggrieved person so desires, claiming relief for issuance of a protection order;
>
> (d) to ensure that the aggrieved person is provided legal aid under the Legal Services Authorities Act, 1987 (39 of 1987) and make available free of cost the prescribed form in which a complaint is to be made;
>
> (e) to maintain a list of all service providers providing legal aid or counselling, shelter homes and medical facilities in a local area within the jurisdiction of the Magistrate;
>
> (f) to make available a safe shelter home, if the aggrieved person so requires and forward a copy of his report of having lodged the aggrieved person in a shelter home to the police station and the Magistrate having jurisdiction in the area where the shelter home is situated;
>
> (g) to get the aggrieved person medically examined, if she has sustained bodily injuries and forward a copy of the medical report to the police station and the Magistrate having jurisdiction in the area where the domestic violence is alleged to have been taken place;

(h) to ensure that the order for monetary relief under section 20 is complied with and executed, in accordance with the procedure prescribed under the Code of Criminal Procedure, 1973 (2 of 1974);

(i) to perform such other duties as may be prescribed.

(2) The Protection Officer shall be under the control and supervision of the Magistrate, and shall perform the duties imposed on him by the Magistrate and the Government by, or under, this Act."

8. Section 190 of CrPC runs as under:-

"190. Cognizance of offences by Magistrates.

(1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub- section (2), may take cognizance of any offence-

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try."

9. As per Section 190 of CrPC, cognizance means it indicates the point where the Court or Magistrate takes judicial notice of the offence with a view to initiate proceedings in respect of such offence said to have been committed by someone. Further, it is entirely a different thing from initiation of proceedings, rather it is the condition precedent to the initiation of proceeding by the Magistrate or the Judge. The cognizance is taken of cases and not of persons. [(kindly see *Bhushan Kumar. vs. State (NCT of Delhi)*, (AIR 2012 SC 1747)].

10. In the present case, the Protection Officer is legally authorized officer and his duties are defined in Domestic Violence Act. Therefore, it cannot be said that if on the basis of DIR any cognizance has been taken by the Magistrate, the same would be unlawful.

11. In view of the above, no perversity in impugned order is found. Hence, the petition stands dismissed and the order dated 02/6/2017 passed by the Judicial Magistrate First Class, Gwalior in MJC-R No.975/2017 is hereby affirmed.

Application dismissed