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है जिसमें शहर के निवासियों एवं राज्य प्राधिकारियों/नगर पालिक निगम दोनों के लिए निष्पादन किये जाने हेतु एक महत्वपूर्ण स्थाई कार्य है – निदेश जारी किये गये। (अवधेश सिंह भदौरिया वि. म.प्र. राज्य) **(DB)…2009**

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संविधान – अनुच्छेद 226 एवं सेवा विधि – स्थानांतरण – व्याप्ति व अधिकारिता – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया कि स्थानांतरण, कर्मचारी की सेवा शर्तों का भाग है जिसके साथ न्यायालय द्वारा अनुच्छेद 226 के अंतर्गत अधिकारिता के प्रयोग में साधारणतः हस्तक्षेप नहीं किया जाना चाहिए जब तक कि न्यायालय यह नहीं पाता कि उक्त स्थानांतरण को असद्भावपूर्वक या सेवा नियमों के विरूद्ध अथवा बिना प्राधिकार पारित किया गया है। (भागवत सिंह कोटिया वि. म.प्र. राज्य) **…1987**

***Court Fees Act (7 of 1870), Section 7(iv)(c) – Ad Valorem Court fees* – Held – Plaintiff claiming 1/3rd share in property and seeking declaration of sale deed as null and void, though she is not a party to the sale deed – *Ad valorem* court fees on 1/3rd value of the registered sale deed is payable. [Ankur Dubey Vs. Jayshree Pandey] …2106**

न्यायालय फीस अधिनियम (1870 का 7), धारा 7(iv)(सी) – मूल्यानुसार न्यायालय फीस – अभिनिर्धारित – वादी द्वारा संपत्ति में एक तिहाई भाग का दावा तथा विक्रय विलेख को अकृत एवं शून्य करने की घोषणा चाही जाना, यद्यपि वह विक्रय विलेख का एक पक्षकार नहीं है – रजिस्ट्रीकृत विक्रय विलेख के एक तिहाई मूल्य पर मूल्यानुसार न्यायालय फीस देय है। (अंकुर दुबे वि. जयश्री पांडे) **…2106**

***Criminal Practice – Medico Legal Case (MLC)* – Procedure, duties and jurisdiction of Medical Officer discussed and explained. [Mala @ Gunmala Lodhi (Smt.) Vs. State of M.P.] …2160**

दाण्डिक पद्धति – चिकित्सा विधिक प्रकरण (एम.एल.सी.) – प्रक्रिया, चिकित्सा अधिकारी के कर्तव्य व अधिकारिता विवेचित एवं स्पष्ट किये गये। (माला उर्फ गुणमाला लोधी (श्रीमती) वि. म.प्र. राज्य) **…2160**

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Criminal Practice – Related & Interested Witness **– Held – 'Related' is not equivalent to 'interested' – Witness may be called 'interested' only when he derives some benefit from result of a litigation or in seeing the accused person punished – No hard and fast rule that evidence of 'interested' witness cannot be taken into consideration, burden is on Courts to consider it with care, caution and circumspection – Relationship can never be a factor to effect credibility of witness as it is not always possible to get independent witness. [Ajay Tiwari Vs. State of M.P.] (DB)…2098**

दाण्डिक पद्धति – संबंधी व हितबद्ध साक्षी – अभिनिर्धारित – 'संबंधी', 'हितबद्ध' के समतुल्य नहीं – साक्षी को केवल तब 'हितबद्ध' कहा जा सकता है जब उसे मुकदमेबाजी के परिणाम से अथवा अभियुक्तगण को दण्डित होता देख, कुछ लाभ व्युत्पन्न होता है – कोई पक्का नियम नहीं है कि 'हितबद्ध' साक्षी के साक्ष्य को विचार में नहीं लिया जा सकता, इसे सतर्कता, सावधानी एवं एहतियात के साथ विचार में लेने का भार न्यायालयों पर है – संबंध कभी भी साक्षी की विश्वसनीयता को प्रभावित करने के लिए एक कारक नहीं हो सकता, क्योंकि स्वतंत्र साक्षी मिलना हमेशा संभव नहीं होता है। (अजय तिवारी वि. म.प्र. राज्य) **(DB)…2098**

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Criminal Procedure Code, 1973 (2 of 1974), Section 161 – See – Penal Code, 1860, Section 302/149 & 148 **[Ramesh Kachhi Vs. State of M.P.] (DB)…2083**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 161 – देखें – दण्ड संहिता, 1860, धारा 302/149 व 148 (रमेश काछी वि. म.प्र. राज्य) **(DB)…2083**

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***Criminal Procedure Code, 1973 (2 of 1974), Section 216 – Alteration/ Addition of Charge – Opportunity of Hearing – Principle of Natural Justice* – Held – If prosecution makes the submissions bringing the factual aspects to notice of Court that additional charge requires to be framed, fullest opportunity should be given to accused to defend himself and after providing such opportunity, Court is empowered to pass appropriate order u/S 216 Cr.P.C. – Impugned order passed after independent application of mind following the principle of natural justice – Application dismissed. [R.K. Mittal Vs. State of M.P.] ...2154**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 216 – आरोप में परिवर्तन/ परिवर्धन – सुनवाई का अवसर – नैसर्गिक न्याय का सिद्धांत – अभिनिर्धारित – यदि अभियोजन तथ्यात्मक पहलुओं को न्यायालय के ध्यान में लाते हुए निवेदन करता है कि अतिरिक्त आरोप विरचित किया जाना अपेक्षित है, अभियुक्त को अपना बचाव करने के लिए पूरा अवसर दिया जाना चाहिए तथा उक्त अवसर प्रदान करने के पश्चात्, न्यायालय दं.प्र. सं. की धारा 216 के अंतर्गत समुचित आदेश पारित करने हेतु सशक्त है – आक्षेपित आदेश, नैसर्गिक न्याय के सिद्धांत का पालन करते हुए स्वतंत्र रूप से मस्तिष्क का प्रयोग करने के पश्चात् पारित किया गया – आवेदन खारिज। (आर.के. मित्तल वि. म.प्र. राज्य) **...2154**

***Criminal Procedure Code, 1973 (2 of 1974), Section 216 – Alteration/ Addition of Charge – Power of Court* – Held – Court shall not entertain applications as a matter of right by the parties, however parties to proceedings can make submissions/applications and Cr.P.C. empowers the Courts to entertain the submissions made for bringing the factual aspects to notice of Court that additional charge requires to be framed. [R.K. Mittal Vs. State of M.P.] ...2154**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 216 – आरोप में परिवर्तन/परिवर्धन – न्यायालय की शक्ति – अभिनिर्धारित – न्यायालय, पक्षकारों द्वारा अधिकार के रूप में आवेदनों को ग्रहण नहीं करेगा, तथापि कार्यवाहियों के पक्षकार निवेदन/आवेदन कर सकते हैं तथा दं.प्र.सं. इस तथ्यात्मक पहलुओं को न्यायालय के ध्यान में लाने के लिए कि अतिरिक्त, आरोप विरचित किया जाना अपेक्षित है, किये गये निवेदनों को ग्रहण करने हेतु न्यायालयों को सशक्त करती है। (आर.के. मित्तल वि. म.प्र. राज्य) **...2154**

***Criminal Procedure Code, 1973 (2 of 1974), Section 227 & 228 – Framing of Charge* – Held – Facts cannot be adjudicated at the initial stage of framing of charge and without taking evidence on record – No interference required under the revisional jurisdiction. [Kapil Vs. State of M.P.] ...2138**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 227 व 228 – आरोप की विरचना – अभिनिर्धारित – आरोप विरचना के प्रारंभिक प्रक्रम पर तथा साक्ष्य के अभिलेख पर लिये बिना, तथ्यों का न्यायनिर्णयन नहीं किया जा सकता – पुनरीक्षण अधिकारिता के अंतर्गत किसी हस्तक्षेप की आवश्यकता नहीं। (कपिल वि. म.प्र. राज्य) **...2138**

***Criminal Procedure Code, 1973 (2 of 1974), Section 468 & 472 – See – Protection of Women from Domestic Violence Act, 2005, Sections 12, 18 & 31* [Praveen Upadhyay Vs. Smt. Rajni Upadhyay] ...2127**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 468 व 472 – देखें – घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम, 2005, धाराएँ 12, 18 व 31 (प्रवीण उपाध्याय वि. श्रीमती रजनी उपाध्याय) **...2127**

***Criminal Procedure Code, 1973 (2 of 1974), Section 482 – See – Penal Code, 1860, Section 415 & 420* [Praveen Vs. Amit Verma] ...2164**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – देखें – दण्ड संहिता, 1860, धारा 415 व 420 (प्रवीण वि. अमित वर्मा) **...2164**

***Evidence Act (1 of 1872), Section 32 – See – Penal Code, 1860, Section 302/149 & 148* [Ramesh Kachhi Vs. State of M.P.] (DB)...2083**

साक्ष्य अधिनियम (1872 का 1), धारा 32 – देखें – दण्ड संहिता, 1860, धारा 302/149 व 148 (रमेश काछी वि. म.प्र. राज्य) **(DB)...2083**

***Evidence Act (1 of 1872), Section 45 – Medico Legal Case (MLC) – Competent Authority* – Held – There is no criteria of doing MLC either by a government doctor or by a private doctor – MLC can be done by a person having special knowledge in the specific field – If any MLC is done by a specially skilled person following the prescribed procedure, it shall be considered as MLC. [Mala @ Gunmala Lodhi (Smt.) Vs. State of M.P.] ...2160**

साक्ष्य अधिनियम (1872 का 1), धारा 45 – चिकित्सा विधिक प्रकरण (एम.एल.सी.) – सक्षम प्राधिकारी – अभिनिर्धारित – एक सरकारी चिकित्सक या एक निजी चिकित्सक एम.एल.सी. तैयार करने का कोई मानदंड नहीं है – एम.एल.सी., विनिर्दिष्ट क्षेत्र में विशेष ज्ञान रखने वाले किसी व्यक्ति द्वारा तैयार किया जा सकती है – यदि कोई एम.एल.सी., विहित प्रक्रिया का पालन करते हुए एक विशेष रूप से कुशल व्यक्ति द्वारा तैयार किया जाता है, तो उसे एम.एल.सी. माना जाएगा। (माला उर्फ गुणमाला लोधी (श्रीमती) वि. म.प्र. राज्य) **…2160**

***Evidence Act (1 of 1872), Section 62, Explanation-1 – Primary Evidence* – Held – Where a document is executed in several parts, each part is a primary evidence of the document – Original document, as well as carbon copies are prepared together and thus both are primary evidence. [Nathulal (Deceased) Through L.R. Kailashchandra Vs. Ramesh] …2015**

साक्ष्य अधिनियम (1872 का 1), धारा 62, स्पष्टीकरण–1 – प्राथमिक साक्ष्य – अभिनिर्धारित – जहां एक दस्तावेज अनेक भागों में निष्पादित किया जाता है, प्रत्येक भाग दस्तावेज का एक प्राथमिक साक्ष्य होता है – मूल दस्तावेज के साथ ही कार्बन कॉपी तैयार की जाती हैं एवं इसलिए दोनों प्राथमिक साक्ष्य हैं। (नाथूलाल (मृतक) द्वारा विधिक प्रतिनिधि कैलाशचन्द्र वि. रमेश) **…2015**

***Hindu Marriage Act (25 of 1955), Section 9 & 13 – Divorce – Cruelty – Divorce decree against wife* – Husband and wife living separately for more than 6 years – Allegation of adultery & cruelty against each other – Evidence of mental cruelty by wife available – Revival of marriage not possible, thus attracts the concept of irretrievable breakdown – No illegality in impugned judgment – Suit for restitution and Appeal against divorce decree, dismissed. [Disha Kushwaha Vs. Rituraj Singh] (DB)…2055**

हिंदू विवाह अधिनियम (1955 का 25), धारा 9 व 13 – विवाह विच्छेद – क्रूरता – पत्नी के विरूद्ध विवाह विच्छेद डिक्री – पति पत्नी 6 वर्षों से अधिक समय से पृथक रूप से रह रहे हैं – एक दूसरे के विरूद्ध जारकर्म व क्रूरता का अभिकथन – पत्नी द्वारा मानसिक क्रूरता का साक्ष्य उपलब्ध है – विवाह का पुनर्जीवन संभव नहीं, अतः असाध्य विफलता की संकल्पना आकर्षित होती है – आक्षेपित निर्णय में कोई अवैधता नहीं – प्रत्यास्थापन हेतु वाद एवं विवाह विच्छेद डिक्री के विरूद्ध अपील खारिज। (दिशा कुशवाहा वि. रितुराज सिंह) **(DB)…2055**

***Hindu Marriage Act (25 of 1955), Sections 9, 13 & 25 – Permanent Alimony – Application for & Entitlement* – Permanent alimony was only granted to children and not to wife, on ground that she never claimed it – Held – Not filing application seeking permanent alimony is merely a circumstance, it cannot be an impediment to deny permanent alimony to wife and allow parties to continue litigation in other courts either in**

proceedings u/S 125 Cr.P.C. or for maintenance under other laws – Demand of permanent alimony on request made by counsel for wife is sufficient for granting the same. [Disha Kushwaha Vs. Rituraj Singh] (DB)…2055

हिंदू विवाह अधिनियम (1955 का 25), धाराएँ 9, 13 व 25 – स्थाई निर्वाह व्यय – के लिए आवेदन व हकदारी – स्थाई निर्वाह व्यय केवल बच्चों को प्रदान किया गया था और न कि पत्नी को, इस आधार पर कि उसने कभी उसका दावा नहीं किया – अभिनिर्धारित – स्थाई निर्वाह व्यय चाहते हुए आवेदन प्रस्तुत न करना, मात्र एक परिस्थिति है वह पत्नी को स्थाई निर्वाह व्यय देने से इंकार करने और पक्षकारों को या तो धारा 125 दं.प्र.सं. के अंतर्गत कार्यवाहियां या अन्य विधि अंतर्गत भरणपोषण हेतु अन्य न्यायालयों में मुकदमेबाजी जारी रखने की मंजूरी के लिए एक अड़चन नहीं हो सकती – पत्नी के परामर्शदाता द्वारा स्थाई निर्वाह व्यय की मांग का निवेदन उसे उक्त प्रदान करने हेतु पर्याप्त है। (दिशा कुशवाहा वि. रितुराज सिंह) **(DB)…2055**

***Hindu Marriage Act (25 of 1955), Section 13 – Divorce – Grounds - "Irretrievable Breakdown of Marriage"* – Held – Irretrievable breakdown is not a ground for divorce but its essence may be put in – Apex Court directed that Courts are duty bound to see the repercussion, consequences, impact and ramification of criminal and other proceedings and also circumstances in which grounds specified under the Act, have been pleaded and proved – Chances of revival of marriage for said reasons may also looked into while recording the findings. [Disha Kushwaha Vs. Rituraj Singh] (DB)…2055**

हिंदू विवाह अधिनियम (1955 का 25), धारा 13 – विवाह विच्छेद – आधार – ''विवाह की असाध्य विफलता'' – अभिनिर्धारित – असाध्य विफलता, विवाह विच्छेद हेतु आधार नहीं है परंतु उसका सार लिया जा सकता है – सर्वोच्च न्यायालय ने निदेशित किया कि न्यायालय, दाण्डिक एवं अन्य कार्यवाहियों के प्रतिक्षेप, परिणाम, प्रभाव एवं जटिलता और उन परिस्थितियों को भी देखने के लिए कर्तव्यबद्ध है, जिनमें अधिनियम के अंतर्गत विनिर्दिष्ट आधारों का अभिवाक् कर साबित किया गया है – उक्त कारणों हेतु विवाह के पुनर्जीवन की संभावनाओं को भी निष्कर्ष अभिलिखित करते समय ध्यान में लिया जा सकता है। (दिशा कुशवाहा वि. रितुराज सिंह) **(DB)…2055**

***Hindu Marriage Act (25 of 1955), Section 13 – "Irretrievable Breakdown of Marriage"* – Circumstances which fall within purview of "irretrievable breakdown of marriage" – Illustrated & explained. [Disha Kushwaha Vs. Rituraj Singh] (DB)…2055**

हिंदू विवाह अधिनियम (1955 का 25), धारा 13 – ''विवाह की असाध्य विफलता'' – परिस्थितियां, जो ''विवाह की असाध्य विफलता'' की परिधि के भीतर आती हैं – उदाहरण के साथ समझाई एवं स्पष्ट की गई। (दिशा कुशवाहा वि. रितुराज सिंह) **(DB)…2055**

Hindu Marriage Act (25 of 1955), Section 13-B – See – Civil Procedure Code, 1908, Section 114 & Order 43 Rule 1-A(2) **[Shiv Singh Vs. Smt. Vandana] …*64**

हिन्दू विवाह अधिनियम (1955 का 25), धारा 13–बी – देखें – सिविल प्रक्रिया संहिता, 1908, धारा 114 व आदेश 43 नियम 1–ए(2) (शिव सिंह वि. श्रीमती वंदना) **…*64**

Hindu Marriage Act (25 of 1955), Section 25 – Permanent Alimony – Quantum – Income of Husband & Wife **– Held – Husband, an IFS Officer getting salary of approx. 1,80,000 pm and living only with his mother – Wife residing separately with three school going children and having no source of income – They are required to live separately with status of husband or father – Permanent alimony of Rs. 75,000 pm granted. [Disha Kushwaha Vs. Rituraj Singh] (DB)…2055**

हिंदू विवाह अधिनियम (1955 का 25), धारा 25 – स्थाई निर्वाह व्यय – मात्रा – पति–पत्नी की आय – अभिनिर्धारित – पति एक IFS अधिकारी, लगभग 1,80,000 प्रतिमाह वेतन प्राप्त कर रहा है तथा वह केवल उसकी माता के साथ रह रहा है – पत्नी, स्कूल जाने वाले तीन बच्चों के साथ पृथक रूप से निवासरत है तथा उसके पास आय का कोई स्त्रोत नहीं है – उन्हें पति या पिता की हैसियत के साथ पृथक रूप से रहना अपेक्षित है – रू. 75,000 प्रतिमाह स्थाई निर्वाह व्यय प्रदान किया गया। (दिशा कुशवाहा वि. रितुराज सिंह) **(DB)…2055**

Land Revenue Code, M.P. (20 of 1959), Section 44 and Constitution – Article 226 – Scope & Jurisdiction **– Held – Section 44 does not provide for an appeal from order of Tehsildar, directly to Collector – Appellant herein, under official capacity of Collector was justified in sending the matter to SDO for deciding the appeal – In writ petition, petitioner has not prayed for any relief of transferring the case from concerned SDO to any other SDO or for direction to Collector to hear appeal on his own – In absence of such relief, Single Judge exceeded its jurisdiction in passing an order in violation of statutory provisions of the Code – Impugned order set aside – Appeal allowed. [Madan Vibhishan Nagargoje Vs. Shri Shailendre Singh Yadav] (DB)…1981**

भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 44 एवं संविधान – अनुच्छेद 226 – व्याप्ति व अधिकारिता – अभिनिर्धारित – धारा 44, तहसीलदार के आदेश से सीधे कलेक्टर को अपील हेतु उपबंध नहीं करती – यहां अपीलार्थी का कलेक्टर की पदीय क्षमता के अंतर्गत एसडीओ को अपील विनिश्चय हेतु मामला प्रेषित करना न्यायानुमत था – रिट याचिका में, याची ने संबंधित एसडीओ से प्रकरण किसी अन्य एसडीओ को अंतरित करने के किसी अनुतोष अथवा कलेक्टर को स्वयं से अपील सुनने हेतु निदेश की प्रार्थना नहीं की है – उक्त अनुतोष की अनुपस्थिति में, एकल न्यायाधीश संहिता के कानूनी उपबंधों के

उल्लंघन में आदेश पारित करने में अपनी अधिकारिता से बाहर गये – आक्षेपित आदेश अपास्त – अपील मंजूर। (मदन विभीषण नागरगोजे वि. श्री शैलेन्द्र सिंह यादव) **(DB)…1981**

Limitation Act (36 of 1963), Article 137 – Period of Limitation – Practice **– Held – As per Article 137, any other application for which no period of limitation is provided, limitation period would be three years when the right to apply accrues – Application u/S 12 of the Act of 2005 filed within one year and is thus not barred by Limitation. [Praveen Upadhyay Vs. Smt. Rajni Upadhyay] …2127**

परिसीमा अधिनियम (1963 का 36), अनुच्छेद 137 – परिसीमा की अवधि – पद्धति – अभिनिर्धारित – अनुच्छेद 137 के अनुसार, कोई भी अन्य आवेदन जिसके लिए परिसीमा की कोई अवधि उपबंधित नहीं है, परिसीमा अवधि, आवेदन करने का अधिकार प्रोद्भूत होने की तिथि से तीन वर्ष होगी – 2005 के अधिनियम की धारा 12 के अंतर्गत आवेदन एक वर्ष के भीतर प्रस्तुत किया गया तथा इसलिए परिसीमा द्वारा वर्जित नहीं है। (प्रवीण उपाध्याय वि. श्रीमती रजनी उपाध्याय) **…2127**

Lok Seva (Anusuchit Jatiyon, Anusuchit Jan Jatiyon aur Anya Pichhade Vargon Ke Liye Arakshan) Adhiniyam, M.P., 1994, Section 4(2) – **Held – Section 4(2) relates to vertical reservations and not to horizontal compartmentalised reservations. [State of M.P. Vs. Uday Sisode](DB)…2022**

लोक सेवा (अनुसूचित जातियों, अनुसूचित जनजातियों और अन्य पिछड़े वर्गों के लिए आरक्षण) अधिनियम, म.प्र., 1994, धारा 4(2) – अभिनिर्धारित – धारा 4(2) वर्टीकल आरक्षणों से संबंधित है और न कि हारिजान्टल कम्पार्टमेन्टलाइजड आरक्षणों से। (म.प्र. राज्य वि. उदय सिसोदे) **(DB)…2022**

Money Lenders Act, M.P. (13 of 1934), Sections 11-B, 11-F & 11-H – Registration Certificate – Maintainability of Suit **– Held – No suit for recovery of loan advanced by money lender, shall proceed in Civil Court until Court is satisfied that plaintiff has a registration certificate – Appellants/plaintiffs failed to prove that their firm was having any registration under the Act of 1934 – Trial Court rightly dismissed the suit inspite of finding that defendant no.1 had borrowed money from plaintiffs – Appeal dismissed. [Modi Kevalchand Through Partners (M/s.) Vs. Balchand (Dead) Through L.Rs.] …*62**

साहूकार अधिनियम, म.प्र. (1934 का 13), धाराएँ 11–बी, 11–एफ व 11–एच – रजिस्ट्रीकरण प्रमाणपत्र – वाद की पोषणीयता – अभिनिर्धारित – साहूकार द्वारा दिये गये ऋण की वसूली के लिए किसी वाद पर सिविल न्यायालय में कार्यवाही तब तक नहीं होगी जब तक कि न्यायालय संतुष्ट न हो कि वादी के पास रजिस्ट्रीकरण प्रमाण–पत्र है – अपीलार्थीगण/वादीगण यह साबित करने में विफल रहे कि उनकी फर्म के पास 1934 के

अधिनियम के अंतर्गत कोई रजिस्ट्रीकरण था – विचारण न्यायालय ने, इस निष्कर्ष के बावजूद कि प्रतिवादी क्र. 1 ने वादीगण से पैसे उधार लिये थे, उचित रूप से वाद खारिज किया – अपील खारिज। (मोदी केवलचंद द्वारा भागीदार (मे.) वि. बालचंद (मृतक) द्वारा विधिक प्रतिनिधि) **...*62**

***Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 2(vii-a) & 36(A)(4) and Central Government Notification, 2001 – Commercial Quantity – Period of Filing Challan* – Held – In present case, 20 kgs of 'ganja' seized – Commercial quantity would be any quantity greater than the quantity specified by Central Government Notification, which is specified as 20 Kgs for 'ganja' – Thus, commercial quantity for 'ganja' would be more than 20 kgs and not 20 kgs – If more than 20 kgs would have been seized, then period of filing challan would have been 180 days. [Jitendra Vs. State of M.P.] ...2121**

स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 2(vii-a) व 36(A)(4) एवं केन्द्रीय सरकार अधिसूचना, 2001 – वाणिज्यिक मात्रा – चालान प्रस्तुत करने की अवधि – अभिनिर्धारित – वर्तमान प्रकरण में, 20 किलोग्राम 'गांजा' जब्त – वाणिज्यिक मात्रा, केन्द्र सरकार की अधिसूचना द्वारा विनिर्दिष्ट मात्रा, जो कि 'गांजा' हेतु 20 कि.ग्रा. के रूप में विनिर्दिष्ट है, से अधिक की कोई मात्रा होगी – अतः, 'गांजा' हेतु वाणिज्यिक मात्रा 20 कि.ग्रा. से अधिक की होगी और न कि 20 कि.ग्रा. – यदि 20 कि.ग्रा. से अधिक जब्त किया गया होता तब चालान प्रस्तुत करने की अवधि 180 दिन होती। (जितेन्द्र वि. म.प्र. राज्य) **...2121**

***Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 8/20 & 36(A)(4) and Criminal Procedure Code, 1973 (2 of 1974), Section 167(2) – Bail* – Held – Magistrate rejected the application u/S 167(2) Cr.P.C. on 28.05.2019 and thereafter challan has been filed on 09.06.2019 – Since challan is filed beyond the period of 60 days, therefore right u/S 167(2) Cr.P.C. is not to be treated as extinguished or frustrated – Impugned order quashed – Applicants directed to be released on bail – Revision allowed. [Jitendra Vs. State of M.P.] ...2121**

स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 8/20 व 36(A)(4) एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 167(2) – जमानत – अभिनिर्धारित – मजिस्ट्रेट ने 28.05.2019 को धारा 167(2) दं.प्र.सं. के अंतर्गत आवेदन को अस्वीकार किया एवं तत्पश्चात् 09.06.2019 को चालान प्रस्तुत किया गया है – चूंकि चालान को 60 दिनों की अवधि से परे प्रस्तुत किया गया इसलिए धारा 167(2) दं.प्र.सं. के अंतर्गत के अधिकार को समाप्त या विफल होना नहीं समझा जाना चाहिए – आक्षेपित आदेश अभिखंडित – आवेदकगण को जमानत पर छोड़ने के लिए निदेशित किया गया – पुनरीक्षण मंजूर। (जितेन्द्र वि. म.प्र. राज्य) **...2121**

***Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 11 – Appeal – Authorization* – Held – As per general interpretation of Section 11, if Gram Panchayat wants to sue or to file appeal, it has to pass a resolution authorizing somebody to act on its behalf – In absence of any such resolution, Sarpanch cannot sue and file an appeal independently. [Balbeer Singh Lodhi Vs. State of M.P.] …1994**

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 11 – अपील – प्राधिकरण – अभिनिर्धारित – धारा 11 के साधारण निर्वचन अनुसार, यदि ग्राम पंचायत वाद लाना अथवा अपील प्रस्तुत करना चाहती है, उसे उसकी ओर से कार्य करने हेतु किसी व्यक्ति को प्राधिकृत करते हुए संकल्प पारित करना होगा – उक्त संकल्प के अभाव में, सरपंच स्वतंत्र रूप से वाद नहीं ला सकता तथा अपील प्रस्तुत नहीं कर सकता। (बलबीर सिंह लोधी वि. म.प्र. राज्य) **…1994**

***Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 86(2) – Appointment – Advertisement* – Held – Record shows that advertisement was issued before appointment of petitioner – After following due process and preparation of merit list, petitioner was appointed on the post of Panchayat Secretary – Respondents admitted the fact of issuance of advertisement and preparation of panchnama – Impugned order set aside – Petition allowed. [Balbeer Singh Lodhi Vs. State of M.P.] …1994**

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 86(2) – नियुक्ति – विज्ञापन – अभिनिर्धारित – अभिलेख यह दर्शाता है कि याची की नियुक्ति के पूर्व विज्ञापन जारी हुआ था – सम्यक् प्रक्रिया का पालन करने तथा मेरिट सूची तैयार होने के पश्चात्, याची की नियुक्ति पंचायत सचिव के पद पर हुई थी – प्रत्यर्थीगण ने विज्ञापन जारी करने तथा पंचनामा तैयार करने के तथ्य को स्वीकार किया – आक्षेपित आदेश अपास्त – याचिका मंजूर। (बलबीर सिंह लोधी वि. म.प्र. राज्य) **…1994**

***Penal Code (45 of 1860), Section 90 – Consent* – Held – Section 90 though does not define "consent" but describes what is not "consent" – Consent may be express or implied, coerced or misguided, obtained willingly or through deceit – If consent is given by complainant under misconception of fact, it is vitiated. [Amit Kumar Vs. State of M.P.] …2145**

दण्ड संहिता (1860 का 45), धारा 90 – सहमति – अभिनिर्धारित – यद्यपि धारा 90 ''सहमति'' को परिभाषित नहीं करती परंतु क्या ''सहमति'' नहीं है वर्णित करती है – सहमति, अभिव्यक्त या विवक्षित, प्रपीड़क या भ्रामक, रजामंदी से या प्रवंचना से अभिप्राप्त हो सकती है – यदि परिवादी द्वारा तथ्य के भ्रम अंतर्गत सहमति दी गई है, वह दूषित है। (अमित कुमार वि. म.प्र. राज्य) **…2145**

***Penal Code (45 of 1860), Section 182 – False Information – Ingredients* – Held – Gist of offence u/S 182 IPC is giving false information so as to cause**

the public servant to act upon it – Offence is complete when the information bleaches the public servant – FIR indicates that on basis of false information by applicant regarding offence committed with him u/S 307/34 IPC, report was lodged by Complainant. [Kapil Vs. State of M.P.] …2138

दण्ड संहिता (1860 का 45), धारा 182 – मिथ्या सूचना – घटक – अभिनिर्धारित – भा.दं.सं. की धारा 182 के अंतर्गत अपराध का तात्पर्य मिथ्या सूचना देना है ताकि लोक सेवक उस पर कार्रवाई करे – अपराध पूर्ण होता है, जब जानकारी लोक सेवक को विरंजित करती है – प्रथम सूचना प्रतिवेदन यह इंगित करता है कि भा.दं.सं. की धारा 307/34 के आवेदक के साथ कारित हुए अपराध के संदर्भ में उसके द्वारा दी गई मिथ्या सूचना के आधार पर, परिवादी द्वारा प्रतिवेदन दर्ज किया गया था। (कपिल वि. म.प्र. राज्य) **…2138**

***Penal Code (45 of 1860), Section 182 and Criminal Procedure Code, 1973 (2 of 1974), Section 195(1)(a)(i) – Complaint by Court/Private Party – Maintainability* – Held – No complaint is necessary for commission of offence which is not related to any Court proceeding – In present case, complaint was not at the instance of private party but was at the instance of investigating agency – Provision of Section 195(1)(a)(i) is not applicable – Proceeding maintainable – Revision dismissed. [Kapil Vs. State of M.P.] …2138**

दण्ड संहिता (1860 का 45), धारा 182 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 195(1)(a)(i) – न्यायालय/निजी पक्षकार द्वारा परिवाद – पोषणीयता – अभिनिर्धारित – ऐसे अपराध जो न्यायालय की किसी कार्यवाही से संबंधित नहीं है, के कारित होने पर कोई परिवाद आवश्यक नहीं है – वर्तमान प्रकरण में, परिवाद निजी पक्षकार के कहने पर नहीं बल्कि अन्वेषण एजेंसी के कहने पर दायर किया गया – धारा 195(1)(a)(i) का उपबंध लागू नहीं होता – कार्यवाही पोषणीय – पुनरीक्षण खारिज। (कपिल वि. म.प्र. राज्य) **…2138**

***Penal Code (45 of 1860), Section 211 and Criminal Procedure Code, 1973 (2 of 1974), Section 195(1)(b)(i) – Cognizance – Ingredients* – Held – For taking cognizance of offence u/S 211 IPC, making of complaint in writing is mandatory when the offence is alleged to have been committed, in or in relation to any proceedings in Court by that or any Court to which that Court is administratively subordinate. [Kapil Vs. State of M.P.] …2138**

दण्ड संहिता (1860 का 45), धारा 211 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 195(1)(b)(i) – संज्ञान – घटक – अभिनिर्धारित – भा.दं.सं. की धारा 211 के अंतर्गत अपराध का संज्ञान लेने के लिए, ऐसे न्यायालय या किसी अन्य न्यायालय जिसके वह न्यायालय प्रशासनिक रूप से अधीनस्थ है, द्वारा लिखित में परिवाद करना आज्ञापक है जब ऐसे अपराध के बारे में यह अभिकथित है कि वह किसी न्यायालय में की कार्यवाही में या उसके संबंध में किया गया है। (कपिल वि. म.प्र. राज्य) **…2138**

Penal Code (45 of 1860), Section 302 – Medical/Ocular Evidence & Related/Interested Witnesses **– Held – Relation between appellant and deceased were inimical due to property issues – Prosecution witnesses are the interested witnesses – Contradiction between medical and ocular evidence cannot be ignored nor primacy can be given to ocular evidence because the said evidence is coming from related & interested witnesses – Not safe to record conviction. [Ajay Tiwari Vs. State of M.P.] (DB)…2098**

दण्ड संहिता (1860 का 45), धारा 302 – चिकित्सीय/चाक्षुष साक्ष्य व संबंधी/हितबद्ध साक्षीगण – अभिनिर्धारित – संपत्ति विवाद्यक के कारण अपीलार्थी एवं मृतक के मध्य शत्रुतापूर्ण संबंध थे – अभियोजन साक्षीगण हितबद्ध साक्षीगण हैं – चिकित्सीय एवं चाक्षुष साक्ष्य के मध्य विरोधाभास को अनदेखा नहीं किया जा सकता, न ही चाक्षुष साक्ष्य को प्रधानता दी जा सकती है क्योंकि उक्त साक्ष्य, संबंधी व हितबद्ध साक्षीगण से आ रहा है – दोषसिद्धि अभिलिखित करना सुरक्षित नहीं। (अजय तिवारी वि. म.प्र. राज्य) **(DB)…2098**

Penal Code (45 of 1860), Section 302 – Weapon of Offence – Expert Report **– Held – As per ballistic expert, seized gun was full of rust which shows that it has not been used for last 2 years – Further, gunshot injury is caused from a distance of about 84 feet and cannot be caused from a distance of 10 feet, as stated by prosecution witnesses – Prosecution failed to discharge its duty to prove by expert evidence that injuries were possible from weapon allegedly used by appellant – If ocular evidence is diametrically opposite to expert evidence, conviction wholly based on oral testimony cannot be upheld – Conviction set aside – Appeal allowed. [Ajay Tiwari Vs. State of M.P.] (DB)…2098**

दण्ड संहिता (1860 का 45), धारा 302 – अपराध का शस्त्र – विशेषज्ञ का प्रतिवेदन – अभिनिर्धारित – प्राक्षेपिकी विशेषज्ञ के अनुसार, जब्तशुदा बंदूक पूरी तरह जंग लगी हुई थी जो यह दर्शाता है कि पिछले 2 वर्षों से उसका उपयोग नहीं किया गया है – इसके अतिरिक्त, चोट लगभग 84 फीट की दूरी से बंदूक की गोली से कारित की गई है तथा 10 फीट की दूरी से कारित नहीं की जा सकती जैसा कि अभियोजन साक्षीगण द्वारा कहा गया– अभियोजन, विशेषज्ञ के साक्ष्य द्वारा साबित करने के अपने कर्तव्य का निर्वहन करने में विफल रहा कि अपीलार्थी द्वारा अभिकथित रूप से उपयोग किये गये शस्त्र से चोटें संभव थी – यदि चाक्षुष साक्ष्य, विशेषज्ञ के साक्ष्य से पूर्णतया विरूद्ध है, मौखिक परिसाक्ष्य पर पूरी तरह आधारित दोषसिद्धि को कायम नहीं रखा जा सकता – दोषसिद्धि अपास्त – अपील मंजूर। (अजय तिवारी वि. म.प्र. राज्य) **(DB)…2098**

Penal Code (45 of 1860), Section 302/149 & 148 – Appreciation of Evidence – Hostile Witnesses **– Held – Statement of hostile witness is admissible to the extent it does not disturb the credibility of part of his statement – Apex Court concluded that, portion of evidence of such hostile**

witnesses, which is consistent with case of prosecution/defence may be accepted – In instant case, witness has not assigned any reason as to why investigating officer would record something which was not stated by him – However, existence of signature of witness in *dehati nalishi* is clearly established – Witness trying to conceal material truth to protect the appellants. [Ramesh Kachhi Vs. State of M.P.] (DB)…2083

दण्ड संहिता (1860 का 45), धारा 302/149 व 148 – साक्ष्य का मूल्यांकन – पक्षविरोधी साक्षीगण – अभिनिर्धारित – पक्षविरोधी साक्षी का कथन उस सीमा तक ग्राह्य है जहां तक वह उसके कथन के भाग की विश्वसनीयता पर बाधा न डालता हो – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि ऐसे पक्षविरोधी साक्षीगण के साक्ष्य का हिस्सा, जो कि अभियोजन/बचाव पक्ष के प्रकरण के साथ संगत है, स्वीकार किया जा सकता है – वर्तमान प्रकरण में, साक्षी ने कोई कारण नहीं बताया है कि क्यों अन्वेषण अधिकारी कुछ ऐसा अभिलिखित करेगा जो कि उसके द्वारा नहीं कहा गया था – तथापि, देहाती नालिशी में साक्षी के हस्ताक्षर का विद्यमान होना स्पष्ट रूप से स्थापित हुआ है – साक्षी ने अपीलार्थीगण को संरक्षित करने के लिए तात्विक सत्य को छिपाने का प्रयत्न किया। (रमेश काछी वि. म.प्र. राज्य) **(DB)…2083**

***Penal Code (45 of 1860), Section 302/149 & 148 – Appreciation of Evidence – Plea of Alibi* – Held – No minutes, register or documentary evidence produced by defence to establish that appellant was present in meeting of Municipal Council and not at the scene of crime – Neither the Chairman of Council nor other representative who attended the meeting was called in witness box by defence to support the plea. [Ramesh Kachhi Vs. State of M.P.] (DB)…2083**

दण्ड संहिता (1860 का 45), धारा 302/149 व 148 – साक्ष्य का मूल्यांकन – अन्यत्र उपस्थित होने का अभिवाक् – अभिनिर्धारित – यह स्थापित करने हेतु कि अपीलार्थी नगरपालिका परिषद् की बैठक में उपस्थित था तथा न कि घटना स्थल पर, बचाव पक्ष द्वारा कोई कार्यवृत्त, रजिस्टर अथवा दस्तावेजी साक्ष्य प्रस्तुत नहीं किये गये – बचाव पक्ष द्वारा अभिवाक् का समर्थन करने के लिए न तो परिषद् के अध्यक्ष को न ही किसी अन्य प्रतिनिधि को जिसने बैठक में भाग लिया था, को साक्षी कठघरे में बुलाया गया था। (रमेश काछी वि. म.प्र. राज्य) **(DB)…2083**

***Penal Code (45 of 1860), Section 302/149 & 148 – Related Witness – Effect* – Held – There is no rule of thumb that evidence of a related witness must be discarded solely on ground that he is a relative of deceased. [Ramesh Kachhi Vs. State of M.P.] (DB)…2083**

दण्ड संहिता (1860 का 45), धारा 302/149 व 148 – संबंधी साक्षी – प्रभाव – अभिनिर्धारित – ऐसा कोई अनुभवसिद्ध नियम नहीं है कि एक संबंधी साक्षी के साक्ष्य को एकमात्र इस आधार पर अस्वीकार किया जाना चाहिए कि वह मृतक का संबंधी है। (रमेश काछी वि. म.प्र. राज्य) **(DB)…2083**

***Penal Code (45 of 1860), Section 302/149 & 148 and Criminal Procedure Code, 1973 (2 of 1974), Section 161 – Recording of Statement – Delay – Effect* – Held – Prosecution satisfactorily established that appellants assaulted deceased because of which he died – Interference on ground that statements were belatedly recorded is unwarranted – Apex Court concluded that if prosecution evidence is worthy of credence, the point that investigation was faulty or statements u/S 161 Cr.P.C. were recorded belatedly, pales into insignificance. [Ramesh Kachhi Vs. State of M.P.] (DB)…2083**

दण्ड संहिता (1860 का 45), धारा 302/149 व 148 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 161 – कथन अभिलिखित किया जाना – विलंब – प्रभाव – अभिनिर्धारित – अभियोजन ने संतोषजनक रूप से स्थापित किया है कि अपीलार्थीगण ने मृतक पर हमला किया जिसके कारण उसकी मृत्यु हुई – इस आधार पर हस्तक्षेप कि कथन विलंबित रूप से अभिलिखित किये गये थे, अनपेक्षित है – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि यदि अभियोजन साक्ष्य विश्वास के योग्य है, तो यह बिंदु कि अन्वेषण दोषपूर्ण था अथवा दं.प्र.सं. की धारा 161 के अंतर्गत कथन विलंब से अभिलिखित किये गये थे, महत्वहीन हो जाता है। (रमेश काछी वि. म.प्र. राज्य) **(DB)…2083**

***Penal Code (45 of 1860), Section 302/149 & 148 and Evidence Act (1 of 1872), Section 32 – Oral Dying Declaration – Credibility* – Held – There is no absolute rule of law that dying declaration cannot form sole basis of conviction – In instant case, both parents of deceased deposed about dying declaration in harmony without any material inconsistency in their statements, which would destroy its evidentiary value. [Ramesh Kachhi Vs. State of M.P.] (DB)…2083**

दण्ड संहिता (1860 का 45), धारा 302/149 व 148 एवं साक्ष्य अधिनियम (1872 का 1), धारा 32 – मौखिक मृत्युकालिक कथन – विश्वसनीयता – अभिनिर्धारित – विधि का कोई आत्यंतिक नियम नहीं है कि मृत्युकालिक कथन दोषसिद्धि का एकमात्र आधार नहीं बन सकता – वर्तमान प्रकरण में, मृतक के माता–पिता दोनों ने अपने कथनों में, बिना किसी तात्विक असंगति के एक स्वर में मृत्युकालिक कथन के बारे में अभिसाक्ष्य दिया है जो कि उसका साक्ष्यिक मूल्य नष्ट कर देगा। (रमेश काछी वि. म.प्र. राज्य) **(DB)…2083**

***Penal Code (45 of 1860), Sections 302/149, 148 & 304 Part II – Intention & Motive – No injury found on vital part of body of deceased – No intention of murder* – Cause of death was multiple injuries on various parts of body by hard and blunt objects, hemorrhage and excessive bleeding – No internal injury found – Although appellants acted together and assaulted deceased with knowledge that injuries caused by them were likely to cause death – Conviction altered to one u/S 304 Part II IPC – Appeal partly allowed. [Ramesh Kachhi Vs. State of M.P.] (DB)…2083**

दण्ड संहिता (1860 का 45), धाराएँ 302/149, 148 व 304 भाग II – आशय व हेतु – मृतक के शरीर के महत्वपूर्ण अंग पर कोई चोट नहीं पाई गई – हत्या का कोई आशय नहीं – मृत्यु का कारण, सख्त और भोथरी वस्तुओं द्वारा अनेक चोटें शरीर के विभिन्न अंगों पर, रक्तस्त्राव होना और अत्यधिक रक्त का बहना था – कोई आंतरिक चोट नहीं पाई गई – यद्यपि अपीलार्थीगण ने एक साथ कार्य किया तथा मृतक पर यह ज्ञात होते हुए हमला किया कि उनके द्वारा पहुंचाई गई चोटों से मृत्यु कारित होना संभाव्य थी – दोषसिद्धि को भा.दं.सं. की धारा 304 भाग II में परिवर्तित किया गया – अपील अंशतः मंजूर। (रमेश काछी वि. म.प्र. राज्य) **(DB)…2083**

***Penal Code (45 of 1860), Section 302 & 304 Part II – Dying Declaration – Intention – Conviction u/S 302 IPC* – Held – As per dying declaration, quarrel was going on between deceased and her husband, when appellant (*sister-in-law of deceased*) arrived and she threw burning stove on deceased which caused burn injuries and resulted in her death – No evidence of any strained relations between appellant and deceased – No evidence to conclude that appellant had any such intention to kill deceased – When a person throws a burning stove on a person there is a knowledge that the act is likely to cause death – Appellant committed offence u/S 304 Part II IPC – Conviction altered to one u/S 304 Part II IPC – Appeal partly allowed. [Kalabai Vs. State of M.P.] (SC)…1973**

दण्ड संहिता (1860 का 45), धारा 302 व 304 भाग II – मृत्युकालिक कथन – आशय – भा.दं.सं. की धारा 302 के अंतर्गत दोषसिद्धि – अभिनिर्धारित – मृत्युकालिक कथन के अनुसार, मृतिका और उसके पति के मध्य झगड़ा चल रहा था, जब अपीलार्थी (मृतिका की ननद) वहाँ पहुँची तथा उसने मृतिका पर जलता हुआ स्टोव फेंका जिससे उसे जलने की चोटें कारित हुईं एवं परिणामस्वरूप उसकी मृत्यु हो गई – अपीलार्थी और मृतिका के मध्य किसी तनावपूर्ण संबंधों का कोई साक्ष्य नहीं – यह निष्कर्षित करने के लिए कोई साक्ष्य नहीं कि अपीलार्थी का मृतिका को मारने का आशय था – जब एक व्यक्ति किसी व्यक्ति पर जलता हुआ स्टोव फेंकता है तो वह यह ज्ञान रखता है कि उस कृत्य से मृत्यु कारित होना संभाव्य है – अपीलार्थी ने भारतीय दंड संहिता की धारा 304 भाग II के अंतर्गत अपराध कारित किया – दोषसिद्धि भा.दं.सं. की धारा 304 भाग II में परिवर्तित – अपील अंशतः मंजूर। (कलाबाई वि. म.प्र. राज्य) **(SC)…1973**

***Penal Code (45 of 1860), Section 375 – Consent* – Held – Consent for the purpose of Section 375 requires voluntary participation not only after exercise of intelligence based on knowledge of the significance and moral quality of the act, but also after having fully exercised the choice between resistance and assent – Whether there was any consent or not is to be ascertained only on a careful study of all relevant circumstances. [Amit Kumar Vs. State of M.P.] …2145**

दण्ड संहिता (1860 का 45), धारा 375 – सहमति – अभिनिर्धारित – धारा 375 के प्रयोजन हेतु सहमति में, न केवल कृत्य की नैतिक गुणवत्ता एवं महत्व के ज्ञान पर आधारित बुद्धिमत्ता के प्रयोग के पश्चात् बल्कि विरोध एवं सहमति के बीच पसंद के पूर्ण रूप से प्रयोग करने के पश्चात्, स्वेच्छयापूर्ण सहभाग अपेक्षित है – क्या कोई सहमति थी अथवा नहीं इसका अभिनिश्चय केवल सभी सुसंगत परिस्थितियों के सावधानीपूर्वक अध्ययन करने पर किया जाता है। (अमित कुमार वि. म.प्र. राज्य) **...2145**

***Penal Code (45 of 1860), Section 376 (2)(n) & 506-II – Framing of Charge – Rape on Pretext of Marriage* – Held – Prosecutrix, a married woman having a child, started living with accused as husband and wife, without getting decree of divorce and knowing fully that accused was also a married person – *Prima Facie*, she herself gave consent for sexual intercourse – It cannot be presumed that consent was obtained giving false assurance of marriage – Charge quashed – Application allowed. [Amit Kumar Vs. State of M.P.] ...2145**

दण्ड संहिता (1860 का 45), धारा 376(2)(n) व 506–II – आरोप विरचित किया जाना – विवाह के बहाने बलात्संग – अभिनिर्धारित – अभियोक्त्री एक विवाहित महिला जिसका एक बालक है, ने यह पूर्ण रूप से ज्ञात होते हुए कि अभियुक्त भी एक विवाहित व्यक्ति है और विवाह विच्छेद की डिक्री प्राप्त किये बिना अभियुक्त के साथ पति–पत्नी के रूप में निवास करना आरंभ किया – प्रथम दृष्ट्या, उसने स्वयं लैंगिक संभोग हेतु सहमति दी – यह उपधारणा नहीं की जा सकती कि विवाह का मिथ्या आश्वासन देकर सहमति अभिप्राप्त की गई थी – आरोप अभिखंडित – आवेदन मंजूर। (अमित कुमार वि. म.प्र. राज्य) **...2145**

***Penal Code (45 of 1860), Section 415 & 420 – Intention* – Held – Apex Court concluded that in such matters what is important to consider is intention of accused at the time of inducement – If intention was dishonest at the very first time when the promise was made and contract was entered into, then offence of cheating is made out. [Praveen Vs. Amit Verma] ...2164**

दण्ड संहिता (1860 का 45), धारा 415 व 420 – आशय – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि ऐसे मामलों में उत्प्रेरणा के समय अभियुक्त का आशय क्या है, यह विचार में लिये जाने हेतु आवश्यक है – यदि प्रथम बार में ही, जब वचन दिया गया था तथा संविदा की गई थी, आशय बेईमानी करने का था तो छल का अपराध बनता है। (प्रवीण वि. अमित वर्मा) **...2164**

***Penal Code (45 of 1860), Section 415 & 420 – Nature of Dispute – Civil/Criminal* – Held – Had there been a history of commercial transaction between parties, subsequent dishonour of cheque in a later commercial transaction would show that transaction was a breach of contract only and dispute is of a civil nature. [Praveen Vs. Amit Verma] ...2164**

दण्ड संहिता (1860 का 45), धारा 415 व 420 – विवाद का स्वरूप – सिविल / आपराधिक – अभिनिर्धारित – यदि पक्षकारों के मध्य वाणिज्यिक संव्यवहार का इतिहास रहा होता, तब बाद के वाणिज्यिक संव्यवहार में चेक का पश्चात्वर्ती अनादरण यह दर्शाएगा कि संव्यवहार केवल एक संविदा का भंग था तथा विवाद सिविल स्वरूप का है। (प्रवीण वि. अमित वर्मा) **...2164**

***Penal Code (45 of 1860), Section 415 & 420 and Criminal Procedure Code, 1973 (2 of 1974), Section 482 – Ingredients & Grounds* – Held – Parties were unacquainted with each other and cheque of respondent got dishonoured in the first instance and subsequent attempts of complainant to get his money back failed – Respondent on one pretext or the other did not honour his commitment – Intention to deceive is perceivable from the very beginning – Cheating as described u/S 415 is attracted – JMFC directed to register case u/S 420 IPC – Application allowed. [Praveen Vs. Amit Verma] ...2164**

दण्ड संहिता (1860 का 45), धारा 415 व 420 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – घटक व आधार – अभिनिर्धारित – पक्षकार एक दूसरे से अपरिचित थे एवं प्रतिवादी का चेक प्रथम बार में अनादृत हुआ तथा परिवादी द्वारा अपने पैसे वापस पाने के पश्चात्वर्ती प्रयत्न विफल रहे – प्रत्यर्थी ने कोई न कोई बहाना कर अपनी प्रतिबद्धता का आदरण नहीं किया – प्रवंचना का आशय प्रारंभ से ही बोधगम्य है – धारा 415 के अंतर्गत वर्णित छल आकर्षित होता है – न्यायिक मजिस्ट्रेट प्रथम श्रेणी को भा. दं.सं. की धारा 420 के अंतर्गत प्रकरण पंजीबद्ध करने हेतु निदेशित किया गया – आवेदन मंजूर। (प्रवीण वि. अमित वर्मा) **...2164**

***Protection of Women from Domestic Violence Act (43 of 2005), Section 12 – Complaint Against Female Members – Maintainability* – Held – Apex Court concluded that remedies under Act of 2005 are available against female family members and others including non adult also. [Praveen Upadhyay Vs. Smt. Rajni Upadhyay] ...2127**

घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम (2005 का 43), धारा 12 – महिला सदस्यों के विरूद्ध परिवाद – पोषणीयता – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि 2005 के अधिनियम के अंतर्गत उपचार, परिवार की महिला सदस्यों तथा अन्य जिसमें अवयस्क भी शामिल है, के विरूद्ध उपलब्ध है। (प्रवीण उपाध्याय वि. श्रीमती रजनी उपाध्याय) **...2127**

***Protection of Women from Domestic Violence Act (43 of 2005), Section 12 – Maintainability* – Held – On 05.08.2017 wife lodged FIR u/S 498-A IPC where in her statement u/S 161 Cr.P.C., no allegation was made against A-2, 3 & 4, but later, on 13.01.2018 she filed application u/S 12 of the Act of 2005 alleging against them – Allegations are an afterthought and they have been**

implicated because of close relation with husband – No *prima facie* case against them – Proceedings against them is purely misuse of process of law and thus set aside – Revision partly allowed. [Praveen Upadhyay Vs. Smt. Rajni Upadhyay] ...2127

घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम (2005 का 43), धारा 12 – पोषणीयता – अभिनिर्धारित – दिनांक 05.08.2017 को पत्नी ने भा.दं.सं. की धारा 498–A के अंतर्गत प्रथम सूचना प्रतिवेदन दर्ज कराया जहां दं.प्र.सं. की धारा 161 के अंतर्गत उसके कथन में, ए–2, 3 व 4 के विरूद्ध कोई अभिकथन नहीं किया गया था, परंतु बाद में, दिनांक 13.01.2018 को उसने 2005 के अधिनियम की धारा 12 के अंतर्गत उनके विरूद्ध अभिकथन करते हुए आवेदन प्रस्तुत किया – अभिकथन एक पश्चात् कल्पना हैं तथा पति के साथ करीबी रिश्ता होने के कारण उन्हें आलिप्त किया गया – उनके विरूद्ध कोई प्रथम दृष्ट्या प्रकरण नहीं – उनके विरूद्ध कार्यवाहियां पूर्ण रूप से विधि की प्रक्रिया का दुरूपयोग है एवं इसलिए अपास्त – पुनरीक्षण अंशतः मंजूर। (प्रवीण उपाध्याय वि. श्रीमती रजनी उपाध्याय) **...2127**

***Protection of Women from Domestic Violence Act (43 of 2005), Sections 12, 18 & 31 and Criminal Procedure Code, 1973 (2 of 1974), Section 468 & 472 – Limitation – Applicability* – Held – Section 468 Cr.P.C. is applicable in relation to offences and not to application – No limitation period prescribed for application u/S 12 of the Act – Wife claiming maintenance which is a continuous cause, she cannot be debarred from it – Limitation u/S 468 Cr.P.C. is applicable only when there is a violation of protection order passed u/S 18 and consequently offence is committed u/S 31 of the Act of 2005 – Application however filed within one year, is not barred by limitation. [Praveen Upadhyay Vs. Smt. Rajni Upadhyay] ...2127**

घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम (2005 का 43), धाराएँ 12, 18 व 31 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 468 व 472 – परिसीमा – प्रयोज्यता – अभिनिर्धारित – दं.प्र.सं. की धारा 468 अपराधों के संबंध में लागू है तथा न कि आवेदन पर – अधिनियम की धारा 12 के अंतर्गत आवेदन हेतु कोई परिसीमा अवधि विहित नहीं है – पत्नी द्वारा भरणपोषण का दावा किया जाना जो एक निरंतर हेतुक है, उससे उसे विवर्जित नहीं किया जा सकता – दं.प्र.सं. की धारा 468 के अंतर्गत परिसीमा केवल तब लागू होती है, जब 2005 के अधिनियम की धारा 18 के अंतर्गत पारित हुये संरक्षण आदेश का उल्लंघन होता है तथा परिणामस्वरूप धारा 31 के अंतर्गत अपराध कारित होता है – आवेदन तथापि एक वर्ष के भीतर प्रस्तुत किया गया, परिसीमा द्वारा वर्जित नहीं है। (प्रवीण उपाध्याय वि. श्रीमती रजनी उपाध्याय) **...2127**

***Protection of Women from Domestic Violence Act (43 of 2005), Section 12 & 27 – Territorial Jurisdiction* – Held – Wife can file a petition where she temporarily resides – Wife, after dispute, living at parental home at Barely,**

where she can file the application. [Praveen Upadhyay Vs. Smt. Rajni Upadhyay] ...2127

घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम (2005 का 43), धारा 12 व 27 – क्षेत्रीय अधिकारिता – अभिनिर्धारित – पत्नी वहां याचिका प्रस्तुत कर सकती है जहां वह अस्थायी रूप से रहती है – पत्नी, विवाद के पश्चात् पैतृक घर बरेली में रह रही है, जहां वह आवेदन प्रस्तुत कर सकती है। (प्रवीण उपाध्याय वि. श्रीमती रजनी उपाध्याय) **...2127**

***Protection of Women from Domestic Violence Act (43 of 2005), Section 20 and Criminal Procedure Code, 1973 (2 of 1974), Section 125 – Maintenance & Monetary Relief* – Held – Supreme Court concluded that monetary relief as referred in Section 20 of the Act of 2005 is different from maintenance. [Manudatt Bhardwaj Vs. Smt. Babita Bhardwaj] ...2117**

घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम (2005 का 43), धारा 20 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125 – भरणपोषण व आर्थिक अनुतोष – अभिनिर्धारित – उच्चतम न्यायालय ने निष्कर्षित किया कि 2005 के अधिनियम की धारा 20 में यथा निर्दिष्ट आर्थिक अनुतोष, भरणपोषण से भिन्न है। (मनूदत्त भारद्वाज वि. श्रीमती बबीता भारद्वाज) **...2117**

***Protection of Women from Domestic Violence Act (43 of 2005), Sections 20, 23 & 26 and Criminal Procedure Code, 1973 (2 of 1974), Section 125 – Maintenance – Eligibility* – Held – Wife can seek interim maintenance/ maintenance under provisions of the Act of 2005 in addition to and alongwith any other relief including the relief of maintenance u/S 125 Cr.P.C. – Parallel receipt of interim maintenance/maintenance is certainly maintainable. [Manudatt Bhardwaj Vs. Smt. Babita Bhardwaj] ...2117**

घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम (2005 का 43), धाराएँ 20, 23 व 26 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125 – भरणपोषण – पात्रता – अभिनिर्धारित – पत्नी, धारा 125 दं.प्र.सं. के अंतर्गत भरणपोषण का अनुतोष समाविष्ट करते हुए किसी अन्य अनुतोष के अतिरिक्त एवं साथ साथ, 2005 के अधिनियम के उपबंधों के अंतर्गत अंतरिम भरणपोषण/भरणपोषण चाह सकती है – अंतरिम भरणपोषण/भरणपोषण की समानांतर प्राप्ति निश्चित रूप से पोषणीय है। (मनूदत्त भारद्वाज वि. श्रीमती बबीता भारद्वाज) **...2117**

***Regional Rural Banks (Appointment and Promotion of Officers and Other Employees) Rules, 1998 – Promotion – Criteria* – Held – Although Rules of 1998 do not provide for any minimum qualifying marks for interview as well as for performance appraisal, however fixing the benchmark of minimum marks by the Selection Committee for interview and performance appraisal is permissible and it does not violate the principle of seniority-cum-merit – Candidates are required to be promoted in the order of seniority,**

irrespective of anyone among them having obtained more marks – Department directed to prepare a fresh select list for promotion accordingly – Impugned orders directing fresh exercise of promotion is set aside – Appeal allowed. [Shriram Tomar Vs. Praveen Kumar Jaggi] (SC)…1965

प्रादेशिक ग्रामीण बैंक (अधिकारियों और अन्य कर्मचारियों की नियुक्ति और प्रोन्नति) नियम, 1998 – पदोन्नति – मानदंड – अभिनिर्धारित – यद्यपि 1998 के नियम साक्षात्कार के साथ–साथ प्रदर्शन आंकने के लिए कोई न्यूनतम अर्हक अंक उपबंधित नहीं करते, तथापि चयन समिति द्वारा साक्षात्कार एवं प्रदर्शन आंकने हेतु न्यूनतम अंक का मानदंड तय किया जाना अनुज्ञेय है तथा यह वरिष्ठता–सह–योग्यता के सिद्धांत का उल्लंघन नहीं करता – अभ्यर्थियों को वरिष्ठता के क्रम में पदोन्नत किये जाने की आवश्यकता है, भले ही उनमें से किसी को भी अधिक अंक प्राप्त हुए हों – विभाग को पदोन्नति के लिए तद्नुसार एक नई चयन सूची तैयार करने हेतु निदेशित किया गया – पदोन्नति की नई कवायद निदेशित करने वाला आक्षेपित आदेश अपास्त – अपील मंजूर। (श्रीराम तोमर वि. प्रवीण कुमार जग्गी) **(SC)…1965**

***Service Law – Horizontal Compartmentalised Reservation – Procedure* – Held – As per advertisement, reservation for OBC Police Personnel was horizontal compartmentalised reservation, thus respondents being OBC Police Personnel are not entitled to appointment against open general category post on the ground that they received more marks than the last candidate of open general category – Procedure explained – No migration of OBC Police Personnel to general category post is permissible – Petition dismissed – Revision Petition allowed. [State of M.P. Vs. Uday Sisode] (DB)…2022**

सेवा विधि – हारिजान्टल कम्पार्टमेन्टलाईजड (क्षैतिज श्रेणीकृत) आरक्षण – प्रक्रिया – अभिनिर्धारित – विज्ञापन के अनुसार, अ.पि.व. पुलिस कर्मियों हेतु आरक्षण, हारिजान्टल कम्पार्टमेन्टलाईजड आरक्षण था अतः प्रत्यर्थीगण अ.पि.व. पुलिस कर्मी होने के नाते, खुले सामान्य वर्ग के पद पर इस आधार पर नियुक्ति के लिए हकदार नहीं कि उन्हें खुले सामान्य वर्ग के अंतिम अभ्यर्थी से अधिक अंक प्राप्त हुए थे – प्रक्रिया स्पष्ट की गई – अ.पि.व. पुलिस कर्मी का सामान्य वर्ग के पद पर प्रव्रजन अनुज्ञेय नहीं है – याचिका खारिज – पुनरीक्षण याचिका मंजूर। (म.प्र. राज्य वि. उदय सिसोदे) **(DB)…2022**

***Service Law – Promotion – Upgrading of Adverse Confidential Remarks – Applicability* – Held – Once adverse confidential remarks of employee are upgraded then it has to be presumed that earlier remarks were wiped out from very inception – Principle of prospective application cannot be applied – Claim of petitioner for reconsideration of her case for promotion has been wrongly rejected – Respondents directed for review DPC to consider entitlement of petitioner. [Rekha Singhal Agrawal (Smt.) Vs. State of M.P.] …*63**

सेवा विधि – पदोन्नति – प्रतिकूल गोपनीय टिप्पणियों का उन्नयन – प्रयोज्यता – अभिनिर्धारित – एक बार कर्मचारी की प्रतिकूल गोपनीय टिप्पणियों का उन्नयन किया गया है तब यह उपधारणा की जानी चाहिए कि पूर्वतर टिप्पणियों का प्रारंभ से ही सफाया किया गया था – भविष्यलक्षी प्रयोज्यता के सिद्धांत को लागू नहीं किया जा सकता – पदोन्नति हेतु याची के प्रकरण का पुनर्विचार किये जाने हेतु उसके दावे को गलत रूप से अस्वीकार किया गया है – याची की हकदारी पर विचार करने के लिए प्रत्यर्थीगण को पुनर्विलोकन डी पी सी हेतु निदेशित किया गया। (रेखा सिंघल अग्रवाल (श्रीमती) वि. म.प्र. राज्य) …*63

***Service Law – See – Constitution – Article 226* [Bhagwat Singh Kotiya Vs. State of M.P.] …1987**

सेवा विधि – देखें – संविधान – अनुच्छेद 226 (भागवत सिंह कोटिया वि. म.प्र. राज्य) **…1987**

***Service Law – Transfer – Competent Authority* – Held – As per transfer policy, although the Chief Medical & Health Officer is the administrative head of paramedical staff but so far as authority to transfer/post an employee within district, Collector is also a competent authority to pass the transfer orders. [Bhagwat Singh Kotiya Vs. State of M.P.] …1987**

सेवा विधि – स्थानांतरण – सक्षम प्राधिकारी – अभिनिर्धारित – स्थानांतरण नीति के अनुसार, यद्यपि मुख्य चिकित्सा एवं स्वास्थ्य अधिकारी, पराचिकित्सीय स्टाफ का प्रशासनिक प्रमुख है परंतु जहां तक जिले के भीतर एक कर्मचारी का स्थानांतरण/पदस्थापना के प्राधिकार का संबंध है, कलेक्टर भी स्थानांतरण आदेशों को पारित करने के लिए एक सक्षम प्राधिकारी है। (भागवत सिंह कोटिया वि. म.प्र. राज्य) **…1987**

***Service Law – Transfer – Frequent Transfer Orders* – Held – Petitioner was transferred earlier on his own request and not because of any administrative exigency – Present transfer orders cannot be considered as frequent transfer orders – Petition dismissed. [Bhagwat Singh Kotiya Vs. State of M.P.] …1987**

सेवा विधि – स्थानांतरण – बारम्बार स्थानांतरण आदेश – अभिनिर्धारित – पूर्व में याची का स्थानांतरण उसके स्वयं के निवेदन पर हुआ था और न कि किसी प्रशासनिक अत्यावश्यकता के कारण – वर्तमान स्थानांतरण आदेशों को बारम्बार स्थानांतरण आदेश नहीं माना जा सकता – याचिका खारिज। (भागवत सिंह कोटिया वि. म.प्र. राज्य) **…1987**

***Service Law – Transfer – Model Code of Conduct – Effect* – Petitioner's transfer order passed on 10.03.2019 and on same date model code of conduct was made applicable – Thus cannot be said that he was transferred after model code of conduct was made applicable. [Bhagwat Singh Kotiya Vs. State of M.P.] …1987**

सेवा विधि – स्थानांतरण – आदर्श आचार संहिता – प्रभाव – याची का स्थानांतरण आदेश 10.03.2019 को पारित किया गया और उसी दिनांक को आदर्श आचार संहिता लागू की गई थी – अतः यह नहीं कहा जा सकता कि उसे आदर्श आचार संहिता लागू किये जाने के पश्चात् स्थानांतरित किया गया था। (भागवत सिंह कोटिया वि. म.प्र. राज्य) …1987

***Service Law – Transfer – Representation – Effect* – Held – Mere filing of representation does not give any right to employee to stay on a particular place, even after transfer order has been passed – Petitioner has not joined at transferred place and unless and until employee joins his transferred place, no direction can be given to respondents to consider his representation. [Bhagwat Singh Kotiya Vs. State of M.P.] …1987**

सेवा विधि – स्थानांतरण – प्रतिनिधित्व – प्रभाव – अभिनिर्धारित – मात्र अभ्यावेदन प्रस्तुत करना, कर्मचारी को, स्थानांतरण आदेश पारित किये जाने के पश्चात् भी एक विशिष्ट स्थान पर रूकने का कोई अधिकार नहीं देता – याची ने स्थानांतरित किये गये स्थान पर कार्यग्रहण नहीं किया और जब तक कि कर्मचारी उसे स्थानांतरित किये गये स्थान पर कार्यग्रहण नहीं करता, प्रत्यर्थीगण को उसके अभ्यावेदन पर विचार करने के लिए कोई निदेश नहीं दिया जा सकता। (भागवत सिंह कोटिया वि. म.प्र. राज्य) **…1987**

***Service Law – Vertical Reservation & Horizontal Reservation* – Held – Apex Court concluded that under vertical reservations, candidates of SC, ST, OBC are allowed to compete and appointed against the non-reserved post, but that is not so in case of horizontal reservation – Further, in case of compartmentalised horizontal reservation, process of verification and adjustment should be applied separately to each of the vertical reservation. [State of M.P. Vs. Uday Sisode] (DB)…2022**

सेवा विधि – वर्टीकल (लम्बवत) आरक्षण व हारिजान्टल (क्षैतिज) आरक्षण – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया कि वर्टीकल आरक्षणों के अंतर्गत, अ. जा., अ.ज.जा., अ.पि.व. के अभ्यर्थियों को अनारक्षित पद के लिए प्रतियोगिता करने एवं नियुक्त होने की मंजूरी दी गई है परंतु ऐसा हारिजान्टल आरक्षण की स्थिति में नहीं है – इसके अतिरिक्त, कम्पार्टमेन्टलाइजड हारिजान्टल आरक्षण के प्रकरण में, सत्यापन एवं समायोजन की प्रक्रिया को प्रत्येक वर्टीकल आरक्षण के लिए पृथक रूप से लागू करना चाहिए। (म.प्र. राज्य वि. उदय सिसोदे) **(DB)…2022**

***Stamp Act, Indian (2 of 1899), Schedule 1A and Section 33 & 35 – Carbon Copy Document – Impounding of – Permissibility* – Held – This Court has earlier concluded that carbon copy prepared alongwith original is also an original copy – Petitioners themselves took a stand in the earlier writ petition that document is a partition deed and only it is required to be stamped – Trial Court rightly send the document to Collector of Stamps for**

impounding – Petition dismissed. [Nathulal (Deceased) Through L.R. Kailashchandra Vs. Ramesh] ...2015

स्टाम्प अधिनियम, भारतीय (1899 का 2), अनुसूची 1ए एवं धारा 33 व 35 – दस्तावेज की कार्बन कॉपी – को परिबद्ध किया जाना – अनुज्ञेयता – अभिनिर्धारित – इस न्यायालय ने पूर्व में निष्कर्षित किया है कि मूल के साथ तैयार की गई कार्बन कॉपी भी एक मूल प्रतिलिपि है – याचीगण ने स्वयं पूर्व रिट याचिका में यह स्टैंड लिया है कि दस्तावेज एक विभाजन विलेख है तथा केवल इसे स्टांपित किये जाने की आवश्यकता है – विचारण न्यायालय ने दस्तावेज को परिबद्ध किये जाने हेतु उचित रूप से स्टाम्प कलक्टर को भेजा – याचिका खारिज। (नाथूलाल (मृतक) द्वारा विधिक प्रतिनिधि कैलाशचन्द्र वि. रमेश) **...2015**

***Stamp Act, Indian (2 of 1899), Schedule 1A and Section 33 & 35 – Impounding of Document – Duty of Court* – Held – It is well settled law that once any deed or document comes before Court and if it finds that it is not properly stamped and stamp duty is liable to be paid, then it is duty of Court to send the document to Collector of Stamps. [Nathulal (Deceased) Through L.R. Kailashchandra Vs. Ramesh] ...2015**

स्टाम्प अधिनियम, भारतीय (1899 का 2), अनुसूची 1ए एवं धारा 33 व 35 – दस्तावेज परिबद्ध किया जाना – न्यायालय का कर्तव्य – अभिनिर्धारित – यह सुस्थापित विधि है कि एक बार जब कोई विलेख अथवा दस्तावेज न्यायालय के समक्ष आता है तथा यदि वह यह पाता है कि वह उचित रूप से स्टांपित नहीं है तथा स्टाम्प शुल्क का भुगतान किया जाना दायी है, तो न्यायालय का यह कर्तव्य है कि वह दस्तावेज स्टाम्प कलक्टर को भेजे। (नाथूलाल (मृतक) द्वारा विधिक प्रतिनिधि कैलाशचन्द्र वि. रमेश) **...2015**

***State Financial Corporation Act (63 of 1951), Section 29 – Auction of Pledged Property – Procedure* – Held – There is no statutory provision, rule, regulation or established practice that before finalizing last highest bid, owner of property be given opportunity to deposit the said amount. [Trilochan Singh Chawla Vs. M.P. State Financial Corp.] ...2036**

राज्य वित्तीय निगम अधिनियम (1951 का 63), धारा 29 – गिरवी संपत्ति की नीलामी – प्रक्रिया – अभिनिर्धारित – कोई कानूनी उपबंध, नियम, विनियमन अथवा स्थापित पद्धति नहीं है कि अंतिम सर्वोच्च बोली को अंतिम रूप देने से पूर्व, संपत्ति के स्वामी को उक्त रकम जमा करने का अवसर दिया जाए। (त्रिलोचन सिंह चावला वि. एम.पी. स्टेट फाइनेन्शियल कारपोरेशन) **...2036**

***State Financial Corporation Act (63 of 1951), Section 29 – Rights of Corporation – Auction of Pledged Property – Procedure* – Held – Notice inviting tender was published thrice – Proper correspondence/negotiations were made, minutes of every meeting were recorded and then sale was finalized after calling fresh valuation report of property – Appellant failed to**

establish any illegal nexus between purchaser and officers of corporation – Procedure conducted by respondents for auction and sale of pledged property was fair and reasonable and was not malicious or contrary to law – Suit rightly dismissed – First appeal dismissed. [Trilochan Singh Chawla Vs. M.P. State Financial Corp.] …2036

राज्य वित्तीय निगम अधिनियम (1951 का 63), धारा 29 – निगम के अधिकार – गिरवी संपत्ति की नीलामी – प्रक्रिया – अभिनिर्धारित – निविदा आमंत्रण सूचना तीन बार प्रकाशित की गई थी – उचित पत्राचार/बातचीत की गई, प्रत्येक बैठक के मसौदे अभिलिखित किये गये थे और तब संपत्ति का नया मूल्यांकन प्रतिवेदन बुलाने के पश्चात् विक्रय को अंतिम रूप दिया गया था – अपीलार्थी, क्रेता एवं निगम के अधिकारियों के बीच किसी अवैध सांठ–गांठ को स्थापित करने में असफल रहा – प्रत्यर्थीगण द्वारा गिरवी संपत्ति की नीलामी एवं विक्रय हेतु संचालित प्रक्रिया निष्पक्ष एवं युक्तियुक्त थी तथा दुर्भावपूर्ण अथवा विधि के विपरीत नहीं थी – वाद उचित रूप से खारिज – प्रथम अपील खारिज। (त्रिलोचन सिंह चावला वि. एम.पी. स्टेट फाइनेन्शियल कारपोरेशन) **…2036**

***Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, M.P. 2005 (14 of 2006), Section 2(1) – Writ Appeal – Locus* – Held – Writ Appeal filed by Collector in personal capacity – Appellant, being a party affected inasmuch as contempt proceedings have been drawn against him on the basis of order passed in writ petition, has a locus. [Madan Vibhishan Nagargoje Vs. Shri Shailendre Singh Yadav] (DB)…1981**

उच्च न्यायालय (खण्ड न्यायपीठ को अपील) अधिनियम, म.प्र., 2005 (2006 का 14), धारा 2(1) – रिट अपील – सुने जाने का अधिकार – अभिनिर्धारित – कलेक्टर द्वारा व्यक्तिगत क्षमता में रिट अपील प्रस्तुत की गई – अपीलार्थी, एक प्रभावित पक्षकार है यहाँ तक कि रिट याचिका में पारित आदेश के आधार पर उसके विरूद्ध अवमान कार्यवाहियां की गई है, सुने जाने का अधिकार उसे है। (मदन विभीषण नागरगोजे वि. श्री शैलेन्द्र सिह यादव) **(DB)…1981**

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THE INDIAN LAW REPORTS M.P. SERIES, 2019
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JOURNAL SECTION

FAREWELLS

HON'BLE MR. JUSTICE RAVI SHANKER JHA
ACTING CHIEF JUSTICE

Born on October 14, 1961. After obtaining degree in Law from University Teaching Department, Rani Durgawati Vishwavidyalaya, Jabalpur, in the year 1986, got enrolled as an Advocate on September 20, 1986 with the State Bar Council of Madhya Pradesh. Practiced in the High Court of Madhya Pradesh, the CAT and SAT. Dealt in Constitutional, Tax, Election and other Constitutional matters apart from Civil and Criminal matters. Appointed as Government Advocate in the year 1994 and as Deputy Advocate General of Madhya Pradesh, in the year 1996. Appointed as an Additional Judge of the High Court of Madhya Pradesh on October 18, 2005 and as Permanent Judge on February 02, 2007. Appointed as Acting Chief Justice of the High Court of Madhya Pradesh on June 10, 2019.

Elevated as the Chief Justice of Punjab and Haryana High Court and was accorded farewell ovation in the High Court of M.P., Jabalpur on October 04, 2019.

We, on behalf of The Indian Law Reports (M.P. Series), wish His Lordship a successful tenure as Chief Justice of Punjab and Haryana High Court.

HON'BLE MR. JUSTICE JITENDRA KUMAR MAHESHWARI

Born on June 29, 1961 in Joura, District Morena, Madhya Pradesh. Did LL.B in the year 1985 and thereafter LL.M in the year 1991 from Jiwaji University, Gwalior. Enrolled as an Advocate on November 22, 1985. Practiced on Civil, Criminal, Service, Tax and Constitutional side in the High Court of M.P. and also in Tribunals at Gwalior, Jabalpur and Bhopal. Elected as Member of M.P. State Bar Council in the year 2002. Appointed as Additional Judge of the High Court of Madhya Pradesh on November 25, 2005 and as Permanent Judge on November 25, 2008. Worked as Chairman/Member of various committees in the High Court of M.P..

Elevated as the Chief Justice of Andhra Pradesh High Court and was accorded farewell ovation in the High Court of M.P., Jabalpur on October 04, 2019.

We, on behalf of The Indian Law Reports (M.P. Series), wish His Lordship a successful tenure as Chief Justice of Andhra Pradesh High Court.

FAREWELL OVATION TO HON'BLE MR. JUSTICE R.S. JHA, ACTING CHIEF JUSTICE AND HON'BLE MR. JUSTICE J.K. MAHESHWARI, GIVEN ON 04.10.2019 IN THE CONFERENCE HALL OF THE HIGH COURT OF M.P., JABALPUR.

Hon'ble Mr. Justice Prakash Shrivastava, bids farewell to the Hon'ble Judges:-

It is a historical moment for all of us, being a very rare occasion when two of the eminent Judges are simultaneously going to be sworn-in as the Chief Justices of two important High Courts. Probably it has never happened before in the history of this Court. A very happy and proud moment for all of us.

Hon'ble Shri Justice R.S. Jha has been appointed as the Chief Justice of Punjab and Haryana High Court and Hon'ble Shri Justice J.K. Maheshwari has been appointed as the Chief Justice of Andhra Pradesh High Court.

Both the Hon'ble Judges are going to start a new chapter of their life and take another step forward, in the course of dispensation of justice.

Hon'ble Shri Justice R.S. Jha belongs to a well known family of Jabalpur. He was born on 14th of October 1961. His great-grandfather Raibahadur Pandit Lajja Shanker Jha was an eminent figure in the field of education, who had established Model Higher Secondary School, from where many of us have done schooling. His grandfather, Padmabhushan, Dr. Veni Shanker Jha was an educationalist of exceptional quality, who had rendered his services as Vice Chancellor of BHU, Chairman, M.P. Public Service Commission, Member of Education Commission of India, Member, Royal Commission for Higher Education. One can easily notice, reflection of the high values in Hon'ble Justice R.S. Jha, which he has inherited from his father, grandfather and great-grandfather.

Shri Jha had started his career as an advocate in the office of Hon'ble Justice P.P. Naolekar, now a Retired Judge of the Supreme Court. After appointment as Government Advocate in 1994, till his elevation, Justice Jha had assisted the Court as Government Advocate and then as youngest Dy. Advocate General of that time. He was designated as Senior Advocate in 2003 and elevated as Hon'ble Judge of this Court on 18th of October 2005. After 14 days he will be completing 14 years of his Judgeship. In this journey of rendering justice, he has contributed by delivering important judgments almost in all the fields, be it taxation, education, service or civil. He is true son of this soil and has great affection for the city of Jabalpur. His efforts and contribution in establishing the Dharmshastra National Law University, Jabalpur is well-known to everyone. His in-depth knowledge of *Geeta*, *Ved* and *Purans* has helped him in following the righteous path.

Though, almost 14 years have passed, but, it appears as if he was elevated as Judge of this Court only yesterday. While replying to his ovation on 18.10.2005 he had said:-

"Wherever there is *Dharma*, there is fame and popularity. In other words popularity is a natural consequence of following and upholding *Dharma* and Justice. Popularity has no independent existence."

After quoting Lord Mansfield- he had said:-

"In keeping with these words of wisdom, all my efforts and endeavors would be only towards upholding *Dharma* and serving Justice."

We have no doubt that in these 14 years Hon'ble Justice R.S. Jha has made all possible efforts to uphold *Dharma* and serve justice and has kept his words by acting in accordance with what he said in welcome ovation speech.

We wish him success as the Chief Justice of Punjab and Haryana High Court and further higher responsibility which will be assigned to him.

Another worthy hardworking and able Judge, to whom we are bidding farewell today, is **Hon'ble Justice J.K. Maheshwari**. He was born on 29th of January 1961 at Joura, District Morena (M.P.). He had taken primary and secondary school education at Joura and had obtained bachelor degree of Arts in 1982 and had passed LL.B in 1985 from Jiwaji University, Gwalior. He had also done Master of Laws from Jiwaji University, Gwalior in 1991. He was enrolled as an Advocate on 22nd of November 1985 and had practiced on Civil, Criminal, Service and Constitutional side in the High Court at Gwalior. He was standing counsel for many local bodies and Banks. He was also elected as Member of the State Bar Council of Madhya Pradesh. With his hardwork and dedication, he quickly became an eminent lawyer and was sworn in as Judge of this Court on 25th of November 2005. He has proved himself to be a man of strong conviction and firm decision. He has delivered important judgments in all the fields including Civil, Criminal and Service matters. He is Chairman/Member of various committees in the Court and he has rendered valuable assistance in efficient working of the Court; both on the judicial as also administrative side.

He has participated in West Zone Regional Conference for enhancing the excellence of judicial institutions; challenges and opportunities (November 2016) in association with High Court of Rajasthan and National Judicial Academy; National Conference on Women and Children organized by High Court of judicature at Madras and Tamil Nadu State Judicial Academy in January 2017; World Congress on Justice for Children, 2018 held in UNESCO House, Paris in May 2018 organized by 4th Regional (Western) Round Table Consultation on effective implementation of Juvenile Justice Act, 2000.

As a Judge of this Court, he has disposed off more than 65,000 cases including the orders passed in Division Bench up to December, 2018.

At the time of his elevation as the Hon'ble Judge, while replying to welcome ovation on 25th of November 2005, Hon'ble Shri Justice J.K. Maheshwari had said:-

"I fully realize the truth of the maxim that the merit and moral approach of a Judge should invariably be reflected in his judgments. Undoubtedly, the contents of judgments highlight the caliber of the Judge but it can be possible only by the proper guidance of the members of the Bar…..…further……….when the law reaches the holy hands, justice is given with the spirit of jurisprudence which implies justice to all " without fear or favour".

As all of us have witnessed, that in these 14 years, Hon'ble Justice J.K. Maheshwari has stood true to his words. We all wish him a great success in his future path of journey.

It is a mixed feeling, when we are bidding farewell to the two of our Hon'ble Judges. We are happy because they will be spreading the fragrance of their knowledge, outside the boundaries of this State, but, at the same time somewhere in the corner of our heart, there is a feeling that we will be missing two of our efficient, dynamic and worthy Judges.

On this occasion, I, on my behalf, and on behalf of all brother and sister Judges wish Hon'ble Shri Justice R.S. Jha and Hon'ble Shri Justice J.K. Maheshwari a successful and distinguish career as the Chief Justices of Punjab & Haryana High Court and Andhra Pradesh High Court respectively.

Thank You

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Shri Shashank Shekhar, Advocate General, M.P., bids farewell:-

It is an occasion when we have assembled to bid farewell to My Lord Hon'ble the Acting Chief Justice, Mr. Justice Ravi Shanker Jha on His Lordship having been elevated as the Chief Justice of Punjab and Haryana High Court and also to Hon'ble Mr. Justice Jitendra Kumar Maheshwari on His Lordship's elevation as the Chief Justice of Andhra Pradesh High Court.

Hon'ble Mr. Justice Ravi Shanker Jha, proud son of Late Shri Arun Shanker Jha, was born on 14th of October 1961, in the renowned family of Rai Saheb Pundit Lajja Shanker Jha; a great educationist of his time who founded the famous Government Pundit Lajja Shanker Jha Model School of Excellence, at

Jabalpur. My Lord's grandfather, Padma Bhushan Dr. V.S. Jha, was the Ex. Vice Chancellor of the Banaras Hindu University and also the Chairman of the Common Wealth Education Liaison, London.

My Lord's early education took place in New Delhi and thereafter at the Christ Church Boys School, Jabalpur. After passing Higher Secondary from the St. Aloysious Higher Secondary School, Jabalpur, in the year 1979, Your Lordship obtained a Bachelors Degree of Science in the year 1982 from Government Science College, Jabalpur and subsequently completed his Masters from Jawaharlal Krishi Vishwavidyalaya, Jabalpur, in the year 1983.

My Lord completed his LL.B in the year 1986 from Rani Durgawati Vishwavidyalaya, Jabalpur, and after getting enrolled as an Advocate on 20.09.1986, joined the chambers of the then Advocate and now former Judge of the Supreme Court, Hon'ble Mr. Justice P.P. Naolekar.

The Bar soon witnessed My Lord as a young, assertive and persuasive lawyer and in March 1994, Your Lordship was appointed as a Government Advocate in the Office of the Advocate General of Madhya Pradesh, wherefrom My Lord went on to hold the Office as the youngest ever Deputy Advocate General of Madhya Pradesh from August 1996 to July 2005. My Lord gained vast experience while dealing with countless matters on all sides of Law; be it constitutional, civil or criminal and represented numerous prestigious institutions, corporations, companies and organizations.

It was on 18th of October 2005, that we saw My Lord adorn the seat of Additional Judge of this Hon'ble Court and thereafter as permanent Judge on 2nd of February 2007. From the very first day of Your Lordship's elevation, we have seen Your Lordship's exceptional working style, decision taking capacity, legal acumen and unmatchable intellect, unfailing memory and promptness in going to the root of the legal points involved. Even the overwhelming task of being the Acting Chief Justice was not allowed to affect Your Lordship's judicial duty. Your Lordship is fondly remembered in the Bar for the impartial treatment meted out to them. May it be Senior Advocates or a junior most member of the Bar, the same yardstick has been applied. All had been treated equally. Perennial but majestic flow of warmth, gentility, compassion and justice has been indiscriminate. 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. No wonder, Your Lordship is held in such great reverence and affection by the members of the Bar.

The Bar has also observed Your Lordship's awareness of the problems of the Bar Associations. I had the personal experience of taking advice on crucial Bar problems in difficult times during my tenure as Secretary of the MP High Court

Bar Association. Similarly, Your Lordship solved the problems of many other District Bar Associations. Even while taking tough decisions, Your Lordship has always displayed the qualities of fearlessness and impartiality while maintaining highest standards of integrity.

At this occasion when Your Lordship is at the threshold of carrying the high traditions of this High Court and the outstanding qualities of your great family to the States of Punjab and Haryana, I, on behalf of the Government of Madhya Pradesh, the Office of the Advocate General and all Law Officers of the State of Madhya Pradesh, as well as on my own behalf, wish Your Lordship and your family ALL THE BEST. I sincerely wish Your Lordship reaches to further heights in the judiciary.

We bid a very fond farewell to **Hon'ble Mr. Justice Jitendra Kumar Maheshwari** on His Lordship's elevation as the Chief Justice of the Andhra Pradesh High Court. Parting moments bring in a heavy atmosphere but the present moments are also full of contentment, happiness and sparkling hope for a bright future. Though My Lord is leaving us but the members of the legal fraternity are extremely happy on Your Lordship's elevation.

Hon'ble Mr. Justice Jitendra Kumar Maheshwari was born on 29th of June 1961. My Lord obtained his Bachelors Degree of Arts in the year 1982 and his Bachelors Degree in Law in the year 1985. Thereafter, My Lord went on to complete his Master in Laws also from the Jiwaji University, Gwalior. My Lord was enrolled as an Advocate on 22nd of November 1985 and practiced on Civil, Criminal, Service and Constitutional sides of law with equal mastery at the Gwalior Bench of the High Court of Madhya Pradesh.

As a lawyer Your Lordship had a very lucrative practice. Your soothing smile, sweet encouraging and gentlemanly personality, humanitarian conduct had won over everyone who happened to meet you. Your blissful touch turned the tides. The Bar welcomed Your Lordship joining the galaxy of legal luminaries as an Additional Judge of this Hon'ble Court on 25th of November 2005 and thereafter as Permanent Judge on 25th of November 2008.

During the illustrious career, My Lord has headed various Committees as Chairman in the High Court of Madhya Pradesh. Your Lordship has done extraordinary work on the Administrative Committee No. 1, Finance Committee, Library Committee, Juvenile Justice Committee and most importantly, the Building Construction and Maintenance Committee of the High Court. The upcoming magnificent building for the District Court at Indore is a testament to that. Apart from this, Your Lordship has been participating in various National and International Conferences on Women and Child Welfare which demonstrates

Your Lordship's deep concern for the well being and deliverance of justice to the women and children. Presiding over innumerable Lok Adalats, Your Lordship disposed a large number of cases while holding Pre-Sittings for weeks together, running late into the night. My Lord has disposed more than 65,000 cases which speak volumes about his hard work.

Over all, 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. Lawyers might have lost the case but came out of the Court contended and smiling having got more than they ever expected. 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 is adored in the Bar and has won over the hearts of every human being who came in contact with Your Lordship.

In fact, during Your Lordship's tenure as a Judge in this High Court, the Bar has experienced Your Lordship's great respect, affection and concern for its Members. Simplicity, nobility, cordiality and emotional attachment with the Members of the Bar would be immensely remembered while the Bar would miss you deeply.

My Lord is blessed with a wealth of experience, vast knowledge of law, an almost inexhaustible fund of patience, tolerance and compassion and above all what lawyers always appreciate in a Judge, unfailing courtesy, affection and regard to the Bar.

I, on behalf of the Government of Madhya Pradesh, the Office of the Advocate General and all Law Officers of the State of Madhya Pradesh, as well as on my own behalf, wish Your Lordship a singularly illustrious and successful tenure as Chief Justice of the Andhra Pradesh High Court and further earnestly wish Your Lordship achieves even higher positions in the judiciary.

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

श्री आर0 एस0 झा :–

1. आदरणीय रवि शंकर झा इस नगर की ही नहीं प्रदेश की शान है। जबलपुर जिसे विनोबा जी ने संस्कारधानी नाम रखा था, में जन्मे, राय साहिब पं0 लज्जा शंकर झा के परिवार से आये है।

2. इस न्यायालय से बाहर जाते ही लज्जा शंकर मॉडल हाई स्कूल नजर आता है, यह इसी परिवार की देन है। एल0एल0बी0 भर्ती से लेकर यूनिवर्सिटी तक आपके परिवार की हैसियत बनी।

3. श्री झा सा0 सन् 1986 में अधिवक्ता बने, वे श्री पी0पी0 नावलेकर सा0, रिटायर्ड सुप्रीम कोर्ट जज के जूनियर थे।

4. श्री रवि शंकर झा साहब ने शासकीय अधिवक्ता, डिप्टी एड0 जनरल के पद को सुशोभित किया, आप सबसे कम उम्र में शासकीय पदों पर रहे, आप 2005 में जज बने और आज चीफ जस्टिस होकर जा रहे हैं। आप हमारे उच्च न्यायालय में एक्टिंग चीफ जस्टिस रहे।

आप सभी विधिक गुणों से सम्पन्न हैं, आप से हमारी न्यायधानी गौरवान्वित होगी कि इस उच्च न्यायालय से हमारे लोकप्रिय न्यायमूर्ति, मुख्य न्यायाधिपति इस कम उम्र में होने जा रहे हैं। हम श्री रवि शंकर झा साहब को एक अच्छे मुकाम में पदस्थ होने के लिए बधाई देते हुए विदाई देते हैं।

श्री जे0 के0 माहेश्वरी :–

1. जीवाजी यूनिवर्सिटी में विधि स्नातक होने के बाद 1985 में अधिवक्ता बने।

2. न्यायमूर्ति सन् 2005 में बने।

3. बार में आकर हमेशा हर विषय में लेक्चर देते रहे थे अधिवक्ता बहुत प्रभावित होते थे, शाम 5 बजे भी भीड़ होती थी।

4. श्री माहेश्वरी साहब वकीलों की नजरों में रिलीफ जज माने जाते थे।

5. उनकी मधुरता के हम कायल थे।

6. हमने एक शेरदिल, विद्वान, न्यायप्रिय न्यायमूर्ति को खोया और आज विदा कर रहे हैं पर खुशी इस बात की है कि हमारे जज की काबिलियत को उच्च स्तरीय न्यायिक कमेटी ने स्वीकार किया एवं इस इनसाइक्लोपीडिया पर्सनैलिटी श्री माहेश्वरी सा0 को हम विदा कर भी प्रसन्न हैं कि हमारी संस्कारधानी ने एक और चीफ जस्टिस बनाया है, म0प्र0 उच्च न्यायालय गौरवान्वित है।

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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 Ravi Shanker Jha, the Acting Chief Justice, Madhya Pradesh High Court, and Hon'ble Shri Justice J.K. Maheshwari, Judge, Madhya Pradesh High Court as both of their Lordships have been appointed as Chief Justice of Punjab & Haryana High Court and Andhra Pradesh High Court respectively and would be adorning the high office of Chief Justice shortly.

My Lord **Justice Ravi Shanker Jha** was born on 14th of October 1961 in the renowned Jha family of Jabalpur, a family of educationists and scholars. His

great-grandfather Rai Bahadur Pundit Lajja Shankar Jha was a legend in the field of Education and established the Model Higher Secondary School of Excellence, Jabalpur, which was later on named after him. His grandfather, Padma Bhooshan, Dr. Veni Shankar Jha was a renowned educationist of international repute, and held various prestigious high offices in his life time.

My Lord Justice Ravi Shanker Jha did his schooling from prestigious schools in Delhi and Jabalpur, passed his Higher Secondary from Saint Aloysius Higher Secondary School, Jabalpur in 1979. My Lord did his Graduation in Science from Government Model Science College, Jabalpur in 1982, pursued Post Graduation in Agriculture Science for one year only to realise that his true calling in life was in the field of Law, which led him to Graduation in Law in the year 1986 from the University Teaching Department, Rani Durgawati Vishwavidyalaya, Jabalpur.

My Lord Justice Ravi Shanker Jha got enrolled as an Advocate on 20.09.1986 and joined the office of Hon'ble Shri Justice P.P. Naolekar (a leading advocate at that time), who later adorned the high offices of Judge, Supreme Court and Lokayukta, Madhya Pradesh.

In the profession of Law, My Lord Justice Ravi Shanker Jha made a mark for himself rather early in his career; he was appointed as Government Advocate in 1994 and as youngest Deputy Advocate General in the year 1996. He defended the State in important Constitutional, Tax, NSA matters and Election Causes. My Lord also represented various Government and Semi Government Organizations and PSUs. My Lord was designated as a Senior Counsel on 26.04.2003.

My Lord Justice Ravi Shanker Jha was elevated and appointed as Additional Judge on 18th of October 2005 and as Permanent Judge on 2nd of February 2007 of the High Court of Madhya Pradesh. My Lord was appointed as the Acting Chief Justice of the High Court of Madhya Pradesh on 10th of June 2019.

My Lord Justice Ravi Shanker Jha during his long and illustrious tenure as Judge of this High Court has authored various Judgments which adorn the Law Journals. The passion and energy with which My Lord dealt with Environmental Causes has been truly remarkable and would be cherished and remembered, not only by members of the Legal profession but also by the citizens of Madhya Pradesh.

My Lord Justice Ravi Shanker Jha has been a keen sportsman all his life, which quality of sportsmanship shall hold him in good stead in his career march to higher offices and glory.

On behalf of High Court Advocates' Bar Association and on my own behalf, I wish Godspeed to Hon'ble Shri Justice Ravi Shanker Jha in all his future assignments and endeavours.

I wish Hon'ble Shri Justice Ravi Shanker Jha, Mrs. Jha and all his family members happiness, peace and good health.

My Lord **Hon'ble Shri Justice J.K. Maheshwari** was born on 29th of June 1961 in Joura, Distt. Morena in an illustrious and renowned family, full of community leadership. Legal approach, compassion and righteousness are the foundation of samskars received by My Lord from his parents.

My Lord Hon'ble Shri Justice J.K. Maheshwari after completing his school education from Joura, did his Graduation in Arts from MLB Arts and Commerce College, Gwalior. My Lord did his graduation and post-graduation in Law from the same institution, and for some time pursued research in Law at the University level. This academic background clearly indicated a career in academics in Law, but My Lord chose the active and dynamic field of legal practice and enrolled himself as an Advocate on 22.11.1985.

My Lord Hon'ble Shri Justice J.K. Maheshwari joined the chamber of Hon'ble Shri Justice R.C. Lahoti (as he then was a leading and renowned Advocate), and who later adorned the high office of the Chief Justice of India. My Lord Justice J.K. Maheshwari after elevation of Hon'ble Shri Justice R.C. Lahoti, continued in the same chamber under the able guidance of his younger brother Hon'ble Shri Justice K.K. Lahoti, who was later elevated as Judge of this High Court and was also Acting Chief Justice.

My Lord Hon'ble Shri Justice J.K. Maheshwari after starting his independent practice, soon established himself as a leading Advocate of his time and worked in all fields with equal finesse and expertise. It is this hard work and knowledge of all branches of Law that has been a unique hallmark of My Lords' persona both as an Advocate and as a Judge.

My Lord Hon'ble Shri Justice J.K. Maheshwari has been elected office bearer of High Court Bar Association, Gwalior, being it's Secretary in the 1998-99 term. My Lord has been elected as Member, Bar Council of Madhya Pradesh, in which capacity My Lord has been instrumental in various welfare measures for Advocates. My Lord also was Member of the Advisory Committee of Mahatma Gandhi Law College, Gwalior.

It is thus apparent that My Lord Hon'ble Shri Justice J.K. Maheshwari as an Advocate, besides devoting time to his busy law practice has served and contributed to the Legal Profession in various capacities.

My Lord Hon'ble Shri Justice J.K. Maheshwari was elevated and appointed as an additional Judge on 25th of November 2005 and as Permanent Judge on 25th of November 2008 of the High Court of Madhya Pradesh.

My Lord during his long tenure as Judge of this High Court has been a prolific decision maker, and has been instrumental in deciding more than 65,000 cases, in all fields of Law. His Lordship has very actively participated in Lok Adalats and has disposed a large number of cases. What really further qualifies this great achievement is not merely numbers, but the persistent quest to do substantial justice. No cause has been too small for My Lord in devoting his fullest attention, without being influenced by the stakes involved for the parties. It is this approach, coupled with an abundance of energy and keenness to deal and decide matters expeditiously, which has endeared My Lord to all the Members of Bar. A large number of judgments rendered by My Lord adorn the Law Journals to posterity as a testament of your Lordship's hard work, scholarship and incessant quest for expeditious disposal of cases.

On the Administrative side, My Lord has been instrumental in bringing about overhaul of the infrastructure, in the form of new and large Court buildings throughout the State. My Lord has been part of various committees and has been serving the cause of justice in all spheres of legal administration; besides being part of various national level conferences wherein he has been representing this High Court, and has established a well-deserved and well-earned reputation of a keen performer. The welfare of the legal profession has been the hallmark of the Judgeship of My Lord.

On behalf of High Court Advocates' Bar Association and on my own behalf, I wish Godspeed to Hon'ble Shri Justice J.K. Maheshwari, in all his future assignments and endeavours.

I wish Hon'ble Shri Justice J.K. Mashehwari, Mrs. Maheshwari and all his family members happiness, peace and good health.

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

न्यायमूर्ति श्री रवि शंकर झा जबलपुर के न्यायिक परिवार से जुड़े थे। आपने दिल्ली और जबलपुर में शिक्षा प्राप्त की और 20.09.1986 में राज्य अधिवक्ता परिषद् में नामांकित होकर माननीय न्यायमूर्ति श्री पी. पी. नावलेकर के सानिध्य में वकालत शुरू की। तमाम शासकीय विभागों एवं पक्षकारों के अधिवक्ता के रूप में काम किया और एक कुशाग्र अधिवक्ता के रूप में व न्यायाधिपति बनने के बाद कुशाग्र न्यायाधिपति के रूप में जाने जाते थे। धर्मशास्त्र विश्वविद्यालय के वर्तमान स्वरूप को प्रदान

करने के लिये आपकी अग्रणी भूमिका रही। मध्यप्रदेश का न्यायिक जगत आपकी मुख्य न्यायाधिपति के रूप में नियुक्ति होने पर काफी हर्षित है और आपको उच्चतम न्यायालय के न्यायाधिपति के रूप में जल्द ही नियुक्त होने की कामना करता है। आपके मुख्य न्यायाधिपति के रूप में पंजाब एण्ड हरियाणा में नियुक्ति होने पर मैं अपनी ओर से व राज्य अधिवक्ता परिषद् की ओर से बधाई व शुभकामना देता हूं व उज्ज्वल भविष्य आपका हो, ऐसी प्रार्थना करता हूं।

न्यायमूर्ति श्री जितेन्द्र कुमार माहेश्वरी ने मुरैना जिले के जौरा ग्राम के साधारण परिवार से इस मुकाम को हासिल किया वे बधाई के पात्र हैं। अधिवक्ता के रूप में व हमारे राज्य अधिवक्ता परिषद् के सदस्य के रूप में उनका प्रभावी कार्यकाल रहा जो मध्यप्रदेश का न्यायिक जगत सदैव याद रखेगा। न्यायाधिपति के रूप में नियुक्त होने के बाद, उच्च न्यायालय की कई समितियों में कार्य किया लेकिन मुख्य रूप से राज्य अधिवक्ता परिषद् के नये भवन के व उच्च न्यायालय के विस्तार के शिल्पी के रूप में आपको याद किया जायेगा। मध्यप्रदेश से उच्चतम न्यायालय में न्यायाधिपति के रूप में आप जल्द प्रतिनिधित्व करें, ऐसी मध्यप्रदेश का न्यायिक जगत प्रार्थना करता है।

मध्यप्रदेश के न्यायिक जगत को इस समय उल्लास के साथ निराशा भी है। आप लोगों के जाने के बाद 23 न्यायाधिपति तमाम उनके संसाधनों के होने के बाद भी पदस्थ नहीं है। मुख्य न्यायाधिपति की नियुक्ति में जिस तरह का घटनाक्रम हुआ, उससे निराशा और बढ़ी है। मध्यप्रदेश उच्च न्यायालय में 3.5 लाख प्रकरण लंबित है व औसतन 14–15 हजार प्रकरण हर माह दायर होते हैं और करीब 12–13 हजार प्रकरण निराकृत हो पाते हैं। औसतन हर माह 2–3 हजार प्रकरण इस 3.5 लाख की संख्या में जुड़ता जा रहा है। न्यायिक जगत इन प्रकरणों के निराकरण की आशा से न्यायपालिका की ओर देखता है लेकिन दुर्भाग्य यह है कि विगत 10 सालों से न्यायाधिपतियों की नियुक्ति पूर्ण स्वीकृत पदों की संख्या में कभी नहीं रही। अधीनस्थ न्यायालयों से प्रकरण के निराकरण के बाद अपीलों के न निपटने पर दीवानी प्रकरणों का दायरा समाप्त हो रहा है व आपराधिक प्रकरणों में न्यायालय के बाहर निराकृत कराने की प्रवृत्ति बढ़ रही है जो न्यायिक जगत के लिये अच्छी नहीं है। राज्य अधिवक्ता परिषद् आप दोनों न्यायाधिपतियों से आशांवित होकर यह कह रही है कि आप मुख्य न्यायाधिपति के रूप में या उच्चतम न्यायालय के न्यायाधिपति के रूप में पदस्थ होने की स्थिति में निराकरण की प्रक्रिया निर्धारित करेंगे। मध्यप्रदेश उच्च न्यायालय के न्यायाधिपतियों की नियुक्ति विगत समय में भेजे गये नामों को जिस ढंग से वापस किया गया है उसे देखकर न्यायाधिपतियों के नाम भेजने की प्रक्रिया ही मध्यप्रदेश मे बंद है, इससे न्यायिक जगत चिंतित है। हमारे प्रदेश में हिंदी भाषी लोग रहते है। अंग्रजों से भारत जब आजाद हुआ तो संविधान निर्माताओं ने संविधान का अनुच्छेद 348 बनाने के बाद विधायिका ने अनुच्छेद 349 बनाया है। उसके पीछे मंशा यह थी कि 15 वर्ष में 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 में स्वीकार कर चुके है। मध्यप्रदेश एवं बिहार ने एक कदम आगे जाकर हिन्दी की याचिकायें भी लगाने की अनुमति दे दी है। लेकिन इन प्रयासों के बाद भी 72 साल की आजादी के बाद राष्ट्र भाषा को हम वांछित बढ़ावा नहीं दे रहे हैं। आप के सामने यह तथ्य इसलिये राज्य अधिवक्ता परिषद् रख रही है कि हिन्दी को बढ़ावा दिया जाना चाहिये। हमारे देश की पुरानी न्याय प्रणाली क्षेत्रीय भाषाओं मे संचालित होती थी। हमारे प्रदेश में जो छोटे छोटे राज्य थे उन्होंने अपनी क्षेत्रीय भाषाओं में कानून बनाये थे। जैसे हमारे स्वयं के जिले में मध्यप्रदेश भू–राजस्व की जगह रीवा राज्य माल कानून व अन्य कानून बघेलखण्डी भाषा में निर्मित थे और तब भी न्याय प्रणाली अच्छे ढंग से काम करती थी। हमेशा जो सबकी समझ में आये उसी भाषा में कानून होना चाहिये, व उसी भाषा में न्याय होना चाहिये और उसी भाषा का जानकार न्यायाधीश चाहिये, ये समय

की मांग है । इस अवसर पर दो विद्वान विभिन्न उच्च न्यायालय के मुखिया बनके जा रहे हैं, उनसे इस आशा में, इस विषय में वे विचार कर अपने प्रभाव का प्रयोग कर इस सोच को आगे बढ़ाने का कार्य करेंगे, इस आशा से यह धृष्ट्ता मैंने की है। पुनः आप दोनों न्यायाधिपतियों को स्वयं की ओर से व राज्य अधिवक्ता परिषद् की ओर से उज्ज्वल भविष्य की कामना करते हुये मॉ दुर्गा से यह कामना करता हूं कि आप दोनों को भारत की शीर्ष न्यायालय के शीर्ष न्यायाधिपति के रूप में स्थापित करें।

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Shri Jinendra Kumar Jain, Asstt. Solicitor General, bids farewell :-

विगत कुछ दिन पूर्व समाचार प्रकाशित हुआ कि म.प्र. उच्च न्यायालय के वरिष्ठ न्यायाधीश श्री रवि शंकर झा एवं श्री जे. के. माहेश्वरी जी को मुख्य न्यायाधिपति के पद पर पदोन्नत करने का निर्णय कॉलेजियम द्वारा लिया जा चुका है, तभी से इस शुभ घड़ी का इंतजार था। आज जब पूरे भारतवर्ष में जगत जननी मॉ दुर्गा के अवतार को बुराई पर अच्छाई, अंधकार पर प्रकाश, असत्य पर सत्य की विजय को हर्ष और उल्लास के साथ मनाया जा रहा है, ऐसे समय में यह शुभ अवसर प्राप्त हुआ है।

आज से 58 वर्ष पूर्व मॉ नर्मदा के अंचल में जबलपुर के प्रसिद्ध 'झा' परिवार में स्व. श्री अरूण शंकर झा को अन्याय पर न्याय की जीत के प्रतीक स्वरूप पुत्र रत्न की प्राप्ति हुई। जिस परिवार में स्व. श्री लज्जा शंकर झा, स्व. श्री अरूण शंकर झा, स्व. श्री पद्‌मभूषण डॉ. व्ही. एस. झा जैसी विभूतियों ने गौरव प्रदान किया है, उनके संस्कार श्री रवि शंकर झा को विरासत में प्राप्त हुये, जिसे पल्लवित करने का श्रेय परिवार को प्राप्त होता है।

सन् 2004 में जब वरिष्ठ अधिवक्ता श्री रविनन्दन सिंह का महाधिवक्ता के रूप में प्रदेश सरकार ने चयन किया और श्री सिंह साहब ने अपनी टीम तैयार की, उस समय टीम के सदस्य के रूप में श्री रवि झा से निकटता हुई, दोपहर में चाय के समय जब सभी लॉ ऑफीसर एक साथ चाय का आनन्द लेते थे उस समय भी आप अपने चैम्बर में केसों की तैयारी करते थे, जब कभी विशेष बात होती थी तब आपको चैम्बर से बुलाना पड़ता था।

अक्टूबर माह का विशेष महत्व श्री रवि जी के जीवन से जुड़ा हुआ है। 14 अक्टूबर 1961 में जन्म, सन् 1986 में सितम्बर माह में पंजीयन के पश्चात्, अक्टूबर 86 से वकालत प्रारम्भ की, 18 अक्टूबर 2005 में न्यायाधिपति के गरिमामय पद पर आसीन हुये, और अब अक्टूबर 2019 को संस्कारधानी का यह सितारा प्रदेश के बाहर अन्य प्रदेशों में सूरज की किरणों के माध्यम से न्याय की ज्योति जलाकर प्रदेश का गौरव बढ़ायेंगे।

इस अवसर पर मैं न्यायाधिपति श्री जे. के. माहेश्वरी का स्वागत, वंदन, अभिनंदन करते हुये बधाई देता हूँ।

श्री माहेश्वरी जी ने ऐतिहासिक नगरी ग्वालियर से कला एवं विधि में स्नातक एवं विधि में स्नातकोत्तर की उपाधि अर्जित कर सन् 1985 से विधि के विभिन्न आयामों में वकालत प्रारम्भ की, पश्चात् कठोर परिश्रम करते हुये योग्य मार्गदर्शन के साथ एक एक कदम आगे बढ़ाते हुये अपने व्यक्तित्व को निखारते हुये अधिवक्ताओं, पक्षकारों एवं न्यायाधीशों के बीच ख्याति अर्जित कर प्रगति के पथ पर आगे बढ़ते हुये दक्षता प्राप्त की, फलस्वरूप 25 नवम्बर 2005 को आपका चयन म.प्र. उच्च

न्यायालय में न्यायाधिपति के गौरवशाली पद पर हुआ एवं चयन के पश्चात् ग्वालियर खंडपीठ पर न्यायाधिपति के आसन पर आसीन हुये। न्यायाधिपति के पद का निर्वहन करते हुये प्रबंधन एवं न्यायिक प्रक्रिया से जुड़ी अनेक समितियों को नेतृत्व प्रदान करते हुये उनका सफलतापूर्वक संचालन एवं सम्पादन किया, जिनमें प्रमुखतः न्यायिक सेवा, वित्त, क्रय एवं भुगतान एवं लायब्रेरी से संबंधित हैं। आपकी प्रतिभा का लाभ विगत वर्षों से मुख्यपीठ जबलपुर को हो रहा है। जिससे अनेक महत्वपूर्ण प्रकरणों का निराकरण आपके द्वारा सूझबूझ एवं न्यायिक गरिमा को बनाये रखते हुये किया गया।

आज हम सभी आनंदित हैं कि योग्य व्यक्तियों का चयन किया गया जो प्रदेश के बाहर अपने व्यक्तित्व एवं कृतित्व से प्रदेश का मान बढ़ायेंगे। प्रसन्नता के साथ हमें खेद भी है कि दो महान् विभूतियों के अनुभव एवं ज्ञान के लाभ से हम वंचित रहेंगे लेकिन हम आशा करते हैं, यहाँ से जाने के पश्चात् भी जबलपुर संस्कारधानी की माटी से एवं बार से आपका सम्बंध बना रहेगा।

संस्कारधानी एवं ऐतिहासिक नगरी ग्वालियर से शिक्षित संस्कारित, वरिष्ठ अधिवक्ताओं के मार्गदर्शन में वकालत के बीज मंत्रों से शिक्षित होकर, हाईकोर्ट बार के सदस्यों की निकटता एवं आत्मीयता के साथ निरंतर आगे बढ़ते हुये लक्ष्य को प्राप्त करने के पश्चात् अब संस्कारधानी से विदा लेने का अवसर आ गया है।

इस अवसर पर मैं अपनी ओर से, भारत सरकार की ओर से, केन्द्रीय विधि अधिकारियों की ओर से हृदय से बधाई देता हूँ और आशा करता हूँ शीघ्र ही वह अवसर आवेगा जब प्रगति के पथ का यह पहिया प्रगति के सिलसिले को कायम रखते हुये भारत के उच्चतम न्यायालय तक पहुँचकर सम्पूर्ण भारत को न्याय की किरणों से आलोकित करेगा।

'जय–भारत'

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Shri Umakant Sharma, Sr. Advocate, Representative, Senior Advocates' Council, bids farewell:-

My Lords, today we have assembled here to convey our best wishes to Hon'ble Acting Chief Justice Shri R.S. Jha and Hon'ble Justice Shri J.K. Maheshwari who are proceeding to take charge of their new assignments as Chief Justice of prestigious High Courts, namely, P&H High Court and A.P. High Court.

My Lord, **Hon'ble Justice R.S. Jha** was sworn in as a Judge of this High Court on 18th of October 2005. He has a tenure of almost 14 years and now the time has come when he is leaving us for his new assignment. Justice R.S. Jha has a very pleasing personality and is liked by one and all. He has treated the lawyers with utmost politeness and was also very kind to the junior advocates. Justice R.S. Jha during his tenure has passed several landmark judgments settling difficult propositions of law.

Hon'ble Justice R.S. Jha was born in an eminent family of educationists and social reformers of Central India. He is the grandson of Rai Saheb Pandit

Lajja Shanker Jha who was the founder of the Model School of Excellence, Jabalpur.

Hon'ble Justice R.S. Jha had a very eminent career as a lawyer of this Court. He has also been a very keen sportsman taking interest in sports tournaments and activities. He was the youngest Deputy Advocate General of M.P.. Hon'ble Justice R.S. Jha also took extra pains on the administrative side of the High Court of M.P. and has taken landmark decisions on the administrative side.

My Lord, **Hon'ble Justice J.K. Maheshwari** was appointed as a Judge of this High Court on 25th of November 2005. Prior to his elevation as a Judge of this Court, My Lord practiced as a lawyer in the Gwalior Bench of this High Court. Hon'ble Justice J.K. Maheshwari has given very able leadership to several administrative committees and has continuously worked for the upliftment of the justice delivery system keeping in mind the requirements of the weaker sections of the society. My Lord, Hon'ble Justice Maheshwari has passed a catena of judgments in plethora of cases on wide ranging subjects and different laws. He has decided cases by adopting a summary procedure to dispense justice very effectively.

My Lord, Hon'ble Justice Jha and Hon'ble Justice Maheshwari's tenure in this High Court has been stellar. They have disposed off cases of all types, in large numbers, without compromising with the quality of judgments. The legal fraternity of Jabalpur is losing two very hardworking Judges who have continuously worked and decided cases.

Hon'ble Justice Jha and Hon'ble Justice Maheshwari have accumulated vast amount of knowledge and experience in the legal field. The gain of P&H High Court and Andhra Pradesh High Court is a loss of this Court and its lawyers.

Hon'ble Sirs, as one tenure ends, another begins. Enjoy your new tenure in the respective High Courts. You will always be remembered for your accomplishments. Thanks for your years of hard work and dedication because of which this institution has been greatly benefitted. On behalf of the Senior Advocates' Council and on my own behalf, I wish Your Lordships a very happy tenure in your new assignment.

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Farewell speech delivered by Hon'ble Mr. Justice Jitendra Kumar Maheshwari :-

I feel grateful and honoured for the kind and generous words spoken about me on my elevation as Chief Justice of Andhra Pradesh High Court. On this occasion, I am full of confidence much less feel proud to get an opportunity to serve this prestigious High Court of Madhya Pradesh, which has a glorious history and from where the eminent jurists have emerged.

First of all, I convey my deepest regards to the members of the Collegium of Hon'ble the Supreme Court to recommend my name as Chief Justice. It is my trust that the feelings of needy, weaker and downtrodden sections to whom a Judge dispense justice, plays a pivotal role to achieve the destination and satisfaction. The support of my esteemed sister and brother Judges, has also been a pillar of strength for me. Similarly, for the cooperation and cordial behavior of the members of Bar to uplift the functioning of my Court with the assistance of Court staff to pave my path, I convey my thanks and regards.

Today, I am overwhelmed and have a mixed feeling of joy and emotions, which can't be expressed in words. My heart is filled with emotions and memories implanted in my mind, speaks volumes of affection showered by the members of legal fraternity. However, I want to be here with all of you, whenever possible, with whom I spent best part of my life.

In my old days of joining the Bar as an Advocate under the able guidance of my senior Hon'ble Shri Justice R.C. Lahoti, Former Chief Justice of India, who gave the guidance that "live like a hermit and work like a horse" which would fill your ambitions and pave the path of success.

Friends, Gwalior remained my "Karm Bhumi" during Advocacy, which made me strong and I learnt how to achieve my ambitions. My sincere thanks and regards to the members of the Gwalior Bar who reposed faith in me and always remained unconcerned, in discharging my duties as Judge.

After my elevation as Judge, immediately after two weeks, I was shifted to Indore Bench of this Court. The members of the Bar at Indore were exceedingly well in my initial days of Judgeship. They were always polite, courteous and well-prepared, which gave me the shape, what I am today, I am grateful and convey my gratitude.

The members of Bar at Principal Seat, Jabalpur made me strong on the legal issues on account of their competence, fearlessness and developed me as a person as well as a Judge to live up to their expectations. I feel that if the Bar is good and strong, it will undoubtedly manifest the same quality to the Bench, my sincere gratitude to them.

For upliftment of justice delivery system, the lawyers and the Judges are its integral part. No Judge can be a great Judge unless the Bar has great lawyers, simultaneously no lawyer can be a great lawyer unless the Court has great Judges. Thus, to uplift each other and to flourish their knowledge, thinking and vision, their cooperation is required. It is a time when the lawyers must be equipped and trained to appear before the Court where the Judges are providing rigorous trainings and updated knowledge, however, training to them is essentially required. Upon the training, while working under the guidance of the senior they may achieve proficiency in the legal field by which the litigant may be benefitted which is the ultimate object to justice delivery system. At this occasion, I remember few words of Abraham Lincoln made in his law lecture dated 1.7.1850.

"Let no young man choosing the law for a calling for a moment yield to the popular belief-resolve to be honest at all events; and if in your own judgment you cannot be an honest lawyer, resolve to be honest without being a lawyer".

Now it's a time to express my gratitude to those who assisted me in discharging my pious duties. My deepest regards to all of them for their fullest cooperation including my personal staff.

I acknowledge the blessings of my late father and late elder brother, who was a fatherly figure to me and shaped me as a lawyer by his professional competence. I was guided by my mother since childhood who always advised me to work hard in discharging of the duties with devotion and honesty. It is my good fortune that my mother is with me and I convey my regards to her with the following words :-

''जला के रखा है दिया तेज हवाओं पर,
मुझे ऐतबार है मेरी माँ की दुआओं पर।''

She has always preached me "work for work's sake, worship for worship's sake, do good because it is good to do good. Ask no more."

At this stage, I acknowledge the blessings of my elder brothers and other family members who always stood behind me and supported in discharge of my duties without fear and favour. My sincere thanks to my wife Smt. Uma Maheshwari, who always stood by me even during my struggling days and also to my children Manu and Diksha, without their support, I would not have achieved, what I have today.

At this juncture, it is my duty to acknowledge the valuable support and services rendered by the Registry staff, Doctors at Jabalpur, Gwalior and Indore and particularly my personal and protocol staff, who remained associated with me and worked untiringly with me for hours together. I am thankful to all from the bottom of my heart.

During my working as an Advocate and as a Judge, I got the opportunity to become a part of High Court of Madhya Pradesh, I will genuinely miss it but I have the memories with you and the valuable skill you have given to me due to which I could gain the wealth of knowledge, which I will have as treasure forever.

''कुछ ऐसे भी तिनके हैं नशेमन के,
बरक जिन्हे जला नहीं सकती,
खूने दिल से जो दीये जलते हैं,
आंधी उन्हें बुझा नहीं सकती।''

At last, I end up with well known rhyme of renowned poet Robert Frost that: "Miles to go before I sleep, miles to go before I sleep."

Thanking you all.

Jai Hind.

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Farewell speech delivered by Hon'ble Mr. Justice Ravi Shanker Jha, Acting Chief Justice :-

It is my proud privilege of being associated with this Institution for the last more than 33 years, first as an Advocate and then 14 years as a Judge. I was introduced to this profession by my Senior Shri Justice Naolekar and I was taught a lot of things by the stalwarts in the Bar at that time including Senior Advocates Shri Rajendra Singh, Shri Y.S. Dharmadhikari, Shri R.P. Verma, Shri M.M. Sapre, Shri Justice D.M. Dharmadhikari and several others, some of them who are present here today, including Senior Advocates Shri S.C. Datt, Shri Surendra Singh, Shri Ravish Agrawal, Shri R.N. Singh, Mrs. Nair and several others.

The profession of Advocacy is not taught in schools and colleges and it is being my experience that I learnt it here in the corridors of this Court from these stalwarts and it is from them that I learnt not just the ropes but also the intricacies of law and more importantly the intricacies of Advocacy. I am extremely grateful and thankful to all these seniors and this Institution for grooming me in this profession. I have always, since the very beginning, believed in the two great formulas and principles that have been adopted by this Country, first as its motto and second as motto of the Supreme Court and that is *Satya Mev Jayate* and *Yato Dharmastato Jaya* and I am grateful to Shri Justice Prakash Shrivastava for reminding me that at the time of my oath, I had in fact quoted from the *Mahabharat* and had in fact warned the Bar that I would not be one of those who would be seeking popularity or wanting to become a popular Judge but one who would try his level best to tread the path of *Dharma* because it is and it has always

been my belief that if you tread the path of *Dharma*, popularity and fame follows you.

I am extremely proud of the legacy of this Institution and have seen the respect to this Institution as amongst all the other Courts in this Country, so it has throughout been my endeavor to persuade my young friends in the Bar to strive harder and harder.They should be inspired by these great lawyers of this Institution and should learn from them to work hard. Advocacy is not just collecting and preparing cases and appearing in the Courts. It is about learning the law; it is about understanding the intricacies of law; it is about understanding and learning the intricacies of Advocacy. My dear friends, in my entity as a Judge and because of my experience as a Judge, I find that my young friends in the Bar are not working hard. It is my request to them that they draw inspiration from these great seniors of this greatest Institution to work hard so that, not just for yourself but for this Institution you are able to maintain, if not raise the name of this Institution of the Country. In the Bible there is a saying that, "*if you sow tears and sweat; you reap joy and success"*. Without hard work you will not be able to do that; and hard work towards the legal profession is not just collecting cases and appearing in the matters before the Court. There is an old saying that:

"हमसफर मिलती है मंजिल, ठोकरें खाने के बाद।
रंग लाती है हिना, पत्थर पर पिस जाने के बाद।"

You have to work hard, only then you will be able to enjoy this profession and you will be able to assist people in delivering justice here and raising the Bar at this wonderful Institution as there are thousands and thousands of advocates all over, running about from morning to evening. You will find advocates running about in the corridors, attending to their cases, drafting and other works, but their efforts go in vain. You have to be somebody who is outstanding. You have to draw inspiration from the great seniors to become good. There is another old *Sher* of Ghalib:

"रगों में दौड़ते फिरने के हम नहीं क़ायल।
जब ऑख से ही न टपका तो फिर लहू क्या है।"

We are running about in the corridors showing somebody that your working is not going to help you unless and until you are that *Aankh Se Na Tapka Lahu,* you have to work that hard.

It is my sincere request to all of you, the Institution tried to train advocates, I would like to say, we have tried to do it. I don't know whether we have succeeded to any extent or not but this is an attempt by the Administration, it is never going to bear fruits unless and until the attempt comes from you; you have to become better; you have to strive to become better. It is my request to you, do something about this. Make sure that there is no decline in the status and high office of this

Institution. All this is little off the track, but I thought, since this is the only opportunity that I am going to get, so thought of talking to you.

I must say this, I have been extremely fortunate to have had wonderful colleagues as Judges and I have learnt a great deal from them. As an Acting Chief Justice, I have been able to discharge my duties only because of the able advice and assistance of all my brother Judges. I thank them for this wonderful support and strength that they have given me in discharging this onerous duty.

The Registry has been a wonderful assisting arm to the Acting Chief Justice. I thank all of them. The staff of this Institution has worked wonders not just in discharging the duties of listing cases, monitoring them but also assisting the Judges in discharging their duties. I would be failing in my duties if I do not thank all my secretarial staff; the staff that was deputed in my home and all others who have helped and assisted me in discharging my duties. It is on such occasion that we remember those who have done something for us and being one among you and as common as all of you, I remember my parents. I thank them for whatever I am today. My father late Shri Arun Shanker Jha is no more and my mother is also not able to attend this function today. The source of my strength is my family, i.e. my wife and two sons. I thank them for their support. I know that my elevation as a Chief Justice is an answer to the long standing prayer of this Bar and I am thankful for that but I am really taken aback and extremely surprised, thankful, grateful and humbled by the wonderful words that you have spoken about me. In fact, I am taken aback by the fact and surprised by some of the qualities that you have attributed to me. Even I do not know that I possess them but, in any case, I am extremely grateful to you. Whether I accept these wonderful words is another thing because I am one of those persons who belong to an old school who believe that until and unless the words come from the heart they won't touch your heart, but I am extremely grateful to all of you for all that you have done and said here today. Let me assure you that my elevation is not just because of the hard work that I have given, if any, to this Institution but it is also because of the blessings of my elders, the good wishes of all of you and the time.

It is said:

"तुलसी नर का क्या बड़ा, समय बड़ा बलवान।
भीलां लूटी गोपियॉं, वही अर्जुन वही बाण।।"

It is just time that is taking me from one step to the other. I don't think I have the courage to say that it is because of some effort on my part that I have been blessed with this great office of Chief Justice of Punjab and Haryana High Court. It is an extremely painful experience to leave all of you of this Institution after 15 years but I was just telling some of the members of the Bar who came to wish me that they would find it very hard to get rid of me. I am going to be that brooding

organic presence that is always going to trouble you and your functions from time to time and I shall be here as and when it is possible for me.

In the end, I wish all of you all the best in life. I wish all of you success and I wish whatever I have requested to you, especially to my young friends, has some effect:

"पश्येम शरदः शतम्
जीवेम शरदः शतम्
सूर्याम शरदः शतम्
हरिनाम शरदः शतम्
पुयेस शरदः शतम्
समस्त लोका सुखनि भवन्तुः।"

NOTES OF CASES SECTION

Short Note
**(62)*
Before Mr. Justice G.S. Ahluwalia

F.A. No. 241/2008 (Gwalior) decided on 24 January, 2019

MODI KEVALCHAND THROUGH PARTNERS (M/S) …Appellant

Vs.

BALCHAND (DEAD) THROUGH LRs. …Respondents

***Money Lenders Act, M.P. (13 of 1934), Sections 11-B, 11-F & 11-H – Registration Certificate – Maintainability of Suit* – Held – No suit for recovery of loan advanced by money lender, shall proceed in Civil Court until Court is satisfied that plaintiff has a registration certificate – Appellants/plaintiffs failed to prove that their firm was having any registration under the Act of 1934 – Trial Court rightly dismissed the suit inspite of finding that defendant no.1 had borrowed money from plaintiffs – Appeal dismissed.**

साहूकार अधिनियम, म.प्र. (1934 का 13), धाराएँ 11–बी, 11–एफ व 11–एच – रजिस्ट्रीकरण प्रमाणपत्र – वाद की पोषणीयता – अभिनिर्धारित – साहूकार द्वारा दिये गये ऋण की वसूली के लिए किसी वाद पर सिविल न्यायालय में कार्यवाही तब तक नहीं होगी जब तक कि न्यायालय संतुष्ट न हो कि वादी के पास रजिस्ट्रीकरण प्रमाण–पत्र है – अपीलार्थीगण/वादीगण यह साबित करने में विफल रहे कि उनकी फर्म के पास 1934 के अधिनियम के अंतर्गत कोई रजिस्ट्रीकरण था – विचारण न्यायालय ने, इस निष्कर्ष के बावजूद कि प्रतिवादी क्र. 1 ने वादीगण से पैसे उधार लिये थे, उचित रूप से वाद खारिज किया – अपील खारिज।

Cases referred:

1990 (II) MPWN 211, 1987 (II) MPWN 123.

N.K. Gupta with *Ravi Gupta*, for the appellants.
None, for of the respondents, though served.

NOTES OF CASES SECTION

Short Note
****(63)***
Before Mr. Justice G.S. Ahluwalia
W.P. No. 20821/2018 (Gwalior) decided on 31 January, 2019

REKHA SINGHAL AGRAWAL (SMT.) …Petitioner

Vs.

STATE OF M.P. & anr. …Respondents

***Service Law – Promotion – Upgrading of Adverse Confidential Remarks – Applicability* – Held – Once adverse confidential remarks of employee are upgraded then it has to be presumed that earlier remarks were wiped out from very inception – Principle of prospective application cannot be applied – Claim of petitioner for reconsideration of her case for promotion has been wrongly rejected – Respondents directed for review DPC to consider entitlement of petitioner.**

सेवा विधि – पदोन्नति – प्रतिकूल गोपनीय टिप्पणियों का उन्नयन – प्रयोज्यता – अभिनिर्धारित – एक बार कर्मचारी की प्रतिकूल गोपनीय टिप्पणियों का उन्नयन किया गया है तब यह उपधारणा की जानी चाहिए कि पूर्वतर टिप्पणियों का प्रारंभ से ही सफाया किया गया था – भविष्यलक्षी प्रयोज्यता के सिद्धांत को लागू नहीं किया जा सकता – पदोन्नति हेतु याची के प्रकरण का पुनर्विचार किये जाने हेतु उसके दावे को गलत रूप से अस्वीकार किया गया है – याची की हकदारी पर विचार करने के लिए प्रत्यर्थीगण को पुनर्विलोकन डी पी सी हेतु निदेशित किया गया।

Cases referred:

(2008) 8 SCC 725, (2013) 9 SCC 566.

Prashant Sharma, for the petitioner.
Harish Dixit, G.A. for the State.

NOTES OF CASES SECTION

Short Note
**(64)*
Before Mr. Justice G.S. Ahluwalia

C.R. No. 644/2017 (Gwalior) decided on 6 February, 2019

SHIV SINGH …Applicant

Vs.

SMT. VANDANA …Non-applicant

A. Civil Procedure Code (5 of 1908), Section 114 & Order 43 Rule 1-A(2) and Hindu Marriage Act (25 of 1955), Section 13-B–Compromise Decree–Review/Recall–**Held–Wife alleged that husband obtained compromise decree by practicing fraud–Instead of filing appeal, respondent (wife) rightly approached trial Court for recall of compromise decree– Revision dismissed.**

क. सिविल प्रक्रिया संहिता (1908 का 5), धारा 114 व आदेश 43 नियम 1–ए(2) एवं हिन्दू विवाह अधिनियम (1955 का 25), धारा 13–बी – समझौता डिक्री – पुनर्विलोकन/वापस बुलाना – अभिनिर्धारित – पत्नी ने अभिकथन किया कि पति ने कपट करते हुए समझौता डिक्री प्राप्त की – अपील प्रस्तुत करने के बजाय, प्रत्यर्थी (पत्नी) समझौता डिक्री वापस बुलाने हेतु उचित रूप से विचारण न्यायालय के पास गई – पुनरीक्षण खारिज।

B. Civil Procedure Code (5 of 1908), Order 23 Rule 3-A & Order 43 Rule 1-A(2) – Compromise Decree – Appeal – Maintainability – **Held – When a compromise decree is passed, a party to litigation will have a remedy of filing an appeal under Order 43 Rule 1-A(2) CPC, thus, against a compromise decree, an appeal is maintainable.**

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 23 नियम 3–ए व आदेश 43 नियम 1–ए(2) – समझौता डिक्री – अपील – पोषणीयता – अभिनिर्धारित – जब एक समझौता डिक्री पारित की गई, मुकदमेबाजी के पक्षकार को सि.प्र.सं. के आदेश 43 नियम 1–ए(2) के अंतर्गत अपील प्रस्तुत करने का एक उपचार होगा, अतः, एक समझौता डिक्री के विरूद्ध, एक अपील पोषणीय है।

NOTES OF CASES SECTION

Cases referred:

AIR 2003 AP 32, (1993) 1 SCC 581, (2015) 5 SCC 747, 2006 SCC OnLine Cal 221, C.R.P. (NPD) No. 2553/2009 decided on 29.07.2013 (Madras High Court).

Ankur Mody, for the applicant.
None, for the respondent, though served.

I.L.R. [2019] M.P. 1965 (SC)
SUPREME COURT OF INDIA
Before Mr. Justice L. Nageswara Rao & Mr. Justice M.R. Shah
C.A. Nos. 3603-07/2019 decided on 9 April, 2019

SHRIRAM TOMAR & anr. …Appellants

Vs.

PRAVEEN KUMAR JAGGI & ors. …Respondents

(Alongwith C.A. No. 3608/2019)

***Regional Rural Banks (Appointment and Promotion of Officers and Other Employees) Rules, 1998 – Promotion – Criteria* – Held – Although Rules of 1998 do not provide for any minimum qualifying marks for interview as well as for performance appraisal, however fixing the benchmark of minimum marks by the Selection Committee for interview and performance appraisal is permissible and it does not violate the principle of seniority-cum-merit – Candidates are required to be promoted in the order of seniority, irrespective of anyone among them having obtained more marks – Department directed to prepare a fresh select list for promotion accordingly – Impugned orders directing fresh exercise of promotion is set aside – Appeal allowed. (Paras 9 to 13)**

प्रादेशिक ग्रामीण बैंक (अधिकारियों और अन्य कर्मचारियों की नियुक्ति और प्रोन्नति) नियम, 1998 – पदोन्नति – मानदंड – अभिनिर्धारित – यद्यपि 1998 के नियम साक्षात्कार के साथ–साथ प्रदर्शन आंकने के लिए कोई न्यूनतम अर्हक अंक उपबंधित नहीं करते, तथापि चयन समिति द्वारा साक्षात्कार एवं प्रदर्शन आंकने हेतु न्यूनतम अंक का मानदंड तय किया जाना अनुज्ञेय है तथा यह वरिष्ठता–सह–योग्यता के सिद्धांत का उल्लंघन नहीं करता – अभ्यर्थियों को वरिष्ठता के क्रम में पदोन्नत किये जाने की आवश्यकता है, भले ही उनमें से किसी को भी अधिक अंक प्राप्त हुए हों – विभाग को पदोन्नति के लिए तद्नुसार एक नई चयन सूची तैयार करने हेतु निदेशित किया गया – पदोन्नति की नई कवायद निदेशित करने वाला आक्षेपित आदेश अपास्त – अपील मंजूर।

Cases referred:

(2013) 4 SCC 376, (2010) 1 SCC 335, (1998) 6 SCC 720, (2013) 6 SCC 287

J U D G M E N T

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

2. As common question of law and facts arise in this group of appeals, and as such they arise out of the impugned common judgment and order passed by the

High Court, all these appeals are being decided and disposed of by this common judgment and order.

2.1 All these appeals arise out of the impugned common judgment passed by the Division Bench of the High Court of Judicature at Jabalpur (Madhya Pradesh) passed in Writ Appeal Nos. 1510/2007, 1509/2007, 1508/2007, 1511/2007 and 1535/2007, by which the Division Bench of the High Court dismissed the said appeals, however, while dismissing the said appeals, modified the order passed by the learned Single Judge and directed that instead of preparing a fresh select list, the establishment would conduct the fresh exercise for promotion, and further directed that the establishment would be obliged to prescribe minimum necessary cut off merit marks out of 100 so that the rule of seniority-cum-merit is made applicable.

3. The facts leading to the present appeals in nutshell are as under:

The dispute is with respect to promotion to the post of Junior Management Scale II in the Mahakoshal Kshetriya Bank. That in exercise of powers conferred under Section 29 of the Regional Rural Banks Act, 1976, the Central Government, in consultation with National Bank and the Sponsor Bank, i.e., the UCO Bank, formulated the Rules called Regional Rural Banks (Appointment and Promotion of Officers and other Employees) Rules, 1998 (hereinafter referred to as the 'Rules'). That the said Rules were notified in the gazette on 29.07.1998. Third Schedule of the aforesaid Rules, inter alia, provides for appointment of two different categories of officers. It also provides for eligibility as well as mode of selection in respect thereto. As regards Scale II officers, it was specifically provided that the source of appointment shall be 100% by promotion and the criterion for promotion shall be on the basis of seniority-cum-merit. That mode of selection was that the candidate shall be selected by a committee on the basis of written test, interview and the assessment of 'performance appraisal reports' for the preceding five years as officer in Scale I/Field Supervisor. The division of marks was as follows:

Written Test	60 marks
Interview	20 marks
Performance appraisal	20 marks
Total	100 marks

3.1 As regards written test, it provided that the candidate shall be required to appear for written test comprising of two parts, viz., Part 'A' and Part 'B'. The 60 marks allotted to written test were further divided as :

Part 'A'	30 marks
Part 'B'	30 marks

3.2 As per the aforesaid rules, a list of only those candidates who secure minimum 40% of marks in each part (Part 'A' & Part 'B') shall be prepared and shall be called for interview. As regards interview and 'performance appraisal reports' for preceding five years' service, under the rules, no minimum qualifying marks were provided.

3.3 The respondent-bank for the purpose of promotion from Scale I to Scale II issued a memo dated 30.03.2004 and informed all the Branch Managers and all the departments of the Head Office to submit 'performance appraisal reports' of preceding five years' of Scale I officers. The bank also issued guidelines in consonance with the Rules, vide guidelines dated 12.04.2004.

3.4 For promotion of Scale I officers to the available 16 posts of Scale II, the Bank called 64 candidates/officers in the ratio of 1:4. The written test was conducted on 16.04.2004 and 32 candidates out of 64 were declared qualified in the written test, as it was found that they secured more than 40% marks in the written examination. That thereafter, the appellants along with other eligible candidates (32 in numbers) appeared in the interview conducted on 18/19.09.2004. That vide memo dated 09.10.2004, the bank published the results of successful officers/candidates shown to have been promoted to Scale II posts. That the appellants herein who were also placed in the seniority list came to be promoted, by virtue of their seniority, having secured more than minimum marks in the written test and having passed the interview and performance appraisals. However, it appears that three persons, namely, Sunil Kumar Gupta, Gopal Singh Raj and Rajesh Kumar Jain (respondents herein), though much junior in the seniority list of Scale I officers, were also included in the list of promoted officers, issued vide memo dated 9.10.2004 and three senior persons were ignored, namely, Anil Kumar Singh, K.C. Soni and N.K. Sharma. Therefore, the aforesaid three persons, namely, Anil Kumar Singh, K.C. Soni and N.K. Sharma and one another, namely, Praveen K. Jaggi filed Writ Petition Nos. 12127/2004, 12125/2004, 12126/2004 and 11005/2004 challenging the order dated 09.10.2004 whereby the aforesaid three persons, namely, Sunil Kumar Gupta, Gopal Singh Raj and Rajesh Kumar Jain were placed below Anil Kumar Singh, K.C. Soni and N.K. Sharma in the seniority list. Before the learned single Judge, it was the case on behalf of the original writ petitioners that promotions to the post of Scale II were solely on the basis of seniority-cum-merit and the rules provide that only those candidates who secure minimum 40% marks in the written test shall be called for interview and there being no minimum qualifying marks provided so far as marks obtained in interview and performance appraisal reports and therefore the original writ petitioners being senior and they obtained more than 40% marks in the written test, they ought to have been promoted to the post of Scale II.

3.5 However, it was the case on behalf of the bank that as per the administrative instructions, a conscious decision was taken by the Selection Committee fixing the bench mark of minimum 12 marks to be secured in the interview as well as performance appraisals (each) and only those candidates who secured in all 24 marks in minimum in the interview as well as the performance appraisals were required to be considered for promotion and accordingly those candidates who secured 24 marks minimum in the interview as well as the performance appraisals were promoted.

4. The learned Single Judge of the High Court did not accept the same and observed that such a procedure and insisting securing 24 marks minimum in the interview and the performance appraisals was not provided under the rules and therefore such a procedure was not permissible by administrative instructions. The learned Single Judge also observed that the aforesaid criteria would violate the principle of seniority-cum-merit and by such a criteria the principle of merit-cum-seniority is applied, which is contrary to the rules. Therefore, while allowing the aforesaid writ petitions and quashing and setting aside the list dated 9.10.2004, the learned Single Judge directed to prepare a fresh selection list by prescribing the minimum necessary cut off marks out of 100 so that the rule of seniority-cum-merit should be made applicable and thereafter may proceed to prepare a fresh selection list and after prescribing the necessary minimum/cut off marks the persons who secure the minimum merit marks on the basis of their seniority shall be re-arranged and accordingly a fresh order of promotion shall be passed by the bank.

5. Feeling aggrieved and dissatisfied with the common impugned judgment and order passed by the learned Single Judge of the High Court, the bank as well as the appellants herein - original respondents before the learned single Judge preferred writ appeals before the Division Bench of the High Court. By common impugned judgment and order, the Division Bench has not only dismissed the appeals, but while dismissing the appeals has set aside the direction issued by the learned Single Judge to prepare a fresh merit list and has further directed that instead of preparing a fresh selection list by prescribing the minimum necessary cut off merit marks out of 100, the bank shall conduct the fresh exercise for promotion. The Division Bench also observed that the bank would be obliged to prescribe minimum necessary cut off merit marks out of 100 so that the rule of seniority-cum-merit is made applicable.

6. Feeling aggrieved and dissatisfied with the impugned common judgment and order passed by the Division Bench of the High Court dismissing the appeals and further directing to conduct the fresh exercise for promotion, the original appellants before the Division Bench of the High Court (those who were promoted pursuant to the list/order dated 09.10.2004) have preferred the present appeals.

7. Shri R.S. Hegde, learned advocate appearing on behalf of the appellants has vehemently submitted that in the facts and circumstances of the case, the Division Bench has committed a grave error of law and facts while quashing the entire selection test/list and ordering fresh exercise of promotion.

7.1 It is vehemently submitted by the learned counsel appearing on behalf of the appellants that in an appeal against the judgment and order passed by the learned Single Judge ordering fresh exercise of promotion and when it was nobody's case before the Division Bench that the entire selection test has been vitiated and even that was not the observation made by the learned Single Judge, the Division Bench could not have/ought not to have set aside the entire selection test and/or not to have ordered the fresh exercise of promotion.

7.2 It is further submitted by the learned counsel appearing on behalf of the appellants that even otherwise both, the learned Single Judge as well as the Division Bench have materially erred in observing and holding that by prescribing minimum 12 marks each to obtain in the oral interview as well as performance appraisal reports, the principle of seniority-cum-merit has been given go by.

7.3 Relying upon the decision of this Court in the case of *Chairman, Rushikulya Gramya Bank v. Bisawamber Patro* reported in (2013) 4 SCC 376, it is submitted by the learned counsel appearing on behalf of the appellants that prescription of benchmark merit criterion based on aggregate performance in written test, interview and performance appraisal report, besides criteria fixed by rules for grant of promotion on seniority-cum-merit basis is permissible.

7.4 It is further submitted by the learned counsel appearing on behalf of the appellants that in the case of *Rajendra Kumar Srivastava v. Samyut Kshetriya Gramin Bank* reported in (2010) 1 SCC 335, it is held by this Court that prescribing minimum qualifying marks to ascertain the minimum merit necessary for discharging the functions of the higher post, is not violative of the concept of promotion by seniority-cum-merit.

7.5 Making the above submissions and relying upon the above two decisions of this Court, it is vehemently submitted by the learned counsel appearing on behalf of the appellants that in the present case both, the learned Single Judge as well as the Division Bench erred in holding that prescribing the benchmark to obtain 12 marks each in the interview and performance appraisal reports shall be defeating the principle of seniority-cum-merit and as such the same is contrary to the law laid down by this Court in the aforesaid two decisions.

7.6 It is further submitted by the learned counsel appearing on behalf of the appellants that even otherwise it is required to be noted that out of 16 candidates promoted, 13 candidates were as such above the original writ petitioners in the

seniority list and the objection was only with respect to three persons who were promoted and who were junior to the original writ petitioners. It is submitted that therefore at the most the learned Single Judge could have set aside the promotion with respect to only those three promotes who were junior to the original writ petitioners. However, learned advocate appearing on behalf of the appellants herein has fairly conceded that after all those candidates who crossed the benchmark even in interview and the performance appraisal reports, thereafter the promotions are to be made on the basis of seniority-cum-merit.

8. Learned advocate(s) appearing on behalf of the original writ petitioners has supported the order passed by the learned Single Judge and has/have submitted that as rightly observed by the learned Single Judge and to that extent the learned Division Bench that by prescribing the benchmark of obtaining 12 marks each in interview and performance appraisal reports, the principal of seniority-cum-merit has been given go by.

8.1 It is submitted by the learned advocate(s) on behalf of the original writ petitioners that as such in the advertisement, the only eligibility criteria was that a candidate shall have to obtain minimum 40% marks in the written test and no minimum marks were prescribed for the interview and the performance appraisal reports.

8.2 Relying upon the decision of this Court in the case of *B.V.Sivaiah v. K. Addanki Babu* reported in (1998) 6 SCC 720, and another decision of this Court in the case of *Sarva U.P.Gramin Bank v. Manoj Kumar Chak* reported in (2013) 6 SCC 287, it is prayed to dismiss the present appeals.

9. We have heard learned counsel for the respective parties at length.

At the outset, it is required to be noted that the promotion to the post of Junior Management Scale II is governed by the principal of seniority-cum-merit. It is true that as per the rule and as per the eligibility criteria mentioned in the rule, the selection shall be on the basis of performance in the written test, interview and performance appraisal reports for preceding five years. As per the rules, 60 marks are allotted for written test, 20 marks for interview and 20 marks for performance appraisal reports. The rule further provides that a candidate shall be required to appear in the written test comprising of two parts, viz, Part 'A' and Part 'B'. 60 marks allotted for written test are further divided as under:

Part 'A'	30 marks
Part 'B'	30 marks

The rule further provides that a list of only those candidates who secure minimum 40% marks in each part shall be prepared and such candidates shall be called for interview. It is true that the rule do not provide any minimum qualifying marks for

interview as well as performance appraisal. However, at the same time, the authority/Selection Committee took a conscious decision to fix the benchmark of having 12 marks each out of 20 marks each in interview as well as performance appraisal reports. Both the learned Single Judge as well as the Division Bench found fault with the same and observed and held that further fixing the qualifying marks/benchmark to obtain minimum 12 marks in the interview and the performance appraisal was not permissible and that it would defeat the principle of seniority-cum-merit. The learned Single Judge therefore directed to prepare the fresh promotion list by prescribing the minimum necessary cut off merit marks out of 100 so that the rule of seniority-cum-merit could be made applicable.

10. When the aforesaid order passed by the learned Single Judge was challenged before the Division Bench, the Division Bench, by the impugned judgment and order, not only dismissed the appeals, but also set aside the directions issued by the learned Single Judge to prepare a fresh select list by prescribing the minimum necessary cut off merit marks out of 100 and directed the establishment to conduct the fresh exercise for promotion, meaning thereby, the Division Bench set aside the entire select list. In the absence of any finding by the learned Single Judge that the select list was vitiated on account of any irregularity, the Division Bench was not justified in setting aside the entire select list and ordering fresh exercise for promotion.

11. Now so far as the finding recorded by the learned Single Judge and the Division Bench that further fixing the qualifying marks/benchmark of obtaining minimum 12 marks each in the interview and the performance appraisal reports is not permissible and it would defeat the principle of seniority-cum-merit is concerned, as observed and held by this Court in the case of *Bisawamber Patro* (supra), the same is permissible. This Court was considering a similar situation and the similar rules governing promotions from Junior Management Scale I to Middle Management Scale II. In the case before this Court, the rule was similar to the rule in the present case. In the rule before this Court, also there was no minimum qualifying marks for the interview provided. However, the bank in addition to the requirement of 40% qualifying marks in the written test further fixed the qualifying marks of 60% for general candidates and 55% marks for SC/ST candidates on the aggregate marks comprising written test, performance appraisal reports and interview. That thereafter the names of all the candidates who got 60% or above in the aggregate were put in the list for promotion strictly as per their seniority. All candidates were promoted in the order of seniority, irrespective of anyone among them having got marks in excess of 60% in the aggregate. The candidates unsuccessful in getting promotion challenged the select list on the similar grounds on which the select list in the present case was challenged. The High Court allowed the writ petition holding that prescription of the benchmark of 60% marks in the aggregate was in violation of the promotion

policy and the rules governing the field. Consequently, the High Court allowed the writ petition and directed the bank to make fresh selection in accordance with the rules. Reversing the order passed by the High Court, and even after considering the decision of this Court in the case of *B.V.Sivaiah* (supra) (the judgment which has been relied upon by the High Court), this Court observed that the procedure adopted by the bank to further fixing the qualifying marks in the written test, performance appraisal reports and the interview has not violated the principle of seniority-cum-merit. While observing so, this Court took into consideration the observations made by this Court in para 13 of another decision of this Court in the case of *Rajendra Kumar Srivastava* (supra).

12. Applying the law laid down by this Court in the aforesaid two decisions to the facts of the case on hand, we are of the opinion that both, the learned Single Judge as well as the Division Bench erred in holding that further fixing the qualifying marks to be obtained in the interview and the performance appraisal reports, viz., 12 minimum marks each to be obtained in interview and the performance appraisal reports and fixing such a benchmark would violate the principle of seniority-cum-merit. As the promotion to the post of Junior Management Scale II shall be made on the basis of seniority-cum-merit, the only requirement would be that after it is found that the candidates have possessed the minimum necessary merit, namely, minimum 40% qualifying marks in the written test and minimum 12 marks each out of 20 marks each in interview and the performance appraisal reports respectively, thereafter the candidates are required to be promoted in the order of seniority, irrespective of anyone among them having obtained more marks.

13. In view of the above and for the reasons stated above, the present appeals are allowed. The judgment and order passed by the learned Single Judge of the High Court as well as the impugned judgment and order passed by the Division Bench are hereby quashed and set aside. It is directed that the respondent-authority shall prepare a fresh select list for promotion to the post of Junior Management Scale II and to consider the case of those candidates who crossed the benchmark of having obtained minimum 40% qualifying marks in the written test and having obtained minimum 12 marks each out of 20 marks each for interview and performance appraisal reports respectively and those candidates be promoted in the order of seniority, irrespective of anyone among them having obtained more marks.

14. The present appeals are allowed to the aforesaid extent. No order as to costs.

Appeal allowed

I.L.R. [2019] M.P. 1973 (SC)
SUPREME COURT OF INDIA
Before Mr. Justice Ashok Bhushan & Mr. Justice K.M. Joseph
Cr.A. No. 763/2019 decided on 30 April, 2019

KALABAI …Appellant

Vs.

STATE OF M.P. …Respondent

Penal Code (45 of 1860), Section 302 & 304 Part II – Dying Declaration – Intention – Conviction u/S 302 IPC **– Held – As per dying declaration, quarrel was going on between deceased and her husband, when appellant (*sister-in-law of deceased*) arrived and she threw burning stove on deceased which caused burn injuries and resulted in her death – No evidence of any strained relations between appellant and deceased – No evidence to conclude that appellant had any such intention to kill deceased – When a person throws a burning stove on a person there is a knowledge that the act is likely to cause death – Appellant committed offence u/S 304 Part II IPC – Conviction altered to one u/S 304 Part II IPC – Appeal partly allowed.**
(Paras 12, 13, 17 & 18)

दण्ड संहिता (1860 का 45), धारा 302 व 304 भाग II – मृत्युकालिक कथन – आशय – भा.दं.सं. की धारा 302 के अंतर्गत दोषसिद्धि – अभिनिर्धारित – मृत्युकालिक कथन के अनुसार, मृतिका और उसके पति के मध्य झगड़ा चल रहा था, जब अपीलार्थी (मृतिका की ननद) वहाँ पहुँची तथा उसने मृतिका पर जलता हुआ स्टोव फेंका जिससे उसे जलने की चोटें कारित हुई एवं परिणामस्वरूप उसकी मृत्यु हो गई – अपीलार्थी और मृतिका के मध्य किसी तनावपूर्ण संबंधों का कोई साक्ष्य नहीं – यह निष्कर्षित करने के लिए कोई साक्ष्य नहीं कि अपीलार्थी का मृतिका को मारने का आशय था – जब एक व्यक्ति किसी व्यक्ति पर जलता हुआ स्टोव फेंकता है तो वह यह ज्ञान रखता है कि उस कृत्य से मृत्यु कारित होना संभाव्य है – अपीलार्थी ने भारतीय दंड संहिता की धारा 304 भाग II के अंतर्गत अपराध कारित किया – दोषसिद्धि भा.दं.सं. की धारा 304 भाग II में परिवर्तित – अपील अंशतः मंजूर।

Case referred:

(1998) 8 SCC 355.

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 and order of the High Court of Madhya Pradesh, Bench at Indore dated 25.03.2014 by which Criminal Appeal filed by the appellant questioning her conviction and sentence under Section 302 IPC has been dismissed.

2. The prosecution case in brief is :

Deceased, Smt. Lalita Bai was wife of Vijay Singh. The appellant is sister-in-law of the deceased. On 20.08.1999 in the late evening a quarrel was going on between Lalita Bai and her husband, Vijay Singh. The appellant who lives on the ground floor came on the first floor where Lalita Bai was boiling milk on battiwala stove. Appellant threw the burning stove on the deceased due to which clothes of deceased caught fire and serious burn injuries were caused. Husband of the deceased got her admitted in the M.Y. Hospital, Indore. On receiving information from the Hospital, a Police Inspector reached the Hospital. The information was mentioned in the Rojnamcha and Head Constable, Udai Pal Singh was sent in the Hospital where Lalita Bai was being admitted with burn injury with 96% burn. Report was asked for from the Incharge-Medical Officer as to whether patient was in a position to give the statement, after receiving certificate that the patient was fit to give statement, I.O. informed the Executive Magistrate-cum-Naib Tehsildar for recording her statement. Executive Magistrate-cum-Naib Tehsildar reached Hospital and recorded the statement of the patient, Lalita Bai. On the basis of the report case under Section 307 read with Section 34 IPC was registered on 20.08.1999. Lalita Bai, during the course of treatment died on 23.08.1999 and case has been registered under Section 302 IPC. Chargesheet was submitted both against Lalita Bai and Vijay Singh and the trial proceeded against both of them.

3. The prosecution in support of its case has produced 24 witnesses. The trial court after considering the evidence on record and relying on the dying declaration of the deceased recorded on 21.08.1999 held the appellant guilty of murder. Appellant was convicted with life imprisonment and fine of Rs.2,000/-. Vijay Singh, husband of deceased was acquitted from charge under Section 302 read with Section 34 IPC. Appellant filed a criminal appeal in the High Court challenging her conviction and sentence. The High Court by the impugned judgment has dismissed the criminal appeal giving rise to this appeal.

4. This Court vide order dated 02.07.2015 issued limited notice which is to the following effect:

> "Delay condoned.
>
> Issue notice limited to the question of nature of offence.
>
> Prayer for suspension of sentence is rejected."

5. We have heard learned counsel for the appellant and learned counsel for the State of Madhya Pradesh, Shri Prashant Kumar.

6. Learned counsel for the appellant in support of his submission contends that the appellant ought not to have been convicted under Section 302 IPC. He

submits that there was no motive for the appellant to kill the deceased. Appellant had neither intention nor motive to cause the death of the deceased.

7. Learned counsel has also submitted that deceased was not in a fit physical condition to record her statement, since the MLC of deceased clearly mentioned that the patient was restless, Afebrile, Pulse not palpable. It is submitted that the patient was so feeble and so restless that she was not in a position to give the correct version of the incident.

8. Learned counsel for the appellant placed reliance on the judgment of this Court in *Hari Shanker vs. State of Rajasthan,* (1998) 8 SCC 355, and submits that the facts of the present case are similar to the facts of the above case and in the above case this Court had altered the conviction from under Section 302 IPC to Section 304 Part II IPC and reduced the sentence of imprisonment for life to rigorous imprisonment for five years. This case also deserves the same treatment.

9. Learned counsel for the State refuting the submission of the appellant submits that the deceased physical condition was certified by the Doctor who proved her to be in a fit state of mind to record her statement which has been proved by the prosecution witnesses. It is submitted that the burn injury on the neck and head was only 8% which was noticed by the High Court; The dying declaration had rightly been relied by the Courts below and the appellant cannot be allowed to raise submission that the dying declaration should not be relied. The limited notice having been issued on 02.07.2015, the appellant may not be permitted to challenge the conviction recorded against the appellant. The appellant can be permitted only to raise submissions on the nature of offence as is the limited notice in the present case.

10. We have considered the submissions of the parties and perused the records.

11. Limited notice having been issued only to the question of nature of offence, we confine our consideration of the case only to the above question.

12. The dying declaration which was recorded within few hours of admission of deceased in the Hospital has been relied by the Courts below. The Magistrate who recorded the dying declaration, namely Vijendra Singh Panwar, PW.15 has appeared in the witness box and proved her dying declaration. The High Court in its judgment has extracted the entire statement made by the deceased which is treated as dying declaration. On the question put to the deceased "How could you burn" detailed answer was given by the deceased. It is useful to extract the above question and answer given by the deceased which is to the following effect :

"Q.: How could you burn ?
Ans.: A quarrel was going on between myself and my husband, during the said quarrel my husband's sister namely Kala who is living in the lower floor of my house, came at my house and said that I will see her, and while I was boiling the milk, took the said slow-match (batti wala stove) kerosene stove and put on me, due to which the kerosene oil was spared upon my body and my clothes caught the fire from its burnt wicks."

13. It is relevant to notice that husband of the deceased, Vijay Singh was also charged under Section 302 read with Section 34 IPC and 114 IPC who has been acquitted by the trial court. In the evidence which was led before the Courts below, there are no evidence of any strained relations between the appellant and deceased. The entire incident which happened has been elaborately described by the deceased herself in her dying declaration. There is no evidence to come to conclusion that the appellant had any intention to kill the deceased. As per statement of deceased herself that a quarrel was going on between herself and her husband, Vijay Singh and during that quarrel, the appellant who is living in the lower floor of house arrived at the scene. There cannot be any issue that when a person throws a burning stove on a person there is knowledge that the act is likely to cause death.

14. Before the trial court the argument was made on behalf of the appellant that at best, she be convicted under Section 304 Part II IPC which was not acceded to. In paragraph 60 the trial court while dealing with the said submission made the following observations:

"60. As far as the question of arguments placed by the learned advocate on behalf of the accused Kala Bai against the offence under Section 304 Part II IPC in place of Section 302 IPC is that it has been shown that the accused Kala Bai has burnt Lalita Bai by putting burning stove on her head and burnt her 96 per cent. Dr. A.K. Dixit (PW-11) has stated in his statement that the wound (Burn) found during his inspection, the wounds have been shown as fatal injuries and the examination of whole body of Lalita Bai was conducted after 3 days of her death. The Dr. Ravindra Singh Chaudhary (PW-17) has mentioned the reason of death burning, other serious problems, blockading of breathing process etc."

15. The trial court has rightly held that accused Kala Bai threw burning stove on the deceased but whether the act was done with intention to cause death had not adverted to by the trial court.

16. Learned counsel for the appellant has placed reliance on the judgment of this Court in *Hari Shankar* (supra). In the above case the appellant had also picked up a burning kerosene wick-stove and threw it on the deceased. Kerosene from

stove spilled over the clothes they caught the fire. The deceased in the said case also died as a result of the burns received by him. This Court held that since the appellant had thrown a burning stove on the deceased, he would have known that his act was likely to cause burns resulting in death. It is useful to extract paragraphs 2,3 and 4 of the judgment which is to the following effect:

> **"2.** Only question that we have to consider in this appeal is what offence can be said to have been committed by the appellant on the basis of the facts found by the High Court. It has been held that while the appellant, deceased Bheem Singh and one Shah Megan were taking tea in the tea-club of the Air Force, 32 Wing (MT Section), an exchange of words took place between the appellant and the deceased on account of the demand made by the appellant for returning Rs 50,000 which he had advanced to the deceased. The appellant became angry and picked up the burning kerosene wick-stove and threw it on the deceased. Kerosene from the stove spilled over the clothes of the deceased and as the burning wicks came in contact with his clothes they caught fire. The deceased ultimately died as a result of the burns received by him.
>
> **3.** What was submitted by the learned counsel for the appellant was that the appellant had no enmity with the deceased. He had no intention to kill the deceased as by killing him he could not have recovered the amount of Rs 50,000 which he had advanced to the deceased. He further submitted that the quarrel between the two took place all of a sudden and in the heat of the moment the appellant had picked the stove and had thrown it towards the deceased. He, therefore, submitted that it was merely a rash and negligent act on the part of the appellant. We cannot agree with the submission of the learned counsel. Since the appellant had thrown a burning stove on the deceased, he would have known that his act was likely to cause burns resulting in death. In view of the facts and circumstances of the case, he can be said to have committed an offence under Section 304 Part II IPC.
>
> **4.** We, therefore, allow this appeal partly, alter the conviction of the appellant from under Section 302 to Section 304 Part II IPC and reduce the sentence of imprisonment for life to rigorous imprisonment for five years."

17. Following the above decision, we are of the view that the present is also a case where in the facts and circumstances of the case, the appellant can be said to have committed offence under Section 304 Part II IPC.

18. In the result, we partly allow the appeal and alter the conviction of the appellant from under Section 302 IPC to Section 304 Part II IPC and reduce the sentence of imprisonment for life to rigorous imprisonment for five years.

Appeal partly allowed

I.L.R. [2019] M.P. 1978 (SC)
SUPREME COURT OF INDIA

Before Mr. Justice Abhay Manohar Sapre & Mr. Justice Dinesh Maheshwari
C.A. Nos. 4847-4848/2019 decided on 9 May, 2019

KARUNA KANSAL …Appellant

Vs.

HEMANT KANSAL & anr. …Respondents

***Civil Procedure Code (5 of 1908), Order 43 Rule 1 – Directions in Appeal – Scope & Jurisdiction – Ex-parte* decree of dissolution of marriage in favour of husband, who, after the limitation period of appeal, married the appellant (*herein*) – First wife's application to set aside *ex-parte* decree was rejected on ground of limitation which was subsequently allowed by High Court directing that "*parties shall live together as husband and wife*" – Held – High Court even after taking note of the fact of second marriage, has given such direction which may not be capable of due performance – Second wife was not even a party to the appeal – Impugned order wholly without jurisdiction and legally unsustainable and thus set aside – Matter remanded to High Court for adjudication afresh after impleading the second wife as party – Appeal allowed. (Paras 11 to 14)**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 43 नियम 1 – अपील में निदेश – व्याप्ति एवं अधिकारिता – पति के पक्ष में विवाह विच्छेद की एकपक्षीय डिक्री, जिसने अपील की परिसीमा अवधि के पश्चात् अपीलार्थी (यहाँ पर) से विवाह किया – एकपक्षीय डिक्री अपास्त किये जाने हेतु प्रथम पत्नी का आवेदन, परिसीमा के आधार पर अस्वीकार किया गया था, जिसे पश्चात्वर्ती रूप से उच्च न्यायालय द्वारा यह निदेशित करते हुए मंजूर किया गया था कि *''पक्षकार, पति–पत्नी के रूप में साथ रहेंगे''* – अभिनिर्धारित – उच्च न्यायालय ने, द्वितीय विवाह के तथ्य को ध्यान में लेने के पश्चात् भी, उक्त निदेश दिया है जो कि सम्यक् पालन योग्य नहीं हो सकता – द्वितीय पत्नी अपील में एक पक्षकार भी नहीं थी – आक्षेपित आदेश संपूर्णतः अधिकारिता विहीन एवं विधिक रूप से कायम रखने योग्य नहीं और इसलिए अपास्त – द्वितीय पत्नी को पक्षकार बनाने के पश्चात् नये सिरे से न्यायनिर्णयन हेतु मामला, उच्च न्यायालय को प्रतिप्रेषित – अपील मंजूर।

J U D G M E N T

The Judgment of the Court was delivered by : **ABHAY MANOHAR SAPRE, J. :-** Leave granted.

2. These appeals are filed against the final judgment and order dated 17.10.2014 passed by the Division Bench of the High Court of Madhya Pradesh at Indore in Review Petition No.48 of 2014 whereby the Division Bench of the High Court dismissed the said Review Petition filed by the appellant herein and upheld

the order dated 09.08.2011 passed by the Single Judge of the High Court in Miscellaneous Appeal No.709 of 2005.

3. A few facts need mention hereinbelow for the disposal of these appeals, which involve a short point.

4. The dispute, which is the subject matter of these appeals, is between the husband (respondent No.1) and his two wives (appellant and respondent No.2). It arises out of the matrimonial suit decided by the Family Court between respondent Nos. 1 and 2.

5. By impugned order dated 09.08.2011, the High Court disposed of the appeal (M.A. No.709/2005) filed by respondent No.2 (first wife) against respondent No.1 (husband) under Order 43 Rule 1 (d) of the Code of Civil Procedure, 1908 (hereinafter referred to as "CPC") against the order dated 10.12.2004 passed by the Additional District Judge, Kukshi in MJC No. 35 of 2003.

6. By order dated 10.12.2004, the ADJ had declined to condone the delay in filing the application filed by respondent No.2 under Order 9 Rule 13 of the CPC and thereby declined to set aside the *ex parte* decree dated 23.08.2003 passed in C.S. No. 09-A/02 by the said Court.

7. The appellant herein is the second wife of respondent No.1 (husband). It is the case of the appellant that after passing of the *ex parte* decree for dissolution of marriage of respondent No.1 with respondent No.2 and expiry of period of limitation for filing appeal, respondent No.1(husband) entered into matrimony with her (appellant). On the other hand, respondent No.2 (first wife of respondent No.1) filed the aforesaid appeal of which the appellant had no knowledge, but the fact of respondent No.1 having married the appellant was indeed stated before the High Court. However, when respondent No.1 stated that she was having no problem with the appellant, the High Court set aside the *ex parte* decree passed on 23.08.2003 in C.S. No.09-A of 2002 and directed that, *"the parties shall live together as husband and wife."* The appellant herein (second wife of respondent No.1), on coming to know of the aforesaid order dated 09.08.2011 passed by the Single Judge of the High Court in M.A. No.709/2005, filed review petition (R.P. No.48 of 2014) before the High Court. The Division Bench of the High Court, by order dated 17.10.2014, dismissed the said review petition. Challenging both the orders, the appellant has filed the present appeals by way of special leave in this Court.

8. Heard Mr. A.K. Chitale, learned senior counsel for the appellant and Ms. Pankhuri and Mr. S.K. Verma, learned counsel for the respondents.

9. Having heard the learned counsel for the parties and on perusal of the record of the case, we are constrained to allow these appeals, set aside the

impugned orders and remand the case to the High Court for deciding the miscellaneous appeal afresh on merits in accordance with law.

10. The need to remand the case has occasioned because we find that the appellant was not made a party to the appeal and nor she was heard by the High Court.

11. On perusal of the impugned order dated 09.08.2011, we find that the High Court, even after taking note of the factum of the marriage of the appellant with respondent No.1, has not adverted to the consequences thereof and has given such directions, which may not be capable of due performance.

12. In such a situation, where the impugned order was passed without hearing the appellant and not issuing any notice of the appeal to her and yet giving such directions, which may not be capable of being carried out, the impugned order, in our view, is wholly without jurisdiction and legally unsustainable and it has to be set aside on this short ground alone.

13. It is apart from the fact as to whether such directions could at all be issued; and secondly, whether such directions were necessary in an appeal between the respondents *inter se* for its disposal wherein the only question involved was as to whether the Family Court (ADJ) was justified in declining to condone the delay in filing the application filed by respondent No.1 herein under Order 9 Rule 13 of the CPC and, if so, on what grounds.

14. In view of the foregoing discussion, the appeals succeed and are accordingly allowed. The impugned orders are set aside. The case is remanded to the High Court for deciding the miscellaneous appeal afresh on merits in accordance with law after impleading the appellant herein as a party respondent in the appeal before the High Court.

15. We, however, consider it apposite to mention that admittedly during pendency of the litigation, certain events have taken place which have bearing over the rights of the parties.

16. It is for this reason, we request the High Court to implead the appellant herein as a party in the miscellaneous appeal and persuade the parties to settle the issues, if possible, on some mutually acceptable terms to give quietus to this long pending matrimonial dispute, since it is not in the interest of any of the parties to these appeals to continue this litigation.

17. It is only if the High Court eventually finds that the parties are not able to settle amicably for any reason, the miscellaneous appeal be decided on its merits in accordance with law without being influenced by any observations made in the impugned order and in this order.

Appeal allowed

I.L.R. [2019] M.P. 1981 (DB)
WRIT APPEAL

Before Mr. Justice Sanjay Yadav & Mr. Justice Vivek Agarwal
W.A. No. 1280/2019 (Gwalior) decided on 9 August, 2019

MADAN VIBHISHAN NAGARGOJE …Appellant

Vs.

SHRI SHAILENDRE SINGH YADAV & ors. …Respondents

A. Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, M.P. 2005 (14 of 2006), Section 2(1) – Writ Appeal – Locus **– Held – Writ Appeal filed by Collector in personal capacity – Appellant, being a party affected inasmuch as contempt proceedings have been drawn against him on the basis of order passed in writ petition, has a locus. (Para 13)**

क. उच्च न्यायालय (खण्ड न्यायपीठ को अपील) अधिनियम, म.प्र., 2005 (2006 का 14), धारा 2(1) – रिट अपील – सुने जाने का अधिकार – अभिनिर्धारित – कलेक्टर द्वारा व्यक्तिगत क्षमता में रिट अपील प्रस्तुत की गई – अपीलार्थी, एक प्रभावित पक्षकार है यहाँ तक कि रिट याचिका में पारित आदेश के आधार पर उसके विरूद्ध अवमान कार्यवाहियां की गई है, सुने जाने का अधिकार उसे है।

B. Land Revenue Code, M.P. (20 of 1959), Section 44 and Constitution – Article 226 – Scope & Jurisdiction **– Held – Section 44 does not provide for an appeal from order of Tehsildar, directly to Collector – Appellant herein, under official capacity of Collector was justified in sending the matter to SDO for deciding the appeal – In writ petition, petitioner has not prayed for any relief of transferring the case from concerned SDO to any other SDO or for direction to Collector to hear appeal on his own – In absence of such relief, Single Judge exceeded its jurisdiction in passing an order in violation of statutory provisions of the Code – Impugned order set aside – Appeal allowed. (Para 28)**

ख. भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 44 एवं संविधान – अनुच्छेद 226 – व्याप्ति व अधिकारिता – अभिनिर्धारित – धारा 44, तहसीलदार के आदेश से सीधे कलेक्टर को अपील हेतु उपबंध नहीं करती – यहां अपीलार्थी का कलेक्टर की पदीय क्षमता के अंतर्गत एसडीओ को अपील विनिश्चय हेतु मामला प्रेषित करना न्यायानुमत था – रिट याचिका में, याची ने संबंधित एसडीओ से प्रकरण किसी अन्य एसडीओ को अंतरित करने के किसी अनुतोष अथवा कलेक्टर को स्वयं से अपील सुनने हेतु निदेश की प्रार्थना नहीं की है – उक्त अनुतोष की अनुपस्थिति में, एकल न्यायाधीश संहिता के कानूनी उपबंधों के उल्लंघन में आदेश पारित करने में अपनी अधिकारिता से बाहर गये – आक्षेपित आदेश अपास्त – अपील मंजूर।

Cases referred :

AIR 2001 SC 1739, 2018 (2) UAD 478.

Arvind Dudawat, for the appellant.
Gaurav Mishra, for the respondent No. 1.
Pratip Visoriya, G.A. for the respondents/State.

(Supplied: Paragraph numbers)

O R D E R

The Order of the Court was passed by : **VIVEK AGARWAL, J. :-** This appeal under Section 2 (1) of the Madhya Pradesh Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005, has been filed by the appellant being aggrieved by order dated 24.07.2019 passed in Review Petition No.82/2016 and order dated 06.01.2016 passed in W.P. No.16/2016.

2. Heard on I.A. No. 3546/2019, an application seeking permission to file writ appeal.

3. In this application, appellant has mentioned that earlier he was posted as Collector district Datia and at present he is posted as Deputy Secretary, Government of M.P. Bhopal.

4. During period of posting of appellant as Collector, Datia, a copy of order dated 06.01.2016 passed in W.P. No.16/2016 was received by him in his official capacity as Collector Datia. Vide order dated 06.01.2016, learned Single Judge disposed of the writ petition directing the petitioner to file statutory appeal under Section 44 of the Madhya Pradesh Land Revenue Code (hereinafter referred to as 'MPLRC') before the Collector, Datia who was in turn directed that the same if done within a period of ten working days, shall be entertained and decided on its own merits by adverting to all the contentions of the petitioner and the law on the issue.

5. Appellant in compliance of the said order entertained the appeal and after considering the rival submissions of the parties found that as per the law, the Sub-Divisional Officer, Datia is the competent authority to decide said appeal and accordingly vide order dated 20.01.2016, sent the record to Sub-Divisional Officer, Datia to decide the appeal as per law. Pursuant to which the Sub-Divisional Officer decided the appeal vide order dated 27.01.2016.

6. Thereafter, the petitioner had filed Contempt Case No.129/2016 against the present appellant and one another.

7. State Government had filed Review Petition No. 82/2016 mentioning therein that the statute does not provide for first appeal under Section 44 of the

MPLRC to the Collector, and therefore, direction to the Collector to decide such appeal directly be reviewed as there is an error apparent on the face of the record.

8. It is submitted that said review petition was dismissed as was filed by the State vide order dated 24.07.2019, therefore, this I.A. has been filed seeking permission to file such writ appeal on the ground that appellant was not impleaded as party in the writ petition in individual capacity but the impact and effect of said order has resulted in filing of contempt petition impinging on the personal rights and authorities of appellant which he had exercised as Collector Datia. Therefore, leave be granted to him to file writ appeal in personal capacity.

9. Along with this application, another I.A. No.3554/2019 has been filed seeking condonation of delay. It is mentioned in this I.A. that impugned order was passed on 06.01.2016 and thereafter review petition was filed for recalling/ modifying said order with a delay of 23 days which was graciously condoned by learned Single Judge which was decided on 24.07.2019 and simultaneously cognizance has been taken in the contempt petition, therefore, delay in filing the writ appeal be condoned in the interest of justice.

10. Learned counsel for the appellant has placed reliance on the judgment of Supreme Court in case of *Vinod Kumar Vs. State of U.P.* As reported in AIR 2001 SC 1739, wherein it has been held that advocate has no locus standi to file writ petition in his own name and substitute himself for his client, particularly, when petition was not filed in public interest and nothing prevented, affected person from filing writ petition. It is submitted that affected persons can always file a writ petition and as a natural corollary, a writ appeal.

11. On the other hand, learned counsel for the petitioner/respondent No.1 herein submits that learned Single Judge had directed the District Collector, Datia to decide the appeal on merits. The Collector in flagrant violation of the directions issued by this Court transferred the appeal to the Sub-Divisional Officer to decide it on merits though he was directed to adjudicate the appeal on merits.

12. It is submitted that this act of the Collector was contemptuous and to avoid the contempt proceedings, the State Government preferred the review petition which was dismissed by learned Single Judge vide order dated 24.07.2019. It is submitted that since this writ appeal has been filed by the then Collector in his personal capacity though he has no locus to assail the order passed by learned Single Judge in his personal capacity, and therefore, has no locus to file instant appeal as he was neither the party to the proceeding before learned writ court nor he is personally effected by the impugned order.

13. This argument of learned counsel for the petitioner/respondent No.1 deserves to be out-rightly rejected inasmuch as provisions contained in Section 2 (1) of the Madhya Pradesh Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal)

Adhiniyam, 2005 are clear that appeal shall lie from a judgment or order passed by one Judge of High Court in exercise of original jurisdiction under Article 226 of the Constitution of India, to a Division Bench comprising of two Judges of the same High Court. Thus, appellant, being a party affected inasmuch as admittedly contempt proceedings have been drawn against him on the basis of order passed in the writ petition, has a locus.

14. Learned counsel for the respondent No.1 has placed reliance on the judgment of Uttarakhand High Court in case of *Arvind Kumar Lohani and Others Vs. Uttarakhand State Information Commission and Another,* as reported in, 2018 (2) UAD 478, wherein petition was filed by the Public Information Officers as appointed under the Right to Information Act, who had challenged order dated 07.02.2012 passed by second appellate authority which had directed the petitioner as Information Officer to supply the information as sought by the respondent No.2.

15. Therefore, it is submitted that petitioner, exercising quasi judicial authority, has no locus to file this appeal.

16. The High Court held that writ petition by petitioner in personal capacity by engaging office of the Chief Standing Counsel will not lie as the office of Chief Standing Counsel is obliged to represent the State or any authority within the State in such other civil cases in which he might be directed or required to appear.

17. Interpreting such provisions in Legislative Secretary-cum-Legal Remembrance Manual, it has been held that the term "authority" herein used would mean the 'office' and not the government officer personally, more particularly, when the office of Chief Standing Counsel is called to defend personal liability of an officer, who has been harnessed individually with a liability under the law.

18. Thus, it is apparent that law laid down in case of *Arvind Kumar Lohani* (Supra) is that an individual officer cannot be represented by the office of Chief Standing Counsel as the function of Chief Standing Counsel is to represent the State or any authority within the State and not the government officer personally.

Present case is not covered under the facts and circumstances of the case of *Arvind Kumar Lohani* (Supra) and this judgment is clearly distinguishable and is not applicable to the facts of present case.

19. Office has reported delay of 1211 days in filing this writ appeal. It is apparent that out of these 1211 days, time with effect from 01.03.2016 to 24.07.2019 was bonafidly spent in pursuing and prosecuting review petition. When outcome of review petition was made known then this writ appeal has been filed most expeditiously on 30.07.2019 without any further delay, and therefore,

delay in filling (sic : filing) the writ appeal being bonafide and just deserves to be condoned and is hereby condoned.

20. Consequently, permission to pursue the writ appeal in individual capacity is also granted as we are *prima facie* satisfied that appellant is a person aggrieved of the order of learned Single Judge of the High Court made in exercise of the original jurisdiction.

21. Accordingly, I.A. Nos. 3546/2019 and 3554/2019 stand disposed of.

22. On the merits of the writ appeal, learned counsel for the appellant submits that in W.P. No.16/2016, SDO Datia was not made a party in personal capacity. There was no allegation of malafides against said SDO. In the writ petition, petitioner had challenged the order dated 29.12.2015 passed by Tahsildar (Nazul), Tahsil Datia under Section 248 of the MPRLC vide which Tahsildar directed the petitioner to remove the encroachment/ construction measuring 966.54 square feet on land situated at Nazul Sheet No.34C on the land survey No.171 measuring 285.00 square meter within seven days and to bring said land in its original position and has also imposed fine equivalent to 20% of the market value of said land i.e. Rs. 53,292/- and in case of non-compliance of the order within seven days, reserved an option to propose civil jail for the petitioner.

23. This order was challenged on the ground that Tahsildar Nazul had without giving any opportunity to the petitioner recorded order sheet that the petitioner counsel does not want to make arguments. Thereafter, it is mentioned in the petition that though inspection of survey No. 171 and 172 was carried out on an application moved by the petitioner before the Collector Datia who had in turn forwarded it to the Tahsildar, yet without taking such spot inspection report into consideration, order dated 29.12.2015 was passed by the Tahsildar. Thereafter, there are bald allegations that Tahsildar was under influence and had shown the house of the petitioner as encroachment as per the ex-parte statement of Revenue Inspector without application of mind and on behest of the SDO, but despite making such allegations, and also making allegation against the Tahsildar that he was acting under the political influence and under the influence of State authorities, none of the respondents who were alleged to be acting under political influence or under the influence of State authorities were impleaded as party in individual capacity affording them opportunity to rebut such allegation.

24. It is submitted by learned counsel for the appellant that since Section 44 does not provide for any appeal from the order of Tahsildar directly to the Collector, therefore, the Collector was justified in making over the matter to the SDO for decision in terms of the statutory provisions contained in Section 44 of the MPLRC. After receiving such file, SDO passed a speaking order and decided the appeal; and against such order, petitioner has alternative remedy of filing

second appeal before the Divisional Commissioner and therefore firstly writ petition was not maintainable directly before the High Court and secondly appellant had statutory right of appeal as provided under the statute. Forum of a statutory appeal could not have been changed or altered except by amending the statute.

25. It is submitted that all these aspects have been glossed over by learned Single Judge despite admitting in the impugned order dated 24.07.2019 passed in R.P. 82/2016 that, 'no first appeal lies from an order of Tahsildar to Collector directly'. It is submitted that addition of a caveat by learned Single Judge that "but the argument raised by State herein could have been accepted if any particular statutory remedy available to the petitioner have been taken away". This qualification as has been mentioned in the impugned order is not just because statutes are there not only to balance rights of petitioner but to balance right of the parties to a litigation. It is also submitted that learned Single Judge has admitted that "in the instant case the Court while passing of the order in writ jurisdiction was given the impression that SDO is prejudiced against the petitioner and therefore, this Court in the attending facts and circumstance, where adjudication required going into disputed questions of facts, decided to adopt via media by directing that petitioner should avail the remedy of appeal not to the SDO but to the next higher authority i.e. Collector." Overstepped the jurisdiction inasmuch as no via media could have been adopted by the writ Court in violation of the statutory provisions specially when there is clear delineation of jurisdiction, unless a statute is declared to be ultra vires, that is bound to be followed in letter and spirit, thus, it is also submitted that if there would have been any pleading of malafide against a particular SDO then at best Court could have directed the Collector to have assigned that particular case to some other SDO so to prevent any prejudice being affected in the case. Having not adopted this course, impugned order cannot be sustained in the eyes of law and deserves to be set-aside.

26. Learned counsel for the respondent No.1/petitioner, on the other hand, submits that reasoning of learned Single Judge is just and correct and in administration of justice via media was worked out which cannot be faulted with as exercise of a jurisdiction not vested in the learned Single Judge.

27. As far as Judgment in *Arvind Kumar Lohani* (Supra) is concerned, it has been observed by Uttarakhand High Court that under the duties defined in clause 5.04 sub-clause (3) in particular the Chief Standing Counsel which includes within its ambit the Additional Chief Standing Counsel also do not include duty to cater to individual Government officials is clearly distinguishable and not applicable to the facts and circumstances of the present case.

28. After hearing arguments of learned counsel for the parties and going through the record, this Court is of the opinion that in terms of unambiguous provisions contained in MPLRC, Section 44 since does not provide for an appeal from an order of Tahsildar to the Collector. Present appellant in his official capacity of Collector was justified in sending the matter to SDO to take decision in terms of the statute. It is also apparent from the relief sought by the petitioner in the writ petition that he had not claimed any relief of transferring the case from the concerned SDO to any other SDO or to direct the Collector to hear appeal on his own. In absence of such relief, in our opinion learned Single Judge has exceeded its jurisdiction in passing an order in violation of the statutory provisions contained in the MPLRC, and therefore, such order cannot be sustained in the eyes of law and deserves to set-aside and is hereby set-aside.

Parties to bear their own costs.

Order accordingly

I.L.R. [2019] M.P. 1987
WRIT PETITION
Before Mr. Justice G.S. Ahluwalia
W.P. No. 6119/2019 (Gwalior) decided on 25 March, 2019

BHAGWAT SINGH KOTIYA …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

***A. Service Law – Transfer – Frequent Transfer Orders* – Held – Petitioner was transferred earlier on his own request and not because of any administrative exigency – Present transfer orders cannot be considered as frequent transfer orders – Petition dismissed. (Para 5)**

क. सेवा विधि – स्थानांतरण – बारम्बार स्थानांतरण आदेश – अभिनिर्धारित – पूर्व में याची का स्थानांतरण उसके स्वयं के निवेदन पर हुआ था और न कि किसी प्रशासनिक अत्यावश्यकता के कारण – वर्तमान स्थानांतरण आदेशों को बारम्बार स्थानांतरण आदेश नहीं माना जा सकता – याचिका खारिज।

***B. Service Law – Transfer – Model Code of Conduct – Effect* – Petitioner's transfer order passed on 10.03.2019 and on same date model code of conduct was made applicable – Thus cannot be said that he was transferred after model code of conduct was made applicable. (Para 6)**

ख. सेवा विधि – स्थानांतरण – आदर्श आचार संहिता – प्रभाव – याची का स्थानांतरण आदेश 10.03.2019 को पारित किया गया और उसी दिनांक को आदर्श आचार संहिता लागू की गई थी – अतः यह नहीं कहा जा सकता कि उसे आदर्श आचार संहिता लागू किये जाने के पश्चात् स्थानांतरित किया गया था।

C. Service Law – Transfer – Competent Authority – **Held – As per transfer policy, although the Chief Medical & Health Officer is the administrative head of paramedical staff but so far as authority to transfer/post an employee within district, Collector is also a competent authority to pass the transfer orders. (Para 7)**

ग. सेवा विधि – स्थानांतरण – सक्षम प्राधिकारी – अभिनिर्धारित – स्थानांतरण नीति के अनुसार, यद्यपि मुख्य चिकित्सा एवं स्वास्थ्य अधिकारी, पराचिकित्सीय स्टाफ का प्रशासनिक प्रमुख है परंतु जहां तक जिले के भीतर एक कर्मचारी का स्थानांतरण/पदस्थापना के प्राधिकार का संबंध है, कलेक्टर भी स्थानांतरण आदेशों को पारित करने के लिए एक सक्षम प्राधिकारी है।

D. Service Law – Transfer – Representation – Effect – **Held – Mere filing of representation does not give any right to employee to stay on a particular place, even after transfer order has been passed – Petitioner has not joined at transferred place and unless and until employee joins his transferred place, no direction can be given to respondents to consider his representation. (Para 12)**

घ. सेवा विधि – स्थानांतरण – प्रतिनिधित्व – प्रभाव – अभिनिर्धारित – मात्र अभ्यावेदन प्रस्तुत करना, कर्मचारी को, स्थानांतरण आदेश पारित किये जाने के पश्चात् भी एक विशिष्ट स्थान पर रूकने का कोई अधिकार नहीं देता – याची ने स्थानांतरित किये गये स्थान पर कार्यग्रहण नहीं किया और जब तक कि कर्मचारी उसे स्थानांतरित किये गये स्थान पर कार्यग्रहण नहीं करता, प्रत्यर्थीगण को उसके अभ्यावेदन पर विचार करने के लिए कोई निदेश नहीं दिया जा सकता।

E. Constitution – Article 226 and Service Law – Transfer – Scope & Jurisdiction – **Held – Apex Court concluded that transfer is part of service conditions of employee which should not be interfered with ordinarily by Court of law in exercise of jurisdiction under Article 226 unless Court finds such transfer to be *malafide* or against Service Rules or has been passed without authority. (Para 8)**

ड. संविधान – अनुच्छेद 226 एवं सेवा विधि – स्थानांतरण – व्याप्ति व अधिकारिता – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया कि स्थानांतरण, कर्मचारी की सेवा शर्तों का भाग है जिसके साथ न्यायालय द्वारा अनुच्छेद 226 के अंतर्गत अधिकारिता के प्रयोग में साधारणतः हस्तक्षेप नहीं किया जाना चाहिए जब तक कि न्यायालय यह नहीं पाता कि उक्त स्थानांतरण को असद्भावपूर्वक या सेवा नियमों के विरूद्ध अथवा बिना प्राधिकार पारित किया गया है।

Cases referred :

AIR 1993 SC 2444, (1993) 1 SCC 148, (2001) 8 SCC 574, (2001) 5 SCC 508, (1989) 2 SCC 602, (2009) 15 SCC 178, (2009) 8 SCC 337, (2004) 11 SCC 402, ILR [2015] MP, 2556.

Alok Bandhu Shrivastava, for the petitioner.
Anand V. Bhardwaj, G.A. for the respondents/State.

J U D G M E N T

G.S. AHLUWALIA, J. :- This petition under Article 226 of the Constitution of India has been filed against the order dated 10/3/2019, by which the petitioner has been posted in Sector Kumbhraj, Community Health Center Beenaganj.

2. The necessary facts for disposal of the present petition in short are that the petitioner is working on the post of Male Multipurpose Supervisor. Earlier he was posted at Sector Kumbhraj, Community Health Center, Beenaganj and at the personal request of the petitioner, he was transferred to Sector Markimahu, Primary Health Center, Bhadora by order dated 16/7/2017.

3. It is submitted by the counsel for the petitioner that the petitioner has been transferred within a short span of less than two years, therefore, the present transfer order is bad because of frequent transfers. It is further submitted that the order under challenge has been passed by the Collector, Guna, whereas the Chief Medical & Health Officer is the administrative officer of the petitioner and, therefore, the transfer order should have been passed by the Chief Medical & Health Officer and not by the Collector. Further, by referring to Clause 8.20 of the transfer policy, it is submitted that rationalization of the Doctors / Nurses / Staff posted in Hospitals / Dispensaries functioning under the control of Public Health and Family Welfare Department has to be made and thus, the petitioner has been transferred in violation of the transfer policy. Furthermore, it is submitted that as the model code of conduct has been made applicable, therefore, the transfer order is bad and the petitioner has also made a representation against his transfer order.

4. Heard learned counsel for the petitioner.

5. So far as the question of frequent transfer is concerned, it is clear that by order dated 16/7/2017 the petitioner was transferred to Sector Markimahu (Primary Health Center, Bhadora) on his own request and thus, his previous transfer was not because of any administrative exigency, but it was the accommodation by the respondents. Therefore, the last transfer order dated 16/7/2017 cannot be taken into consideration for considering that whether the impugned transfer order suffers from frequent transfer or not. Thus, the submission made by the counsel for the petitioner with regard to his frequent transfer is rejected.

6. So far as the model code of conduct is concerned, the same was made applicable from 10/3/2019 and the impugned order was also passed on 10/3/2019. It is not the case of the petitioner that the impugned order was passed after the model code of conduct was made applicable. Thus, the contention of the

petitioner that after declaration of the elections no employee can be transferred without the permission of the Election Commission, cannot be accepted.

7. It is further submitted by the counsel for the petitioner that the transfer of the petitioner is violative of the conditions of the transfer policy. It is further submitted that petitioner's administrative head is the Chief Medical & Health Officer, therefore, the Collector could not have transferred him, is also misconceived, because so far as the authority to post / transfer an employee within the district is concerned, as per the transfer policy, Collector is also competent, although the Chief Medical & Health Officer is the administrative head of the Paramedical Staff. Under these circumstances, it cannot be said that the transfer of the petitioner is without authority. Furthermore, it is well established principle of law that the transfer policy is an executive guidelines and is not enforceable.

8. The Supreme Court in the case of *Union of India and Others vs. S. L. Abbas* reported in AIR 1993 SC 2444 has held as under:-

> "**6.** An order of transfer is an incident of Government Service. Fundamental Rule 11 says that "the whole time of a Government servant is at the disposal of the Government which pays him and he may be employed in any manner required by proper authority." Fundamental Rule 15 says that "the President may transfer a Government servant from one post to another". That the respondent is liable to transfer anywhere in India is not in dispute. It is not the case of the respondent that order of his transfer is vitiated by *mala fides* on the part of the authority making the order,- though the Tribunal does say so merely because certain guidelines issued by the Central Government are not followed, with which finding we shall deal later. The respondent attributed "mischief" to his immediate superior who had nothing to do with his transfer. All he says is that he should not be transferred because his wife is working at Shillong, his children are studying there and also because his health had suffered a set-back some time ago. He relies upon certain executive instructions issued by the Government in that behalf. Those instructions are in the nature of guidelines. They do not have statutory force.
>
> **7.** Who should be transferred where, is a matter for the appropriate authority to decide. Unless the order of transfer is vitiated by malafides or is made in violation of any statutory provisions, the Court cannot interfere with it. While ordering the transfer, there is no doubt, the authority must keep in mind the guidelines issued by the Government on the subject. Similarly if a person makes any representation with respect to his transfer, the appropriate authority must consider the same having regard to the exigencies of administration. The guidelines say that as far as possible, husband and wife must be posted at the same place. The said guideline

> however does not confer upon the government employee a legally enforceable right."

The scope of judicial review of transfer under Article 226 of the Constitution of India has been settled by the Supreme Court in *Rajendra Roy v. Union of India* [(1993) 1 SCC 148], *National Hydroelectric Power Corpn. Ltd. v. Shri Bhagwan* [(2001) 8 SCC 574], *State Bank of India v. Anjan Sanyal* [(2001) 5 SCC 508] and it has been held that the transfer is a part of the service conditions of an employee which should not be interfered with ordinarily by a court of law in exercise of its discretionary jurisdiction under Article 226 unless the court finds that either the order is mala fide or that the service rules prohibit such transfer, or that the authorities who issued the orders, were not competent to pass the orders.

The Supreme Court in the case of *Gujarat Electricity Board v. Atmaram Sungomal Poshani,* reported in (1989) 2 SCC 602 has held as under :

> "**4.** Transfer of a government servant appointed to a particular cadre of transferable posts from one place to the other is an incident of service. No government servant or employee of Public Undertaking has legal right for being posted at any particular place. Transfer from one place to other is generally a condition of service and the employee has no choice in the matter. Transfer from one place to other is necessary in public interest and efficiency in the public administration. Whenever, a public servant is transferred he must comply with the order but if there be any genuine difficulty in proceeding on transfer it is open to him to make representation to the competent authority for stay, modification or cancellation of the transfer order. If the order of transfer is not stayed, modified or cancelled the concerned public servant must carry out the order of transfer. In the absence of any stay of the transfer order a public servant has no justification to avoid or evade the transfer order merely on the ground of having made a representation, or on the ground of his difficulty in moving from one place to the other. If he fails to proceed on transfer in compliance with the transfer order, he would expose himself to disciplinary action under the relevant rules........."

The Supreme Court in the case of *Rajendra Singh v. State of U.P.,* reported in (2009) 15 SCC 178, has held as under :

> "**8.** A government servant has no vested right to remain posted at a place of his choice nor can he insist that he must be posted at one place or the other. He is liable to be transferred in the administrative exigencies from one place to the other. Transfer of an employee is not only an incident inherent in the terms of appointment but also implicit as an essential condition of service in the absence of any specific indication to the contrary. No Government can function if

> the government servant insists that once appointed or posted in a particular place or position, he should continue in such place or position as long as he desires."

The Supreme Court in the case of *Airports Authority of India v. Rajeev Ratan Pandey,* reported in (2009) 8 SCC 337, has held as under :

> **"10.** In the writ petition, the transfer order has been assailed by the present Respondent 1 on the sole ground that it was violative of transfer policy framed by the appellant. The High Court, did not even find any contravention of transfer policy in transferring Respondent 1 from Lucknow to Calicut. In a matter of transfer of a government employee, scope of judicial review is limited and the High Court would not interfere with an order of transfer lightly, be it at interim stage or final hearing. This is so because the courts do not substitute their own decision in the matter of transfer.
>
> **11.** In the present case, the High Court fell into a grave error in staying the transfer order which, if allowed to stand, may cause prejudice to the administrative functioning of the appellant."

The Supreme Court in the case of *State of U.P. v. Gobardhan Lal,* reported in (2004) 11 SCC 402 has held as under :

> **"7.** It is too late in the day for any government servant to contend that once appointed or posted in a particular place or position, he should continue in such place or position as long as he desires. Transfer of an employee is not only an incident inherent in the terms of appointment but also implicit as an essential condition of service in the absence of any specific indication to the contra, in the law governing or conditions of service. Unless the order of transfer is shown to be an outcome of a mala fide exercise of power or violative of any statutory provision (an Act or rule) or passed by an authority not competent to do so, an order of transfer cannot lightly be interfered with as a matter of course or routine for any or every type of grievance sought to be made. Even administrative guidelines for regulating transfers or containing transfer policies at best may afford an opportunity to the officer or servant concerned to approach their higher authorities for redress but cannot have the consequence of depriving or denying the competent authority to transfer a particular officer/servant to any place in public interest and as is found necessitated by exigencies of service as long as the official status is not affected adversely and there is no infraction of any career prospects such as seniority, scale of pay and secured emoluments. This Court has often reiterated that the order of transfer made even in transgression of administrative guidelines cannot also be interfered with, as they do not confer any legally enforceable rights, unless, as noticed supra, shown to be

> vitiated by mala fides or is made in violation of any statutory provision.
>
> **8.** A challenge to an order of transfer should normally be eschewed and should not be countenanced by the courts or tribunals as though they are Appellate Authorities over such orders, which could assess the niceties of the administrative needs and requirements of the situation concerned. This is for the reason that courts or tribunals cannot substitute their own decisions in the matter of transfer for that of competent authorities of the State and even allegations of mala fides when made must be such as to inspire confidence in the court or are based on concrete materials and ought not to be entertained on the mere making of it or on consideration borne out of conjectures or surmises and except for strong and convincing reasons, no interference could ordinarily be made with an order of transfer."

The Supreme Court in the case of *Union of India and Others vs. S. L. Abbas* reported in AIR 1993 SC 2444 has held as under:-

> **"7.** Who should be transferred where, is a matter for the appropriate authority to decide. Unless the order of transfer is vitiated by malafides or is made in violation of any statutory provisions, the Court cannot interfere with it. While ordering the transfer, there is no doubt, the authority must keep in mind the guidelines issued by the Government on the subject. Similarly if a person makes any representation with respect to his transfer, the appropriate authority must consider the same having regard to the exigencies of administration. The guidelines say that as far as possible, husband and wife must be posted at the same place. The said guideline however does not confer upon the government employee a legally enforceable right."

9. Thus, considering the contentions made by the Counsel for the petitioner in the light of the law, laid down by the Supreme Court, this Court is of the considered opinion, that no case is made out warranting any interference in the matter.

10. It is next submitted by the counsel for the petitioner that the petitioner has made a representation, therefore, the respondents be directed to decide his representation and till then, the petitioner may be allowed to continue at his original place of posting.

11. The petitioner has admittedly not joined at his transferred place. The Division Bench of this Court in the case of *Mridul Kumar Sharma Vs. State of M.P.* reported in ILR [2015] MP, 2556 has held as under:-

> "6. Accordingly, this appeal is devoid of merit. We, however, make it clear that it is for the appropriate Authority to entertain the

> representation filed by the appellant and including to consider the request of the appellant to allow him to continue at the same place or otherwise. The appellant must, as per the settled legal position, report to the transferred place and pursue his remedy of representation, particularly when the appropriate Authority before whom the representation is pending has so far not favoured the appellant by allowing him to continue at the same place. At best, we may only observe that the appropriate Authority must decide the representation expeditiously, preferably within two weeks.
>
> 7. Accordingly, the writ appeal is rejected with the above observations."

12. Thus, unless and until the employee joins at the transferred place, no direction can be issued to the respondents to consider his representation. Furthermore, mere filing of representation does not give any right to the employee to stay on a particular place. Accordingly, as the petitioner has not joined at his transferred place, therefore, no direction can be issued to the respondents for deciding his representation and in the light of the judgment passed by the Division Bench of this Court in the case of *Mridul Kumar Sharma* (supra), the transfer order cannot be kept in abeyance till the decision of the representation.

13. Consequently, this petition fails and is hereby **dismissed.**

Petition dismissed

I.L.R. [2019] M.P. 1994
WRIT PETITION
Before Mr. Justice S.A. Dharmadhikari
W.P. No. 1651/2010 (Gwalior) decided on 23 April, 2019

BALBEER SINGH LODHI …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

A. Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 11 – Appeal – Authorization **– Held – As per general interpretation of Section 11, if Gram Panchayat wants to sue or to file appeal, it has to pass a resolution authorizing somebody to act on its behalf – In absence of any such resolution, Sarpanch cannot sue and file an appeal independently. (Para 5 & 6)**

क. पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 11 – अपील – प्राधिकरण – अभिनिर्धारित – धारा 11 के साधारण निर्वचन अनुसार, यदि ग्राम पंचायत वाद लाना अथवा अपील प्रस्तुत करना चाहती है, उसे उसकी ओर से कार्य करने हेतु किसी व्यक्ति को प्राधिकृत करते हुए संकल्प पारित करना होगा – उक्त संकल्प

के अभाव में, सरपंच स्वतंत्र रूप से वाद नहीं ला सकता तथा अपील प्रस्तुत नहीं कर सकता।

***B. Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 86(2) – Appointment – Advertisement* – Held – Record shows that advertisement was issued before appointment of petitioner – After following due process and preparation of merit list, petitioner was appointed on the post of Panchayat Secretary – Respondents admitted the fact of issuance of advertisement and preparation of panchnama – Impugned order set aside – Petition allowed. (Para 7)**

ख. पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 86(2) – नियुक्ति – विज्ञापन – अभिनिर्धारित – अभिलेख यह दर्शाता है कि याची की नियुक्ति के पूर्व विज्ञापन जारी हुआ था – सम्यक् प्रक्रिया का पालन करने तथा मेरिट सूची तैयार होने के पश्चात्, याची की नियुक्ति पंचायत सचिव के पद पर हुई थी – प्रत्यर्थीगण ने विज्ञापन जारी करने तथा पंचनामा तैयार करने के तथ्य को स्वीकार किया – आक्षेपित आदेश अपास्त – याचिका मंजूर।

Case referred :

2008 (3) MPLJ 127.

M.P.S. Raghuvanshi, for the petitioner.
Sanjay Bahirani, G.A. for the respondents-State.

O R D E R

S.A. DHARMADHIKARI, J. :- In this petition, under Article 226 of the Constitution of India, petitioner has assailed the legality, validity and propriety of the order dated 3/3/2010 (Annexure P/1) passed by the Additional Commissioner, Gwalior Division, Gwalior in Case No. 256/2006-007/Appeal, whereby the order dated 4/6/2007 (Annexure P/9) appointing the petitioner on the post of Panchayat Secretary of Gram Panchayat Bastari, Janpad Panchayat Morar, District Gwalior has been quashed.

2. The brief facts leading to filing of this case are that the State Government had formulated a policy dated 12/9/1995 providing method of recruitment to the post of Panchayat Karmi. A further notification dated 27/1/2006 was issued clarifying the policy dated 12/9/1995 wherein provision has been made in respect of exercise of powers after 30 days on failure of Gram Panchayat to make appointment after orders of Collector of the district and thereby Chief Executive Officer of the Janpad Panchayat has been empowered to make the appointment in exercise of powers under section 86(2) of the M.P. Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 (for short "the Act"). Since Gram Panchayat Bastari did not appoint Panchayat Karmi as provided, the Collector, Gwalior directed Chief Executive Officer, Janpad Panchayat, Morar, District Gwalior to make

appointment of Panchayat Karmi and to inform him accordingly. In compliance, the Chief Executive Officer issued an advertisement dated 24/4/2007. In all three applications were received in the office of Chief Executive Officer, Janpad Panchayt, Morar, District Gwalior including that of the petitioner. A merit list was prepared and petitioner was appointed as Panchayat Secretary being more meritorious. The appointment order was issued by the Chief Executive Officer appointing the petitioner as Panchayat Secretary. Being aggrieved, respondent no.5-Sarpanch filed an appeal before Additional Commissioner, Gwalior Division under section 91 of the Act read with Rule 3 of the M.P. Panchayat (Appeal and Revision) Rules, 1995 (for short "the Rules"). It was registered as Case No.256/2006-007/appeal. The aforesaid appeal was finally decided on 3/3/2010 by setting aside the order of appointment on the ground that no advertisement was issued for appointment of Panchayat Karmis at Gram Panchayats Tiholi, Bilheti and Bastari and only Panchanama to that effect was available on record which could not have been prepared in absence of the advertisement and that the Chief Executive Officer had undertaken the exercise of appointment of Panchayta (sic : panchayat) Karmi without advertisement which itself was *dehors* the rules.

3. Learned counsel for the petitioner submitted that due procedure for appointment on the post of Panchayat Karmi had been followed. The Collector vide letter dated 10/11/2006 (Annexure P/4) had asked the Sarpanch of the Gram Panchayat to initiate the process of appointment of Panchayat Secretaries within thirty days. Thereafter, the Collector again issued a reminder on 28/12/2006 (Annexure P/5) for filling up the posts of Panchayat Karmi, but respondent no.5/Sarpanch failed to fill-up the posts. Ultimately, the Chief Executive Officer after approval of the Collector passed the order of appointment dated 4/6/07 (Annexure P/9).

4. Learned counsel for the petitioner raised a preliminary objection regarding maintainability of the appeal filed by respondent no.5-Sarpanch before the Additional Commissioner on the ground that there is no resolution about filing of appeal by Sarpanch, passed by the Gram Panchayat. Therefore, without taking authority from the Gram Panchayat and without resolution of the Gram Panchayat, respondent no.5/Sarpanch had no power to file an appeal. Consequently, the Commissioner, who passed the impugned order also had no power to entertain the same under Rule 3 of the Rules whereby the appeal lied (sic : filed) before the Collector against the order of Chief Executive Officer. In support of his contention, learned counsel placed reliance on decision of a Division Bench of this Court in the case of *Gram Panchayat, Bamrol Vs. Jagdish Singh Rawat* (2008 (3) MPLJ 127) in which it has been held that Gram Panchayat is a body corporate having power to sue or to be sued. It has to authorize somebody to act on its behalf and without resolution authorizing someone to act

on its behalf, Sarpanch cannot sue and file an appeal independently, therefore, the appeal was incompetent and not maintainable. It is further submitted that the impugned order is based on the fact that no advertisement was issued, whereas it is an admitted position that advertisement was issued and three persons applied in which petitioner was found to be most meritorious. This aspect has not been denied by the respondents in their return wherein they have categorically admitted that advertisement was issued.

5. Per contra learned Government Advocate has supported the order passed by the Additional Commissioner. However, he was unable to point out any resolution passed by the Gram Panchayat in favour of respondent no.5/Sarpanch with regard to filing of appeal. Further, issuance of advertisement has been admitted in the return.

6. Section 11 of the Act reads as under:-

> **"Incorporation of Panchayats. -** Every Gram Panchayat, Janpad Panchayat and Zila Panchayat shall be body corporate by the name specified, therefor in the order under Section 3 for village or notification under Section 10 for Janpad Panchayat and Zila Panchayat as the case may be, having perpetual succession and a common seal and shall by the said name, sue and be sued and shall subject to the provisions of this Act and the rules made thereunder, have power to acquire, hold or transfer property movable or immovable, to enter into contracts and lo do all other things necessary for the purpose of this Act."

Section 49 of the Adhiniyam, 1993 deals about the function of Gram Panchayat. Rules have been framed regarding the power and functions namely:"Madhya Pradesh Panchyat (Powers and Function of Sarpanch and Up-sarpanch of Gram Panchayat) Rules, 1994" (for short Rules of 1994), but in these rules, it is nowhere provided that who will sue on behalf of the Panchayat. On the basis of section 11 of the Adhiniyam 1993, Gram Panchayat being body corporate can sue and can be sued. As per the general interpretation of section 11, the power shall not vest in the Sarpanch but it will vest in the whole body of the Gram Panchayat and if the Panchayat wants to sue or to file an appeal, the Panchayat has to pass a resolution authorising either to Sarpanch, or Up-sarpanch or to any Panch or to file appeal or Writ Petition or any other petition. Rule 3 of the M. P. Gram Panchayat (Power and Functions of the Secretary) Rules, 1999 provides that executive power of Gram Panchayat shall vest in the Panchayat Secretary, who will exercise the executive power, but in these rules also it is nowhere provided that who will sue on behalf of the Panchayat. Therefore, this Court is of the view that Gram Panchayat has to authorise somebody to act on its behalf and without the resolution by authorising any person to sue on behalf of the Panchayat, the Sarpanch cannot sue and file an appeal independently.

7. Even otherwise, advertisement was issued before appointment of petitioner, which is available on record as Annexure P/6. Thereafter, after following due process and preparation of merit list, petitioner was appointed on the post of Panchayat Secretary. In the return also, in paragraph 6, respondents have admitted issuance of advertisement and preparation of Panchnama. As such, the finding of the Court below regarding non issuance of advertisement is perverse and is not sustainable.

8. In view of the foregoing discussion, the impugned order dated 3/3/2010 (Annexure P/1) is set aside. Since petitioner is already working in the wake of interim order dated 7/4/10, no further directions are necessary.

Petition, accordingly, stands allowed.

Petition allowed

I.L.R. [2019] M.P. 1998
WRIT PETITION
Before Ms. Justice Vandana Kasrekar
W.P. No. 4763/2019 (Indore) decided on 17 July, 2019

GLOBAL TRADEX LTD. (FORMERLY KNOWN AS NAMCO CORP LIMITED) & anr. …Petitioners

Vs.

STATE BANK OF INDIA …Respondent

***A. Constitution – Article 226 – Opportunity of Hearing – Principle of Natural Justice* – Held – Classification of account of petitioner as fraud is carrying serious civil as well as criminal consequences and attracts grave punitive measures therefore Bank should have issued prior notice to petitioner, providing opportunity of hearing, before classifying the account of petitioner as fraud – Earlier notice issued was regarding issue of 'willful defaulter' and not for classifying the account as 'fraud' – Impugned order quashed – Petition allowed. (Paras 13, 17 & 18)**

क. संविधान – अनुच्छेद 226 – सुनवाई का अवसर – नैसर्गिक न्याय का सिद्धांत – अभिनिर्धारित – याची के खाते का कपट के रूप में वर्गीकरण गंभीर सिविल के साथ–साथ दाण्डिक परिणाम रखता है तथा गंभीर दण्डात्मक उपायों को आकर्षित करता है इसलिए बैंक को, याची के खाते को कपट के रूप में वर्गीकृत करने से पूर्व, याची को सुनवाई का अवसर प्रदान करते हुए पूर्व–नोटिस जारी करना चाहिए था – पूर्व में जारी नोटिस 'जानबूझकर व्यतिक्रमी' के संबंध में था और न कि खाते को 'कपट' के रूप में वर्गीकृत करने हेतु था – आक्षेपित आदेश अभिखंडित – याचिका मंजूर।

***B. Constitution – Article 226 – Administrative Decision – Principle of Natural Justice* – Held – Apex Court concluded that even administrative decisions entailing civil consequences are subject to principles of natural justice. (Para 14)**

***ख. संविधान – अनुच्छेद 226 – प्रशासनिक विनिश्चय – नैसर्गिक न्याय का सिद्धांत* – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि यहां तक कि सिविल परिणामों को आवश्यक बनाने वाले प्रशासनिक विनिश्चय भी नैसर्गिक न्याय के सिद्धांतों के अध्यधीन है।**

Cases referred :

(1981) 1 SCC 664, (1994) 1 Supp 615, (1995) 1 SCC 552, (2003) 4 SCC 557, (2008) 14 SCC 151, (2011) 6 SCC 220, (2018) 7 SCC 670, (1978) 1 SCC 248, 1993 (4) SCC 260, (2013) 6 SCC 384, AIR 1993 SC 1082, LAWS (SC) – 2012-12-66, (2018) 7 SCC 679.

A.K. Chitale with *Vaibhav Jain* and *Kartik Chitale*, for the petitioners.
A.K. Sethi with *R.C. Sinhal,* for the respondent.

O R D E R

VANDANA KASREKAR, J. :- The petitioners have preferred the present writ petition challenging the order dated 04/06/2018, by which, the respondent/s have rejected the representation filed by the petitioners.

2. Petitioner no.1 enjoyed credit facilities sanctioned by a consortium of ten banks led by respondent/Bank. Petitioner no.1 remained reasonably profitable between 2007 to 2012 and enjoyed a stellar reputation in India and around the world. However, in the year 2012-13, there was decline in the business of petitioner no. 1 owing to several factors. Consequently, the loan accounts of petitioner no. 1 including its account which respondent/ Bank became stressed. The petitioners requested the lending banks to allow a restructuring of its loan accounts in order to tide over the period of stress. However, when the lender banks refused to restructure the accounts, the petitioners offered to settled the loan accounts on mutually acceptable terms and conditions by way of one time settlement. Petitioner no. 1 settled the loan accounts of six out of the ten lender banks. On 31/03/2015, the Central Vigilance Commission (hereinafter referred to as "the CVC ") issued an office memorandum directing respondent/S inter-alia, to declare the account of petitioner no. 1 as fraud. It is further stated that the office memorandum issued by CVC was without jurisdiction. Against the office memorandum issued by CVC, the petitioners filed Writ Petition no. 239/2016 before this Court. The said writ petition was disposed of vide order dated 19/04/2018 with the direction to the petitioner/s to appear before the Dy. General Manager, Assets Management Branch, State Bank of India, Bhopal on30/04/2018

and the Dy. General Manager was directed to pass a self contained speaking order with the advertence to the relevant material placed before him. In compliance of the order passed by this Court, the petitioner/s appeared before respondent/s on 30/04/2018 at Bhopal. The petitioners attended the personal hearing held on 19/05/2018 at Bhopal and at the time of personal hearing, the petitioners requested to be advised the charges of the bank with respect to fraud, so that the petitioners could have an opportunity to submit their representation. However, no such opportunity was given to the petitioner. Thereafter, 04/06/2018, the respondent/s passed the impugned order with respect to the hearing held by him and by the impugned order, respondent/s contended that the final order dated 19/04/2018 passed in W.P. no. 239/2016 did not require him to pass an order on the fraud classification of the respondent/s The act of respondent/s in denying the petitioners a hearing with respect to reversal of fraud classification is in direct contravention to the direction in WP no. 239/2016. Respondent/s contended that although the final order in W.P. no. 239/2016 contemplated a hearing to be allowed to the petitioners, such hearing would not be on the subject of fraud classification. Members of the consortuim (sic : consortium) were broadly of the view that the account did not deserve to be classified as fraud. This was recorded by the consortium at their consortium meeting held on 08/02/2017. By the said order, the member banks decided to reconsider the fraud classification of petitioner no. 1. Subsequent to the meeting of 08/02/2017, two members banks viz, Indian Bank and Union Bank of India also wrote to respondent/s to record that it had been unanimously decided that the account did not deserve to be classified as fraud. The Reserve Bank of India has framed guidelines from time to fime (sic : time) with respect to fraud classification of accounts by banks in India. It is contained in Master Circulars, which prescribed that under a consortium arrangement, an account should be classified as fraud on the basis of broad agreement amongst consortium members or on the majority rule of agreement amongst banks with at least 60% share in the total lending. In the present case, it is evident that the dissenting opinions of other consortium members were steamrolled by respondent/s and that there is no broad agreement or agreement amongst banks with at least 60% share in the total lending to classify the account of petitioner no. 1 as fraud. The respondent/s while classifying the petitioner no. 1 account as fraud has ignored the letters issued by the consortium members. RBI guidelines further prescribe that a forensic audit with respect to the account should be conducted jointly by consortium members as a precursor to fraud classification. In the present case, a forensic audit was commissioned independently by consortium member Bank of Boroda without reference to the procedure prescribed by the RBI. Challenging this action of the respondent/ Bank, the petitioners have filed the present writ petition before this Court.

3. Learned Sr. counsel for the petitioners has argued that the action of the respondent in classifying the account of the petitioner as fraud on the basis of the

office memorandum dated 31/03/2015 issued by the CVC is illegal. This office memorandum contains several allegations against the petitioner, which have been refuted in full by the petitioners in W.P. no. 239/2016. The CVC has no jurisdiction to issue such memorandum and cannot interfere in the matters of such bank or fraud declaration between the bank and the borrower, which are governed by RBI. He further submits that on the basis of the several documents on record, it reveals that the account of petitioner no. 1 was classified as fraud by the respondent/s, although no such order was supplied to petitioner no. 1. He further submits that at no point of time, the petitioners ever afforded a hearing by the CVC or the respondent/Bank prior to classification of their account as fraud. He further submits that consortium members have issued various letters stating that petitioner no 1's account could not be classified as fraud. He further submits that this Court while disposing of writ petition no. 239/2016, has directed the respondent/s to provide ample opportunity of hearing to the petitioners before taking decision in the matter and pass speaking order, but in the present case, the respondent/s has not issued any notice to the petitioners before declaring their account as fraud. He further submits that two notices were issued by the respondent / Bank on 26/09/2013 and 06/02/2016 in respect of willful default and on both occasion, the petitioners had responded on 09/10/2013 and 05/03/2016 respectively with detailed submissions to counter the allegations of wilful default. He further argues that classified as fraud is much more serious matter than wilful default. The declaration as willful defaulter primarily has civil consequences whereas the classification of an account as fraud is a far more serious quasi-criminal matter., therefore, the requirement of natural justice and hearing should be even more strict in the case of classification of an account as fraud compared to declaration of a borrower as a willful defaulter. He further relied upon the detailed interim order passed by Delhi High Court in the case of *Apple Sponge and Power Ltd and others Vs. Reserve Bank of India and another* (W.P. (c) no. 306/2019). He further argued that the respondent/s in their reply have admitted the fact that the account of the petitioner no. 1 has been declared as fraud and prior to such declaration, no notice was issued to the petitioners. He further submits that even though, it is not provided in the Master Circular issued by RBI for issuance of any notice before declaring the account as fraud, but the declaration of the account as fraud involves civil consequences and therefore, it requires that opportunity of hearing should have been given to the petitioners before declaring petitioner no.1's account as fraud.

4. Learned counsel for the petitioners has relied upon the following judgments :

i) *Kanchan Motors and others Vs. Bank of India and others* passed in W.P. (L) no. 2072/2018 decided on 12/07/2018

ii) *Swadeshi Cotton Mills Vs. union of India* reported in (1981) 1 SCC 664.

iii) *State of Arunachal Pradesh Vs. Khudiram Chakna* reported in (1994) 1 Supp 615.

iv) *State of U.P Vs. Vijay Kumar Tripathi* reported in (1995) 1 SCC 552

v) *Canara Bank Vs. Debasis Das* reported in (2003)4 SCC 557

vi) *Sahara India Vs. Commissioner of Income Tax* reported in (2008) 14 SCC 151

vii) *Rasila S. Mehta Vs. Custodin, Narman Bhavan, Mumbai* reported in (2011) 6 SCC 220

viii) *Union of India Vs. Ram Lakhan Sharma* reported in (2018) 7 SCC 670.

ix) *Maneka Gandhi Vs. Union of India* reported in (1978) 1 SCC 248

x) *Apple Sponge and Power Vs. Reserve Bank of India* passed by Delhi High Court dated 15/12/2019.

xi) *Union of India Vs. W.N. Chadha* reported in 1993 (4) SCC 260

xii) *Anju Choudhary Vs. State of U.P.* reported in (2013) 6 SCC 384.

5. The respondents have filed their reply and in the reply, the respondents have stated that the Bank has issued notice to the petitioners only in respect of their identification as willful defaulter and as no notice regarding classification of their loan accounts as fraud, has been issued. The respondent/s has passed detailed order dated 04/06/2018 after giving an opportunity of hearing to the petitioners and the same has been passed in accordance with the directions issued by this Court. In terms of the RBI's Master Circular dated 01/07/2015, petitioner's loan account have already been classified as fraud and the said fraud classification has already been reported to RBI and the matter has already been referred to Law Enforcing Agencies for investigation. Under the Law, there is no provision that for lodging a complaint prior or post notice should be issued to accused person or to explain him as to why the complaint has been lodged against him with the Law Enforcing Agencies. If complaint is lodged, it is for the Law Enforcing Agencies to investigate into the matter on the alleged facts and to directly deal with the person against whom the complaint is lodged as per laid down legal procedure. Under RBI's Master Circular, there is no mandate either to issue any notice prior to classifying his account as fraud or to give personal hearing to borrower or to apprise him as to on what charges / facts, his loan accounts have been classified as fraud. The petitioners are not entitled to ask for any notice prior to classifying his

account as fraud. In classifying the petitioner's loan account as fraud, the respondent /Bank has performed its internal administrative work in terms of said RBI's Master Circular.

6. Office memorandum of the CVC is mere advisory and not directory and otherwise also, the complaint lodged by the respondent / Bank in respect of classification of petitioner's loan account as fraud is the subject matter of investigation by Law Enforcing Agencies and as such, it is of no avail to say that the petitioner's loan accounts have rightly been classified as fraud on the advice of the CVC.

7. Learned Sr. counsel appearing on behalf of the respondent/s relying on the Master Circular issued by the RBI, has argued that the Master Circular does not provide for giving any opportunity of hearing before classifying the accounts as fraud. He further submits that the order dated 15/02/2019 passed by Delhi High Court is an interlocutory order and it was existed only till the next date of hearing and on the next date of hearing i.e. 26/04/2019, Hon'ble Delhi High Court has not continued the said interlocutory order. He further relied upon the judgment delivered by Hon'ble Apex Court in the case of *Union of India Vs. W.N. Chadha* reported in AIR 1993 SC 1082 and *Anju Chaudhary Vs. State of UP* reported in LAWS (SC) - 2012-12-66. On the basis of these judgments, learned counsel has argued that no personal hearing to a suspects is contemplated in law and as such a hearing is warranted only when the Investigating Agency files its report with the Competent Court of Law under section 173 of Cr.P.C to term the suspect as an accursed (sic : accused).

8. The petitioners have filed their rejoinder and in the rejoinder, they have denied the fact that the order passed by the respondent/s is in accordance with the directions issued by this Court in W.P. no. 239/2016 and further that while disposing of the said writ petition, **<u>this Court has not given any</u>** direction for giving an opportunity of hearing to the petitioner on ground of fraud. The petitioners submits that in W.P. no. 239/2016, the petitioners have challenged the memorandum dated 31/03/2015 issued by the CVC to declare the account of the petitioner no. 1 as fraud and the said memorandum was challenged on the ground that on the basis of the said memorandum, the respondent / Bank proceeded to classy the account of the petitioner no. 1 as fraud without hearing the petitioners. The petitioners have given several letters to the CVC with respect to the allegations made by the CVC in the office memorandum and also requested personal hearing should be allowed to him in the present case. That inspite of these letters, as no action has been taken by the CVC, therefore, writ petition was filed and initially, this Court, vide order dated 08/01/2016 has granted interim relief to the petitioners and thereafter, the said writ petition was disposed of with the directions to the respondent / Bank to pass afresh order after giving an

opportunity of hearing to the petitioners. In respect of the pleadings made by the respondents in their reply that the RBI's Master Circular does not make personal hearing on fraud classification, the petitioners in their rejoinder have stated that the Master Circular, if it is so construed itself, does not stand the test of natural justice in allowing the Banks to classify the account of the borrower as fraud, without hearing the borrower. Classification of a borrower as fraud has serious ramifications, which are indicated with the Master Circular itself. By virtue of the strigent penal measures stipulated in the Master Circular, the ex-parte order classifying the petitioner Company and its directors as fraud by the respondent / Bank has sounded the death knell for the future prospects of the petitioner's business and their revival. The petitioners have been blacklisted and debarred from the public financial system without even having been heard..

9. The respondents have stated in their reply that in classifying the account of the petitioners as fraud, the respondent/Bank has performed its internal administrative work. This contention falls flat when considering the stringent punitive measures that accompany the fraud classification, which include complete debarment of the petitioner/company and its directors from the public financial system along with elimination of any propects for their revival.

10. The respondents have filed their reply to the rejoinder filed by the petitioners reiterating their earlier stand taken in their reply.

11. Heard learned counsel for the parties and perused the records.

12. Present writ petition has been filed against the order dated 04/06/2018, thereby the petitioner's representation has been rejected. That on 31/03/2018, Central Vigilance Commission has issued office memorandum directing the respondent / Bank to declare the account of the petitioner as fraud. Being aggrieved by the said memorandum, the petitioners have filed writ petition no. 239/2016 before this Court. That on 19/04/2018, the said writ petition was disposed of by issuing following directions :

> "As the learned Senior Counsels have agreed for disposal of the writ petition with direction to the respondent/Bank to provide ample opportunity to the petitioners before taking a decision in the matter, this Court refrains from commenting upon merits of the contentions as sought to be canvassed during the course of hearing and in the fitness of things, considers it apposite to dispose of the same with the following directions:
>
> (a) Petitioners shall appear before the Deputy General Manager, Assets Management Branch, State Bank of India, Bhopal on **30.04.2018** at **10:30 am** with complete set of submissions submitted in response to the notices already issued to them by the

State Bank of India and if they intended may also file additional documents;

(b) the Deputy General Manager, Assets Management Branch, State Bank of India, Bhopal shall fix a date of hearing of the case and on the said date afford personal hearing to the petitioners or their representative if so demanded; and

(c) the Deputy General Manager, Assets Management Branch, State Bank of India, Bhopal shall pass a self-contained speaking order with due advertence to the relevant material placed before him and/or official record of the Bank within 30 days and the decision shall be communicated to the petitioners;"

13. Thereafter, opportunity of hearing was given to the petitioner by respondent/s as directed by this Court. Respondent/s thereafter, passed the order dated 04/06/2018, thereby rejecting the objections raised by the petitioner/s. The order is impugned in the present writ petition. In the present case, while disposing of W.P. no. 239/2016, this Court has directed respondent/s to decide the matter after considering the submissions made by the petitioner/s in response to the notice already issued to them. The earlier notices issued to the petitioner/s were in respect of willful defaulter. However, no notice has been given regarding declaration of the petitioner/s account as fraud and this fact has been admitted by the respondent/s in the impugned order as well as in the reply, which is filed by the respondent/s in earlier writ petition. The respondent/s while rejecting the representation, has also stated that when the Bank has not issued any notice of fraud to the petitioner/s, therefore, there is no question of issuing any show-cause notice to the petitioner/s on account of fraud. However, from perusal of the reply as well as the reply to the rejoinder, the respondent have admitted the fact that the account of the petitioner/s is declared as fraud and prior to that no notice was issued to the petitioner/s. The respondents have further stated that in the master circular issued by the RBI, there is no provision of giving any opportunity of hearing before declaring account as fraud. Declaration of the account as fraud is having civil as well as criminal consequences. It causes serious complications on the account holder. These punitive measures have seriously affected the petitioners' right to do business other liberties guaranteed by the Constitution of India. Thus, penal measures, sounding death knell for future prospects of the business of the petitioners and their revival, blacklisting, debarment from public finance system and refusal to consider proposals for restraining the accounts have been stated.

14. Hon'ble Apex Court in the case of *Maneka Gandhi Vs. Union of India* reported in (1978) 1 SCC 248, has held that even administrative decisions entailing civil consequences are subject to the principles of natural justice. For the sake of reference, para 10 of the said judgment is reproduced below :

"Now, if this be the test of applicability of the doctrine of natural justice, there can be no distinction between a quasi-judicial function and an administrative function for this purpose. The aim of both administrative inquiry as well as quasi-judicial inquiry is to arrive at a just decision and if a rule of natural justice Is calculated to secure justice, or to put it negatively, to prevent miscarriage of justice, it is difficult to see why it should be applicable to quasi-judicial inquiry and not to administrative inquiry. It must logically apply to both. On what principle can distinction be made between one and the other ? Can it be said that the requirement of 'fair play in action' is any the less in an administrative inquiry than in a quasi—judicial one? Sometimes an unjust decision in an administrative inquiry may have far more serious consequences than a decision in a quasi-judicial inquiry and hence the rules of natural justice must apply equally in an administrative inquiry which entails-civil consequences. There was, however, a time in the early stages of the development of the doctrine of natural justice when the view prevailed that the rules of natural justice have application only to a quasi-judicial proceeding as distinguished from an administrative proceeding and the distinguishing feature of a quasi-judicial proceeding is that the authority concerned is required by the, law under which it is functioning to act judicially. This requirement of a duty to act judicially in order to invest the function with a quasi,judicial character was spelt out from the following observation of Atkin, L.J. in Rex v. Electricity Commissioners(1), "wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King Bench Division. . . .". Lord Hewart, C.J., in Rex V. Legislative Committee of the Church Assembly, (2) read this observation to mean that the duty to act judicially should be an additional requirement existing independently of the "authority to determine questions affecting the rights of subjects"-something super added to it. This gloss placed by Lord Hewart, C.J., on the dictum of Lord Atkin, L.J., bedevilled the law for a considerable time and stultified the growth of the doctrine of natural justice. The Court was constrained in every case that came before it, to make a search for the duty to act judicially sometimes from tenuous material and sometimes in the services of the statute and this led to oversubtlety and over-refinement resulting in confusion and uncertainty in the law. But this was plainly contrary to the earlier authorities and in the epoch-making decision of the House of Lords in Ridge v. Baldwin(3), which marks a turning point in the history of the development of the doctrine of natural justice, Lord Reid pointed out how the gloss of Lord Hewart, C.J., was based on a misunderstanding of the; observations of Atkin, L.J., and it went counter to the law laid

down in the earlier decisions, of the Court. Lord Reid observed : "If Lord Hewart meant that it is never enough that a body has a duty to determine what the rights of an individual should be, but that there must always be something more to impose on it a duty to act judicially, then that appears to me impossible to reconcile with the earlier authorities". The learned law Lord held that the duty to act judicially may arise from the very nature of the function intended to be performed' and it need not be shown to be superadded. This decision, broadened the area of application of the rules of natural justice and to borrow the words of Prof. Clar in his article on 'Natural Justice, Substance and Shadow' in Public Law Journal, 1975, restored light to an area "benighted by the narrow conceptualism of the previous decade". This development in the law had its parallel in India in the Associated Cement Companies Ltd. v. P. N. Sharma & Anr(4) where this Court approvingly referred to the decision in Ridge v. Baldwin (supra) and, later in State of Orissa v. Dr. Binapani(1) observed that : "If there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power". This Court also, pointed out in A.K. Kraipak & Ors. v. Union of India & Ors. (2) another historic decision in this branch of the law, that in recent years the concept of quasi-judicial power has been undergoing radical change and said:

"The dividing line between an administrative power and a quasijudicial power is quite thin and is being gradually obliterated, for determining whether a power is an administrative, power or a quasi-judicial power one has to look to the nature of the power conferred, the person or persons on whom it is conferred, the framework of the law conferring that power, the consequences ensuing from the exercise of that power and the manner in which that power is expected to be exercised".

The net effect of these and other decisions was that the duty to act judicially need not be super-added, but it may be spelt out from the nature of the power conferred, the manner of exercising it and its impact on the rights of the person effected and where it is found to exist, the rules of, natural justice would be attracted."

15. Similarly, Hon'ble Apex Court in the case of *Union of India and others Vs. Ram Lakhan Sharma* reported in (2018) 7 SCC 679 has held that in cases, where a statute is silent with respect to the principles of natural justice, these principles must be read into the statute. For the sake of reference, para 34 of the said judgment is reproduced below :

"We fully endorse the principles as enumerated above, however, the principles have to be carefully applied in facts situation of

> a particular case. There is no requirement of appointment of Presenting Officer in each and every case, whether statutory rules enable the authorities to make an appointment or are silent. When the statutory rules are silent with regard to the applicability of any facet of principles of natural justice the applicability of principles of natural justice which are not specifically excluded in the statutory scheme are not prohibited. When there is no express exclusion of particular principle of natural justice, the said principle shall be applicable in a given case to advance the cause of justice "

16. That, after classifying the account of the petitioner/s as fraud, the same has already been reported to the Law Enforcing Agency and the mater (sic : matter) is no longer in the hands of the Bank. That, this Court while disposing of Writ Petition no. 239/2016 has directed the respondent/ Bani (sic : Bank) to give an opportunity of hearing to the petitioner/s in response to the notice already issued. However, the notices which have already been issued to the petitioner/s are in respect of the willful defaulter. In the earlier writ petition, the petitioners have challenged the jurisdiction of the CVC in issuing office memorandum for declaring the account of the petitioners as fraud.

17. So far as the judgment relied by learned counsel for the respondents is concerned, it deals with filing of complaint against an accused under serious offences triable under certain penal statutes and the Cr.P.C. While in the present case, the petitioner concerns with the wrongful classification of the petitioners' account during banking transactions as fraud, which cannot be equated with filing of a criminal complaint under penal statutes and Cr.P.C. Such classification is a final and binding decision by respondent / Bank which carries serious civil consequences and attracts grave punitive measures as laid down by the Reserve Bank of India in the Master Circular on fraud. As classification of the account of the petitioners as fraud is having civil as well as criminal consequences, therefore, the Bank/ respondent should have issued prior notice to the petitioner/s for classifying the account of the petitioner/s as fraud.

18. In view of the aforesaid discussions, present writ petition is allowed and the order impugned dated 04/06/2018 is hereby quashed. The respondents are restrained from treating the account of the petitioners as fraud. The respondents are free to pass afresh order after affording an opportunity of hearing to the petitioners on the subject of fraud classification.

C c as per rules.

Petition allowed

I.L.R. [2019] M.P. 2009 (DB)
WRIT PETITION
Before Mr. Justice Sanjay Yadav & Mr. Justice Vivek Agarwal
W.P. No. 25339/2018 (Gwalior) decided on 7 August, 2019

AWDHESH SINGH BHADAURIA …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

***Constitution – Article 226 – Public Interest Litigation – Eradication of Vector Borne Diseases* – Petition alleging laxity on part of State Authorities/Municipal Corporation in clearing the debris and covering of marshy lands hatches, causing dengue, malaria, swine flu, chikungunya etc. – Held – Fighting with vector borne diseases and plugging such source/ breeding ground for vectors is an ongoing continuous process, in which both the residents of city and State authorities/Municipal Corporation have an important unending task to be performed – Directions issued.**

(Para 13)

संविधान – अनुच्छेद 226 – लोक हित वाद – वेक्टर जन्य रोगों का उन्मूलन – राज्य प्राधिकारियों/नगर पालिक निगम की ओर से, दलदली जमीन के द्वार आच्छादित करने में तथा कचरा साफ करने में ढिलाई के कारण डेंगू, मलेरिया, स्वाईन फ्लू, चिकनगुनिया इत्यादि का अभिकथन करते हुए याचिका – अभिनिर्धारित – वेक्टर जन्य रोगों से लड़ने तथा वेक्टर के उक्त स्त्रोत/प्रजनन स्थान नष्ट करना एक निरंतर प्रक्रिया है जिसमें शहर के निवासियों एवं राज्य प्राधिकारियों/नगर पालिक निगम दोनों के लिए निष्पादन किये जाने हेतु एक महत्वपूर्ण स्थाई कार्य है – निदेश जारी किये गये।

Omendra Singh Kushwah, for the petitioner.
F.A. Shah, G.A. for the respondent Nos. 1 to 3/State.
Deepak Khot, for the respondent No. 4.

(Supplied: Paragraph numbers)

ORDER

The Order of the Court was passed by :
VIVEK AGARWAL, J.: - This Public Interest Litigation has been filed by the petitioner, who is a practising lawyer in the High Court of M.P., highlighting the issue of laxity on the part of the authorities of the State and local body like Municipal Corporation in clearing the debris and covering of marshy lands hatches which is cause of several diseases including Dengue, Malaria, Swine Flu, Chikungunya etc.

2. It is submitted by the learned counsel for the petitioner that authorities of State have failed to take appropriate measures so to clear such potential source where vectors of such diseases like Malaria or Dengue grow and develop. In support of his contention, he has enclosed several photographs showing how solid waste and municipal waste are being dumped in open spaces and how open spaces are being left uncared for resulting in development of swamps, water pools etc. which are providing breeding ground to the vectors which communicate such diseases like Malaria, Dengue and Swine Flu.

3. In this backdrop, petitioner has sought relief against the authorities of State and its instrumentalities to direct them to carry out serious measures to prevent accumulation of waste, accumulation of water and development of swamp and if such situation is found, then concerned zonal officer and health officer of the Municipal Corporation be penalized. It is also prayed that all the open drains be covered and they be cleaned regularly so to prevent accumulation of water and waste material. It is also prayed that regular fogging of chemicals so to prevent growth of Malaria and Dengue mosquitoes be carried out besides equipping Government Hospitals with adequate number of preventive kits and medicines so that appropriate and inexpensive treatment be rendered to the patients in Government Hospital, rather leaving the patients and sufferers at the mercy of private hospitals which not only charge exorbitant amount for the treatment, but also in the name of investigation. Ancillary to these main reliefs, it has been prayed that municipal authorities be directed to earmark a particular budget for such cleansing operations which will be preventive in nature and for investigation, prevention and supply of medicines. It is also prayed that Municipal Authorities be directed to publish phone numbers of cleaning in-charge and mobile numbers of the staff engaged in the work of lifting of waste material besides that of concerned doctors etc. in newspapers. It is prayed that Commissioner, Municipal Corporation and Collector, Gwalior, be directed to monitor cleansing operation of the district on regular basis and be further directed to submit their report before the Court in every alternative month.

4. Authorities of the State have filed their reply and in their reply they have mentioned that a report was called from the District Malaria Officer. A bare perusal of which reveals that certain measures have been taken by the State Government and its functionaries to provide medical facilities to the patients of Dengue etc., copies of these charts have been enclosed as Annexure R/1 and Annexure R/2.

5. A duty chart showing duties assigned to various officers to prevent spreading of viruses of Dengue, Chikungunya, Swine Flu and Malaria has been enclosed as Annexure R/3 issued by the Collector, Gwalior, on 15.6.18. However, it is mentioned when the team so constituted by the District Collector visited

various localities, then at some places unpleasant situation had arisen when members of the team tried to educate people about cleanliness of their water coolers etc. and members of such team were attacked, and therefore, they were forced to lodge a FIR, Annexure R/4. After making such submissions, it is submitted that mainly reliefs have been sought against the Municipal Corporation, and therefore, Municipal Corporation, could answer them adequately.

6 Respondent No.4/Municipal Corporation has filed a reply and it is submitted that authorities are taking preventive as well as curative measures for the residents of Gwalior. It is also submitted that respondent/Corporation has deployed in all 2904 cleaning wardens/ protectors (Safai Sanrakshak) within the municipal limits of Gwalior and details of such employees has been annexed as Annexure R/4-I. It is also submitted that Municipal Corporation has deployed 85 vehicles including JCB dumper and tractor trolley for collection of garbage from different points in the city and sending it to dumping yard/ landfill sites of the Municipal Corporation and in this regard it has entered into an agreement with Eco Green Pvt. Ltd. for door to door collection of waste/garbage and re-utilizing that garbage for production of electricity at the landfill sites. It is also submitted that assembly-wise fogging is being carried out periodically as acknowledged by the concerned residents and this shows that Municipal Corporation is alive to its responsibilities and is discharging the same to best of their capacity.

7. It is also submitted that municipal authorities are making random checks and removing those employees who are not doing their job sincerely and properly. Authorities have removed 100 employees outsourced from the contractors as they were not found available during random checks. They are also taking aspect of water pollution, water logging and choking of sewer lines in a systematic and detailed manner. They have also denied factum of dumping of garbage and unhygienic conditions in various colonies of Morar, Gwalior and Lashkar. It has also denied that because of water logging and open drainage at public places, mosquitoes are increasing. Agreement was entered into for construction of comprehensive sewage system in Lashkar and Morar region and agreements were executed in the month of September and October, 2017 respectively. It is also submitted that a laboratory has been established at Motijheel with a dedicated Division functional for last several years which deals with the aspect of treatment and sampling of water. While repulsing the charge of lethargic/negligent attitude, it is mentioned that Municipal Corporation is undertaking all necessary steps to keep the city pollution free and has tried to suggest that an incinerator is being installed by the said company within the municipal limits of Gwalior. It is also mentioned that fixed compact transfer station (10 in numbers) are being constructed for compacting garbage and then sending it to landfill sites and once this arrangement of Public Private Partnership (PPP) becomes functional from

2020, there will be a win win situation for the residents of Gwalior. It is also complained that instead of furnishing any representation, petitioner has directly approached the Court.

8. When this issue was taken up, then from time to time various compliance reports and counter affidavits have been filed. First one being dated 18.3.19. This report was filed in compliance of order dated 11.3.19 when we directed the Corporation to divulge the status as regards the steps taken by the Municipal Corporation to control and eradicate the epidemics like Dengue and Swine Flu. It is submitted that whenever such virus borne epidemic erupts in the city, Malaria Department identifies the places and make a joint survey with the employees of the Municipal Corporation to disinfect the places by fogging and spraying medicines in particular areas so identified. Otherwise, also Municipal Corporation periodically do the job of fogging and spraying medicines to eradicate viruses within the municipal limits. It is also mentioned in such report that Municipal Corporation is imposing fine on the persons who are littering waste in public places. Rest all are repetition of what has already been mentioned in the reply discussed above.

9. On 20.3.2019 another status report has been filed mentioning therein that Municipal Corporation has categorized the areas which are sensitive/ high risk areas where fogging and spraying of disinfectant is very necessary and accordingly action plan has been worked out and to keep the city clean they have proposed fine for various unhygienic activities like spitting, urinating, throwing of garbage etc.. As per the details contain in Annexure C-5, fine was imposed on about 49 persons for littering wastes, spitting at public places etc. whose list has been enclosed by the Municipal Corporation.

10. Another report dated 23.4.19 was filed showing that Corporation after completion of schedule work of one month as provided by Malaria Department has made a plan for fumigation/fogging and spraying of disinfectant which has been enclosed alongwith the report.

11. This is followed by another status report dated 1.7.19 wherein it is mentioned that in coordination with Malaria Department steps have been taken for detection of larva from infected areas, so also its eradication. It is also admitted that all the Zonal Officers have been entrusted with the work of fogging and spraying of disinfectant in respective zones consisting of 2-3 wards for which separate machines have been provided and in case of any failure of machine, Nodal Officer Workshop has been directed to make arrangement of alternative machines and for repair of said machines. Health Officers have been empowered to take action against those who are found to be negligent in respect of accumulation of water because of which larvae are born. This is an indirect

admission of the authorities of Municipal Corporation after having denied growth of any larva or existence of any breeding ground for such vector borne diseases in their initial reply.

12. After receiving this reply, we in the Court asked learned counsel for the Municipal Corporation, Gwalior, to call on certain numbers mentioned in compilation filed on 3.7.19 when counsel fairly conceded that such eight digit numbers do not exist in Gwalior. We directed Commissioner, Municipal Corporation, Gwalior, to remain personally present and then on 11.7.19 while tendering an unconditional apology, he apprised us that orders have been issued suspending persons who were found guilty of dereliction of duties and has also issued appropriate orders for reorganizing the structure of process of fumigation and spraying of disinfectant in all areas situated within municipal limits by giving fresh responsibility. On 22.7.19 we asked as to whether all the fogging machines are in working condition when we were informed that 40% of the machines were nonfunctional due to non-availability of spare parts. However, we were assured that remedial measures are being taken to rectify the anomalies in execution of plans and in furtherance of this another compliance report has been filed on 23.7.19 in which there is an admission vide Annexure C-3 that out of 25 fogging machines only 20 were functional and 5 were not functional.

13. After hearing arguments of learned counsel for the parties, we are of the disposition that fighting with vector borne diseases and plugging such source/breeding ground for the vectors is an ongoing continuous process. In this process, both the residents of the city and instrumentalities of the State and local body, namely Municipal Corporation, have an important unending task to be performed. Since petitioner has been able to put State machinery in motion, we expect that disposal of this petition will not turn them lethargic towards their duties. Learned counsel for the State and Municipal Corporation have assured that they will continue this fight against spread of Malaria, Chikungunya, Dengue and Swine Flu on a war footing on a continuous and sustainable basis. Therefore, we intend to dispose of this petition with following directions:

(1) State authorities to built resilience against epidemic prone diseases like Dengue and invest properly in surveillance and preparedness of capacity for early detection and reporting of disease outbreaks. Authorities of the State are also directed to carry out robust and timely public health response for their containment and mitigation.

(2) Under the head of prevention, they are required to take steps to close uncovered land fill sites, cover swamps or introduce such variety of fishes also called "mosquitofish" of Genus: Gambusia, Species G.affinis which feed on larvae of such mosquitoes so that their incidence may be eradicated or reduced.

(3) Authorities are also directed to prepare a system of reporting, action taken and impact of such action on the society which should remain in public domain so that there is three way interaction between the persons at the receiving end, authorities of the local bodies and the team of doctors consisting of district hospitals/community health centers/ PHC or medical colleges as the case may be. This three way interactive system will ensure prevention as well as cure and when these three factors work in tandem then such menace can be fought effectively.

(4) State authorities shall ensure training of health personnel at all levels of health system to implement early case detection and referral system for patient, managing severe cases with appropriate treatment, reorienting health services to control Dengue and Chikungunya outbreaks.

(5) The authorities of the State, specially the Department of Health and local administration shall work in a coordinated manner so to improve their outbreak prediction and detection through coordinated epidemiological and entomological surveillance; promoting the principles of integrated vector management and deploying locally-adapted vector control measures including effective urban and household water management and through communication to achieve behavioural outcomes that augment prevention programmes.

(6) The authorities of the State should also promote increased outlay for research in combating such tropical disease and for their prevention as well as curative measures.

(7) The authorities of the State to strengthen local research capabilities by making rational mobilization and allocation of resources so that all the stakeholders are able to work as a team and there is no wastage of public money.

(8) On the clinical side, diagnosis and investigative tools play a very important role in reducing the mortality and it can be reduced to minimal by implementing timely and appropriate clinical management involving clinical and laboratory diagnosis. For this purpose, there is a need to establish appropriate facilities for early detection of such diseases. For which purpose, they should establish a de-centralized mechanism of laboratory testing which are not only inexpensive, but also effective to handle large number of sampling requirements during crucial period of a year when such outbreak is optimum.

(9) Public cannot be a mute spectator and it will have to supplement the efforts of instrumentalities of the State and they can do so by adopting few simple measures like (i) using mosquito net or repellents; (ii) wear light colour clothes covering most of the body parts; (iii) they be also educated about the necessity to keep doors and windows closed especially during evening; (iv) people should be educated to empty and clean containers holding water such as flower vases, flower pots, coolers atleast once a week; (v) people should also be educated to

keep their surroundings clean and ensure that there is no stagnant water which is a breeding ground for the mosquitoes; (vi) inexpensive remedies can be propagated in consultation with team of doctors belonging to various branches of medicines, like Allopathy, Ayurved, Homeopathy, Unani etc..

(10) Petitioner is also directed to devote at least one weekend in a fortnight to generate awareness amongst various stakeholders at his end, then only it can be said that petitioner is truly a public spirited citizen as he claims himself to be. He should not only spread awareness about prevention and curative measures, but should also spread awareness amongst the members of the public to keep their surrounding environment clean and not to create such breeding place where vectors can easily grow. This effort, if sustained over a sufficiently effective duration of three years can help in bringing down incidence of dengu, malaria, swine flue etc..

(11) Unless and until Governmental steps are supplemented by public response, none of the stakeholders will be able to optimize the benefits of individual efforts, and therefore, we hope and trust that not only the instrumentalities of the State, but people like petitioner from public and public at large will respond to such community measures to prevent diseases, existence of which can be substantially reduced through awareness, cleanliness and early detection.

With these directions, petition is disposed of.

Order accordingly

I.L.R. [2019] M.P. 2015
MISCELLANEOUS PETITION
Before Mr. Justice Vivek Rusia
M.P. No. 6237/2018 (Indore) decided on 28 August, 2019

NATHULAL (DECEASED) THROUGH
L.R. KAILASHCHANDRA & anr. …Petitioners
Vs.
RAMESH & ors. …Respondents

A. Stamp Act, Indian (2 of 1899), Schedule 1A and Section 33 & 35 – Carbon Copy Document – Impounding of – Permissibility **– Held – This Court has earlier concluded that carbon copy prepared alongwith original is also an original copy – Petitioners themselves took a stand in the earlier writ petition that document is a partition deed and only it is required to be stamped – Trial Court rightly send the document to Collector of Stamps for impounding – Petition dismissed. (Paras 10 & 13 to 15)**

क. स्टाम्प अधिनियम, भारतीय (1899 का 2), अनुसूची 1ए एवं धारा 33 व 35 – दस्तावेज की कार्बन कॉपी – को परिबद्ध किया जाना – अनुज्ञेयता – अभिनिर्धारित – इस न्यायालय ने पूर्व में निष्कर्षित किया है कि मूल के साथ तैयार की गई कार्बन कॉपी भी एक मूल प्रतिलिपि है – याचीगण ने स्वयं पूर्व रिट याचिका में यह स्टैंड लिया है कि दस्तावेज एक विभाजन विलेख है तथा केवल इसे स्टांपित किये जाने की आवश्यकता है – विचारण न्यायालय ने दस्तावेज को परिबद्ध किये जाने हेतु उचित रूप से स्टाम्प कलक्टर को भेजा – याचिका खारिज।

***B. Stamp Act, Indian (2 of 1899), Schedule 1A and Section 33 & 35 – Impounding of Document – Duty of Court* – Held – It is well settled law that once any deed or document comes before Court and if it finds that it is not properly stamped and stamp duty is liable to be paid, then it is duty of Court to send the document to Collector of Stamps. (Para 14)**

ख. स्टाम्प अधिनियम, भारतीय (1899 का 2), अनुसूची 1ए एवं धारा 33 व 35 – दस्तावेज परिबद्ध किया जाना – न्यायालय का कर्तव्य – अभिनिर्धारित – यह सुस्थापित विधि है कि एक बार जब कोई विलेख अथवा दस्तावेज न्यायालय के समक्ष आता है तथा यदि वह यह पाता है कि वह उचित रूप से स्टांपित नहीं है तथा स्टाम्प शुल्क का भुगतान किया जाना दायी है, तो न्यायालय का यह कर्तव्य है कि वह दस्तावेज स्टाम्प कलक्टर को भेजे।

***C. Evidence Act (1 of 1872), Section 62, Explanation-1 – Primary Evidence* – Held – Where a document is executed in several parts, each part is a primary evidence of the document – Original document, as well as carbon copies are prepared together and thus both are primary evidence. (Para 11)**

ग. साक्ष्य अधिनियम (1872 का 1), धारा 62, स्पष्टीकरण–1 – प्राथमिक साक्ष्य – अभिनिर्धारित – जहां एक दस्तावेज अनेक भागों में निष्पादित किया जाता है, प्रत्येक भाग दस्तावेज का एक प्राथमिक साक्ष्य होता है – मूल दस्तावेज के साथ ही कार्बन कॉपी तैयार की जाती हैं एवं इसलिए दोनों प्राथमिक साक्ष्य हैं।

Cases referred :

AIR 1971 SC 1070, 2004 (1) MPHT 488, 2016 (2) MPLJ 450, AIR 1956 SC 593, (2007) 8 SCC 514, 1982 JJLJ 738, AIR 1983 Allahabad 90, AIR 2007 Gujrat 88, AIR 1989 SC 702, 1982 JLJ 738, M.P. No. 1158/2017 decided on 06.07.2018, (2003) 8 SCC 745.

A.S. Garg with *Aditya Garg*, for the petitioners.
Amit Dube, for the respondent No. 1.
None, for the respondent Nos. 2 to 5 despite service.

ORDER

VIVEK RUSIA, J. :- Petitioners have filed the present petition being aggrieved by the order dated 10.12.2018 passed by IInd Civil Judge, Class-II,

Sardarpur, district Dhar in COS No.76-A/17 whereby the trial Court has allowed the application filed by the plaintiff under sections 33 & 35 of the Indian Stamp Act and sent the document to the Collector (Stamps) for payment of stamp duty.

Facts of the case are as under:

2. Respondent No.1/plaintiff preferred a civil suit against the petitioners and respondents No.2 to 5 in respect of an agricultural land bearing survey No.1934 area 0.941 hectare situated at village Ledgaon, Tehsil Sardarpur, district Dhar (for short 'the suit property') seeking a decree of declaration to the effect that he is the sole owner of the suit property by virtue of family settlement and partition which took place on 29.05.1993. The plaintiff also prayed for a decree of perpetual injunction. The defendants filed written statement denying the averment made in the plaint. Thereafter, trial Court framed issues on 23.08.2016. The plaintiff submitted the affidavit of his witnesses under Order 18 Rule 4 of the CPC.

3. On 21.09.2016, during the course of examination of plaintiff Rameshchandra (PW/1), a carbon copy of a partition deed dated 21.05.1993 was tendered in evidence by him. At that stage, the present petitioner raised an objection regarding admissibility of the said document for want of registration and proper stamp. Thereafter, petitioner moved an application under section 151 CPC challenging the admissibility of the said partition deed. The application was opposed by the plaintiff. After considering the contention of the parties and the nature of the document, learned trial Court vide order dated 08.11.2016 rejected all the objections and held that the deed is admissible in evidence.

4. Present petitioners filed a writ petition No.7622/2016 before this Court and by order dated 30.07.2018 the writ petition was allowed and set aside the order dated 08.11.2016 and held that the deed is an instrument of partition and not a memorandum of partition, hence stamp duty was required to be paid keeping in view the Indian Stamp Act, Schedule 1-A Item No.(52).

5. After the aforesaid order, on 11.10.2018 the plaintiff filed an application under sections 33 & 35 of the Stamp Act for sending the partition deed for stamping. Even the aforesaid application has been opposed by the present petitioners by filing reply that the partition deed produced by the plaintiff is neither an original document nor a carbon copy, therefore, it is not an instrument under section 2(14) of the Indian Stamp Act, hence the photocopy of the instrument cannot be impounded and sent to the Collector for validation of the said document. By impugned order dated 10.12.2018, learned trial Court has allowed the application and sent the document to the Collector for payment of stamp duty. Being aggrieved by the aforesaid order, petitioners/defendants No.3 & 4 have filed the present petition before this Court.

6. Shri A.S.Garg, learned Senior Advocate appearing for the petitioners submits that sections 33 & 35 of the Indian Stamp Act are applicable to the original instrument and not to the photocopy of the instrument. Section 2(14) of the Indian Stamp Act also deals with the instrument. By submitting the photocopy the document cannot be validated. In support of his contention he has placed reliance over the judgment passed by the Apex Court in the case of *Jupudi Kesava Rao vs. Pulavarthi Venkata Subbarao & others* AIR 1971 SC 1070: judgments of this Court in the case of *Sugreeva Prasad Dubey and others vs. Sitaram Dubey* 2004 (1) MPHT 488 and *Abhiyank Builders Ltd. and another vs. Daulat Singh* and others 2016 (2) MPLJ 450. He further submits that the so called partition deed dated 29.05.1993 filed by the plaintiff is not a partition deed because it is not signed by all the parties, hence the same cannot be validated even by paying deficit stamp duty.

7. Per contra, Shri Dube, learned counsel appearing for the respondent No.1/plaintiff submits that the petitioners had already raised this objection at the time of exhibiting the said partition deed and vide order dated 08.11.2016 the trial Court had already rejected the same. This Court vide order dated 30.07.2018 has held that the instrument is a partition deed but not sufficiently stamped, hence the stamp duty is required to be paid and now the petitioners cannot raise the objection for payment of stamp duty. The petitioners cannot be permitted to approbate and reprobate. Earlier they raised an objection that being a partition deed it requires to be stamped properly. When this Court has directed for payment of stamp duty, now they cannot object that the stamp duty cannot be paid for validating the instrument because the document being a photocopy it is not a primary evidence. In support of his contention he has placed reliance over the judgment in the case of *Nagubai Ammal and others vs. B.Shama Rao and others* AIR 1956 SC 593 and prayed for dismissal of the writ petition.

8. The entire case of the plaintiff is based on a family partition held on 29.05.1993 between the plaintiff, defendants and mother Ayodhyabai. He pleaded that the original stamped copy of the deed is with the defendant No.1 and other signed copies are with the son of defendants. When he tendered the partition deed in evidence, the defendants/present petitioners raised the following objections:

1. *उक्त लेख असल न होकर प्रतिलिपि है।*
2. *उक्त बटवारा लेख अपर्याप्त रूप से स्टाम्पित है।*
3. *उक्त लेख अरजिस्ट्रीकृत है।*
4. *जिस दिनांक का लेख है उसी दिनांक का बटवारा होना भी दावे मे उल्लेखित है।*
5. *यदि लेख को पारिवारिक व्यवस्था लेख भी मान लिया जाये तब भी लेख पर्याप्त रूप से स्टाम्पित नही है।*
6. *लेख पर कोई स्टाम्प नही है।*

7. वादी ने सेकेन्डरी ऐवीडेन्स पेश करने की कोई परमिशन नही ली है।
8. मूल लेख वादी ने पेश नही किया है। छायाप्रति अथवा द्वितीय प्रति साक्ष्य मे ग्राहय नही है।
9. मूल दस्तावेज वादी के मुताबिक 10/– रूपये के स्टाम्प पर था। मूल दस्तावेज अपर्याप्त रूप से स्टाम्पित होने से उसकी प्रतिलिपि अथवा द्वितीय प्रति साक्ष्य मे ग्राहय नही है।
10. इस न्यायालय द्वारा अस्थायी निषेधाज्ञा आवेदन पत्र के निराकरण के दौरान यह अभिमत दिया गया कि लेख विल के स्वरूप का न होकर सेटलमेंट के स्वरूप का है। ऐसी दशा मे यदि तर्क के लिए लेख को सेटलमेंट अथवा व्यवस्थापन लेख भी मान लिया जाये तब भी स्टाम्प एक्ट के शेड्यूल वन–ए के क्रमांक 52 मे के मुताबिक स्टाम्प ड्यूटी लेख पर देय है। लेख उक्त स्टाम्प ड्यूटी अनुसार स्टाम्पित नही है।
11. वादोक्त भूमि नाथुलाल की स्वअर्जित सम्पत्ति है जिसके संबंध मे सक्षम न्यायालय द्वारा नाथुलाल के पक्ष मे घोषणा की गई है।

9. While answering objections No.1, 7 & 8, the trial Court has held that the partition deed dated 29.05.1993 produced by the plaintiff being a carbon copy is a primary evidence, therefore, he is not required to obtain a permission to prove it as secondary evidence. The trial Court has also rejected other objections by order dated 08.11.2016. The defendants challenged the aforesaid order before this Court by way of writ petition No.7622/2016. Learned counsel appeared for the petitioner in the writ petition No.7622/2016 had straight away drawn attention of the Court towards the partition deed dated 29.05.1993 as well as para-4 of the plaint and submitted that it is a partition deed and not a memorandum of partition, therefore, the petitioners had confined the petition only in respect of payment of stamp duty for the said partition deed. This Court has accepted the contention and held that it is a partition deed and stamp duty is required to be paid and accordingly allowed the application filed under section 151 of the CPC. Shri Garg, learned Senior Counsel submits that the writ Court has set aside the entire order dated 08.11.2016 as a whole, therefore, all the findings recorded by the trial Court in the order dated 08.11.2016 have been set aside. Though the petitioners have challenged the entire order dated 08.11.2016 before this Court but they confined the writ petition only to the issue of stamp duty payable on a partition deed. They specifically argued that the deed dated 29.05.1993 is a partition deed and not a memorandum of partition. This Court has held that the stamp duty is liable to be paid and accordingly the plaintiff filed an application under sections 33 & 35 of the Indian Stamp Act which has been allowed by the trial Court.

10. Shri Garg, learned Senior Counsel submits that the partition deed produced by the plaintiff is a photocopy under section 2(4) and section 46 of the Indian Stamp Act and only an original document can be validated. In support of his contention he has relied the judgments in the cases of *Jupudi Kesava Rao,*

Sugreeva Prasad Dubey and Abhiyank Builders (supra) and also the judgment passed by the Apex Court in the case of *Hariom Agrawal vs. Prakash Chand Malviya* (2007) 8 SCC 514.

11. The trial Court has held that the partition deed produced by the plaintiff is a carbon copy signed by the parties. Section 62 of the Evidence Act defines primary evidence and according to which primary evidence means the document itself produced for the inspection of the Court. There is an Explanation-1 to section 62 which provide that where a document is executed in several parts, each part is primary evidence of the document. The carbon copy is always prepared along with the original copy, therefore, both the documents original as well as carbon are prepared together, hence, as per Explanation-I, both are primary evidence. This Court in the case of *Satish Kumar vs. Lalsingh* (1982 JLJ 738) has held that carbon copy of a document is a primary or original document can be validated under section 35 of the Stamp Act. Allahabad High Court in the case of *Smt.Kamala Rajamaikkam vs. Smt.Sushila Thakur Dass* (AIR 1983 Allahabad 90) has also held that the carbon copy prepared along with the original, then each one is original copy. The same view has been followed by Gujrat High Court in the case of *Bhagwanji and Kalyanji vs. Punjabhai Hajabhai Rathod reported in AIR 2007 Gujrat 88.* The Supreme Court in the case of *Prithi Chand vs. State of Himachal Pradesh* (AIR 1989 SC 702) has held that carbon copy made by one uniform process of certificate of doctor is admissible being a primary evidence.

12. In the case of *Satish Kumar vs. Lalsingh* 1982 JLJ 738, this Court has held as under:

> *"In the instance case the trial Court has held that as the carbon copy purports to have been signed by parties it is original. In my view, the view taken by the trial Court is correct. What appears to be is that the document is prepared in duplicate and each one has been signed by the parties, is a primary evidence in view of section 62 of the Evidence Act. See Gulam Mohammad vs. Ali Hussain (3). I would venture to seek support in this view from the decision of the Supreme Court in the State of Bihar vs. Karamchand Thapar and Brother Ltd. (supra). In this case, the arbitrator had prepared an award in triplicate, signed all of them and sent one each to the parties and the third to the Court. The copy sent to the Court, though bore an endorsement "certified copy" was held to be an original and the words "certified copy" were held to be mis-description. The relevant observation is set out below-*
>
>> *"Therefore, the question is whether the award which was sent by the arbitrator to the Court is the original instrument or a copy thereof. There cannot, in our opinion, be any doubt that it is the original and not a copy of the award. What the arbitrator did was to prepare the award in triplicate, sign all of them and send one each to the party and the third to the Court. This would be an*

original instrument, and the third to the Court. This would be an original instrument and the words "certified copy" appearing thereon are a misdescription and cannot have the effect of altering the true character of the instrument. There is no substance in this contention of the appellant either. In the result, the appeal fails and is dismissed with costs."

13. This Court in the case of *Firm Jethmal Bakhtawarmal through Proprietor vs. Smt.Chandrakanta Jain & others* (Misc. Petition No.1158/2017 dated 06.07.2018) has held that carbon copy prepared along with original is also an original copy. Against the aforesaid judgment an SLP (SLP No.24753/2018) was filed and that has been dismissed by order dated 28.09.2018.

14. The petitioners ought to have raised this objection in the writ petition No.7622/2016 that though it is partition deed but cannot be validated by paying deficit stamp duty. The petitioners might have raised this point but did not obtain any order from the Court. The Court has already ordered that the stamp duty is required to be paid keeping in view the provisions of the Indian Stamp Act. It is also settled law that once any deed or document comes before the Court and the Court finds that it is not properly stamped and the stamp duty is liable to be paid, then it is the duty of the Court to send the said document to the Collector of Stamps. At this stage, the only issue of payment of deficit stamp duty over the partition deed is concerned whether that amounts to validating the stamp or the probative value of the partition deed is yet to be decided by the Court. In the case of *Narbada Devi Gupta vs. Birendra Kumar Jaiswal* (2003) 8 SCC 745 the Apex Court has held that mere production and marking of document as exhibit by the Court cannot be held to be due proof and its execution has to be proved by admissible evidence.

15. In view of the above, I do not find any substance in the present writ petition filed under Article 227 of the Constitution of India. Accordingly, the petition being devoid of merit and substance is hereby dismissed.

Petition dismissed

I.L.R. [2019] M.P. 2022 (DB)
REVIEW PETITION

Before Mr. Justice Prakash Shrivastava & Mr. Justice S.K. Awasthi
R.P. No. 1572/2018 (Indore) decided on 18 October, 2019

STATE OF M.P. & anr. …Petitioners

Vs.

UDAY SISODE & ors. …Respondents

A. Service Law – Horizontal Compartmentalised Reservation – Procedure – **Held – As per advertisement, reservation for OBC Police Personnel was horizontal compartmentalised reservation, thus respondents being OBC Police Personnel are not entitled to appointment against open general category post on the ground that they received more marks than the last candidate of open general category – Procedure explained – No migration of OBC Police Personnel to general category post is permissible – Petition dismissed – Revision Petition allowed. (Paras 8, 16 & 24)**

क. सेवा विधि – हारिजान्टल कम्पार्टमेन्टलाईजड (क्षैतिज श्रेणीकृत) आरक्षण – प्रक्रिया – अभिनिर्धारित – विज्ञापन के अनुसार, अ.पि.व. पुलिस कर्मियों हेतु आरक्षण, हारिजान्टल कम्पार्टमेन्टलाईजड आरक्षण था अतः प्रत्यर्थीगण अ.पि.व. पुलिस कर्मी होने के नाते, खुले सामान्य वर्ग के पद पर इस आधार पर नियुक्ति के लिए हकदार नहीं कि उन्हें खुले सामान्य वर्ग के अंतिम अभ्यर्थी से अधिक अंक प्राप्त हुए थे – प्रक्रिया स्पष्ट की गई – अ.पि.व. पुलिस कर्मी का सामान्य वर्ग के पद पर प्रव्रजन अनुज्ञेय नहीं है – याचिका खारिज – पुनरीक्षण याचिका मंजूर।

B. Service Law – Vertical Reservation & Horizontal Reservation – **Held – Apex Court concluded that under vertical reservations, candidates of SC, ST, OBC are allowed to compete and appointed against the non-reserved post, but that is not so in case of horizontal reservation – Further, in case of compartmentalised horizontal reservation, process of verification and adjustment should be applied separately to each of the vertical reservation. (Para 14 & 15)**

ख. सेवा विधि – वर्टीकल (लम्बवत) आरक्षण व हारिजान्टल (क्षैतिज) आरक्षण – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया कि वर्टीकल आरक्षणों के अंतर्गत, अ.जा., अ.ज.जा., अ.पि.व. के अभ्यर्थियों को अनारक्षित पद के लिए प्रतियोगिता करने एवं नियुक्त होने की मंजूरी दी गई है परंतु ऐसा हारिजान्टल आरक्षण की स्थिति में नहीं है – इसके अतिरिक्त, कम्पार्टमेन्टलाइजड हारिजान्टल आरक्षण के प्रकरण में, सत्यापन एवं समायोजन की प्रक्रिया को प्रत्येक वर्टीकल आरक्षण के लिए पृथक रूप से लागू करना चाहिए।

C. Lok Seva (Anusuchit Jatiyon, Anusuchit Jan Jatiyon aur Anya Pichhade Vargon Ke Liye Arakshan) Adhiniyam, M.P., 1994, Section 4(2) **– Held – Section 4(2) relates to vertical reservations and not to horizontal compartmentalised reservations. (Para 22)**

ग. लोक सेवा (अनुसूचित जातियों, अनुसूचित जनजातियों और अन्य पिछड़े वर्गों के लिए आरक्षण) अधिनियम, म.प्र., 1994, धारा 4(2) **– अभिनिर्धारित – धारा 4(2) वर्टीकल आरक्षणों से संबंधित है और न कि हारिजान्टल कम्पार्टमेन्टलाइजड आरक्षणों से।**

Cases referred :

(1995) 5 SCC 173, 1992 Supp (3) SCC 217, (2007) 8 SCC 785, (2010) 12 SCC 204, (2010) 3 SCC 119, 2017 (12) SCC 680.

Amol Shrivastava, for the petitioners.
L.C. Patne, for the respondent Nos. 1 to 6.
Vikram Bhatnagar, for the respondent No. 7.

O R D E R

The Order of the Court was passed by : **PRAKASH SHRIVASTAVA, J.:-** By this petition the petitioner State Government is seeking review of the order dated 23.3.2018 passed in WA No.138/2018.

2. Facts in nutshell are that the respondents No.1 to 6 (writ petitioners) are serving in the Police Department of the State as Assistant Sub Inspector, Constable etc. Advertisement was issued by the respondent No.7-M.P. Professional Examination Board for the post of Subedar, Sub Inspector, Platoon Commander etc. There was compartmentalised horizontal reservation of 15% of the posts for police personnel serving in the police department. These 15% posts were sprayed over in the unserved SC/ST & OBC category by way of compartmentalised horizontal reservation. Respondents No.1 to 6 had applied under the OBC police personnel category and had accordingly participated in the selection process. They were not selected, hence they had filed the writ petition raising the grievance that they had secured more marks than the marks of the last candidate in the open general category, therefore, they were entitled to selection.

3. Learned Single Judge by the order dated 24.10.2017 had noted that the respondents No.1 to 6 who fall under the OBC Police Personnel category, had obtained more marks than the cut off marks of general category candidate (Police Personnel), therefore, they were entitled to appointment. Hence while allowing the writ petition the Single Judge had directed the respondents to revise the result and to take all consequential steps keeping in view the marks obtained by petitioners and by ignoring the fact that they are members of OBC. The Division Bench by order dated 23.3.2018 had dismissed the Writ Appeal No.138/2018 and

had affirmed the order of the learned Single Judge. Against the order of the Division Bench SLP (Civil) Diary No.26616/18 was preferred, which is dismissed as withdrawn by order dated 17.8.2018 passed by the Hon'ble Supreme Court with liberty to file the review petition by observing as under:-

> "It was submitted by the learned counsel appearing on behalf of the State that relying upon the decision dated 3.6.2010 of this Court in C.A. No.5987/2007 titled as Public Service Commission Uttaranchal Vs. Mamta Bisht & others [2010(12) SCC 204] that for the category of police personnels, it was a horizontal reservation. High Court has failed to consider this vital aspect. Thus, the police personnel could not have claimed the post of general category, since it was horizontal reservation for them. This aspect has not been considered in the impugned order, as such, we grant liberty to the petitioner to file review of the petition in accordance with law.
>
> The Special Leave Petition is dismissed as withdrawn with the aforesaid liberty. Liberty is also granted to assail impugned order after decision of review petition in this Court in case necessity arises."

4. In view of the above order and liberty granted by the Hon'ble Court, the issue is required to be decided keeping in view the fact that reservation for police personnel was horizontal reservation.

5. Learned counsel appearing for the petitioner submits that the reservation for OBC (Police Personnel) was horizontal compartmentalised reservation, therefore, the persons belonging to the said category are not entitled for consideration under the open general category. He further submits that this Court while deciding writ appeal has committed an error in treating it to be a case of vertical reservation, whereas it is a case of horizontal reservation and respondents No.1 to 6 are not entitled to migrate to the open general category.

6. As against this, learned counsel for the respondents No.1 to 6 has submitted that it is not a case of horizontal reservation but it is a case of vertical reservation and therefore, the respondents are entitled to appointment against the general category posts on the basis of their merit. He has further submitted that respondents No.1 to 6 have not claimed the benefit of any age relaxation, marks relaxation etc., therefore, they have rightly been considered by this Court against the general category posts. He has also placed reliance upon Section 4(4) of the Madhya Pradesh Lok Seva (Anusuchit Jatiyon, Anusuchit Jan Jatiyon Aur Anya Pichhade Vargon Ke Liye Arakshan) Adhiniyam, 1994 in support of his submission that the migration of the reserved category candidate on the basis of merit against the general category posts is permissible.

7. Having heard the learned counsel for the parties and on perusal of the record, it is noticed that in the advertisement inviting applications (Annexure P/1 to the writ petition) itself the nature of reservation for OBC Police Personnel was disclosed. It was specifically mentioned that 15% posts would be reserved for police personnel and that the reservation for women police personnel, Ex Army Man would be in the nature of horizontal and compartment wise in terms of the judgment of the Supreme Court in the case of *Anil Kumar Gupta and others Vs. State of U.P. and others* reported in (1995) 5 SCC 173. The advertisement in clear terms provides the distribution of the seats and the nature of reservation as under:-

S. No.	Post	Unreserved					ST					SC					OBC					total
		Total	Nil		ExS	Police	Total	Nil		ExS	Police	Total	Nil		ExS	Police	Total	Nil		ExS	Police	
			Open	Women	Open	Open		Open	Women	Open	Open		Open	Women	Open	Open		Open	Women	Open	Open	
1	सूबेदार	31	13	10	03	05	13	06	04	01	02	10	04	03	01	02	09	04	03	01	01	63
2	उप नि. (जि. बल)	335	140	111	34	50	134	57	44	13	20	107	45	35	11	16	94	40	31	09	14	670
3	उप नि. (विशा)	25	07	05	01	02	03	02	01	00	00	04	02	01	00	01	00	00	00	00	00	22
4	उप नि. (क्यू. डी.)	02	01	01	00	00	00	00	00	00	00	00	00	00	00	00	00	00	00	00	00	02
5	उप नि. (रेडियो)	11	04	04	01	02	06	02	02	01	01	03	02	01	00	00	05	01	02	01	01	25
6	उप नि. (आ.वि.)	03	02	01	00	00	01	01	00	00	00	01	01	00	00	00	00	00	00	00	00	05
7	प्लाटून कमान्डर	27	20	00	03	04	11	08	00	01	02	08	06	00	01	01	07	05	00	01	01	53
8	उप. नि. (आयुध)	11	04	04	01	02	05	01	02	01	01	04	02	01	00	01	03	02	01	00	00	23
	योग	435	191	136	43	65	173	77	53	17	26	137	62	41	13	21	118	52	37	12	17	863

नोट–(1) मध्यप्रदेश शासन सामान्य प्रशासन विभाग की अधिसूचना क्रमांक–सी–3–8–2015–एक–3 दिनांक 17 नवम्बर 2015 के द्वारा महिलाओं के लिए 33 प्रतिशत आरक्षण 'हारीजोन्टल एवं कम्पार्टमेन्ट वाईज' निर्धारित किया गया है। 10 प्रतिशत पद भूतपूर्व सैनिकों के लिए आरक्षित है, तथा म.प्र. शासन गृह विभाग के राजपत्र कं एफ–2(अ) 96–2015–बी–4–दो दिनांक 05 मार्च 2016 द्वारा 15 प्रतिशत पद मध्यप्रदेश पुलिस कर्मियों के लिए आरक्षित है। ये तीनों ही हारीजोन्टल आरक्षण है। योग्य उम्मीदवार उपलब्ध न होने पर इनके लिये आरक्षित पद कैरीफारवर्ड नहीं होंगे। ऐसी स्थिति में यह पद उसी श्रेणी के अन्य उपलब्ध योग्य उम्मीदवारों से भरे जावेंगे। यदि चयन सूची मे पहले से ही 33 प्रतिशत महिलाये, 15 प्रतिशत पुलिस कर्मी या 10 प्रतिशत भूतपूर्व सैनिक मेरिट के आधार पर उपलब्ध होंगे तो पृथक से आरक्षण और नहीं दिया जायेगा।

यहां यह उल्लेखनीय है कि कुल पदों के 15 प्रतिशत पद पुलिस विभाग के उन कर्मचारियों के लिये आरक्षित रखे जाएंगे जिन्होने कम से कम 6 वर्ष का सेवाकाल पूर्ण कर लिया हो तथा सम्पूर्ण सेवाकाल के दौरान उन्हे कोई भी बड़ी सजा नहीं मिली हो। इस हेतु आरक्षण के पात्र पुलिस कर्मियों को इकाई प्रमुख द्वारा जारी तदाशय का प्रमाण पत्र प्रस्तुत करना होगा।

भारत सरकारः कार्मिक एवं प्रशिक्षण मंत्रालय के परिपत्र No-36034/1/2014-Estt/Res दिनांक 14.08.14 में निहित प्रावधान अनुसार ऐसे भूतपूर्व सैनिक उम्मीदवार जो पूर्व में भूतपूर्व सैनिकों को प्रदाय आरक्षण का लाभ प्राप्त कर चुके है उन्हे पुनः भूतपूर्व सैनिक आरक्षण का लाभ नहीं दिया जायेगा।

यहां स्पष्ट करना आवश्यक है कि सामाजिक वर्ग पर आधारित आरक्षण अर्थात अनुसूचित जाति, अनु. जनजाति एवं अन्य पिछड़ा वर्ग के लिए निर्धारित आरक्षण 'वर्टिकल' स्वरूप का है। जबकि महिलाओं, पुलिस कर्मियों तथा भूतपूर्व सैनिको के लिए आरक्षण ''हारीजोन्टल एवं कम्पाटमेंट वाईज'' स्वरूप का है। इन दो आरक्षणों में अन्तर मान. उच्चतम न्यायालय द्वारा इन्द्रा साहनी विरूध्द भारत संघ (1992 Supp (3) SCC-217) म स्पष्ट किया गया है । हारीजोन्टल एवं कम्पाटमेंट वाईज आरक्षण लागू करने की प्रक्रिया जो मान. उच्चतम न्यायालय द्वारा अनिल कुमार गुप्ता विरूध्द उत्तर प्रदेश राज्य के प्रकरण में निर्धारित की गई है। (संदर्भ 1995(2) Supp, SCR-396 1995(5) SCC-173) का अनुसरण किया जाता है।''

8. The above clauses in the advertisement leave no iota of doubt that the number of posts reserved for OBC Police Personnel for each category of post such as Subedar, Sub Inspector, Platoon Commander etc. were clearly specified and that the reservation for OBC Police Personnel was horizontal compartmentalised reservation.

9. The sole issue involved in this case is if in the case of horizontal compartmentalised reservation the petitioners who have participated in selection process under OBC Police Personnel category are entitled to claim appointment on the basis of their marks against the posts for open general category.

10. In the case of *Indra Sawhney and others Vs. Union of India and others* reported in 1992 Supp(3) SCC 217 in Paragraph 812 the distinction between vertical and horizontal reservation has been drawn and horizontal reservation cutting across the vertical reservation is termed as "interlocking reservations", by holding as under:-

"812. We are also of the opinion that this rule of 50% applies only to reservations in favour of backward classes made under Article 16(4). A little clarification is in order at this juncture: all reservations are not of the same nature. There are two types of reservations, which may, for the sake of convenience, be referred to as 'vertical reservations' and 'horizontal reservations'. The reservations in favour of Scheduled Castes, Scheduled Tribes and other backward classes [under Article 16(4)] may be called vertical reservations whereas reservations in favour of physically handicapped [under Clause (1) of Article 16] can be referred to as horizontal reservations. Horizontal reservations cut across the vertical reservations that is called inter-locking reservations. To be more precise, suppose 3% of the vacancies are reserved in favour of physically handicapped persons; this would be a reservation relatable to Clause (1) of Article 16. The persons selected against this quota will be placed in the appropriate category; if he belongs to S.C. category he will be placed in that quota by making necessary adjustments; similarly, if he belongs to open competition (O.C.) category, he will be placed in that category by making necessary adjustments. Even after providing for

these horizontal reservations, the percentage of reservations in favour of backward class of citizens remains - and should remain - the same. This is how these reservations are worked out in several States and there is no reason not to continue that procedure."

11. In the matter of *Anil Kumar Gupta and others Vs. State of U.P. and others* reported in (1995) 5 SCC 173 a distinction between horizontal and vertical reservation has been drawn and it has been clarified as to when the horizontal reservation is overall reservation or compartmentalised reservation. Compartmentalised reservation is one where the seat reserved for horizontal reservations are proportionately divided among the vertical (social) reservations and are not inter-transferable. In compartmentalised reservation, social reservation is watertight compartment in each of the vertical reservation class (OC, OBC, SC and ST). In this regard in the case of *Anil Kumar* (supra) it has been held as under:-

> "15. On a careful consideration of the revised notification of 17-12-1994 and the aforementioned corrigendum issued by the Lucknow University, we are of the opinion that in view of the ambiguous language employed therein, it is not possible to give a definite answer to the question whether the horizontal reservations are overall reservations or compartmentalised reservations. We may explain these two expressions. Where the seats reserved for horizontal reservations are proportionately divided among the vertical (social) reservations and are not inter-transferable, it would be a case of compartmentalised reservations. We may illustrate what we say: Take this very case; out of the total 746 seats, 112 seats (representing fifteen percent) should be filled by special reservation candidates; at the same time, the social reservation in favour of Other Backward Classes is 27% which means 201 seats for O.B.Cs.; if the 112 special reservation seats are also divided proportionately as between O.C.,O.B.C.,S.C. and S.T., 30 seats would be allocated to the O.B.C. category; in other words, thirty special category students can be accommodated in the O.B.C. category; but say only ten special reservation candidates belonging to O.B.C. are available, then these ten candidates will, of course, be allocated among O.B.C. quota but the remaining twenty seats cannot be transferred to O.C. category (they will be available for O.B.C. candidates only) or for that matter, to any other category; this would be so whether requisite number of special reservation candidates (56 out of 373) are available in O.C. category or not; the special reservation would be a water tight compartment in each of the vertical reservation classes (O.C.,O.B.C.,S.C. and S.T.). As against this, what happens in the over-all reservation is that while allocating the special reservation students to their respective social reservation category, the over-all reservation in favour of special reservation categories has yet to be honoured. This means that in the above illustration, the twenty remaining seats would be

> transferred to O.C. category which means that the number of special reservation candidates in O.C. category would be 56+20=76. Further, if no special reservation candidate belonging to S.C. and S.T. is available then the proportionate number of seats meant for special reservation candidates in S.C. and S.T. also get transferred to O.C. category. The result would be that 102 special reservation candidates have to be accommodated in the O.C. category to complete their quota of 112. The converse may also happen, which will prejudice the candidates in the reserved categories. It is, of course, obvious that the inter se quota between O.C., O.B.C., S.C. and S.T. will not be altered."

12. In the above case it has been clearly held that the Government should specifically provide if the horizontal reservation is overall horizontal reservation or compartmentalised reservation, by holding as under:-

> "17. It would have been better - and the respondents may note this for their future guidance - that while providing horizontal reservations, they should specify whether the horizontal reservation is a compartmental one or an overall one. As a matter of fact, it may not be totally correct to presume that the Uttar Pradesh Government was not aware of this distinction between "overall horizontal reservation", since it appears from the judgment in Swati Gupta that in the first notification issued by the Government of Uttar Pradesh on 17-5-1994, the thirty percent reservation for ladies was split up into each of the other reservations. For example, it was stated against backward classes that the percentage of reservation in their favour was twenty seven percent but at the same time it was stated that thirty percent of those seats were reserved for ladies. Against every vertical reservation, a similar provision was made, which meant that the said horizontal reservation in favour of ladies was to be a "compartmentalised horizontal reservation". We are of the opinion that in the interest of avoiding any complications and intractable problems, it would be better that in future the horizontal reservations are comparmentalised in the sense explained above. In other words, the notification inviting applications should itself state not only the percentage of horizontal reservation(s) but should also specify the number of seats reserved for them in each of the social reservation categories, viz., S.T., S.C., O.B.C. and O.C. If this is not done there is always a possibility of one or the other vertical reservation category suffering prejudice as has happened in this case. As pointed out hereinabove, 110 seats out of 112 seats meant for special reservations have been taken away from the O.C. category alone - and none from the O.B.C. or for that matter, from S.C. or S.T. It can well happen the other way also in a given year."

13. In the above judgment the procedure for filling up the open and reserved category seats has been provided as under:-

> "18. Now, coming to the correctness of the procedure prescribed by the revised notification for filling up the seats, it was wrong to direct the fifteen percent special reservation seats to be filled up first and then take up the O.C. (merit) quota (followed by filling of O.B.C., S.C. and S.T. quotas). The proper and correct course is to first fill up the O.C. quota (50%) on the basis of merit: then fill up each of the social reservation quotas, i.e., S.C., S.T. and B.C; the third step would be to find out how many candidates belonging to special reservations have been selected on the above basis. If the quota fixed for horizontal reservations is already satisfied - in case it is an over-all horizontal reservation - no further question arises. But if it is not so satisfied, the requisite number of special rreservation candidates shall have to be taken and adjusted/accommodated against their respective social reservation categories by deleting the corresponding number of candidates therefrom. (If, however, it is a case of compartmentalised horizontal reservation, then the process of verification and adjustment/ accommodation as stated above should be applied separately to each of the vertical reservations. In such a case, the reservation of fifteen percent in favour of special categories, overall, may be satisfied or may not be satisfied.) Because the revised notification provided for a different method of filling the seats, it has contributed partly to the unfortunate situation where the entire special reservation quota has been allocated and adjusted almost exclusively against the O.C. quota."

14. In the above judgment it has been clarified that in case of compartmentalised horizontal reservation, process of verification and adjustment should be applied separately to each of the vertical reservation.

15. In the case of *Rajesh Kumar Daria Vs. Rajasthan Public Service Commission and others* reported in (2007) 8 SCC 785 it has been made clear that in case of vertical reservations candidate of SC, ST, OBC are allowed to compete and appointed against the non reserved post, but that is not so in the case of horizontal reservation. Taking the example of women seats it has been held that proper procedure is to fill up the quota for SC in order of merit and then find out the number of candidate among them who belong to special reservation group of Scheduled Caste Woman and then meet the shortfall. In this regard it has been held as under:-

> "8. We may also refer to two related aspects before considering the facts of this case. The first is about the description of horizontal reservation. For example, if there are 200 vacancies and 15% is the vertical reservation for SC and 30% is the horizontal reservation for women, the proper description of the number of posts reserved for SC, should be : "For SC : 30 posts, of which 9 posts are for women". We find that many a time this is wrongly described thus : "For SC : 21 posts for

men and 9 posts for women, in all 30 posts". Obviously, there is, and there can be, no reservation category of 'male' or 'men'.

9. The second relates to the difference between the nature of vertical reservation and horizontal reservation. Social reservations in favour of SC, ST and OBC under Article 16(4) are 'vertical reservations'. Special reservations in favour of physically handicapped, women etc., under Articles 16(1) or 15(3) are 'horizontal reservations'. Where a vertical reservation is made in favour of a backward class under Article 16(4), the candidates belonging to such backward class, may compete for non-reserved posts and if they are appointed to the non-reserved posts on their own merit, their numbers will not be counted against the quota reserved for the respective backward class. Therefore, if the number of SC candidates, who by their own merit, get selected to open competition vacancies, equals or even exceeds the percentage of posts reserved for SC candidates, it cannot be said the reservation quota for SCs has been filled. The entire reservation quota will be intact and available in addition to those selected under Open Competition category. [Vide - Indira Sawhney (1992 Supp(3 SCC 217, R. K. Sabharwal vs. State of Punjab (1995 (2) SCC 745), Union of India vs. Virpal Singh Chauhan (1995 (6) SCC 684 and Ritesh R. Sah vs. Dr. Y. L. Yamul (1996 (3) SCC 253)]. But the aforesaid principle applicable to vertical (social) reservations will not apply to horizontal (special) reservations. Where a special reservation for women is provided within the social reservation for Scheduled Castes, the proper procedure is first to fill up the quota for scheduled castes in order of merit and then find out the number of candidates among them who belong to the special reservation group of 'Scheduled Castes-Women'. If the number of women in such list is equal to or more than the number of special reservation quota, then there is no need for further selection towards the special reservation quota. Only if there is any shortfall, the requisite number of scheduled caste women shall have to be taken by deleting the corresponding number of candidates from the bottom of the list relating to Scheduled Castes. To this extent, horizontal (special) reservation differs from vertical (social) reservation. Thus women selected on merit within the vertical reservation quota will be counted against the horizontal reservation for women. Let us illustrate by an example :

> If 19 posts are reserved for SCs (of which the quota for women is four), 19 SC candidates shall have to be first listed in accordance with merit, from out of the successful eligible candidates. If such list of 19 candidates contains four SC women candidates, then there is no need to disturb the list by including any further SC women candidate. On the other hand, if the list of 19 SC candidates contains only two woman candidates, then the next two SC woman candidates in

accordance with merit, will have to be included in the list and corresponding number of candidates from the bottom of such list shall have to be deleted, so as to ensure that the final 19 selected SC candidates contain four women SC candidates.

[But if the list of 19 SC candidates contains more than four women candidates, selected on own merit, all of them will continue in the list and there is no question of deleting the excess women candidate on the ground that 'SC-women' have been selected in excess of the prescribed internal quota of four.]

10. In this case, the number of candidates to be selected under general category (open competition), were 59, out of which 11 were earmarked for women. When the first 59 from among the 261 successful candidates were taken and listed as per merit, it contained 11 women candidates, which was equal to the quota for 'General Category - Women'. There was thus no need for any further selection of woman candidates under the special reservation for women. But what RPSC did was to take only the first 48 candidates in the order of merit (which contained 11 women) and thereafter, fill the next 11 posts under the general category with woman candidates. As a result, we find that among 59 general category candidates in all 22 women have been selected consisting of eleven women candidates selected on their own merit (candidates at Sl.Nos.2, 3, 4, 5, 9, 19, 21, 25, 31, 35 & 41 of the Selection List) and another eleven (candidates at Sl.Nos.54, 61, 62, 63, 66, 74, 75, 77, 78, 79 & 80 of the Selection List) included under reservation quota for 'General Category-Women'. This is clearly impermissible. The process of selections made by RPSC amounts to treating the 20% reservation for women as a vertical reservation, instead of being a horizontal reservation within the vertical reservation.

11. Similarly, we find that in regard to 24 posts for OBC, 19 candidates were selected by RPSC in accordance with merit from among OBC candidates which included three woman candidates. Thereafter, another five women were selected under the category of 'OBC - Women', instead of adding only two which was the shortfall. Thus there were in all 8 women candidates, among the 24 OBC candidates found in the Selection List. The proper course was to list 24 OBC candidates as per the merit and then find out number of woman candidates among them, and only fill the shortfall to make up the quota of five for women."

16. Having examined the present case in the light of the aforesaid pronouncements, it is clear that there are 9 posts for Subedar OBC category, out of which one post is reserved for police personnel. Similarly for Sub Inspector

(District Force) out of 94 posts of OBC, 14 posts are for police personnel and so on. In terms of the aforesaid judgment the proper procedure is to first fill up the quota for the OBC in order of merit, then find out the number of candidates among them who belong to the Special Reservation Group of "OBC Police Personnel". If the number of OBC Police Personnel in that list is equal to or more than the number of Special Reservation Quota, then there is no need for further selection towards OBC Police Personnel. Hence, in terms of the said judgment no migration of OBC Police Personnel to general category post is permissible.

17. In the case of *Public Service Commission. Uttaranchal Vs. Mamta Bisht and others* reported in (2010) 12 SCC 204, High Court had taken the same view as has been taken by this Court in the judgment under review but the Hon'ble Supreme Court has not approved this view and has set it aside by holding as under:-

> "12. The High Court decided the case on the sole ground that as the last selected candidate, receiving the benefit of horizontal reservation had secured marks more than the last selected general category candidate, she ought to have been appointed against the vacancy in general category in view of the judgment of this Court in Indra Sawhney Vs. Union of India, AIR 1993 SC 477, and the Division Bench judgment of High Court of Uttaranchal in Sikha Agarwal Vs. State of Uttaranchal, WP No.816 of 2002 (M/B), decided on 16.4.2003, and respondent no.1 ought to have appointed giving benefit of reservation thus, allowed the writ petition filed by respondent No.1.
>
> 13. In fact, the High Court allowed the writ petition only on the ground that the horizontal reservation is also to be applied as vertical reservation in favour of reserved category candidates (social) as it held as under:
>
> > "In view of above, Neetu Joshi (Sl.No.9, Roll No.12320) has wrongly been counted by the respondent No.3/Commission against five seats reserved for Uttaranchal Women General Category as she has competed on her own merit as general candidate and as 5th candidate the petitioner should have been counted for Uttaranchal Women General Category seats."
>
> Admittedly, the said Neetu Joshi has not been impleaded as a respondent. It has been stated at the Bar that an application for impleadment had been filed but there is nothing on record to show that the said application had ever been allowed. Attempt had been made to implead some successful candidates before this Court but those applications stood rejected by this Court.
>
> 14. The view taken by the High Court on application of horizontal reservation is contrary to the law laid down by this Court in Rajesh Kumar Daria Vs. Rajasthan Public Service Commission & Ors.

AIR 2007 SC 3127, wherein dealing with a similar issue this Court held as under: (SCC pp.790-91, para 9)

> "9. The second relates to the difference between the nature of vertical reservation and horizontal reservation. Social reservations in favour of SC, ST and OBC under Article 16 (4) are "vertical reservations". Special reservations in favour of physically handicapped, women, etc., under Articles 16(1) or 15(3) are "horizontal reservations". Where a vertical reservation is made in favour of a Backward Class under Article 16(4), the candidates belonging to such Backward Class, may compete for non- reserved posts and if they are appointed to the non- reserved posts on their own merit, their number will not be counted against the quota reserved for respective Backward Class. Therefore, if the number of SC candidates, who by their own merit, get selected to open competition vacancies, equals or even exceeds the percentage of posts reserved for SC candidates, it cannot be said that the reservation quota for SCs has been filled. The entire reservation quota will be intact and available in addition to those selected under open competition category. (Vide Indra Sawhney, R.K. Sabharwal v. State of Punjab, Union of India v. Virpal Singh Chauhan and Ritesh R. Sah v. Dr. Y.L. Yamul.) But the aforesaid principle applicable to vertical (social) reservations will not apply to horizontal (special) reservations. Where a special reservation for women is provided within the social reservation for Scheduled Castes, the proper procedure is first to fill up the quota for Scheduled Castes in order of merit and then find out the number of candidates among them who belong to the special reservation group of "Scheduled Caste women'. If the number of women in such list is equal to or more than the number of special reservation quota, then there is no need for further selection towards the special reservation quota. Only if there is any shortfall, the requisite number of Scheduled Caste women shall have to be taken by deleting the corresponding number of candidates from the bottom of the list relating to Scheduled Castes. To this extent, horizontal (special) reservation differs from vertical (social) reservation. Thus women selected on merit within the vertical reservation quota will be counted against the horizontal reservation for women."
> (Emphasis added)"

18. In the above judgment the High Court had held that since the last selected candidate receiving the benefit of horizontal reservation had secured more marks than the last selected general category candidate, therefore, she ought to have been appointed against the vacancy in general category. The Hon'ble Supreme Court has found this view of the High Court contrary to the law laid down in the case of *Rajesh Kumar Daria* (supra). Same is the position in the present case wherein OBC police personnel receiving the benefit of horizontal compartmentalised reservation is claiming the appointment on the ground that he has secured more marks than the last selected general category candidate, but this can not be accepted in view of above judgment.

19. The issue relating to the appointment of physically handicapped persons [horizontal (social) reservation] against the seat of Open General Category on the basis of higher marks had earlier come up before the Division Bench of this Court at Gwalior in WA No.414/2017 and the Division Bench had held it to be impermissible by holding that the concept of migration from one category to another on the basis of merit may hold good in vertical reservation, but in horizontal reservation the same is not applicable. In this regard the Division Bench has held as under:-

> "**9.** The question is whether a candidate who opts to take up a competitive examination not as a General Category/ Unreserved category but as a reserved category candidate belonging to SC/ST/OBC, as the case may be, thus competing amongst the candidates of his category, if obtain marks higher than obtained by the candidates of a General Category can be permitted to incurs in the General Category. In other words, whether a candidate having opted to participate in a competitive examination as a reserved category candidate can be permitted to migrate to General Category?
>
> **10.** In Indra Swahney vs. Union of India 1992 Supp (3) SCC 217 (Paragraph 812), it has been observed -
> "812. xxxxxxxxxxxxxxxx
>
> **11.** Thus, when a reservation is horizontal, then the candidate selected on the basis of reservation in any category has to be fixed in said category and cannot be allowed to migrate to other category. The concept of migrating from one category to another on the basis of merit may hold good in vertical reservation but in horizontal reservation the same is not applicable.
>
> **12.** In Rajesh Kumar Daria v. Rajasthan Public Service Commission AIR 2007 SC 3127, it has been held -
> "7-8. xxxxxxxxxxxxxxxxxxxxxx
>
> **13.** The impugned judgment when tested on the anvil of the above analysis cannot be faulted with as would warrant any interference.

> However, we are of the considered opinion, in the given facts of the case that there being no malafides on the part of the Commission in causing migration, no case is made out by the petitioners (respondents no.1, 2 and 3) for imposing cost of Rs.25,000/- payable in favour of each of the petitioners therein. We therefore set aside the cost imposed."

20. In the present case the aforesaid judgment of the Division Bench was not brought to the notice when Writ Appeal was decided by judgment under review, and a different view has been taken which renders the judgment under review per incurium.

21. In the present case learned Single Judge has placed reliance upon the judgment in the case of *Jitendra Kumar Singh and Another Vs. State of U.P. and others* reported in (2010) 3 SCC 119 and in the matter of *Deepa E.V. Vs. Union of India and others* reported in 2017(12) SCC 680 but these judgments relate to migration of SC, ST, OBC candidates to open category in case of vertical reservation. These are not the cases where horizontal reservation candidate has been permitted to take appointment against open category seat on the basis of their marks.

22. Learned counsel for respondents No.1 to 6 has also placed reliance upon sub-section (4) of Section 4 of the Madhya Pradesh Lok Seva (Anusuchit Jatiyon, Anusuchit Jan Jatiyon Aur Anya Pichhade Vargon Ke Liye Arakshan) Adhiniyam, 1994, which provides as under:-

> **"4. Fixation of percentage for reservation of posts and standard of evaluation**.
>
> (4) If a person belonging to any of the categories mentioned in sub-section (2) gets selected on the basis of merit in an open competition with general candidates, he shall not be adjusted against the vacancies reserved for such category under sub-section (2)."

Sub-section (2) of Section 4 relates to vertical reservation, therefore, the above provision has no relevance for present controversy.

23. The above position of law has escaped the attention of this Court while passing the order dated 23.3.2018 and dismissing the Writ Appeal No.138/2018 and affirming the judgment of the learned Single Judge. The difference in the concept of migration on the basis of merit in the case of vertical reservation and horizontal compartmentalised reservation has escaped attention of this Court, hence there is an error apparent on the face of record requiring review of the order dated 23.3.2018 passed in WA No.138/2018. Accordingly the said order is reviewed.

24. Having regard to the fact that the respondents No.1 to 6 being the OBC Police Personnels falling under the horizontal compartmentalised reservation are not entitled to appointment against open general category post on the basis of their claim that they had received more marks than the last candidate of open general category, therefore, no merit is found in the writ petition. Hence the order of the learned Single Judge is set aside and writ petition is dismissed. Review petition is accordingly allowed.

Petition allowed

I.L.R. [2019] M.P. 2036
APPELLATE CIVIL
Before Mr. Justice J.P. Gupta
F.A. No. 767/2008 (Jabalpur) decided on 19 September, 2019

TRILOCHAN SINGH CHAWLA …Appellant
Vs.
M.P. STATE FINANCIAL CORP. & ors. …Respondents

A. State Financial Corporation Act (63 of 1951), Section 29 – Rights of Corporation – Auction of Pledged Property – Procedure **– Held – Notice inviting tender was published thrice – Proper correspondence/ negotiations were made, minutes of every meeting were recorded and then sale was finalized after calling fresh valuation report of property – Appellant failed to establish any illegal nexus between purchaser and officers of corporation – Procedure conducted by respondents for auction and sale of pledged property was fair and reasonable and was not malicious or contrary to law – Suit rightly dismissed – First appeal dismissed. (Paras 25 to 33)**

क. राज्य वित्तीय निगम अधिनियम (1951 का 63), धारा 29 – निगम के अधिकार – गिरवी संपत्ति की नीलामी – प्रक्रिया – अभिनिर्धारित – निविदा आमंत्रण सूचना तीन बार प्रकाशित की गई थी – उचित पत्राचार/बातचीत की गई, प्रत्येक बैठक के मसौदे अभिलिखित किये गये थे और तब संपत्ति का नया मूल्यांकन प्रतिवेदन बुलाने के पश्चात् विक्रय को अंतिम रूप दिया गया था – अपीलार्थी, क्रेता एवं निगम के अधिकारियों के बीच किसी अवैध सांठ–गांठ को स्थापित करने में असफल रहा – प्रत्यर्थीगण द्वारा गिरवी संपत्ति की नीलामी एवं विक्रय हेतु संचालित प्रक्रिया निष्पक्ष एवं युक्तियुक्त थी तथा दुर्भावपूर्ण अथवा विधि के विपरीत नहीं थी – वाद उचित रूप से खारिज – प्रथम अपील खारिज।

B. State Financial Corporation Act (63 of 1951), Section 29 – Auction of Pledged Property – Procedure **– Held – There is no statutory provision, rule, regulation or established practice that before finalizing last highest bid, owner of property be given opportunity to deposit the said amount. (Para 30)**

ख. राज्य वित्तीय निगम अधिनियम (1951 का 63), धारा 29 – गिरवी संपत्ति की नीलामी – प्रक्रिया – **अभिनिर्धारित – कोई कानूनी उपबंध, नियम, विनियमन अथवा स्थापित पद्धति नहीं है कि अंतिम सर्वोच्च बोली को अंतिम रूप देने से पूर्व, संपत्ति के स्वामी को उक्त रकम जमा करने का अवसर दिया जाए।**

Cases referred:

AIR 1993 SC 935, (2002) AIR SC 834, AIR (1993) SC 1435, (2005) 4 SCC 456, (2010) 1 SCC 297.

Nirmala Nayak with *Sushma Pandey*, for the appellant.
Rakesh Johari, for the respondent No. 1.
None, for the respondent No. 2 though served.
Sameer Seth, for the respondent No. 3.

JUDGMENT

J. P. GUPTA, J. :- This appeal has been filed under Section 96 of the CPC challenging the judgment and decree dated 7.7.2008 passed by 5th Additional District Judge, Bhopal in Civil Suit No. 17-A/2003 whereby the suit filed by the appellant/ plaintiff for declaration, permanent injunction and for possession as well as mesne profit of suit property has been dismissed.

2. Facts giving rise to this appeal, briefly stated, are that the suit property is a building known as Chawla Mansion and hotel Kanchan is also part of it, situated at Berasia Road, Bhopal. The appellant was owner of the property. He took loan from the respondent no. 1 M.P. State Financial Corporation for running hotel business, however, the appellant failed to pay due amount of the loan of Rs. 27,92,000/- to the respondent no. 1, therefore, the respondent no. 1 gave notice to the appellant/plaintiff on 14.8.1992 under Section 30 of the State Financial Corporation Act and lastly exercising power under Section 29 of the aforesaid Act, on 17.6.1993 the possession and management of the suit property which was pledged under english mortgage, was taken by the respondent no. 1 and after exercising process for selling property through auction and negotiation, the suit property was sold to the respondent no.3 at the price of Rs. 24,00,000/- on 29.10.94.

3. Challenging the aforesaid process of the auction of the respondent no. 1, earlier the appellant filed several litigations before this court and lastly on account of being unsuccessful, the appellant filed civil suit before the District Court, Bhopal stating that the respondent no. 1 wrongly exercising the power under Section 29 of the S.F.C. Act, wrongly took the management and possession of the property. The loan amount was not disbursed in one installment and on account of disbursement of amount in 27 installments, the loan amount could not be utilized fruitfully, therefore, auction of the respondent no. 1, under Section 29 of the Act is

bad in law and deserves to be set aside. Apart from it, whole suit property was not pledged before the respondent no.1, only the premise of Kanchan Hotel was pledged, therefore, the suit premises except the Kanchan Hotel was wrongly taken into possession, therefore, that extended the action of the respondent no. 1 is contrary to law and deserves to be set aside. The respondent no. 1 had no right to sell out the property, therefore, the process of selling out the property is null and void. Apart from it, the process of selling out the property was not fair and reasonable and it was malice as no precaution was taken to ensure highest price of the property and before selling the property to the respondent no. 3 the appellant was not given opportunity to pay the sell amount. Neither the wide publicity was made nor efforts to conduct public auction was made and the highest offer given by M/s. Khaskar Press Private Limited to purchase the property at the price of Rs. 30,00,000/- was refused without any reasonable cause and the property was sold to favour the respondent no. 3, who is brother of near relative of the officer conducting sale process without calling M/s. Khaskar Press Private Limited, who offered highest price earlier. As the sale process was not fair and not conducted with a view to get highest price, caused injustice to the appellant, therefore, the same also deserves to be set aside.

4. In response to the summons, all the three respondents preferred to file separate written statements. Respondent no. 1, M.P.S.F.C. stated in reply that the appellant has no right to file suit for possession as the appellant had mortgaged the suit property in favour of respondent no. 1 under three registered deeds of English Mortgages dated 18.3.1982, 10.8.1983 and 28.9.1985 for repayment of the sanctioned loan of Rs. 11,00,000/- and on 17.6.1993 respondent no. 1 took the possession of the mortgaged property in terms of the mortgage deeds exercising powers conferred under Section 29 of the Act and the respondent no. 3 was only Supurdgidar of the suit property and the appellant has no right to dispossess respondent nos. 1 and 3 and in view of the order dated 12.9.1996, passed by the High Court of M.P. Jabalpur in Civil Revision No.387/96, the appellant is estopped from disputing the sale proceedings of the sale property and the appellant had also taken part in the sale proceedings and he offered only Rs. 14,00,000/-. Despite of the demand by written notice, no dues were cleared, therefore, mortgaged property was put to auction sale, therefore, the respondents took possession of the suit property in accordance with the law. During the sale proceedings the appellant approached to this court and also filed a civil suit but did not get any relief to get the sale proceedings stayed. In the sale proceedings, notice inviting tenders were published in daily news paper on 14.7.1993, 30.12.1993 and 19.5.1994. The tenders received were negotiated with the tenderers in various meetings of the Standing Committee, Recovery Committee and Default Review Committee, convened on different places at Indore and Bhopal. The highest offer was received of Rs. 19,00,000/-, in this regard, information was given to the appellant but he was not prepared to pay more than Rs. 14,00,000/-.

5. On account of multiple litigations started by the appellant, there was no more purchasers of the property and lastly on 29.10.1994. The previous bidders were called for and on 29.10.1994 the Standing Committee accepted further proposal of respondent no. 3 enhancing from 19,00,000/- to Rs. 24,00,000/- and as the appellant earlier refused to enhance his offer from Rs. 14,00,000/-, therefore, the offer given by respondent no. 3 was accepted. Thus, the allegation that no efforts were made to ensure best price of the suit property is not true. Similarly, the respondent no. 3 is not brother or close relative of the officer of the respondent no. 1 and the sale process was conducted in the manner that the best price could be secured. Hence the suit deserves to be set aside as the appellant cannot get any relief against respondents no.1 and 3. So far as respondent no. 3 is concerned, his stand is that the respondent no. 1 had right to take possession of the property and the property has been sold out in accordance with law in the fair manner and he had no connivance with the officers of the respondent no. 1 to purchase the aforesaid property maliciously and the actual market value was paid by him, therefore, the appellant has no right to get any relief against him.

6. Respondent no. 2 in his reply renders support to the case of the appellant. According to him he was occupying four shops in the Chawla Mansion as tenant of the appellant since last more than 18 years but respondent no. 1 and respondent no. 3 having conspired to take possession of these shops illegally and had thrown his all belongings in the street, therefore, he claimed Rs. 1,00,000/- as damage from respondents nos. 1 and 3.

7. The trial Court earlier vide judgment and decree dated 10.8.2004 has dismissed the suit. The said judgment and decree was challenged before this court by way of filing First Appeal No. 659/2004 by the appellant and this court vide order dated 10.5.2007 set aside the judgment and decree and remanded the case to the trial Court, in the light of allowing amendment application in the pleading and observing that without going into the merit of other contention to some extent, non calling of Ms. Khaskar Press Private Limited for negotiation, who had submitted its offer of Rs. 30,00,000/- vide letter dated 3.11.1993 for negotiation, so as to know, if it would still adhere made by it or not, by itself was indicative of the fact that every endeavor was not made to secure the best possible price of the suit property. No plausible or valid reason had been assigned by M.P.S.F.C. for not being able to call Ms. Khaskar Press Private Limited in negotiation before finalizing the deal in favour of respondent no. 3 for a sum of Rs. 24,00,000/-.

8. Then, after due compliance of the direction of this court, after fresh trial, the impugned judgment and decree has been passed. Learned trial Court has arrived at the conclusion that the whole suit property was pledged before the respondent no. 1 by registered deeds and on account of failure of appellant of due amount by exercising power under Section 29 of the Act, respondent no. 1 took

management and possession of the property which was in accordance with law. So far as the sale process is concerned, as the appellant did not offer of more than Rs. 14,00,000/-, therefore, the property was sold out for Rs. 24,00,000/- which was the price near to prevailing market price. In this regard, the respondent no. 1 has published notices in newspapers number of times and invited tenders and lastly by process of negotiation the sale was finalized in favour of actual purchaser who was ready to pay the amount in accordance with the conditions settled during the negotiation and Ms. Khaskar Press Private Limited, who earlier offered Rs. 30,00,000/-, but it was not accepted as the party was not ready to pay 25 % amount in first installment and later on withdrawn this offer, therefore, it cannot be said that the respondent no. 1 deliberately without any reasonable cause refused the offer of the highest bidder and did not call without any reason. The appellant has also failed to prove that the respondent no. 3 is brother or near relative of one of the officers of the respondent no. 1, who was conducting the sale process. Therefore, the appellant has failed to prove that the respondent no. 1 conducted the sale process in unfair, unreasonable manner and maliciously thus the appellant is not entitled to get any relief and the suit was dismissed.

9. This appeal has been preferred on the ground that the aforesaid findings of the learned trial Court are contrary to record and the act of the respondent no. 1 with regard to taking management and possession of the suit premises is illegal and consequently, the process of selling of the property is without jurisdiction and illegal. Similarly the sale process is illegal, arbitrary, unfair and malice as no efforts were made to ensure the best price of the property and the respondent no. 1 has failed to prove that the sale process was conducted to bring the best price of the suit property. The offer of Rs. 30,00,000/- given by Ms. Khaskar Press Private Limited was highest which should have been accepted and before finalizing the sale in favour of respondent no. 3, the appellant was not given opportunity to pay the sale prices. The respondent no. 3 earlier gave offer of Rs. 24,50,000/- and later on, the property was sold out for Rs.24,00,000/- to the same persons, who are relatives of the officers of the respondent no. 1. In this way the act is malice, therefore, the sale deserves to be set aside and the judgment and the decree passed by the trial Court be set aside and the suit be decreed.

10. On behalf of the respondent no. 1, arguments have been made to support the findings of the learned trial Court and the prayer is made to dismiss the appeal as the judgment and decree of the trial Court is based on legal appreciation of evidence after applying the relevant law. The respondent no. 3 has also supported the contention of the respondent no. 1. So far as respondent no. 2 is concerned he is ex-parte.

11. Before considering the arguments of both the parties, it would be appropriate to have a look on the relevant provisions and law governing the

subject matter of this case. The respondent has exercised the power vested under Section 29 of The State Financial Corporation Act, 1951 which is as under :-

> "29. **Rights of Financial Corporation in case of default ---** (1) Where any industrial concern, which is under a liability to the Financial Corporation under an agreement, makes any default in repayment of any loan or advance or any instalment thereof [or in meeting its obligations in relation to any guarantee given by the Corporation] or otherwise fails to comply with the terms of its agreement with the Financial Corporation, the Financial Corporation shall have the [right to take over the management or possession or both of the industrial concerns], as well as the [right to transfer by way of lease or sale] and realise the property pledged, mortgaged, hypothecated or assigned to the Financial Corporation.
>
> (2) Any transfer of property made by the Financial Corporation, in exercise of its powers [* * *] under sub-section (1), shall vest in the transferee all rights in or to the property transferred [as if the transfer] had been made by the owner of the property.
>
> (3) The Financial Corporation shall have the same rights and powers with respect to goods manufactured or produced wholly or partly from goods forming part of the security held by it as it had with respect to the original goods.
>
> (4) [Where any action has been taken against an industrial concern] under the provisions of this sub-section (1), all costs, [charges and expenses which in the opinion of the Financial Corporation have been properly incurred] by it [as incidental thereto] shall be recoverable from the industrial concern and the money which is received by it [* * *] shall, in the absence of any contract to the contrary, be held by it in trust to be applied firstly, in payment of such costs, charges and expenses and, secondly, in discharge of the debt due to the Financial Corporation, and the residue of the money so received shall be paid to the person entitled thereto.]
>
> (5) [Where the Financial Corporation has taken any action against an industrial concern] under the provisions of sub-section (1), the Financial Corporation shall be deemed to be the owner of such concern, for the purposes of suits by or against the concern, and shall sue and be sued in the name of [the concern]."

12. With regard to sale process, there is no provision in the State Financial Corporation Act and no rule and regulation have been framed to conduct the sale process. Earlier, Hon'ble the Apex Court in case of *Mahesh Chandra v. Regional Manager, U.P. Financial Corporation and ors,* AIR 1993 SC 935 has laid down

certain guidelines and this suit was earlier filed in the light of aforesaid guidelines but the aforesaid judgment of *Mahesh Chandra* (Supra) has been over ruled by a three Judge Bench of the Apex Court in the case of *Haryana Financial Corporation and another vs. Jagdamba Oil Mills and another* (2002) AIR SC 834, considering it to be contrary to the judgment of *UP Financial Corporation Vs. Gem Cap (India) Pvt. Ltd. and others* AIR (1993) SC 1435 and held as under :-

> "15. The view in *Mahesh Chandra* case appears to have been too widely expressed without taking note of the ground realities and the intended objects of the statute. If the guidelines as indicated are to be strictly followed, it would be giving premium to a dishonest borrower. It would not further interest of any Corporation and consequently of the industrial undertakings intending to avail financial assistance. It would only provide an unwarranted opportunity to the defaulter (in most cases chronic and deliberate) to stall recovery proceedings. It is not to be understood that in every case the Corporations shall take recourse to action under Section 29. Procedure to be followed, needless to say, has to be observed. If any reason is indicated or cause shown for the default, the same has to be considered in its proper perspective and a conscious decision has to be taken as to whether action under Section 29 of the Act is called for. Thereafter, the modalities for disposal of seized unit have to be worked out. The view expressed in **Gem Cap** case appears to be more in line with the legislative intent. Indulgence shown to chronic defaulter would amount to flogging a dead horse without any conceivable result being expected.As the facts in the present case show, not even a minimal portion of the principal amount has been repaid. That is a factor which should not have been lost sight by the courts below. It is one thing to assist the borrower who has intention to repay, but is prevented by insurmountable difficulties in meeting the commitments. That has to be established by adducing material. In the case at hand factual aspects have not even been dealt with, and solely relying on the decision in *Mahesh Chandra* case, the matter has been decided.
>
> 16. Section 29 gives a right to Financial Corporation inter alia to sell the assets of the industrial concern and realize the property pledged, mortgaged, hypothecated or assigned to the Financial Corporation. This right accrues when the industrial concern, which is under a liability to the Financial Corporation under an agreement, makes any default in repayment of any loan or advance or any instalment thereof or in meeting its obligations as envisaged in Section 29 of the Act. Section 29 (1) gives the Financial Corporation in the event of default the right to take over the management or possession or both and thereafter deal with the property.

17. The aforesaid guidelines issued in *Mahesh Chandra* case place unnecessary restrictions on the exercise of power by the Financial Corporation contained in Section 29 of the Act by requiring the defaulting unit-holder to be associated or consulted at every stage in the sale of the property. A person who has defaulted is hardly ever likely to cooperate in the sale of his assets. The procedure indicated in *Mahesh Chandra* case will only lead to further delay in realization of the dues by the Corporation by sale of assets. It is always expected that the Corporation will try and realize the maximum sale price by selling the assets by following a procedure which is transparent and acceptable, after due publicity, wherever possible.

18. The subsequent decisions of this Court in **Gem Cap, Naini Oxygen,** and **Micro Cast Rubber** run counter to the view expressed in *Mahesh Chandra* case. In our opinion, the issuance of the said guidelines in *Mahesh Chandra* case are contrary to the letter and the intent of Section 29. In our view, the said observations in *Mahesh Chandra* case do not lay down the correct law and the said decision is overruled".

13. In the last Hon'ble the Apex Court directed that it shall be upon the Corporation to dispose all the sick units in accordance with law in such manner as would bring in the highest price.

14. Later on, the Apex Court in case of *Karnataka State Industrial Investment and Development Corporation Ltd. vs. Cavalet India Limited and ors.* (2005) 4 SCC 456 further summarized the legal principle. In the case the sale process was challenged before the writ court. The Apex Court has summarized the legal provisions in Para 19 and 20 which are as under :-

"19. From the aforesaid, the legal principles that emerge are :

(i) The High Court while exercising its jurisdiction under Article 226 of the Constitution does not sit as an appellate authority over the acts and deeds of the Financial Corporation and seek to correct them. The doctrine of fairness does not convert the writ courts into appellate authorities over administrative authorities.

(ii) In a matter between the Corporation and its debtor, a writ court has no say except in two situations;

(a) there is a statutory violation on the part of the Corporation or

(b) where the Corporation acts unfairly i.e., unreasonably.

(iii) In commercial matters, the courts should not risk their judgments for the judgments of the bodies to which that task is assigned.

(iv) Unless the action of the Financial Corporation is mala fide, even a wrong decision taken by it is not open to challenge. It is not for the courts or a third party to substitute its decision, however, more prudent, commercial or businesslike it may be, for the decision of the Financial Corporation. Hence, whatever the wisdom (or the lack of it) of the conduct of the Corporation, the same cannot be assailed for making the Corporation liable.

(v) In the matter of sale of public property, the dominant consideration is to secure the best price for the property to be sold and this could be achieved only when there is maximum public participation in the process of sale and everybody has an opportunity of making an offer.

(vi) Public auction is not the only mode to secure the best price by inviting maximum public participation, tender and negotiation could also be adopted.

(vii) The Financial Corporation is always expected to try and realise the maximum sale price by selling the assets by following a procedure which is transparent and acceptable, after due publicity, wherever possible and if any reason is indicated or cause shown for the default, the same has to be considered in its proper perspective and a conscious decision has to be taken as to whether action under Section 29 of the Act is called for. Thereafter, the modalities for disposal of seized unit have to be worked out.

(viii) Fairness cannot be a one-way street. The fairness required of the Financial Corporations cannot be carried to the extent of disabling them from recovering what is due to them. While not insisting upon the borrower to honour the commitments undertaken by him, the Financial Corporation alone cannot be shackled hand and foot in the name of fairness.

(ix) Reasonableness is to be tested against the dominant consideration to secure the best price.

"20. True, the exercise of the right by a Financial Corporation under Section 29 of the Act should be fair and reasonable. Ultimately, whether the action of the Financial Corporation is bona fide or not would depend on the facts and circumstances of each case".

15. Further, the Apex Court in case of *Punjab Financial Corporation vs. Surya Auto Industries* (2010) 1 SCC 297 held as under :-

"22. The relationship between the Corporation and borrower is that of creditor and debtor. The Corporation is expected to recover the loans already given so that it can give fresh loans/financial assistance to others. The proceedings initiated by the Corporation and action taken for recovery of the

> outstanding dues cannot be nullified by the courts except when such action is found to be in violation of any statutory provision resulting in prejudice to the borrower or where such proceeding/action is shown to be wholly arbitrary, unreasonable and unfair. The court cannot sit as an appellate authority over the action of the Corporation and substitute its decision for the one taken by the Corporation."

16. In view of the aforesaid analysis of the law the power exercised under Section 29 of the Act can be challenged only on the ground that exercise was not fair and reasonable and the reasonableness and the action of the financial corporation under Section 29 of the Act should be decided against the dominant consideration to secure the best price.

17. Having heard learned counsel for the parties and perusal of the record and keeping in mind the aforesaid legal preposition, following questions arises in this appeal for determination.

> 1. Whether the respondent no. 1 has committed illegality in taking of the management and possession of the suit property ?
>
> 2. Whether the manner in which the suit property was sold was not fair and reasonable and resultantly, failed to ensure best price of the property.
>
> 3. If yes, whether the appellant is entitled to get relief claimed in the suit ?

Question No. 1 :-

Appellant Trilochan Singh Chawla P.W. 1 has admitted in the cross examination that he took loan from the respondent no.1 and executed mortgage deed Exs. D-1, D-2, D-3. The mortgage deeds Ex. D-1 to D-3 show that the entire suit premises was pledged before the respondent no. 1 in which constructed part of Kanchan Hotel and other part of the building namely Chawla Mansion situated at ground floor was also pledged. The appellant Trilochan Singh, P.W. 1 has also admitted that on behalf of the respondent no. 1, notice dated 14.8.1992 Ex. D-4 was given to him whereby due amount of Rs. 27,92,000/- was demanded and he replied to the notice which is Ex. D-5 dated 31.8.1992 in which there was no objection with regard to due amount and six months time was sought to pay the amount with the permission of sharing the business with new partner and it is not a case of the appellant that the amount has been paid by him or at any time he offered to pay the whole due amount.

18. The appellant Trilochan Singh Chawla, P.W. 1 has stated that he offered Rs. 22,00,000/- by letter Ex. P-21 after inducting Kuwar Shyam Choudhary as partner and post dated cheques were given but post dated cheques were dishonored, therefore, respondent no. 1 started recovery proceedings and the

appellant challenged it before this court, filing Misc. Petition No. 2976/1992 which was disposed of vide order dated 29.4.1993 Ex. D-6 observing that the "The petitioner, admittedly is a defaulter. The post-dated cheque given by him has been dishonored. Under the circumstances, the proceedings initiated by the respondents for recovery of the amount due, cannot be said to be illegal or unjust and the submission of the learned counsel for the appellant for grant of two months time to pay the outstanding dues, this request deserves sympathetic consideration of the respondents."

19. Admittedly on 17.6.1993 by Panchnama Ex. D-7 the management and suit property was taken invoking power under Section 29 of the Act. The contention, that before expiring of the aforesaid two months given under the order Ex. D-6, the possession of the property was taken which is contrary to the order of this court, therefore, the act of the respondent no. 1 is illegal, has no substance as this court by order Ex. D-6 did not direct to provide two months time to the appellant. There was only the observation that the prayer be considered sympathetically and the appellant has not stated that in compliance with the observation made in the order Ex. D-6 he took any initiative to arrange the money and offer the same and further, ever offer to pay Rs. 22,00,000/- to the respondent.

20. In view of the discussion, on the basis of the said facts and circumstances established in the case, it is found that the respondent no. 1 has not committed any illegality by invoking the power under Section 29 of the Act and taking management in possession of the whole suit property.

Question No. 2 :-

On behalf of the appellant, the procedure followed to sell out the suit property has been challenged on the ground that there was no wide publicity for inviting the potential purchaser and private negotiation was not made properly and the highest offer of Rs. 30,00,000/- given by M/s. Khaskar Press Private Limited was not called for meeting on 29.10.1994 and the offer of Rs. 24,00,000/- given by respondent no. 3 was accepted without considering the fact that earlier he offered Rs. 24,50,000/- and it appears that it was done to favour him on account of his relationship with the officers of respondent no. 1. Apart from it, before finalization the offer of respondent no. 3, the appellant was not given opportunity to pay amount of Rs. 24,00,000/-, consequently, the conduction of sale process cannot be said to be fair and reasonable and in accordance with law.

21. Appellant Trilochan Singh P.W. 1, has given his statement narrating the aforesaid averments and also placed reliance on the documents, the publications with regard to inviting tender to sale out the property in the newspaper which are Ex. P-13 dated 17.7.1993 in Nav Bharat, Ex. P-14 dated 30.12.1993 newspaper Dainik Bhaskar and Ex. P-15 dated 20.5.1994 newspaper Dainik Bhaskar and the

minutes of Recovery Committee Meeting of the respondent no. 1 are Ex. P-17-A, 17-B, 17-C, 17-D and 17-E from 18.3.1994 to 29.10.1994 and letter dated 2.11.1994 Ex. P-18 written by him to the Managing Director of Respondent No. 1 in reply of offer of Rs. 30,00,000/- and the letter dated 24.1.1994, Ex. P-19 written to the General Manager and the letter dated 4.4.1994 Ex. P-20 written by Deputy Manager of the respondent no. 1 to the appellant with regard to rejecting of the offer and the letter dated 5.10.1992 Ex. P-21 written to the Regional Manager of the respondent no. 1. With regard to fresh offer of Rs. 22,00,000/- and written statement by the respondent Ex. P-22 and Ex. P. 23 with regard to acceptance of the aforesaid offer. The genuineness and contents of the aforesaid documents are not disputed by the respondents.

22. On behalf of the respondent no. 1, R.G. Dwivedi, Deputy General Manager, D.W. 1, has stated the procedure followed by the respondent no. 1 to sell out the property and in this regard, it is stated that the notices for invitations of tenders, were published as Ex. P-13, P-14 and P-15 and besides of it on 17.7.1993 in newspaper Nai Duniya by Ex. D-13 and in M.P. Chronicle, by Ex. D-14 and on 30.12.1993 in Newspaper Nav Bharat by Ex. D-16, the publications were also made. He has also proved the letter Ex. P-19 and P-20, whereby the offer of Rs. 14,00,000/-, given by the appellant, was again rejected and also proved the negotiations between respondent no. 1 and the appellant taken place as per the letters Ex. D-11, dated 17.7.1994 and Ex. D-12 dated 19.8.1994 and other communications Ex. D-23 to Ex. D-28 and D-30 and inspection report Ex. D-29 dated 25.10.1994 and the copies of minutes of proceeding of committee of the respondent no. 1 Ex. D-32 C dated 13.8.1993 Ex. D-33 C dated 29.10.1994.

23. Shri P.K. Gupta, D.W. 6 has also proved the minutes of the committee, Ex. D-32 C and 33 C. Saroj Kumar Jha D.W. 2 has proved inspection report dated 25.10.1994 Ex. D-29 as Technical Manager and opined that at that time, value of suit property was between Rs. 20,00,000/- to Rs. 24,00,000/- and P.K. Paliwal D.W. 3 being Regional Manager has stated that the appellant did not offer more than 14,00,000/- on deffered payment and he and R.C. Paliwal, Deputy Manager are not relative of respondent no. 3 purchaser of the suit property and Dr. J.P. Paliwal D.W. 4 has stated that in response of the publication of the notice, he submitted his offer to purchase the property and during the process of selling the appellant was also offered in several meetings to pay more than Rs. 14,00,000/- but the appellant did not pay and did not offer more than Rs. 14,00,000/- and also stated that neither P.K. Paliwal or the Deputy Manager are related to him and they have no role in the meeting of Recovery Committee or Standing Committee by which the decisions were taken and he has purchased the suit premises in accordance with law as he offered highest price of Rs. 24,00,000/- and was in possession of the property.

24. The genuineness and contents of the aforesaid documents have not been challenged by the appellant.

25. On the basis of aforesaid oral and documentary evidence, following facts are found to be proved :-

(1) NIT was published on 17.7.1993 in three daily newspaper, Nav Bharat, Nai Duniya and M.P. Chronicle. As per the publication Ex. P-13, D-13 and D-14 and the second publication was made on 30.12.1993 in two newspapers Nav Bharat and Dainik Bhaskar Ex. D-16 and D-17 and the third publication was made in Dainik Bhaskar on 20.5.1994 by Ex. D-18.

(2) In response of the aforesaid publications by letter Ex. D-23, respondent no. 3 offered Rs. 18,00,000/-. M/s. Khaskar Press Private Limited by letter Ex. D-24 offered Rs. 8,00,000/- and Jeevan Singh Chatwal by letter Ex. D-25 offered Rs. 12,50,000/- and Mohd. Anwar by letter Ex. D-26 offered Rs. 18,00,786/- and R.C. Garg and Nitesh Garg jointly by letter Ex. D. 27 offered Rs. 7,51,000/-.

(3) The minutes of the Standing Committee dated 13.8.1993 Ex. D. 33 C established that all the offerers were called for with a view to revise their offers to meet the actual price of the property. In the meeting, the three offerers were present and submitted revised offer in which M/s. Khaskar Press Private Limited offered Rs. 30,00,000/- on deferred payment basis and respondent no. 3 offered Rs. 24,50,000/- on deferred payment basis and Mohd. Anwar offered Rs. 28,00,786/- on deferred payment basis.

(4) Accordingly, the offer given by M/s. Khaskar Press Private Limited was accepted subject to 25 % initial payment of the sale price within 15 days from the date of receipt of acceptance letter from the corporation, respondent no. 1, in response of this decision, M/s. Khaskar Press Private Limited put condition of 10 % initial payment in place of 25 % which was not accepted, therefore, M/s. Khaskar Press Private Limited by letter dated 3.11.1993 Ex. D-28 withdraw the offer and request was made to return the security amount but this request was turned down and the security amount of Rs. 20,000/- was forfeited as proved by Shri R.G. Dwivedi P.W. 1 by his statement.

(5) After the aforesaid, the actions taken by respondent no. 1 have been recorded in the minutes of the meeting of the Standing Committee/Recovery Committee of the respondent no. 1 which are the documents Ex. P-17 B, C, D and E.

(6) The relevant minutes dated 15.7.94 Ex. P-17 B are as under :-

"The Committee also noticed that the unit is in the possession of the Corpn since last one year and in spite of advt. more than twice,

suitable offers could not be received. It was also noted that in the last Standing Committee, the offers were discussed, but the offers were much below the amount offered by the borrower for settlement. Therefore, it was decided by the Standing Committee that before considering the tender, the borrower may be given one more opportunity for discussion. The Committee also noted that in view of deteriorating condition of the assets as well as some portion of the ground floor in the possession of a tenant who had approached the court for non-vacating the same. The Corpn may not get suitable offer for purchase of assets. Therefore, the borrower was called, but the borrower could not receive the information to attend the meeting. However, a telephone message was received from our Bhopal Office. After discussion, the Committee decided to call the borrower before the next Standing Committee proposed to be held at Bhopal in the last week of July and discuss the proposal for settlement".

(7) The minutes of the meeting Ex. P-17 C dated 27.7.1994 are as under :-

"10. The Committee noted the contents of the memorandum.

The General Manager (R) apprised the Committee that Shri Trilochan Singh Chawla, partner of the firm, called on us at the office and informed that he is arranging funds to get the possession of the hotel back. He has also requested that the possession of the hotel be given to him. It was made him clear that until and unless he deposits Rs. 5.00 lacs. the possession cannot be given back. Shri Chawla has also requested to consider his request for settlement of the loan account at Rs. 14.00 lacs which too on deferred payment, which was not found acceptable. However, he was advised to come on 27.7.94 before the Committee for discussions.

Neither Shri Chawla nor his representative turned up: therefore, nothing could be discussed. However, the Committee authorised the Managing Director to discuss with the borrower if he submits a suitable proposal and in case of no proposal from the borrower, the earlier offerers be called again for negotiation. In case of no solution, the Committee decided to re-advertise the sale.

11. The Committee noted the position of units taken-over and their disposal. The Committee desired that the disposal of the units should be accelerated further.

12. The matter of disposal of the unit on deferred payment basis was also discussed. The Committee was of the view that the period for payment of deferred amount should be reduced from 3-5 years to 3 years only. It was also decided that whenever it is

necessary, collateral security for deferred amount be obtained to secure the amount as well as safeguard of the assets sold on deferred payment basis."

(8) The minutes of the meeting Ex. P-17-D dated 20.10.1994 are as under :-

"The Committee also noted that the Hotel is in the possession of the Corporation since 17.6.93 and a series of discussions had taken place for finalising the matter. Though the sale of the unit was finalized in the Standing Committee dated 13.8.93 at Rs. 30.00 lacs. It was all in vain. After discussions, the Committee decided to call the borrower for further negotiations on the proposal submitted by him for settlement of the loan account. Sardar Trilochan Singh, Proprietor of the Hotel appeared before the Committee. After discussions, the Committee informed him that his offer to settle the loan account at Rs. 14.00 lacs is not acceptable because of the huge outstanding in the loan account as well as there being a huge difference in his offer for settlement and the realisable value of the assets. Shri Sardar Trilochan Singh has argued for extending for facilities like waiver of interest etc, which was also not accepted by the Committee. When the Committee advised him to increase his offer so that his case for settlement can be finalized, he could not enhance his offer. The Committee thereafter advised him to increase his offer atleast to the simple net amount for which he has shown his inability. Therefore, the Committee declined his offer for settlement of loan at Rs. 14.00 lacs.

The Committee was also apprised that recently one Dr. J.P. Paliwal has shown his willingness to purchase the Hotel alongwith Rs. 19.00 lacs and requested for negotiation.

Since the Committee could not arrive at a positive view for settlement of the loan account decided to get the assets revalued and call the offerer i.e. Dr. J.P. Paliwal for further discussions alongwith the earlier offerers as decided by the Standing Committee in its meeting dated 27.7.94."

(9) The minutes of the meeting as per Ex. P-17-E dated 29.10.1994 are is as under :-

"The Committee went through the memorandum and noted the contents. The Committee also noted that the case has been discussed by the Standing Committee as well as the Recovery Committee a number of times but nothing could be finalised. In the last Recovery Committee meeting i.e. 20th Oct 94, the borrower was given last opportunity for negotiation. The

Committee also directed to get the assets revalued. Accordingly, the Manager (T) has inspected the assets and valued the same at Rs. 22.00 to Rs. 24.00 lacs. However, the borrower could not submit his offer acceptable to the Committee. Therefore, the Committee decided to call the earlier offerer as well as the recent offer received from Dr. J.P. Paliwal. Accordingly, Dr. J.P. Paliwal and Shri Mohd. Anwar and M/s. Heavy Cargo Movers were informed to appear before the Committee for negotiation. Dr. J.P. Paliwal and Shri Jeevan Singh Chhatwal (on behalf of Heavy Cargo Movers) appeared before the Committee. None from Shri Mohd. Anwar attended.

After discussion, the Committee enquired from both the offerers whether they are interested in purchase of the assets on cash down basis. Dr. Paliwal was not interested. However, Shri Jeevan Singh Chhatwal agreed to purchase the assets on cash down basis, at Rs. 15 lacs, but this was not acceptable to the Committee. Therefore, the Committee decided to go for open bidding or deferred payment basis. Accordingly, the bidding process was started as under :-

J.P. Paliwal	Heavy Cargo Movers
19.00	19.25
19.50	20.00
20.25	20.50
21.00	21.25
21.50	21.75
22.00	22.25
22.50	22.75
23.00	23.25
23.40	23.50
23.60	23.70
23.80	23.90
24.00	
	Withdrew

After discussion, the Committee noted that the offer amount is equal to recent valuatiuon and to avoid further delay in the matter, the offer can be accepted. Therefore, the Committee decided to accept the offer of Dr. J.P. Paliwal for purchase of the

entire assets of the hotel at Rs. 24.00 lacs on deferred payment basis payable within 3 years on following terms and conditions :-

> "1. The purchaser will pay a sum of Rs. 6.00 lacs (Rs. Six lacs) being 25 % of the offered amount within 15 days from the date of receipt of acceptance letter from the Corporation by way of initial payment. The possession of the unit will be handed over.
>
> (b) The balance sale price of Rs. 18.00 lacs (Eighteen Lacs) will be paid by the purchaser in 6 half yearly installments of Rs. 3.00 lacs each. First of such installments will be payable after 6 months from the date of giving possession.
>
> * * * * * * * * * *
>
> The Committee further decided that on receipt of 25% initial payment, the possession of the assets be given to the purchaser immediately."

10. Before finalizing the sale proceedings a fresh report with regard to assessment of the valuation of the properties was called for which was submitted by Technical Manager S.K. Jha P.W. 2 which is Ex. D-29 and the price was between Rs. 20,00,000/- to Rs. 24,00,000/- and in the light of the aforesaid report the sale process was finalized.

11. It is also found to be proved that after the first offer of Rs. 24,50,000/- of the respondent no. 3 till 25.10.1994, property was devalued on account of natural decay as lying uncared and on account of continuous litigation.

12. The appellant has failed to prove the fact that there was relationship between the respondent no. 3 and officers of the respondent no. 1 and they acted in connivance with the respondent no. 3.

26. In the light of the aforesaid established facts, the contention and objection of the appellant that no wide publicity was made to call for or to give opportunity to the potential purchaser to participate in the process has no substance. Three times, NIT was published in the newspaper. So far, the contention, that the publications were not made in the newspapers having circulation nationwide, is concerned, in absence of requirement of any mandatory provision by statutory rules and regulations or established practice of the institute, it cannot be said that on account of it, the exercise made by the respondent no. 1 was not fair and reasonable. The decision depends upon the possible price of the property and past experience with regard to availability of potential purchaser of the property and in

this regard, the discretion vested in the officers cannot be enquired or tested, in view of the appellant or of this court.

27. Similarly, in response of the NIT, no suitable offers were received. Thus, the respondent no. 1 exercised method of private negotiation to find out actual and potential purchaser with the offer of best price, therefore, as per the minutes of the meeting Ex. P-17-B, the appellant was given further opportunity for settlement which was not availed by him as he remained absent on 27.4.1994 as clear by the minutes of the meeting Ex. P-17-C and the appellant last offer of Rs. 14,00,000/- was declined on 20.10.1994 as mentioned in the minutes of the meeting Ex. P-17-D and lastly after getting the fresh report with regard to revaluation of the assets, the earlier offerers as well as the recent offerers, the respondent no. 3 Dr. J.P. Paliwal, Mohd. Anwar and Ms. Cargo Movers were called for negotiations and the respondent no. 3 Dr. J.P. Paliwal and Jeevan Singh Chatwal on behalf of M/s. Cargo Movers appeared before the committee and in open bidding between the present parties, the last highest offer, given by respondent no. 3 was accepted as the same was matching with the amount of the assets revalued.

28. Shri R.G. Dwivedi, D.W. 1 has stated that M/s. Khaskar Press Private Limited was not informed and called for to participate in the proceeding dated 29.10.1994 as earlier his offer was accepted and failed to deposit 25 % amount of the sale price and withdraw his offer and his security amount was also forfeited.

29. In view of the circumstances, not calling of M/s. Khaskar Press Private Limited was not arbitrary and malice act. On account of forfeiture of the security he was out of the list of the persons who earlier offered bid, therefore, the proceeding dated 29.10.1994 Ex. P-17 E cannot be said to be malice, arbitrary or unfair. Similarly, the acceptance of bid of the respondent no. 3 for Rs. 24,00,000/- while earlier he offered Rs. 24,50,000/- cannot be said to be arbitrary and unreasonable act, in the light of the devaluation of the property, as mentioned earlier and proved by Ex. D-29 Revaluation Report.

30. It is also contended by the appellant that before the sale proceeding in favour of the respondent no. 3, he was not given an opportunity to pay Rs. 30,00,000/-. This contention has no substance as there is no statutory provision, rule and regulation or established practice that before finalizing last highest bid, the owner of the property be given the opportunity to deposit the said amount. In this regard, the appellant placed reliance on the guidelines issued by the Apex Court in the case of *Mahesh Chandra* (supra) but the same judgment has been overruled by the Apex Court in the case of *Haryana Financial Corporation* (supra).

31. Apart from it, in this case the communication between the appellant and respondent no. 1 and in the minutes of the meeting dated 20.10.1994 Ex. P-17 D

prove the fact that the last offer of the appellant was of Rs. 14,00,000/- and earlier several time he was given opportunity to settle the matter by offering reasonable amount but he never offered beyond Rs. 14,00,000/-, therefore, if the appellant had been called for, no purpose would have been served. Therefore, it cannot be said that the appellant was not informed because it was conspiracy with the respondent no. 3 or the officer of the respondent no. 1 acted maliciously and contrary to the object of getting highest price of the property.

32. The other objection of the appellant is that there was illegal nexus among the respondent no. 3 and officer of the respondent no. 1, conducting the sale process with a view to provide opportunity to the respondent no. 3 to purchase the property by unfair manner but this fact was not found to be proved as the appellant Trilochan Singh Chawla P.W. 1, has failed to establish any relationship among respondent no. 3 and officers of the respondent no. 1. Merely on the basis of similarity in the surnames, he has bounced the ball targeting the officers of the respondent no. 1 and contrary to it P.K. Paliwal D.W. 3 with Dr. J.P. Paliwal D.W. 4 have negatived the same.

33. Accordingly, in view of the aforesaid findings, it is considered view of this court that the learned trial Court has not committed any error holding that the appellant has failed to establish that the respondent no. 1 conducted the process of sale of the suit property in unfair, unreasonable manner and maliciously or contrary to law and the sale process was not conducted with a view to get highest price of the assets. Thus, the sale process cannot be said to be illegal, unreasonable and unfair or contrary to law, therefore, the same does not deserve to be set aside. Hence this court affirm the finding of the trial Court. Resultantly, the appellant is not entitled to get any relief prayed in the suit. Thus this appeal is dismissed.

34. The appellant will bear the cost of litigation of the respondents nos. 1 and 3 throughout. Counsel fee Rs. 20,000/-, if certified.

Appeal dismissed

I.L.R. [2019] M.P. 2055 (DB)
APPELLATE CIVIL
Before Mr. Justice J.K. Maheshwari & Smt. Justice Anjuli Palo
F.A. No. 653/2016 (Jabalpur) decided on 1 October, 2019

DISHA KUSHWAHA …Appellant

Vs.

RITURAJ SINGH …Respondent

(Alongwith W.P. No. 5967/2015 & M.Cr.C. No. 16660/2015)

A. Hindu Marriage Act (25 of 1955), Section 9 & 13 – Divorce – Cruelty – Divorce decree against wife **– Husband and wife living separately for more than 6 years – Allegation of adultery & cruelty against each other – Evidence of mental cruelty by wife available – Revival of marriage not possible, thus attracts the concept of irretrievable breakdown – No illegality in impugned judgment – Suit for restitution and Appeal against divorce decree, dismissed. (Para 39 & 40)**

क. हिंदू विवाह अधिनियम (1955 का 25), धारा 9 व 13 – विवाह विच्छेद – क्रूरता – पत्नी के विरूद्ध विवाह विच्छेद डिक्री – पति पत्नी 6 वर्षो से अधिक समय से पृथक रूप से रह रहे हैं – एक दूसरे के विरूद्ध जारकर्म व क्रूरता का अभिकथन – पत्नी द्वारा मानसिक क्रूरता का साक्ष्य उपलब्ध है – विवाह का पुनर्जीवन संभव नहीं, अतः असाध्य विफलता की संकल्पना आकर्षित होती है – आक्षेपित निर्णय में कोई अवैधता नहीं – प्रत्यास्थापन हेतु वाद एवं विवाह विच्छेद डिक्री के विरूद्ध अपील खारिज।

B. Hindu Marriage Act (25 of 1955), Section 13 – Divorce – Grounds - "Irretrievable Breakdown of Marriage" **– Held – Irretrievable breakdown is not a ground for divorce but its essence may be put in – Apex Court directed that Courts are duty bound to see the repercussion, consequences, impact and ramification of criminal and other proceedings and also circumstances in which grounds specified under the Act, have been pleaded and proved – Chances of revival of marriage for said reasons may also looked into while recording the findings. (Para 37)**

ख. हिंदू विवाह अधिनियम (1955 का 25), धारा 13 – विवाह विच्छेद – आधार – ''विवाह की असाध्य विफलता'' – अभिनिर्धारित – असाध्य विफलता, विवाह विच्छेद हेतु आधार नहीं है परंतु उसका सार लिया जा सकता है – सर्वोच्च न्यायालय ने निदेशित किया कि न्यायालय, दाण्डिक एवं अन्य कार्यवाहियों के प्रतिक्षेप, परिणाम, प्रभाव एवं जटिलता और उन परिस्थितियों को भी देखने के लिए कर्तव्यबद्ध है, जिनमें अधिनियम के अंतर्गत विनिर्दिष्ट आधारों का अभिवाक् कर साबित किया गया है–उक्त कारणों हेतु विवाह के पुनर्जीवन की संभावनाओं को भी निष्कर्ष अभिलिखित करते समय ध्यान में लिया जा सकता है।

C. Hindu Marriage Act (25 of 1955), Section 13 – "Irretrievable Breakdown of Marriage" – **Circumstances which fall within purview of "irretrievable breakdown of marriage" – Illustrated & explained. (Para 34)**

ग. हिंदू विवाह अधिनियम (1955 का 25), धारा 13 – ''विवाह की असाध्य विफलता'' – परिस्थितियां, जो ''विवाह की असाध्य विफलता'' की परिधि के भीतर आती हैं – उदाहरण के साथ समझाई एवं स्पष्ट की गई।

D. Hindu Marriage Act (25 of 1955), Sections 9, 13 & 25 – Permanent Alimony – Application for & Entitlement – **Permanent alimony was only granted to children and not to wife, on ground that she never claimed it – Held – Not filing application seeking permanent alimony is merely a circumstance, it cannot be an impediment to deny permanent alimony to wife and allow parties to continue litigation in other courts either in proceedings u/S 125 Cr.P.C. or for maintenance under other laws – Demand of permanent alimony on request made by counsel for wife is sufficient for granting the same. (Para 41 & 42)**

घ. हिंदू विवाह अधिनियम (1955 का 25), धाराएँ 9, 13 व 25 – स्थाई निर्वाह व्यय – के लिए आवेदन व हकदारी – स्थाई निर्वाह व्यय केवल बच्चों को प्रदान किया गया था और न कि पत्नी को, इस आधार पर कि उसने कभी उसका दावा नहीं किया – अभिनिर्धारित – स्थाई निर्वाह व्यय चाहते हुए आवेदन प्रस्तुत न करना, मात्र एक परिस्थिति है वह पत्नी को स्थाई निर्वाह व्यय देने से इंकार करने और पक्षकारों को या तो धारा 125 दं.प्र.सं. के अंतर्गत कार्यवाहियां या अन्य विधि अंतर्गत भरणपोषण हेतु अन्य न्यायालयों में मुकदमेबाजी जारी रखने की मंजूरी के लिए एक अड़चन नहीं हो सकती – पत्नी के परामर्शदाता द्वारा स्थाई निर्वाह व्यय की मांग का निवेदन उसे उक्त प्रदान करने हेतु पर्याप्त है।

E. Hindu Marriage Act (25 of 1955), Section 25 – Permanent Alimony – Quantum – Income of Husband & Wife – **Held – Husband, an IFS Officer getting salary of approx. 1,80,000 pm and living only with his mother – Wife residing separately with three school going children and having no source of income – They are required to live separately with status of husband or father – Permanent alimony of Rs. 75,000 pm granted. (Para 43 & 44)**

ङ. हिंदू विवाह अधिनियम (1955 का 25), धारा 25 – स्थाई निर्वाह व्यय – मात्रा – पति–पत्नी की आय – अभिनिर्धारित – पति एक IFS अधिकारी, लगभग 1,80,000 प्रतिमाह वेतन प्राप्त कर रहा है तथा वह केवल उसकी माता के साथ रह रहा है – पत्नी, स्कूल जाने वाले तीन बच्चों के साथ पृथक रूप से निवासरत है तथा उसके पास आय का कोई स्त्रोत नहीं है – उन्हें पति या पिता की हैसियत के साथ पृथक रूप से रहना अपेक्षित है – रू. 75,000 प्रतिमाह स्थाई निर्वाह व्यय प्रदान किया गया।

Cases referred:

S.A. No. 258/2012 decided on 26.05.2016 (Allahabad High Court), (2006) 4 SCC 558, 1921 NZLR 876, (1969) 1 WLR 392, 1985 AIR 935, (1994) 1 SCC 337, 1994 Supp (2) SCC 588, (1996) 8 SCC 90, (1997) 4 SCC 226, (2005) 2 SCC 22, (2005) 7 SCC 353, (2006) 3 SCC 778, (2009) 10 SCC 415, (2007) 2 SCC 263, (2007) 4 SCC 511, (2008) 7 SCC 734, (2013) 5 SCC 226.

Ankit Saxena, for the appellant/wife.
Praveen Dubey, for the respondent/husband.

JUDGMENT

The Judgment of the Court was delivered by : **J.K. MAHESHWARI, J. :-** This judgment shall govern the disposal of all the aforesaid three cases which are filed by the either parties on matrimonial issues like divorce, restitution of conjugal rights, maintenance *pendente lite* or grant of regular maintenance. However, they are being heard and decided by this common order.

2. The first appeal is filed by the appellant-wife under Section 19 of the Family Courts Act being aggrieved by the judgment and decree dated 02.09.2016 passed in Civil Suit No.828-A/2014 by First Additional Principal Judge, Family Court, Bhopal granting decree of divorce on a suit filed by the respondent-husband under Section 13 (1) of the Hindu Marriage Act. The appellant wife has also assailed the judgment passed in Civil Suit No.464-A/2015 filed by her for restitution of conjugal rights against the respondent which was dismissed by the same order. W.P. No. 5967/2015 has been filed by the husband against grant of maintenance *pendente lite* vide order dated 5.1.2015 passed in R.C.S. No. 828-A/2014; and M.Cr.C. No. 16660/2015 has been filed by the husband under Section 482 of the Cr.P.C. for setting aside of the order dated 12.1.2015 passed in M.J.C. No. 450/2014 granting maintenance of Rs. 35,000/- to the wife.

3. The facts of the case, in brief, are that the appellant is legally wedded wife of the respondent. The marriage was solemnized on 06.02.1999 as per Hindu rituals. They are having three children by the said wedlock i.e. twin daughters and a son. The appellant along with the children is residing separately from the respondent since February, 2013 and they are litigating in the Court by filing various Court cases. Still the wife wish to reside with the husband but he is not ready to live with wife alleging her cruelty.

4. The respondent husband filed a suit under Section 13 of the Hindu Marriage Act *inter alia* pleading that immediate after the marriage the appellant wife ill-treated him, having fit of anger and she use to lose her tamper and abuse him. She also doubted on his character alleging his illicit relation with several

women out of which some are co-workers in the same department and office. The appellant-wife use to quarrel with the neighbours, due to which he took transfer from the State of Arunachal Pradesh to Andaman Nicobar. Even by passage of time, there was no change in her behavior and she did not care to maintain the dignity and reputation of the respondent. It is also alleged that she use to propagate, the respondent is a corrupt man and threatened him to file a criminal case, thereby he would lose his job. In recent past he joined on an important administrative post in All India Institute of Medical Sciences, Bhopal. But due to intolerable behaviour of the appellant, he is living separately in the guest house of the AIIMS since February, 2013. While the appellant and his children are residing in his official accommodation. The husband alleged that the appellant made all efforts to harass and torture him. The respondent alleged that the appellant-wife believes in performing witchcraft and also alleged that mother and sister of the respondent have controlled by witchcraft. At several occasion, in front of the senior officials after reaching office, the appellant insulted the respondent. It is said, there is no possibility of change in her behavior, however, as per the said averments, on the ground of cruelty, the respondent-husband prayed for dissolution of marriage.

5. On filing the written statement, before the Family Court the appellant-wife has denied all the allegations and pleaded that after the marriage her husband and his family members regularly pressurized the appellant to bring dowry. They have mentally and physically tortured her due to non-fulfillment of dowry demand. As per the appellant, the respondent husband is drunkard and on consuming liquor he use to beat the appellant to bring Rs.25 Lakh and once her clothes were burnt. On 20th August, 2004, the appellant gave birth to twin (daughters). All expenses of delivery were born by the parents of the appellant. The family members of the respondent-husband were not happy due to birth to two female children. It is said, the ill-treatment of respondent husband continued till 2012. Thereafter appellant gave birth to a male child on 19.12.2012. In January, 2013, the respondent was transferred to AIIMS, Bhopal as Deputy Director, at that time appellant-wife along with the children came Bhopal and started to reside with respondent-husband in Government Quarter situated in AIIMS campus. But at Bhopal in evening the respondent after taking liquor use to beat and made attempt to oust her from the house. When the appellant refused to leave the house, the respondent himself started living separately in the guest house of the AIIMS situated in the same premises. In view of the foregoing, the appellant prayed for dismissal of the suit preferred by the respondent under Section 13 (1) of the Hindu Marriage Act.

6. The appellant also filed a suit (Civil Suit No.464-A/2015) seeking restitution of conjugal rights under Section 9 of the Hindu Marriage Act interalia stating that without sufficient reason the respondent husband is living separately

and claiming divorce from her to avoid liability to maintain the wife and children. It is said, the Court granted Rs.40,000/-maintenance *pendente lite* to the respondent and to the children in Case No.828-A/2014 filed by the appellant. Against which W.P. No. 5967/2015 has been filed which is pending. The respondent had an agricultural land admeasuring 3.16 acres at Village-Badla, Block-Sanchi, District-Raisen but he deliberately with lack of bonafide transferred the same in favour of his mother without any consideration. The appellant-wife believes and having hope that her relation with the respondent husband may be improved by passage of time, however, prayed for the decree of restitution of conjugal rights.

7. In reply to it, the respondent denied all the allegations of the plaint and taking the same plea as taken in his suit for divorce, prayed for dismissal of the suit for restitution of conjugal rights filed by the wife.

8. Learned trial Court dismissed the suit filed by the appellant-wife under Section 9 of the Hindu Marriage Act, recording the finding that averments made in the suit has not been proved. It is said, without sufficient cause, wife is residing separately from the husband. Simultaneously, the trial Court found that the appellant do not agree for divorce yet it has been proved that she treated her husband with cruelty levelling the allegations on his character and tarnishing his reputation in the office, which is amounting to mental cruelty. Therefore, the marriage between the parties has irretrievably broken down, however granted the decree of divorce. The trial Court also awarded Rs.5 Lakh towards the expenses of study and other needs of the minor children and to the appellant towards permanent alimony.

9. The appellant wife has challenged the adverse findings on the grounds that the impugned judgment and decree are perverse and erroneous therefore, unsustainable in law. The trial Court committed error to held that the cruelty is perpetuating from both side, therefore, the marriage has broken down irretrievably. It is said that such decree can be granted by Hon'ble the Supreme Court only as has been held in the case of *Puja Suri v. Bijoy Suri* (decided on 26th May, 2016 in Second Appeal No.258/2012 by High Court of Allahabad) and *Naveen Kohli v. Neelu Kohli* reported in (2006) 4 SCC 558. It is further contended that the trial Court committed error in dismissing the suit filed by the appellant-wife seeking restitution of conjugal rights due to the finding of mental cruelty and to declare the break down of marriage irretrievably. However, urged allowing the appeal, the decree of divorce granted in favour of the respondent-husband and dismissal of the suit of restitution of conjugal rights, may be set aside. In alternative, it is contended that in case this Court is of the opinion that the judgment and decree passed by the trial Court is in accordance with law, the amount of permanent alimony, as awarded is inadequate, which may be

reasonably enhanced looking to earning of the husband being IFS (Indian Forest Services Officer) and the fact that the appellant-wife is residing separately with three school going children and grant them permanent alimony looking to the status of her husband.

10. Learned counsel appearing for the respondent-husband has strenuously urged that it is a case in which the respondent-husband was subjected to mental cruelty, as reveal from the evidence brought on record. However, trial Court granted decree of divorce, holding that there is no possibility of reunion of spouse, who are residing separately since a long, therefore, the marriage has been irretrievably broken down and possibility of restitution or reunion is bleak. In view of the said fact looking to the evidence on record in support of the pleadings, the findings as recorded by the trial Court do not warrant interference in this appeal. It is also argued that the maintenance by way of permanent alimony as granted, is in accordance with law, which may not be enhanced.

11. After hearing learned counsel for the parties and on perusal of the pleadings, evidence and the findings recorded by the trial Court granting divorce, is mainly perceivable on proving the mental cruelty of the wife due to which reunion of parties is not possible. The Court observed either the appellant-wife or the respondent-husband both have acted unbecoming to each other causing mental cruelty, however, continuation of their marital relationship is not possible, thus held that it is a case of irretrievable break down of marriage, hence granted decree of divorce, dismissing the suit for restitution of conjugal right.

12. To advert the contentions and the grounds raised, it is not out of place to mention that irretrievable breakdown of marriage is not the ground seeking decree of divorce under Hindu Marriage Act. But the said ground has been recognized by Hon'ble the Apex Court while dealing with the facts and circumstances of the individual case in which continuation of the marriage or reunion even after passing the order of restitution of conjugal rights is not possible to the spouse by living together and their life violated the purpose to which the marriage was set up. Therefore, to deal the issue of irretrievable break down of marriage, first of all we have to understand the history and concept of irretrievably breakdown of marriage.

What Is Marriage

13. For understanding the irretrievable breakdown of marriage, first we have to understand what is marriage. According to *Vedas,* marriage is a union between a masculine and feminine entity with commitment to pursue Dharma, Artha (possessions), Kama (physical and other desires) and Moksha (the liberation) in unison. In legal terminology, under the statute, as per *Corpus Juris Secundam,* marriage is a contract under which a man and a woman reciprocally engage to live

with each other during their joint lives, and to discharge toward each other the duties imposed by law on the relation of husband and wife. The marriage is generally considered a civil contract differing in notable respects from ordinary contract, but it is specially a status or personal relation in which the state is deeply concerned and over which the state exercises exclusive dominion. The marriage signifies, the act by which a man and woman unite for life, with intent to discharge towards society and to one another those duties, which result from the relation of husband and wife and to this, the term 'marriage' is most frequently applies. Thus as per Hindu mythology and as per legal terminology, the concept of marriage is different but its usages is the same.

14. In view of the aforesaid, looking to the definition of marriage as per *Vedas,* it is a union based on commitment to pursue *Dharma* which signifies from trust in between tolerance to each other, adjustment and respect to one another, even to the faults of each other tolerance to certain bearable extent. *Artha* indicates the possession to each other signifying common life, happiness, miseries faced in life, possessing joy and miseries by each other in Union. *Kama* indicates fulfillment of physical and other desires of masculine and feminine gender while *Moksha* is indicative of the liberation from the life achieving ultimate object from where either the man or woman have been brought on earth.

15. If we see marriage in legal perspective then it is a contract by reciprocally engaging the man and woman jointly in life and to discharge the duties imposed on them being the husband and wife. The said contract gives special status of personal relations in a family or in a society having deep concern with each other. Thus, by way of marriage the unity of life, to form a relation of husband and wife, signifies. Once it accomplishes, marriage ceases itself.

Irretrievable Break Down of Marriage
Its Meaning, History & Concept

16. Concept of irretrievable breakdown of marriage requires its emphasis from its meaning and the place and time wherefrom it has emerged. The word 'irretrievable' is antonym to the word 'retrievable'. As per Oxford English Dictionary, retrievable is a noun which means Origin Me: from Ofr. Retroeve, stressed stem of retrover 'find again'. It may be understood from the word 'retrieve', which means find and bring back; put right or improve, find or extract. As per verbal meaning it denotes the thing which was not in order or lost, has come back in its revival would retrieve. In view of the above, word irretrievable is an adjective and indicative to the fact 'not able to be retrieved, means the things were lost in past, now cannot be revived. As per Cambridge English Dictionary; a couple separated on the ground of irretrievable breakdown (of their marriage). However, the phrase 'irretrievable breakdown' has been used on cessation of marriage and when its revival is not possible. Thus, it can safely be clarified that a

marriage resumes religious character but under a legal perspective a contract giving special status to spread in society establishing family virtues. Once its continuation is not possible, it would fall within irretrievable breakdown.

17. The concept of irretrievable breakdown of marriage as ground of divorce, came from commonwealth countries. First time in the New Zealand, the *Divorce and Matrimonial Causes Act, 1920* was brought including the provision of Separation Agreement for a period of 3 years or more. It was made out a ground to make petition to the Court for irretrievable breakdown of marriage. In the case of *Lodder vs. Lodder* 1921 NZLR 876, Salmond J, in a passage which has now become classic, enunciated the breakdown principle in the following words:-

> "The legislature must, I think, be taken to have intended that separation for three years is to be accepted by this Court, as prima facie a good ground for divorce. When the matrimonial relation has for that period ceased to exist de facto, it should unless there are special reasons to the contrary, cease to exist de jure also. In general, it is not in the interests of the parties or in the interest of the public that a man and woman should remain bound together as husband and wife in law when for a lengthy period they have ceased to be such in fact. In the case of such a separation the essential purposes of marriage have been frustrated, and its further continuance is in general not merely useless but mischievous."

18. In the history of irretrievable breakdown of marriage the *Matrimonial Causes Act, 1959* of the Commonwealth of Australia provides for divorce as the ground to breakdown of marriage. In this context, the breakdown situation exists when either or both spouse are no longer able or wiling (sic: willing) to live with each other, thereby destroying their husband and wife relationship with no hope of resumption of spousal duties. In other words, it can be defined as failure in the matrimonial relationship or such circumstances adverse to that relationship that no reasonable probability remains to the spouses to live together as husband and wife by mutual comfort and support. It also signifies the breakdown in the cases where neither party is at fault or fault is of such a nature that neither party wishes to divulge it and yet the marriage has ceased to exist; Meaning thereby the irretrievable breakdown of marriage, refers to a situation where the emotional bonds, respect to each other, trust etc, which is the very foundation of a marriage have disappeared and only a facade in the name of marriage remains. Thus Australian Law Commission concluded that where a marriage has ceased to exist both in substance and in reality, divorce has to be taken as a solution to escape from a difficult situation of human being.

19. In the USSR, initially granting the divorce was very liberal and it was called as "Post Card Divorce". The family instability led to the tightening of the divorce conditions lately bringing the breakdown of marriage irretrievably. Similarly in the Canadian Divorce Act 1967-68 irretrievable breakdown of marriage is recognized as a ground of divorce, apart from the normal fault ground.

20. In commonwealth country in England, the theory of irretrievable breakdown was opened up in the case of *Masarati Vs. Masarati* reported in (1969) 1 WLR 392, where both the parties to the marriage had committed adultery. The Court of appeal on its petition for divorce observed it as a breakdown of marriage. Thereafter Law Commission of England in its report said, "the objectives of good divorce law are two: first to buttress rather than to undermine the stability of marriage and second, when regrettably a marriage has broken down, to enable the empty shell to be destroyed with maximum fairness and minimum bitterness, humiliation and distress. On the basis of the said report of Law Commission and the recommendation in England, irretrievable breakdown of marriage was made the ground for divorce. Sections 1 and 2 of the Matrimonial Causes Act, 1973 which is relevant, however, reproduced as under:-

> **1.** (1) Subject to section 3 below, a petition for divorce may be presented to the court by either party to a marriage on the ground that the marriage has broken down irretrievably.
>
> (2) The court hearing a petition for divorce shall not hold the marriage to have broken down irretrievably unless the petition satisfies the court of one or more of the following facts, that is to say-
>
> (a) that the respondent has committed adultery and the petition finds it intolerable to live with the respondent;
>
> (b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;
>
> (c) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petitioner;
>
> (d) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition (hereafter in this Act referred to as "two years" separation") and the respondent consents too a decree being granted;
>
> (e) that the parties to the marriage have lived apart for a continuous period of at least five years immediately

preceding the presentation of the petition (hereafter in this Act referred to as "five years" separation")

(3) On a petition for divorce it shall be the duty of the court to inquire, so far as it reasonably can, into the facts alleged by the petition and into any facts alleged by the respondent.

(4) If the court is satisfied on the evidence of any such fact as is mentioned in subsection (2) above, then, unless it is satisfied on all the evidence that the marriage has not broken down irretrievably, it shall, subject to sections 3(3) and 5 below, grant a decree of divorce.

(5) Every decree of divorce shall in the first instance be a decree nisi and shall not be made absolute before the expiration of six months from its grant unless the High Court by general order from time to time fixes a shorter period, or unless in any particular case the court in which the proceedings are for the time being pending from time to time by special order fixes a shorter period than the period otherwise applicable for the time being by virtue of this subsection.

2.- (1) One party to marriage shall not be entitled to rely for the purposes of section 1(2) (a) above on adultery committed by the other if, after it became known to him that the other had committed that adultery, the parties have lived with each other for a period exceeding, or periods together exceeding, six months.

(2) Where the parties to a marriage have lived with each other after it became known to one party that the other had committed adultery, but subsection (1) above does not apply, in any proceedings for divorce in which the petitioner relies on that adultery the fact that the parties have lived with each other after that time shall be disregarded in determining for the purposes of section 1(2)(a) above whether the petitioner finds it intolerable to live with the respondent.

(3) Where in any proceedings for divorce the petitioner alleges that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with him, but the parties to the marriage have lived with each other for a period or periods after the date of the occurrence of the final

incident relied on by the petitioner and held by the court to support his allegation, that fact shall be disregarded in determining for the purposes of section 1(2)(b) above whether the petitioner cannot reasonably be expected to live with the respondent if the length of that period or of those periods together was six months or less.

(4) For the purposes of section 1(2)(c) above the court may treat a period of desertion as having continued at a time when the deserting party was incapable of continuing the necessary intention if the evidence before the court is such that, had that party not been so incapable, the court would have inferred that his desertion continued at that time.

(5) In considering for the purposes of section 1(2) above whether the period for which the respondent has deserted the petitioner or the period for which the parties to a marriage have lived apart has been continuous, no account shall be taken of any one period (not exceeding six months) or of any two or more periods (not exceeding six months in all) during which the parties resumed living with each other, but no period during which the parties lived with each other shall count as part of the period of desertion or of the period for which the parties to the marriage lived apart, as the case may be.

(6) For the purposes of section 1(2)(d) and (e) above and this section a husband and wife shall be treated as living apart unless they are living with each other in the same household, and references in this section to the parties to a marriage living with each other shall be construed as references to their living with each other in the same household.

(7) Provision shall be made by rules of court for the purpose of ensuring that where in pursuance of section 1(2)(d) above the petitioner alleges that the respondent consents to a decree being granted the respondent has been given such information as will enable him to understand the consequences to him of his consenting to a decree being granted and the steps which he must take to indicate that he consents to the grant of a decree.

In the backdrop of the aforesaid provisions based on different foreign countries wherein long desertion of the spouse with other committing cruelty (physical or mental), living adulterous life and on so many other reasons were recognized by the statute as grounds for divorce which is known as irretrievable breakdown of marriage.

21. But in India, it has not been recognized as a ground for divorce in the statute Book. The Law Commission of India after experiencing the pendency of matrimonial cases, complicity, non-adjustment, vulgarity in relation between the spouse thought it appropriate to recommend the same as a ground for divorce. The Law Commission of India in Chapter III of its 71st Report made such recommendation first time. As per the said report also the theory of irretrievable breakdown first came from New Zealand. General Assembly of Church of Scotland, based on the report of their Moral and Social Welfare Board, which suggested the substitution of breakdown in place of matrimonial offences. They classified it as a matrimonial fault. The proposal for it was based on the following recommendations which is relevant, therefore, reproduced as under:-

> "Matrimonial offences are often the outcome rather than the cause of the deteriorating marriage. An accusatorial principle of divorce tends to encourage matrimonial offences, increase bitterness and widen the rigt that is already there. Separation for a continuous period of at least two years consequent upon a decision of at least one of the parties not to live with the other should act as the sole evidence of marriage breakdown.

22. The Law Commission said that once the parties have separated, which continued for a sufficient length of time and one of them presented the petition for divorce, it can very well be presumed that the marriage has broken down. The Court, no doubt, should endeavour to reconcile, the parties; yet if it is found that the breakdown is irretrievable then divorce should not be withheld. Meaning thereby the consequences of preservation in law of the unworkable marriage which has long ceased to be effective are bound to be a source of greater misery for the parties. In chapter IV of the said report, the merits and demerits of irretrievable breakdown of marriage was considered and the Commission observed that the grounds contained in Hindu Marriage Act even after the amendment 1976 do not specially deal with irretrievable breakdown of marriage. No doubt, some of the amendment taken into account necessary implications of it as a relevant factor but it was not a ground specified in the Act. The Commission says the irretrievable breakdown of marriage may be a ground for divorce even if one of the spouse does not join together in filing of the petition or even opposes such a petition. It is observed that living apart of the husband and wife for a sufficient long time would be presumptive proof of breakdown of marriage but it

is not a ground in the existing law to make such eventuality. While making such recommendation, it was observed that it would obviate the necessity of washing dirty linen of marital life. Even after the said recommendation made on 7.4.1978 by Chairman of the Law Commission, Government of India, it was not made a ground for divorce.

23. The Law Commission of India while discussing the concept of irretrievable breakdown of marriage in its 217th report, said that the foundation of a sound marriage is tolerance, adjustment and respecting one another. Tolerance to each other's fault to a certain bearable extent has to be inherent in every marriage. Petty quibbles, trifling differences should not be exaggerated and magnified to destroy what is said to have been made in heaven. All quarrels must be weighed from the point of view in determining what constitutes cruelty in each particular case and as noted above, always keeping in view the physical and mental conditions of the parties, their character and social status. A too technical and hyper- sensitive approach would be counter-productive to the institution of marriage. Thus, in the said report also recommendation was made that irretrievable break down may be a ground for divorce.

<u>India Case Laws on Irretrievable Breakdown</u>

24. The Apex Court first time in the case of *Jordan Diengdeh Vs. S.S. Chopra* reported in 1985 AIR 935 considered the issue of irretrievable breakdown of marriage as a ground for divorce. The Court explaining the situation as prevalent under Hindu Law, Mohammedan Law and other customs observed as under:-

> "it is thus seen that the law relating to judicial separation, divorce and nullity of marriage is far, far from uniform. Surely the time has now come for a complete reform of the law of marriage and make a uniform law applicable to all people irrespective of religion or caste. It appears to be necessary to introduce irretrievable break down of marriage and mutual consent as grounds of divorce in all cases. The case before us is an illustration of a case where the parties are bound together by a marital tie which is better untied. There is no point or purpose to be served by the continuance of a marriage which has so completely and signally broken down. We suggest that the time has come for the intervention of the legislature in these matters to provide for a uniform code of marriage and divorce and to provide by law for a way out of the unhappy situations in which couples like the present have find themselves in. We direct that a copy of this order may be forwarded to the Ministry of Law and

Justice for such action as they may deem fit to take. In the meanwhile, let notice go to the respondents."

25. Thereafter, the Apex Court in the case of *V. Bhagat Vs. D. Bhagat (Mrs.)* reported in (1994) 1 SCC 337 while dealing with the case of cruelty, in specific mental cruelty, the marriage was declared as dissolved in view of the irretrievable breakdown of marriage in the peculiar circumstances of the case. The Court in Para 20 while examining the allegation made by the parties observed as under:-

> "20 ....She is fully aware that
>
> the marriage is long dead and over. It is her case that the petitioner is genetically insane. Despite all that, she says that she wants to live with the petitioner. The obvious conclusion is that she has resolved to live in agony only to make life a miserable hell for the petitioner as well. This type of callous attitude in the context of the facts of this case, leaves no manner of doubt in our mind that the respondent is bent upon treating the petitioner with mental cruelty. It is abundantly clear that the marriage between the parties should be dissolved under Section 13(1)(i-a) of Hindu Marriage Act and we do so accordingly. Having regard to the peculiar facts and circumstances of this case and its progress over the last eight years- detailed hereinbefore- we are of the opinion that it is a fit case for cutting across the procedural objections to give a quietus to the matter."

26. The Apex Court in *Sandhya Rani Versus Kalyanram Narayanan* reported in 1994 Supp (2) SCC 588 though in a crisp but on concrete basis due to living of parties separately from last more than 3 years and having no chance to come together observed granting the decree as under:-

> **1.** We have heard the parties in person. Learned counsel for the parties have also assisted us. It is not disputed that the parties are living separately for the last more than three years. We have no doubt in our mind that the marriage between the parties has irretrievably broken down. There is no chance whatsoever of their coming together. The parties have made joint request for mutual divorce. The written request by the parties has been placed on the record. In order to do complete justice between the parties, we are inclined to grant decree in divorce on the following agreed terms:
>
> "1. The respondent Kalyanram Narayanan gives up all his claims in respect of plot No. 119 in V.G.P. Pushpa

Nagar which is in the name of the petitioner Sandhya Rani. The said plot measures 3200 sq. yds.;

2. Two-third share in the said plot shall go to Kartak Narain son born out of wedlock. The remaining 1/3 share shall be owned by the petitioner Sandhya Rani;

3. The title deed in respect of the property has been handed over to the petitioner Sandhya Rani; and

4. The petitioner Sandhya Rani shall not claim any maintenance past or future, for herself or for her son Kartak Narain from the respondent."

2. We grant decree for divorce in the above terms. The Divorce Petition No. O.P. 1019 of 1992 filed by the respondent (husband) pending before the Principal Family Court, Madras shall stand disposed in the above terms. No costs.

27. In *Kanchan Devi (Smt.) Vs. Promod Kumar Mittal and another* reported in (1996) 8 SCC 90, the Apex Court found that the parties were living separately for last more than 10 years and there is no possibility of reconciliation. On being found by the parties that the marriage has been irretrievably brokedown, they mutually agreed to dissolve the marriage. The Apex Court has observed as under:-

3. During the pendency of the proceedings in this Court, an effort was made for reconciliation between the parties. It was admitted by the learned counsel for the parties that the parties have not been living together for the last more than one decade as husband and wife and their relationship was totally strained and bitter against each other. On 7-12-1995, it appeared to us that there was no possibility of any reconciliation between the parties and that the marriage between them had irretrievably broken down. The respondent through his learned counsel categorically submitted that there was no possibility of the parties remaining together as husband and wife and that position was not disputed by the learned counsel appearing for the appellant."

4. XXX XXX XXX

5. XXX XXX XXX

6. In view of the peculiar facts and circumstances of the case and being satisfied that the marriage between the appellant and the respondent has irretrievably broken down and that there is no possibility of reconciliation, we in exercise of our powers under Article 142 of the

> Constitution of India hereby direct that the marriage between the appellant and the respondent shall stand dissolved by a decree of divorce.

28. The Apex Court in *Ashok Hurra Versus Rupa Bipin Zaveri* reported in (1997) 4 SCC 226 considered the 71st Report of Law Commission of India and granted decree of divorce relying such Report. The relevant part of the judgment is reproduced as under:-

Para 24

> **24.** A few excerpts from the Seventy-first Report of the Law Commission of India on the Hindu Marriage Act, 1955- "Irretrievable Breakdown of Marriage" - dated 7-4-1978 throw much light on the matter:
>
> "Irretrievable breakdown of marriage is now considered, in the laws of a number of countries, a good ground of dissolving the marriage by granting a decree of divorce.
>
> Proof of such a breakdown would be that the husband and wife have separated and have been living apart for, say, a period of five or ten years and it has become impossible to resurrect the marriage or to reunite the parties. It is stated that once it is known that there are no prospects of the success of the marriage, to drag the legal tie acts as a cruelty to the spouse and gives rise to crime and even abuse or religion to obtain annulment of marriage.
>
> The theoretical basis for introducing irretrievable breakdown as a ground of divorce is one with which, by now, lawyers and others have become familiar. Restricting the ground of divorce to a particular offence or matrimonial disability, it is urged, causes injustice in those cases where the situation is such that although none of the parties is at fault, or the fault is of such a nature that the parties to the marriage do not want to divulge it, yet there has arisen a situation in which the marriage cannot be worked. The marriage has all the external appearances of marriage, but none of the reality. As is often put pithily, the marriage is merely a shell out of which the substance is gone. In such circumstances, it is stated, there is hardly any utility in maintaining the marriage as a facade, when the emotional and other bonds which are of the essence of marriage have disappeared.

After the marriage has ceased to exist in substance and in reality, there is no reason for denying divorce. The parties alone can decide whether their mutual relationship provides the fulfillment which they seek. Divorce should be seen as a solution and an escape route out of a difficult situation. Such divorce is unconcerned with the wrongs of the past, but is concerned with bringing the parties and the children to terms with the new situation and developments by working out the most satisfactory basis upon which they may regulate their relationship in the changed circumstances.

Moreover, the essence of marriage is a sharing of common life, a sharing of all the happiness that life has to offer and all the misery that has to be faced in life, an experience of the joy that comes from enjoying, in common, things of the matter and of the spirit and from showering love and affection on one's offspring. Living together is a symbol of such sharing in all its aspects. Living apart is a symbol indicating the negation of such sharing. It is indicative of a disruption of the essence of marriage- 'breakdown' - and if it continues for a fairly long period, it would indicate destruction of the essence of marriage 'irretrievable breakdown'".

29. In *A. Jayachandra Versus Aneel Kaur* reported in (2005) 2 SCC 22, three Judges' Bench of Supreme Court was having an occasion to consider the case of divorce on the basis of cruelty including mental cruelty. While examining the pleadings and the evidence brought on record, the Court emphasized that the allegation of cruelty is of such nature in which resumption of marriage is not possible, however, referring various decisions, the Court observed that irretrievable breaking of marriage is not one of the statutory grounds on which court can direct dissolution of marriage, this Court has with a view to do complete justice and shorten the agony of the parties engaged in long-drawn legal battle, directed in those cases dissolution of marriage. The Apex Court in Para-17 has observed as under:-

> **17.** Several decisions, as noted above, were cited by learned counsel for the respondent to contend that even if marriage has broken down irretrievably decree of divorce cannot be passed. In all these cases it has been categorically held that in extreme cases the court can direct dissolution of marriage on the ground that the marriage had broken down irretrievably as is clear from para 9 of *Shyam Sunder case*. The factual position in

each of the other cases is also distinguishable. It was held that long absence of physical company cannot be a ground for divorce if the same was on account of the husband's conduct. In *Shyam Sunder case* it was noted that the husband was leading adulterous life and he cannot take advantage of his wife shunning his company. Though the High Court held by the impugned judgment that the said case was similar, it unfortunately failed to notice the relevant factual difference in the two cases. It is true that irretrievable breaking of marriage is not one of the statutory grounds on which court can direct dissolution of marriage, this Court has with a view to do complete justice and shorten the agony of the parties engaged in long-drawn legal battle, directed in those cases dissolution of marriage. But as noted in the said cases themselves, those were exceptional cases.

30. The Apex Court in *Durga Prasanna Tripathy Versus Arundhati Tripathy* reported in (2005) 7 SCC 353 taken into consideration cruelty and desertion as a ground for divorce which resulted into irretrievable breakdown of marriage. The Apex Court referred the situation as emerged between the parties and observed as under:-

21. In our view that 14 years have elapsed since the appellant and the respondent have been separated and there is no possibility of the appellant and the respondent resuming the normal marital life even though the respondent is willing to join her husband. There has been an irretrievable breakdown of marriage between the appellant and the respondent. The respondent has also preferred to keep silent about her absence during the death of her father-in-law and during the marriage ceremony of her brother-in-law. The complaint before the Mahila Commission does not implicate the appellant for dowry harassment though the respondent in her evidence before the Family Court has alleged dowry harassment by the appellant. It is pertinent to mention here that a complaint before the Maila Commission was lodged after 7 years of the marriage alleging torture for dowry by the mother-in-law and brother-in-law during the initial years of marriage. The said complaint was filed in 1998 that is only after notice was issued by the Family Court on 27-3-1997 on the application filed by the appellant under Section 13 of the Hindu Marriage Act. The Family Court, on examination of the evidence on

record, and having observed the demeanour of the witnesses concluded that the appellant had proved that the respondent is not only cruel but also deserted him for more than 7 years. The desertion as on date is more than 14 years and, therefore, in our view there has been an irretrievable breakdown of marriage between the appellant and the respondent. Even the Conciliation Officer before the Family Court gave its report that the respondent was willing to live with the appellant on the condition that they lived separately from his family. The respondent in her evidence had not disputed the fact that attempts have been made by the appellant and his family to bring her back to the matrimonial home for leading a conjugal life with the appellant. Apart from that, relationship between the appellant and the24espondent have become strained over years due to the desertion of the appellant by the respondent for several years. Under the circumstances, the appellant had proved before the Family Court both the factum of separation as well as *animus deserendi* which are the essential elements of desertion. The evidence adduced by the respondent before the Family Court belies her stand taken by her before the Family Court. Enough instances of cruelty meted out by the respondent to the appellant were cited before the Family Court and the Family Court being convinced granted the decree of divorce. The harassment by the in-laws of the respondent was an afterthought since the same was alleged after a gap of 7 years of marriage and desertion by the respondent. The appellant having failed in his efforts to get back the respondent to her matrimonial home and having faced the trauma of performing the last rites of his deceased father without the respondent and having faced the ill- treatment meted out by the respondent o him and his family had, in our opinion, no other efficacious remedy but to approach the Family Court for decree of divorce.

Thereafter in the same Judgment in Paras 28 and 29, granted decree of divorce considering the circumstances subject to award of permanent alimony.

28. The facts and circumstances in the above three cases disclose that reunion is impossible. The case on hand is one such. It is not in dispute that the appellant and the respondent are living away for the last 14 years. It is also true that a good part of the lives of both the parties has been consumed in this litigation. As

> observed by this Court, the end is not in sight. The assertion of the wife through her learned counsel at the time of hearing appears to be impractical. It is also a matter of record that dislike for each other was burning hot.
>
> **29.** Before parting with this case, we think it necessary to say the following:
>
> Marriages are made in heaven. Both parties have crossed the point of no return. A workable solution is certainly not possible. Parties cannot at this stage reconcile themselves and live together forgetting their past as a bad dream. We, therefore, have no other option except to allow the appeal and set aside the judgment of the High Court and affirming the order of the Family Court granting decree for divorce. The Family Court has directed the appellant to pay a sum of Rs. 50,000 towards permanent alimony to the respondent and pursuant to such direction the appellant had deposited the amount by way of bank draft. Considering the status of parties and the economic condition of the appellant who is facing criminal prosecution and out of job and also considering the status of the wife who is employed, we feel that a further sum of Rs. 1 lakh by way of permanent alimony would meet the ends of justice. This shall be paid by the appellant within 3 months from today by an account payee demand draft drawn in favour of the respondent Arundhati Tripathy and the dissolution shall come into effect when the demand draft is drawn and furnished to the respondent.

The similar view has been reaffirmed by the Supreme Court in the case of *Vinita Saxena Versus Pankaj Pandit* reported in (2006) 3 SCC 778.

31. Thereafter the Apex Court in the case of *Naveen Kohli Vs. Neelu Kohli* reported in (2006) 4 SCC 558 in a case of cruelty (physical and mental) has considered the concept of irretrievable breakdown of marriage has observed that there should be statutory ground for divorce. The Apex Court referring the 71st Report of Law Commission of India observed as under:-

> **80.** The High Court ought to have considered the repercussions, consequences, impact and ramifications of all the criminal and other proceedings initiated by the parties against each other in the proper perspective. For illustration, the High Court has mentioned that so far as the publication of the news items is concerned, the status of the husband in a

registered company was only that of an employee and if any news item is published, in such a situation, it could not, by any stretch of imagination be taken to have lowered the prestige of the husband. In next para 69 of the judgment that in one of the news items what has been indicated was that in the Company Nikhil Rubber (P) Ltd., the appellant was only a director along with Mrs. Neelu Kohli who held 94.5% shares of Rs. 100 each in the Company. The news item further indicated that Naveen Kohli was acting against the spirit of the article of association of Nikhil Rubber (P) Ltd. had caused immense loss of business and goodwill. He had stealthily removed produce of the Company, besides diverted orders of foreign buyers to his proprietorship firm M/s. Navneet Elastomers. He had opened the bank account with forged signatures of Mrs. Neelu Kohli and fabricated the resolution of the Board of Directors of the Company. Statutory authority under the Companies Act had refused to register the documents filed by Mr. Naveen Kohli and had issues show-cause notice. All business associates were cautioned to avoid dealing with him alone. Neither the Company nor Mrs. Neelu Kohli shall be liable for the acts of Mr. Naveen Kohli. Despite the aforementioned finding that the news item was intended to caution business associates to avoid dealing with the appellant then to come to this finding in the next para that it will by no stretch of imagination result in mental cruelty is wholly untenable.

83. Even at this stage, the respondent does not want divorce by mutual consent. From the analysis and evaluation of the entire evidence, it is clear that the respondent has resolved to live in agony only to make life a miserable hell for the appellant as well. This type of adamant and callous attitude, in the context of the facts of this case, leaves no manner of doubt in our minds that the respondent is bent upon treating the appellant with mental cruelty. It is abundantly clear that the marriage between the parties had broken down irretrievably and there is no chance of their coming together, or living together again.

84. The High Court ought to have appreciated that there is no acceptable way in which the parties can be compelled to resume life with the consort, nothing is gained by trying to keep the parties tied forever to a marriage that in fact has ceased to exist.

> **85.** Undoubtedly, it is the obligation of the court and all concerned that the marriage status should, as far as possible, as long as possible and whenever possible, be maintained, but when the marriage is totally dead, in that event, nothing is gained by trying to keep the parties tied forever to a marriage which in fact has ceased to exist. In the instant case, there has been total disappearance of emotional substratum in the marriage. The course which has been adopted by the High Court would encourage continuous bickering, perpetual bitterness and may lead to immorality.
>
> **86.** In view of the fact that the parties have been living separately for more than 10 years and a very large number of aforementioned criminal and civil proceedings have been initiated by the respondent against the appellant and some proceedings have been initiated by the appellant against the respondent, the matrimonial bond between the parties is beyond repair. A marriage between the parties is only in name. The marriage has been wrecked beyond the hope of salvage, public interest and interest of all concerned lies in the recognition of the fact and to declare defunct *de jure* what is already defunct *de facto*. To keep the sham is obviously conducive to immorality and potentially more prejudicial to the public interest than a dissolution of the marriage bond.
>
> 87. The High Court ought to have visualised that preservation of such a marriage is totally unworkable which has ceased to be effective and would be greater source of misery for the parties.
>
> 88. The High Court ought to have considered that a human problem can be properly resolved by adopting a human approach. In the instant case, not to grant a decree of divorce would be disastrous for the parties. Otherwise, there may be a ray of hope for the parties that after a passage of time (after obtaining a decree of divorce) the parties may psychologically and emotionally settle down and start a new chapter in life.

On the basis of the same, the Court declared the marriage dissolved setting aside the judgment of the High Court.

32. In *Anil Kumar Jain Vs. Maya Jain* reported in (2009) 10 SCC 415, two Judges' Bench of Supreme Court observed that irretrievable breakdown of marriage can only be ordered by the Supreme Court in exercise of power under

Article 142 of the Constitution of India but not by the High Court. The said view do not find support by the three Judges' Bench of the Supreme Court in *Naveen Kohli* (supra), which was delivered prior in time but the said judgment was not considered in *Anil Kumar Jain* (supra). This Court is bound by three Judges' Bench judgment in which the directions were issued to the High Court to consider the repercussion, consequences, impact and ramification of all the criminal and other proceedings for the purpose of considering the issue of irretrievable breakdown of marriage. The Apex Court in the said case has observed that when the parties are living separately for sufficiently a long time and one of them brings a suit seeking decree of divorce, it can be presumed that the marriage has broken down irretrievably. It will be against the interest of both the parties as well against the society to refuse to grant the decree of divorce in such cases. The Court has observed that Parliament is commended to pass such an amended. But in any case, the dissolution of marriage has been directed.

33. The Apex Court has also considered the said issue in the case of *Rishikesh Sharma Vs. Saroj Sharma* reported in (2007) 2 SCC 263 and reiterated the principles of irretrievable breakdown of marriage thereafter in the case of *Samar Ghosh Vs. Jaya Ghosh* reported in (2007) 4 SCC 511, three Judges' Bench of the Apex Court though passed the decree on the ground of mental cruelty but the concept of irretrievable breakdown of marriage has been discussed in detail referring the 71st Report of Law Commission of India. Similar view has been taken by the Apex Court in the case of *Satish Sitole Vs. Ganga (Smt.)* reported in (2008) 7 SCC 734 taking irretrievable breakdown of marriage as a concept to divorce and to pass the decree of dissolution of marriage. The similar is the view taken by the Apex Court in the case of *K. Srinivas Rao Vs. D.A.Deepa* reported in (2013) 5 SCC 226 wherein it was observed that though irretrievable breakdown of marriage is not a ground for divorce under Hindu Marriage Act, however, marriage which is dead for all purposes cannot be revived by court's verdict, if parties are now willing since marriage involves human sentiments and emotions and if they have dried up, there is hardly any chance of their springing back to life on account of artificial reunion created by court decree.

34. After examination of the above referred precedents, we can illustrate the circumstances which may fall within the purview of irretrievable breakdown of marriage, due to which dissolution of marriage has been considered by the Apex Court:-

(i) From the conduct of the parties looking to the facts and evidence brought in the Court, if parties are living separately since last more than five years and not ready to live together losing possibility of their reunion despite mediation and conciliation, the case may fall within the purview of irretrievable breakdown of marriage.

(ii) In case the parties are not accepting their faults yet under the situation marriage cannot work out, marriage has to be struck down because it s irretrievably broken down.

(iii) If there is no substance in the marital life and the marriage is a mere shell, out of which the substance is gone, then divorce should be seen as a solution and an escape route out of a difficult situation and it would come within the purview of irretrievable breakdown of marriage.

(iv) If divorce is unconcerned with the wrongs of the past, but is concerned with bringing the parties and the children as a hope of new situation by working out the most satisfactory basis upon which they may not be in a position to regulate their relationship even in the changed circumstances, it would come within the purview of irretrievable breakdown of marriage.

(v) If the parties have consumed their most of the lives in litigation and their reunion is impossible and they are living separately for quite number of years by separation and litigation due to which the dislike for each boils hotter and when the parties have crossed the point of 'No Return' that can be termed as Irretrievable Breakdown of Marriage.

(vi) In cases where one of the spouse decided not to resolve the dispute and live in agony only to make life miserable, hell for both husband and wife, this type of adamant and callous attitude, bent upon treating in mental cruelty, such state of affairs may be classified as totally a dead marriage and continuation or preservation of such marriage would encourage continuous bickering, perpetual bitterness and may lead to immorality. Thus, for this human problem, human approach is warranted by declaring it as irretrievable breakdown of marriage.

(vii) Once the marriage has broken down beyond repair and it has become unrealistic for the law not to take notice of that fact, it would be harmful to society and injurious to the interest of the parties because it would show scant regard for the feelings and emotions of the parties. In such circumstances, marriage may be declared irretrievably broken down.

(viii) If we see the concept, irretrievable breakdown of marriage, meaning of marriage recognized by Vedas to maintain Dharma, Artha, Kama and Moksha, if any of the limb is missing by an act, conduct, understanding, losing faith, trust in between husband and wife, it would be called as irretrievable breakdown of marriage.

35. Considering the law laid down by the Apex Court by various precedents, it is not in dispute that in the said cases, suits were filed seeking decree of divorce on the ground as specified under the Hindu Marriage Act. While dealing with those grounds and when it has been proved on the basis of the evidence brought on record, the Apex Court granted decree considering the same and observed, the

revival of marriage between the husband and wife is not possible and ceases its realistic purpose. The Apex Court has dealt with the concept of irretrievable breakdown of marriage in which dissolution of marriage may be directed. The Court relied upon the recommendations of 71st Reports of the Law Commission of India and commended the Parliament to bring it as a ground for divorce or to dissolve the marriage. But in all the cases, the Court was of the opinion that the parties have suffered mental cruelty by their conduct and behaviour and not in a position to continue with marital tie, thus taking, the concept of irretrievable breakdown of marriage is possibly the right way to spouse. However, the said concept is in addition to the grounds specified under the Hindu Marriage Act as reveal from Para 80 of the judgment of *Naveen Kohli* (supra) the Apex Court observed that the High Court ought to have considered the repercussions, consequences, impact and ramifications of all the criminal and other proceedings initiated by the parties against each other in the proper perspective. Meaning thereby the aforesaid circumstances are in addition when the revival of marriage is not possible, therefore, the Judgment of *Anil Jain* (supra) do not apply to this case.

36. The Law Commission of India in its 71st and 217th Report, has left open this issue for the Parliament to bring amendment in the Act inserting the concept of irretrievable breakdown of marriage as a ground for divorce and despite commending to the Parliament, the amendment has not yet been brought but the circumstances may be looked into by the Court in a suit seeking decree of divorce on the grounds so specified under the Hindu Marriage Act, which has not been expressly ousted to consider by the Courts as reveal by various precedents of Hon'ble the Supreme Court directly to dissolve the marriage.

37. Under the Hindu Marriage Act, the grounds of divorcee (sic: divorce) have been specified, which are; if spouse after marriage voluntarily having sexual intercourse other than spouse; any of the parties treated with cruelty; deserted for a continuous period of not less than two years; ceased to be a Hindu by conversion to another religion; the spouse is incurably of unsound mind or continuously or intermittently suffering from mental disorder, in which living of husband and wife is not expected; suffering from leprosy; venereal disease; any spouse has renounced the world by entering any religious order or has not been heard of as being alive and other grounds as specified under sub-section (1A) and (2) of Section 13 of the Hindu Marriage Act. Considering the aforesaid, it can safely be observed that irretrievable breakdown is not a ground for divorce but its essence may be put in, to the above said grounds. If we see various judgments, Hon'ble the Apex Court directed that the Courts are duty bound to see the repercussion, consequences, impact and ramification of the criminal and other proceedings and also circumstances in which the grounds specified under the Hindu Marriage Act have been pleaded and proved. At the time of appreciation of the evidence to those grounds, the chances of revival of marriage for the said reason may be looked into

while recording the finding and to arrive at a conclusion that the reunion or revival of marriage is not possible, therefore, the case of irretrievable breakdown of marriage is made out on the ground so pleaded and proved. Thus, even if the irretrievable breakdown of marriage itself is not a ground but it is a consequence of non revival of marriage due to illustrations as referred in Paragraph 34 hereinabove and due to which the marriage may be dissolved as directed by Hon'ble the Apex Court.

38. In view of the foregoing legal position, now the ground for divorce as taken in the petition and the evidence so brought to prove it, may be discussed, to see the hope of revival of marriage and would it not make the life hell of both the husband and wife on account of their adament and callous attitude. Thus, the pleadigs (sic: pleadings) and evidence of the present case are analyzed in succeeding paragraphs.

39. In the present case, the cruelty has been alleged by the husband against the wife and similar is the position with the wife against the husband. In this regard, in place of perusing the other evidence, a CD of conversation between the husband and wife and children is on record and its transcript is also on record. On perusal, it is abundantly clear that the husband levelled vulgar allegations of adultery against the wife which has not ended to the wife but repeatedly asked the same from the children, alleging to have her adulterous relation. Similar is the position in the conversation of wife with the husband alleging illicit relations with co-workers and other women. For the said allegation of adultery, oral evidence is available on record, blaming to each other. The allegation of cruelty, consuming liquor, assault, to burn the clothes of the wife and to counter the same, Peons and the workers of the family were produced alleging the threat to leave the job. During the course of evidence in the Court, the husband specifically said that he cannot live with the wife in future. The Court found various allegations proved by the evidence and the conduct of the wife and held that it falls within the purview of mental cruelty. It is also said the wife made the complaint reaching in the Office during office hours and alleged for corruption against him and also misbehaved in office. Considering all these circumstances, the trial Court recorded the finding that it is a case of mental cruelty committed by the wife with the husband. Simultaneously the conversation of husband with the wife and children in the CD, alleging adultery against each other is also on record. It is also a case in which the husband and wife are residing separately for the last more than 6 years, however, the Court recorded the finding that the cruelty has been proved, therefore, decreed the suit filed by the husband. It is also observed that it is a case in which revival of marriage is not possible, therefore, it attracts the concept of irretrievable breakdown of marriage and in the said facts, the restitution of conjugal rights was denied.

40. After due appraisal of the evidence brought on record as discussed and also the finding recorded by the trial Court, we do not find any perversity or

illegality in the findings warranting interference in the appeal. In consequence to it, we dismiss this appeal filed by the appellant-wife maintaining the judgment and decree of the trial Court decreeing the suit filed by the husband directing divorce and dismissing the suit filed by the wife for restitution of conjugal rights. Thus, the judgment of trial Court to the said extent is hereby upheld.

41. Now the issue regarding grant of permanent alimony to the appellant-wife, who is living separately along with three children, is also relevant for decision of the case. It is to be noted here that the trial Court granted permanent alimony of Rs. 5 Lakh only to the children without granting any amount to the appellant-wife because it was not claimed by her. In this regard, it can safely be observed that once the wife is contesting the proceeding by filing a suit for restitution of conjugal rights, which has been dismissed by the Court granting decree of divorce on a suit filed by the respondent-husband. However, not filing the application seeking permanent alimony is merely a circumstance, in which, she wants to reside but it cannot be an impediment to deny the permanent alimony to wife and allow the parties to continue to litigate in other Courts either in the proceedings under Section 125 of the Code of Criminal Procedure or for grant of maintenance under other laws.

42. It is relevant to point out that the husband has filed the proceeding under Section 10 of the Hindu Marriage Act in which an application filed by the wife under Section 25 of the Hindu Marriage Act for grant of maintenance *pendente lite* a sum of Rs. 40,000/- was awarded but thereafter the said proceedings were withdrawn, however, the interim order passed in the said has lost its efficacy. Thereafter in a suit filed seeking decree of divorce, on an application filed by the appellant-wife for grant of maintenance under Section 24 of the Hindu Marriage Act, a sum of Rs. 30,000/- was awarded. But on filing W.P. No. 5967/2015, by way of interim order, the Court directed to pay a sum of Rs. 25,000/-, the said writ petition is listed for hearing, however, it cannot be said that the wife is not asking for grant of maintenance to which the proceedings are pending separately. Thus, from the said facts demand of permanent alimony on the request made by the counsel for appellant is sufficient for granting the same.

43. It is also relevant to point out here that the wife and children filed an application seeking maintenance under Section 125 of the Cr.P.C. against the order dated 2.1.2015 by which the Court observed that even after consultation with the parties on several occasion, amicable settlement is not at all possible and a sum of Rs. 35,000/- has already been directed to be paid as interim maintenance. Against the said order, M.Cr.C. No. 16660/2015 has filed in the said case, order dated 4.5.2015 was passed by this Court to list it along with F.A. No. 653/2016 for analogous hearing. Thus, all the cases are listed together for analogous hearing. Considering the aforesaid it cannot be said that the appellant wife and children are not asking the maintenance or permanent alimony. In fact they are running pillar

to post and litigating in the Courts to get the adequate amount of maintenance from the respondent-husband, who is in the Indian Forest Services and was getting the salary of more than 1,50,000/- per month in January, 2015 and at present it may be approximately Rs. 1,80,000/-. On the other hand the wife as well as three children who are school going, are required to live separately with status of her husband or father. Nothing has been brought on record to show that the wife is having any source of income to maintain herself as well her children. In such circumstances, with intent to resolve all the controversies, we deem it appropriate to grant adequate amount of permanent alimony to the wife and children.

44. In the facts and circumstances of the case, in which the husband is working in the Indian Forest Services and getting salary of approximately Rs. 1,80,000/- per month and living only with his mother and on the other hand the appellant-wife is residing separately along with her three school going children and she has no source of income, in our considered opinion, the award of permanent alimony Rs. 75,000/-per month to the wife and children would be adequate. Therefore, the respondent is directed to pay a sum of Rs. 75,000/- per month to the appellant-wife as permanent alimony, which shall be debited every month from his salary and credited in the bank account of the appellant-wife. However, it is open to the parties to apply to the Court for revocation/modification of the amount of permanent alimony showing the change in the circumstances.

45. In consequence to above discussion the F.A. No. 653/2016 (Disha Kushwaha Vs. Rituraj Singh) is hereby dismissed maintaining the decree of divorce with direction to the respondent-husband to pay permanent alimony Rs. 75,000/- per month to the wife and children. W.P. No. 5967/2015 (Ritu Raj Singh Vs. Smt. Disha Kushwaha), which is filed challenging the interim order passed in the R.C.S. No. 828-A/2014, be treated as disposed of because the suit has itself been finally decided. M.Cr.C. No. 16660/2015 (Ritu Raj Singh Vs. Smt. Disha Singh and others) which is arising out of the proceedings under Section 125 of the Cr.P.C. filed by the appellant-wife is also disposed of, in view of the grant of the permanent alimony Rs. 75,000/- to the appellant-wife and children. Thus, the proceedings under Section 125 of the Cr.P.C. if any, pending in the trial Court is not required to be continued further and be now consigned to the record.

46. Let a copy of this order be sent to the Department concerned where the respondent-husband is working (Indian Forest Services) with direction to deduct the amount of permanent alimony from his salary of October paid in November and further by every month as directed hereinabove.

47. In view of the above, F.A. No. 653/2016, W.P. No. 5967/2015 and M.Cr.C. No. 16660/2015 stand disposed of.

Order accordingly

I.L.R. [2019] M.P. 2083 (DB)
APPELLATE CRIMINAL
Before Mr. Justice Sujoy Paul & Mr. Justice B.K. Shrivastava
Cr.A. No. 4833/2018 (Jabalpur) decided on 12 September, 2019

RAMESH KACHHI …Appellant

Vs.

STATE OF M.P. …Respondent

(Alongwith Cr.A. No. 3824/2018)

***A. Penal Code (45 of 1860), Sections 302/149, 148 & 304 Part II – Intention & Motive – No injury found on vital part of body of deceased – No intention of murder* – Cause of death was multiple injuries on various parts of body by hard and blunt objects, hemorrhage and excessive bleeding – No internal injury found – Although appellants acted together and assaulted deceased with knowledge that injuries caused by them were likely to cause death – Conviction altered to one u/S 304 Part II IPC – Appeal partly allowed. (Paras 37, 39 & 40)**

क. दण्ड संहिता (1860 का 45), धाराएँ 302/149, 148 व 304 भाग II – आशय व हेतु – मृतक के शरीर के महत्वपूर्ण अंग पर कोई चोट नहीं पाई गई – हत्या का कोई आशय नहीं – मृत्यु का कारण, सख्त और भोथरी वस्तुओं द्वारा अनेक चोटें शरीर के विभिन्न अंगों पर, रक्तस्त्राव होना और अत्यधिक रक्त का बहना था – कोई आंतरिक चोट नहीं पाई गई–यद्यपि अपीलार्थीगण ने एक साथ कार्य किया तथा मृतक पर यह ज्ञात होते हुए हमला किया कि उनके द्वारा पहुंचाई गई चोटों से मृत्यु कारित होना संभाव्य थी – दोषसिद्धि को भा.दं.सं. की धारा 304 भाग II में परिवर्तित किया गया – अपील अंशतः मंजूर।

***B. Penal Code (45 of 1860), Section 302/149 & 148 – Appreciation of Evidence – Hostile Witnesses* – Held – Statement of hostile witness is admissible to the extent it does not disturb the credibility of part of his statement – Apex Court concluded that, portion of evidence of such hostile witnesses, which is consistent with case of prosecution/defence may be accepted – In instant case, witness has not assigned any reason as to why investigating officer would record something which was not stated by him – However, existence of signature of witness in *dehati nalishi* is clearly established – Witness trying to conceal material truth to protect the appellants. (Para 22 & 23)**

ख. दण्ड संहिता (1860 का 45), धारा 302/149 व 148 – साक्ष्य का मूल्यांकन – पक्षविरोधी साक्षीगण – अभिनिर्धारित – पक्षविरोधी साक्षी का कथन उस सीमा तक ग्राह्य है जहां तक वह उसके कथन के भाग की विश्वसनीयता पर बाधा न डालता हो – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि ऐसे पक्षविरोधी साक्षीगण के साक्ष्य का

हिस्सा, जो कि अभियोजन/बचाव पक्ष के प्रकरण के साथ संगत है, स्वीकार किया जा सकता है – वर्तमान प्रकरण में, साक्षी ने कोई कारण नहीं बताया है कि क्यों अन्वेषण अधिकारी कुछ ऐसा अभिलिखित करेगा जो कि उसके द्वारा नहीं कहा गया था – तथापि, देहाती नालिशी में साक्षी के हस्ताक्षर का विद्यमान होना स्पष्ट रूप से स्थापित हुआ है – साक्षी ने अपीलार्थीगण को संरक्षित करने के लिए तात्विक सत्य को छिपाने का प्रयत्न किया।

C. Penal Code (45 of 1860), Section 302/149 & 148 – Appreciation of Evidence – Plea of Alibi – **Held – No minutes, register or documentary evidence produced by defence to establish that appellant was present in meeting of Municipal Council and not at the scene of crime – Neither the Chairman of Council nor other representative who attended the meeting was called in witness box by defence to support the plea. (Para 34 & 35)**

ग. दण्ड संहिता (1860 का 45), धारा 302/149 व 148 – साक्ष्य का मूल्यांकन – अन्यत्र उपस्थित होने का अभिवाक् – अभिनिर्धारित – यह स्थापित करने हेतु कि अपीलार्थी नगरपालिका परिषद् की बैठक में उपस्थित था तथा न कि घटना स्थल पर, बचाव पक्ष द्वारा कोई कार्यवृत्त, रजिस्टर अथवा दस्तावेजी साक्ष्य प्रस्तुत नहीं किये गये – बचाव पक्ष द्वारा अभिवाक् का समर्थन करने के लिए न तो परिषद् के अध्यक्ष को न ही किसी अन्य प्रतिनिधि को जिसने बैठक में भाग लिया था, को साक्षी कठघरे में बुलाया गया था।

D. Penal Code (45 of 1860), Section 302/149 & 148 – Related Witness – Effect – **Held -There is no rule of thumb that evidence of a related witness must be discarded solely on ground that he is a relative of deceased. (Para 30)**

घ. दण्ड संहिता (1860 का 45), धारा 302/149 व 148 – संबंधी साक्षी – प्रभाव – अभिनिर्धारित – ऐसा कोई अनुभवसिद्ध नियम नहीं है कि एक संबंधी साक्षी के साक्ष्य को एकमात्र इस आधार पर अस्वीकार किया जाना चाहिए कि वह मृतक का संबंधी है।

E. Penal Code (45 of 1860), Section 302/149 & 148 and Evidence Act (1 of 1872), Section 32 – Oral Dying Declaration – Credibility – **Held – There is no absolute rule of law that dying declaration cannot form sole basis of conviction – In instant case, both parents of deceased deposed about dying declaration in harmony without any material inconsistency in their statements, which would destroy its evidentiary value. (Para 30)**

ड. दण्ड संहिता (1860 का 45), धारा 302/149 व 148 एवं साक्ष्य अधिनियम (1872 का 1), धारा 32 – मौखिक मृत्युकालिक कथन – विश्वसनीयता – अभिनिर्धारित – विधि का कोई आत्यंतिक नियम नहीं है कि मृत्युकालिक कथन दोषसिद्धि का एकमात्र आधार नहीं बन सकता – वर्तमान प्रकरण में, मृतक के माता–पिता दोनों ने अपने कथनों में, बिना किसी तात्विक असंगति के एक स्वर में मृत्युकालिक कथन के बारे में अभिसाक्ष्य दिया है जो कि उसका साक्ष्यिक मूल्य नष्ट कर देगा।

***F. Penal Code (45 of 1860), Section 302/149 & 148 and Criminal Procedure Code, 1973 (2 of 1974), Section 161 – Recording of Statement – Delay – Effect* – Held – Prosecution satisfactorily established that appellants assaulted deceased because of which he died – Interference on ground that statements were belatedly recorded is unwarranted – Apex Court concluded that if prosecution evidence is worthy of credence, the point that investigation was faulty or statements u/S 161 Cr.P.C. were recorded belatedly, pales into insignificance. (Para 25 & 26)**

***च. दण्ड संहिता (1860 का 45), धारा 302/149 व 148 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 161 – कथन अभिलिखित किया जाना – विलंब – प्रभाव* – अभिनिर्धारित – अभियोजन ने संतोषजनक रूप से स्थापित किया है कि अपीलार्थीगण ने मृतक पर हमला किया जिसके कारण उसकी मृत्यु हुई – इस आधार पर हस्तक्षेप कि कथन विलंबित रूप से अभिलिखित किये गये थे, अनपेक्षित है – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि यदि अभियोजन साक्ष्य विश्वास के योग्य है, तो यह बिंदु कि अन्वेषण दोषपूर्ण था अथवा दं.प्र.सं. की धारा 161 के अंतर्गत कथन विलंब से अभिलिखित किये गये थे, महत्वहीन हो जाता है।**

Cases referred:

(2014) 12 SCC 670, (2019) 4 SCC 739, (2008) 11 SCC 232, AIR 1976 SC 2488, (2016) 16 SCC 418, AIR 2019 SC 96, AIR 1930 Madras 632, AIR 1960 SC 391, AIR 1972 SC 283, (1976) 4 SCC 362, 1993 Supp. (2) SCC 356, AIR 2004 SC 1920, (2009) 13 SCC 480, (2008) 4 SCC 265, (2016) 4 SCC 583, (2013) 4 SCC 422, (2008) 13 SCC 271, (2012) 8 SCC 450, (1996) 10 SCC 360, 2011 (11) SCC 140, (1976) 1 SCC 389, (1976) 1 SCC 31, (2012) 4 SCC 327, (2012) 5 SCC 777, (2013) 11 SCC 546, (2010) 6 SCC 1, 1995 (5) SCC 518, 2003 (2) SCC 518, 1998 (4) SCC 517, 2004 (3) SCC 654, 1992 (3) SCC 106, 2002 (7) SCC 334, 2004 (13) SCC 279, (2017) 6 SCC 1, (2017) 16 SCC 466, 2006 (2) SCC (Cr.) 331, 1997 (1) SCC 283, 2015 (4) SCC 749.

S.C. Datt with *Nishank Pal Verma,* for the appellant in Cr.A. No. 4833/2018.

R.S. Shukla, Amicus Curiae for the appellants in Cr.A. No. 3824/2018.

Brindavan Tiwari, G.A. for the respondent-State.

J U D G M E N T

The Judgment of the Court was delivered by :
SUJOY PAUL, J. :- This common Judgement will dispose of Criminal Appeal Number 4833/2018 and Criminal Appeal Number 3824/2018.

These criminal appeals are directed against the impugned judgment of conviction and sentence dated 09.05.2018 passed in ST. No.119/17 by learned 1st Additional Sessions Judge, Narsinghpur whereby the appellants were held guilty

for committing the offences under Section 148 and 302/149 of IPC and were directed to undergo R.I. for two years with fine of Rs.2,000/- and life imprisonment with fine of Rs.5,000/- respectively with default stipulation. It is also directed by the Court below that all the sentences will run concurrently.

CRA. No. 4833/18

2. Draped in brevity, the case of the prosecution is that a '*Dehati Nalisi'* was lodged by complainant Akash Patel (PW/3), the brother of deceased, at around 8:55 pm in the evening of 24.01.2017 stating that the appellants of these appeals came to his house armed with weapons and caused injuries on him as well as his brother deceased Arjun Patel, which resulted into the death of Arjun Patel. It is further stated that after causing aforesaid injuries, all the appellants fled away. Govind Kashyap (PW/1) Manju Kashyap (PW/2) had seen the incident. Thereafter, Arjun Patel was sent to hospital where during the treatment, he died.

3. On the basis of said *'Dehati Nalisi',* an FIR was lodged by the police in the late evening of the date of incident i.e. 24.01.2017. In turn, the police recorded the statements of witnesses and other related persons and submitted a final report before the Court below under Section 173 of Cr.P.C. Thereafter, the Court below framed the charges against the appellants, which were denied by the appellants. In turn, evidence of parties was recorded and arguments were heard. By impugned judgment dated 09.05.2018, the appellants were convicted and directed to undergo the sentence mentioned hereinabove.

4. Shri Datt, learned senior counsel urged that although the prosecution witnesses entered the witness box, the alleged eye-witnesses Govind Kashyap (PW/1) and Manju Kashyap (PW/2) and even the complainant (the brother of deceased), who was an injured witness namely Akash Patel (PW/3) also turned hostile. Similarly, the seizure witness Ram Milan Yadav (PW/5) also turned hostile. Manju Patel (PW/6), the (Sister-in-law) of Arjun Patel could not lead any credible evidence. She did not claim that she was an eye-witness. Her statement at best can be treated as a *hearsay* evidence on the strength of which no conviction can be recorded. There are glaring contradictions in the statements of parents of deceased namely Gammat Kachhi (PW/8) and Shanti Bai (PW/10). If their statements are tested on the anvil of expert evidence of Dr. Sanjay Kumar Nigam (PW/7), it will be clear that it cannot be said that at the time of oral dying declaration given to the parents by the deceased Arjun Patel, he was in a fit state of mind. Statement of Dr. G.C. Chourasiya ((PW/9), who conducted the postmortem, was also relied upon to submit that there was no fatal injury found on the person of deceased. Thus, no case is made out for conviction under Section 302 of IPC.

5. In addition, learned senior counsel urged that the present appellant Ramesh Kacchi is an elected Corporator and at the time of incident, he was attending a meeting in the Municipal Council. The defence witness/colleague of this appellant entered the witness box and narrated it with accuracy and precision that this appellant was present with them in a meeting at the time of incident. This appellant has been falsely implicated by the prosecution. In view of statements of parents of deceased, there was previous enmity between the present appellant and the family of the deceased. Thus, it is clear that this appellant has been unnecessarily arraigned in the incident.

6. Shri Datt, by taking this Court to the statement of Shanti Bai (PW/10), contended that when she came to know about the incident, she directly reached to the hospital where Arjun Patel was admitted. The treating doctor categorically deposed that at 3:50 pm, Arjun Patel was not in a fit state of mind to depose any statement. In this backdrop, it is completely unsafe to accept the statements of Shanti Bai (PW/10) and Gammat (PW/8) that before the death, Arjun Patel was in a fit state of mind and informed them that he was assaulted by the appellants.

7. To buttress the aforesaid contentions, reliance is placed on (2014) 12 SCC 670 *(Balbir vs. Vazir & Others)* and (2019) 4 SCC 739 *(Sampat Babso Kale vs. State of Maharashtra)*. It is submitted that an oral dying declaration can be accepted, if it is established that at the time of recording of statement, the person was in a fit state of mind to make such declaration and such declaration is really trustworthy. Furthermore, it is urged that the parents took more than three days to disclose the incident to the police. The alleged dying declaration is made to the mother. Such declaration, in absence of corroboration, is unacceptable. In addition, heavy reliance is placed on (2008) 11 SCC 232 *(Arun Bhanudas Pawar vs. State of Maharashtra)*. To elaborate, it was further argued that the statements of witnesses were recorded after so many days by the police under Section 161 of Cr. P.C. which makes the entire prosecution story as highly doubtful and untrustworthy. The arguments is supported by AIR 1976 SC 2488 *(State of Orissa vs. Brahmananda Nanda),* (2016) 16 SCC 418 *(Harbeer Singh vs. Sheeshpal)* and AIR 2019 SC 96 *(Gupteswar Behera vs. State of Odisha & Others)*.

8. The appellants relied on AIR 1930 Madras 632 *(Sadayan Chetti & Ors. vs. Emperor),* AIR 1960 SC 391 *(State of Bombay vs. Rusy Mistry)* and AIR 1972 SC 283 *(Sheikh Hasib @ Tabarak vs. State of Bihar)* in support of argument that FIR can be used either for corroborating or for contradicting the maker/complainant. Since the complainant Akash Patel (PW/3) has turned hostile, this FIR cannot be used by prosecution for any purpose whatsoever.

9. Apart from this, Shri Datt, learned senior counsel placed reliance on the postmortem report and the nature of injuries mentioned therein. It is urged that since no injury was found on the vital parts of the body of

deceased and reason of death of deceased was multiple injuries coupled with shock and hemorrhage, no case is made out to convict the appellant under Section 302 of IPC. Reference is made to (1976) 4 SCC 362 *(Molu & Others vs. State of Haryana)* and 1993 Supp.(2) SCC 356 *(Sarman & Others vs. State of M.P.)* in support of argument that at best the appellant can be held guilty for committing an offence under Section 304 Part-II of IPC. Hence, the conviction needs to be altered from Section 302 of IPC to 304 Part-2 of IPC.

CRA. No.3824/2018

10. Shri R.S. Shukla, learned *Amicus Curiae* at the outset adopted the arguments of learned Senior Counsel advanced in the connected case. In addition, he urged that as per prosecution story, two sticks were allegedly recovered from the appellants Rupesh Kachhi and Raju Kachhi through Ex.P/14 and P/25 and a baseball bat was recovered from the appellant Arpit Dhobi through Ex.D/24 but the said recovery was not proved. Ram Milan Yadav (PW/5), the alleged seizure witness has turned hostile. The aforesaid weapons, allegedly recovered from the appellants, were sent to Forensic Science Laboratory on 25-04-2017. No report of said laboratory was received and produced before the Court below to prove that the said weapons were ever used. It was not established that any blood stains were found on the said weapons. Thus, it is common ground that all the appellants have been falsely implicated and they deserve blotless exoneration in their appeals.

11. *Per contra,* Shri Brindavan Tiwari, learned Government Advocate opposed the said contention. By taking this Court to the statement of Akash Patel (PW/3), Shri Tiwari argued that this witness although has turned hostile, he has clearly admitted that *'Dehati Nalisi'* contains his signature. The said witness must have turned hostile because of pressure of the appellants, otherwise there is no reason to take a u-turn by this witness. It is prayed that the statements of parents of deceased may be read carefully, which will show that there is no material inconsistency in their statements, which will make their statements untrustworthy. The oral dying declaration can be the sole basis for conviction.

12. The postmortem report shows that the reason of death was multiple injuries caused by the appellants. The defence of alibi by Ramesh Kachhi is rightly disbelieved by the Court below by taking assistance of Section 11 and 106 of the Evidence Act. Moreso, when defence witness Bhola Thakur (DW/1) clearly admitted that from the alleged place of meeting, it is possible to reach the place of incident within 5-10 minutes.

13. So far the question of delay in recording the statements under Section 161 of Cr.P.C. is concerned, it is submitted that the delay is not fatal to the case of prosecution. Reliance is placed on AIR 2004 SC 1920 *(Dhanraj Singh vs. State of Punjab).* The legal maxim of *falsus uno* was relied upon on the strength of (2009) 13 SCC 480 *(Rajendra & Anr. vs. State of U.P.)*. Shri Brindavan Tiwari has taken

pains to contend that dying declaration of this nature is creditworthy in view of judgment of Supreme Court reported in (2008) 4 SCC 265 *(Sher Singh vs. State of Punjab)* and (2016) 4 SCC 583 *(Gulzari Lal vs. State of Haryana).*

14. In the rejoinder submission, Shri Datt placed reliance on the aspect of alibi by referring to the judgments of Supreme Court in (2013) 4 SCC 422 *(Sunil Kundu & Another vs. State of Jharkhand).* Lastly, it is submitted that in a case where there existed a previous enmity between the parties, previous enmity is held to be like a double edged sword and it is totally unsafe to rely on related witnesses, who allegedly heard the deceased. In the peculiar factual backdrop of this matter, it cannot be said that the deceased was in a fit state of mind when he narrated about the incident to his parents.

15. No other point is pressed by the parties.

16. We have heard the parties and perused the record.

17. In the impugned judgment, the Court below recorded that the eye witnesses namely Govind Kashyap (PW/1), Manju Kashyap (PW/2) and Akash Patel (PW/3) turned hostile and did not support the prosecution story. Dr. Sanjay Kumar Nigam (PW/7) opined that the injuries were caused by hard and blunt objects within three hours before the time of examination. In the admission report of hospital, the name of Shanti Bai (PW/10) is mentioned as a person who brought the injured to the hospital. It was also taken note of by the Court below that the said witness Dr. Sanjay Kumar Nigam (PW/7) deposed that he had received an application from the Police Help Center, District Hospital Narsinghpur for informing the condition of injured Arjun Patel to make statement/declaration. Dr. Sanjay Kumar Nigam (PW/7) deposed that he submitted his report about the condition of injured, which is marked as Ex.P/20. This report was sent at 3:50 pm on 24-01-2017. The Court below recorded that admittedly at the time of admission of injured in the said hospital, he was alive and it was the mother of Arjun, who brought him for admission to the hospital.

18. The Court below by impugned judgment opined that the oral dying declaration is trustworthy and cannot be brushed aside. In the impugned judgment, the defence of appellants that delay in recording the statements under Section 161 of Cr.P.C. caused a dent on the case of prosecution is rejected on the strength of *Dhanraj Singh* (supra). No material inconsistency/contradiction was found by the Court below in the statements of parents of deceased namely Gammat (PW/8) and Shanti Bai (PW/10). The Court below also placed reliance on *Rajendra* (supra) and (2008) 13 SCC 271 *(Mahesh vs. State of Maharashtra)* in support of its analysis that when a material witness turns hostile for no valid reasons, it creates serious doubt on the testimony of said witness. Such statement shows that the witness is trying to conceal the material truth from the Court with

the sole purpose of helping and protecting the accused persons for the reasons best known to him. The statement of such witness will not give any benefit/favour to the accused persons. It was further held that in the instant case, there is no contradiction between FIR and dying declaration. Lastly, the Court below disbelieved the statement of Bhola Thakur (DW/1) on the strength of Section 11 and 106 of Evidence Act. Considering the nature of injury and evidence available on record, the appellants were held guilty.

Evidence of hostile witnesses-

19. *Dehati nalishi* (Exhibit P/3) was lodged by Akash Petel (PW/3), brother of the deceased. By placing reliance on the judgments of *Sadayan Chetti, Rusy Mistry* and *Sheikh Haseeb*(supra), it was urged that since PW/3 turned hostile and FIR/*dehati nalishi* can be used either for corroboration or for contradiction, this *nalishi* cannot be relied upon for any purpose. The argument on its face value looks attractive but lost its force when examined on the anvil of settled legal principles.

20. Admittedly, Akash Patel (PW/3) is the real brother of deceased Arjun. His statement to the extent he admitted existence of his signatures in Exhibit P/3 and seizure memo Exhibit P/9 is beyond any pale of doubt. This witness turned hostile and stated that Exhibit P/3 and marg intimation P/4 was not recorded by police at his instance. Curiously, PW/3 deposed that when he visited the hospital to see his brother Arjun, he did not inquire about the reason because of which his brother was hospitalised and later on died.

21. In *State vs. Sanjeev Nanda,* (2012) 8 SCC 450, the Apex Court expressed deep concern about the menace of/tendancy (sic: tendency) of witnesses turning hostile and termed it as a "major disturbing factor" faced by criminal courts in India. Reasons behind this factor, in the opinion of Supreme Court, may be many i.e. due to monitory (sic: monetary) considerations, pressure or because of other tempting offers etc. This factor gives impression that mighty and powerful can always get away from the clutches of law, thereby eroding people's faith in the system.

22. This is trite that statement of a hostile witness is admissible to the extent it does not disturb the credibility of part of his statement. The statement of Akash (PW/3) to the extent he admitted that *dehati nalishi* contains his signature, can be safely relied upon. PW/3 has not assigned any reason as to why the investigating officer/police could record something which has not been stated by him. This is not the case of defence that Akash(PW/3) did not approach the police at all because existence of his signatures on the *dehati nalishi* is clearly established. In *State of U.P. vs. Ramesh Prasad Misra,* (1996) 10 SCC 360, the Apex Court opined that if a witness has not given any reason as to why the investigating officer

could record statements contrary to what had been disclosed, the evidence of the hostile witness would not be totally rejected if spoken in favour of prosecution or the accused, but it can be subjected to close scrutiny and that portion of evidence which is consistent with the case of prosecution/defence may be accepted.

23. The evidence of Akash(PW/3) may be viewed from another angle. If a person comes to know that his real brother is hospitalised because of an assault on him and is in critical condition, upon reaching the hospital, his first anxiety would be to know regarding health condition of his brother and the reason behind his hospitalization. In the instant case, the statement of Akash(PW/3) that upon reaching the hospital, he did not inquire about the reason behind the incident and death of his brother is completely amounts to an unnatural human behaviour. He further narrated that he had not seen his brother carefully in the hospital and therefore is not in a position to state whether there was any bleeding in his head and whether he sustained injuries. In *Rathinam vs. State of Tamil Nadu,* 2011 (11) SCC 140, it was ruled that the best check on the veracity of a witness is the test of normal human behaviour. If the behaviour of a witness is unnatural and grossly against normal human conduct that itself is a strong circumstance in doubting the story projected by him. Such statements are held to be untrustworthy if measured by applying any yardstick. Thus, we are constrained to hold that Akash has tried to conceal the material truth from the court in order to shield/protect the appellants for the reasons best known to him. In *Mahesh vs. State of Maharashtra,* (2008) 13 SCC 271, the PW/1, the maker of complaint has chosen not to corroborate his earlier statement made in the complaint and recorded during investigation, the conduct of such a witness (in absence of any plausible and tenable reasons pointed out on record) was held to be doubtful and testimony of investigating officer who had sincerely and honestly conducted the investigation of the case was held to be acceptable. The court below has rightly relied upon the judgment of *Mahesh*(supra) in this regard. In view of *Bhagwan Singh vs. State of Haryana* (1976) 1 SCC 389, *Karuppanna Thevar vs. State of T.N.* (1976) 1 SCC 31, *Bhajju vs. State of M.P.* (2012) 4 SCC 327, *Ramesh Harijan vs. State of U.P.* (2012) 5 SCC 777, *Gudu Ram vs. State of H.P.* (2013) 11 SCC 546, *State vs. Sanjeev Nanda* (2012) 8 SCC 450, *State of U.P. vs. Ramesh Prasad Misra* (1996) 10 SCC 360*, Manu Sharma vs. State (NCT of Delhi)*(2010) 6 SCC 1 and *Mahesh vs. State of Maharashtra* (2008) 13 SCC 271, it cannot be ruled that statement of hostile witness cannot be seen for any purpose.

24. In view of foregoing analysis, we are unable to hold that court below has committed any error of law in appreciating and evaluating the evidence of the hostile witness. J.N. Gyarasia(PW/4) proved the *dehati nalishi* Exhibit P/3 and the FIR Exhibit P/12. Similarly, PW/11 D.V.S. Nagar who recorded *dehati nalishi* satisfactorily proved it. In no uncertain terms, he deposed that the *dehati nalishi*

was recorded at the instance of complainant Akash Patel. His statement and also the statement of PW/4 could not be demolished. We concur the finding of the court below in the manner the statement of hostile witness PW/3 was analyzed. The judgments cited by Shri Datt are of no assistance in the factual matrix of this case because prosecution has established that *dehati nalishi* contains PW/3's signatures and court below rightly opined that in the manner he deposed in the court while turning hostile, his statement is unacceptable and statement of PW/4 and PW/11 inspires confidence in the light of principle of law laid down in *Mahesh*(Supra).

Effect of belated recording of statements U/s 161 Cr.P.C.-

25. The appellants contended that statements of parents of deceased Arjun were recorded after ten days from the date of incident which makes the investigation totally unreliable. The trial founded upon such a polluted investigation and the judgment impugned needs interference. The effect of defective investigation was considered by Supreme Court in *Karnel Singh vs. State of M.P.,* 1995 (5) SCC 518 and in *Amar Singh vs. Balvinder Singh,* 2003 (2) SCC 518. It was ruled that because of negligence of prosecution alone the story of prosecution cannot be discarded otherwise faith and confidence of people would be shaken not only in the law enforcing agency but also in the administration of justice. (See: *Rambihari Yadav vs. State of Bihar,* 1998 (4) SCC 517). The principle laid down in these cases is that if evidence led by prosecution is worthy of credence, the point that investigation was faulty or statements were belatedly recorded under Section 161 Cr.P.C. pales into insignificance. (See: 2004 (3) SCC 654 *Dhanaj Singh v. State of Punjab).* In the instant case, the mother (PW/8) deposed in her statement (Para 18) that on the next date of incident, police came to her house and she informed the police that his son was assaulted by the accused persons and they are also under threat of being assaulted. She pleaded ignorance whether police had recorded her statement at that point of time or not.

26. In this case, for the reasons mentioned in separate paragraphs, we have recorded the findings that prosecution has satisfactorily established that appellants have assaulted Arjun because of which he died. In view of this satisfaction recorded by us, the interference on the ground that statements were belatedly recorded is unwarranted. The judgments of Supreme Court cited by appellants i.e. AIR 2019 SC 96 :*Gupteswar Behera vs. State of Odisha and Ors* and AIR 1976 SC 2488 : *State of Orissa v. Brahmananda Nanda* cannot be pressed into service in this case in favour of appellants because evidence led by prosecution is otherwise credible and cogent. (See: 1992 (3) SCC 106 *Ganeshlal v. State of Maharashtra* , 2002 (7) SCC 334 *Mohd. Khalid v. State of W.B.,* 2004 (13) SCC 279 *Prithvi (Minor) v. Mam Raj* and 2010 (6) SCC 1 *Manu Sharma v. State (NCT of Delhi)).*

<u>Oral dying declaration given to parents</u>-

27. Shri S.C. Datt, learned senior counsel placed reliance on the judgment of Supreme Court in *Balbir* and *Sampat*(Supra) wherein it was held that oral dying declaration is acceptable provided it is established that the maker was in a fit state of mind. The statement of treating doctor Sanjay Kumar Nigam (PW/7) was relied upon wherein he had deposed that at 3:50 p.m. on 24.01.2017, Arjun was not mentally fit to make a statement. He was not in a position to speak. In addition, judgment of Supreme Court reported in 2008 (11) SCC 232 : *Arun Bhanudas Pawar vs. State of Maharashtra* was relied upon to submit that oral dying declaration given to mother, in absence of corroboration is not acceptable.

28. In our view, learned senior counsel has rightly contended that a dying declaration is acceptable only when it is proved that it was given by a person who was in a fit state of mind at the time of giving such declaration. The dying declaration of the present case needs to be examined on the said principle. The court below recorded the statement of PW/10, mother of Arjun. This witness stated that incident of assault had taken place between 1:00-1:30 p.m. She was selling vegetables in Gulab Chowk where she received the information of assault on Arjun. She immediately rushed to the place of incident and found that Arjun was lying on the road. She took her to the hospital immediately. In the hospital, she asked Arjun who has assaulted him. Arjun informed her the names of appellants who had assaulted him. During extensive cross-examination, her statement could not be demolished. Similarly, father of Arjun (PW/8) categorically deposed that when he visited Arjun in the hospital, he was in the fit state of mind. Arjun died after about two hours. Pertinently, statement of this witness wherein he deposed that Arjun narrated about the incident and informed the names of appellants could not be demolished during lengthy cross-examination.

29. In para 30 of the impugned judgment, the court below has analyzed the statements of parents in the light of deposition of Dr. Sanjay Kumar Nigam (PW/7) wherein he stated that Arjun was not in a fit condition to speak. It was held that a holistic reading of statement of PW/7 shows that he received an application from police at 3:50 p.m. on 24.01.2017 containing a request to record the dying declaration. At 3:50 p.m., as per this witness, Arjun was not in a fit condition to give any declaration. The court below meticulously examined the factual matrix and opined that the District Hospital, Narsinghpur informed police chowki, District Hospital, Narsinghpur at 2:30 p.m. that Arjun has been hospitalized and its a medico legal case. The Court below on the strength of statement of Shanti Bai(PW/10) and the document Exhibit P/18 opined that Shanti Bai came with Arjun to the hospital. The finding given in para 30 is that as per *dehati nalishi* incident had taken place at around 2:30 p.m. and after 1 hour 20 minutes,

application was sent to the doctor for recording the dying declaration. There is no evidence of doctor to show that before 3:50 p.m., Arjun was not in a fit state of mind. We do not find any infirmity in this conclusion drawn by the court below. Prosecution has satisfactorily established that upon receiving information of assault on his son, Shanti Bai took her injured son to the hospital. As noticed above, both the parents categorically deposed that their son Arjun was in a fit state of mind at the time of giving declaration and their statements could sustain the test of cross-examination, hence we are of the view that statement of doctor which reflects condition of Arjun at 3:50 p.m. will not cause any dent to the statements of parents. Putting it differently, the statement of doctor (PW/7) reflects the condition of Arjun at 3:50 p.m. and on the basis of this statement, it cannot be presumed that when Arjun gave declaration to his parents which is much prior to 3:50 p.m., he was not in a fit state of mind. As per statement of doctor(PW/7), there was no injury on the vital parts of body of Arjun. For this reason also, the prosecution version cannot be doubted that Arjun was in a fit state of mind when brought to the hospital and when he gave declaration to PW/8 and PW/10. We, accordingly, countenance the finding of court below in this regard.

30. Apart from this, there is no rule of thumb that evidence of related witness must be discarded solely on the ground that he is relative of the deceased. In view of judgment of Supreme Court reported in (2017) 6 SCC 1 *(Mukesh & Another vs. State (NCT of Delhi) & Ors.)* and (2017) 16 SCC 466 *(Suresh Chandra Jana vs. State of West Bengal & Ors.),* there is no scintilla of doubt that there is no absolute rule of law that dying declaration cannot form sole basis of conviction. In the case of *Vijay Pal*(supra), the oral dying declaration was given to deceased victim's brother which was held to be acceptable. In the case of *Arun Bhanudas(Supra),* the Apex Court disbelieved the statement of a related and interested witness and insisted for corroboration because in the factual backdrop of that case, the deceased became unconscious by the time he was brought to the hospital. The mother arrived at the hospital only on the following day at around 3:30 p.m. Her statement was held to be not acceptable because it could not be proved that deceased Raju had regained consciousness when mother met him in the hospital. In *Arun Bhanudas*(Supra), while making statement to police under Section 161 Cr.P.C., the mother did not name the appellant therein as assailant. Because of this peculiar factual backdrop, in our opinion, the Apex Court disbelieved the statement of mother and insisted for corroboration. At the cost of repetition, in our view, both the parents deposed about dying declaration in harmony and there is no material in consistency in their statements which may destroy its evidenciary (sic: evidentiary) value.

31. The Court below on the strength of 2006 (2) SCC (Cr.) 331 *Ghanshyam Vs. State of Assam* opined that the statement of parents is in tune with the story mentioned in the *dehati nalishi.* In absence of any contradiction, statements of

these witnesses and consequently the dying declaration is trustworthy. This finding of court below is in consonance with law and deserves our stamp of approval.

The plea of alibi by appellant Ramesh Kachi-

32. The plea of alibi and the admitted fact that family of deceased had an enmity with this appellant is a major point of defence in Criminal Appeal No.4833/2018. Bhola Thakur(DW/1), a Corporator in Municipal Council, Narsinghpur entered the witness box and deposed that on the date of incident he alongwith this appellant and other persons was in a meeting in the said Municipal Council. The meeting started between 12:30 to 1:00 and continued upto 3:30-4:00. In the entire meeting, this appellant remained present. During this meeting, this appellant received a phone informing him about the assault on Arjun. Considering the previous animosity with the family of PW/8 and PW/10, they immediately approached the police and informed that they may be falsely implicated. Later on, higher police officers were also informed about the incident.

33. This statement of defence witness could not inspire confidence of court below. In para 46 of impugned judgment, court below opined that this statement shows that the distance between the place of incident and municipality where meeting was allegedly convened is hardly of 5-10 minutes if one travels by a motorbike. On the strength of Section 11 and 106 of the Evidence Act, the Court below disbelieved this statement.

> The Illustration (a) below Section 11 of the Evidence Act reads as under:
>
> *" (a) The question is, whether A committed a crime at Calcutta on a certain day.*
>
> *The fact that, on that day, A was at Lahore is relevant.*
>
> *The fact that, near the time when the crime was committed, A was at a distance from the place where it was committed, which would render it highly improbable, thought not impossible, that he committed it, is relevant."*

34. The Latin word alibi means "elsewhere". In order to establish that appellant was far away from place of occurrence and it is extremely improbable that he would have participated in the crime, he has to establish it with absolute certainty by excluding the possibility of his presence at the place of occurrence. If evidence adduced by accused is of such a quality and is of such a standard that the court may entertain some reasonable doubt regarding his presence at the scene when the occurrence took place, the accused undoubtedly is entitled to the benefit of doubt. (See: 1997 (1) SCC 283 *Binay Kumar Singh vs. State of Bihar* and 2015 (4) SCC 749 *Vijay Pal v. State (Govt. of NCT of Delhi))*.

35. In the instant case, the court below has rightly held that no minutes, register or documentary evidence is produced by defence to establish that this appellant was indeed present in the said meeting. The meeting as per DW/1 was called by Chairman of Municipal Council and attended by representative of Member of Parliament. Neither said Chairman nor the representative was called in the witness box to support this statement. The court below rightly applied Explanation (a) of Section 11 because Bhola Thakur (DW/1) admitted that travel time between Municipal Council and place of incidence is 5-10 minutes. The judgment of *Ramesh Kachi(Supra)* has no application in the present case for the simple reason that in the said case, prosecution could not establish its case and yet adverse inference was drawn by the court because of weakness of defence evidence. Thus, finding of court below in this regard deserves to be accepted.

<u>Regarding alteration of conviction/sentence</u>-

36. As per medical evidence, the following injuries were found on the body of deceased Arjun:

Following injuries were present on the body-

1. Multiple stitched wound were over left leg.

A - stitched wound of about 2 - 4 cm were below knee extended from knee to sole

B. Single Stitched wound were over thigh outer aspect.

2. Single stitched wound were over right leg below knee.

3. Right arm was fractured and were multiple contusions.

4. Two stitched wound were over right elbow, about 3 cm and 2 cm were separated by 6 cm from each other.

5. Left forearm was fractured and were multiple contusion.

6. Contusion and abrasion were over forehead right side.

Internal examination-

2-Cranium and Spinal Cord - Contusion with abrasion over right side of forehead with internal ecchymosis, 3-Thorax-Healthy and Pale, 4-Abdomen -Healthy and Pale.

Description of Injury or disease-

Injuries described on page no 3 were caused by hard, blunt and heavy objects and collectively injuries were dangerous to life.

Opinion in relation to articles sent with corpse

1. His clothes in which one T- shirt, one paint and one red underwear

2. His dressing in which cotton and bandage

All this were preserved and sealed and handed over to concerned constable.

Opinion-

According to his opinion, the mode of death of Arjun is Hypovolemic shock which were possible due to collective injuries found in body. Duration of death, was within 24 hours from the time of PM examination. PM Report presented by him is Exhibit P-21 in whose A to A part, there is my signature."

37. As per medical evidence, no injury was found on the vital parts of the body of the deceased. The cause of death is multiple injuries, hemorrhage and excessive bleeding. No internal injuries were found. The injuries were outcome of assault by hard and blunt objects. As per prosecution story, the appellants were mounting pressure on Arjun to enter into a compromise in relation to a criminal case. Arjun did not succumb to such pressure. During the course of mounting pressure on Arjun, the appellants assaulted him with hard and blunt object. Referring to a judgment of *Molu and others* and *Sarman and* others(Supra), it was canvassed that *lathi/rod* blows inflicted by several persons causing simple injuries on non-vital parts of body will not bring the assault within the ambit of murder. Indeed, conviction should be altered to that under Section 304 Part II of IPC.

38. We find force in this contention of appellants. In *Molu*(Supra) in para 3 and 4 of the judgment, the Apex Court mentioned the nature of injuries on the person of deceased. As many as 14 injuries were found on the person of deceased by the doctor who conducted the postmortem. The doctor opined that death was due to shock and hemorrhage, as a result of fracture of right ulna and bleeding from big blood vessels due to injury no.11 mentioned therein. Considering the nature of injuries, the conviction and sentence was directed to be altered.

39. In the instant case also, no injury is found on the vital part of the body of Arjun. There is nothing to establish that appellants intended to cause the deliberate murder of Arjun. In this backdrop, we are satisfied that there is no legal evidence in this case that the appellants intended to cause the murder of the deceased. We are, however, satisfied that appellants have caused multiple injuries on various parts of body of Arjun. Arjun died because of cumulative effect of such injuries. Appellants undoubtedly had the knowledge that cumulative effect of the injuries would result in the death of the deceased. We are also satisfied that all the

appellants have acted together and assaulted the deceased with the knowledge that the injuries caused by them were likely to cause the death of Arjun.

40. In these circumstances, the accused persons have committed an offence under Section 304 Part II IPC and not one under Section 302 IPC. Accordingly, we deem it proper to allow these appeals in part by altering the conviction of appellants from that under Section 302 to that under Section 304 Part II IPC r/w Section 149 and their sentences reduced from life imprisonment to seven years rigorous imprisonment. The impugned judgment to the extent of fine with default stipulation and conviction under Section 148 IPC is affirmed.

41. The appeals are **partly allowed** to the extent indicated above.

Appeal partly allowed

I.L.R. [2019] M.P. 2098 (DB)
APPELLATE CRIMINAL
Before Mr. Justice Sujoy Paul & Mr. Justice B.K. Shrivastava
Cr.A. No. 1330/2008 (Jabalpur) decided on 16 October, 2019

AJAY TIWARI …Appellant

Vs.

STATE OF M.P. …Respondent

A. Penal Code (45 of 1860), Section 302 – Weapon of Offence – Expert Report **– Held – As per ballistic expert, seized gun was full of rust which shows that it has not been used for last 2 years – Further, gunshot injury is caused from a distance of about 84 feet and cannot be caused from a distance of 10 feet, as stated by prosecution witnesses – Prosecution failed to discharge its duty to prove by expert evidence that injuries were possible from weapon allegedly used by appellant – If ocular evidence is diametrically opposite to expert evidence, conviction wholly based on oral testimony cannot be upheld – Conviction set aside – Appeal allowed.**

(Paras 21, 23 & 26)

क. दण्ड संहिता (1860 का 45), धारा 302 – अपराध का शस्त्र – विशेषज्ञ का प्रतिवेदन – अभिनिर्धारित – प्राक्षेपिकी विशेषज्ञ के अनुसार, जब्तशुदा बंदूक पूरी तरह जंग लगी हुई थी जो यह दर्शाता है कि पिछले 2 वर्षों से उसका उपयोग नहीं किया गया है – इसके अतिरिक्त, चोट लगभग 84 फीट की दूरी से बंदूक की गोली से कारित की गई है तथा 10 फीट की दूरी से कारित नहीं की जा सकती जैसा कि अभियोजन साक्षीगण द्वारा कहा गया– अभियोजन, विशेषज्ञ के साक्ष्य द्वारा साबित करने के अपने कर्तव्य का निर्वहन करने में विफल रहा कि अपीलार्थी द्वारा अभिकथित रूप से उपयोग किये गये शस्त्र से चोटें संभव थी – यदि चाक्षुष साक्ष्य, विशेषज्ञ के साक्ष्य से पूर्णतया विरूद्ध है, मौखिक परिसाक्ष्य

पर पूरी तरह आधारित दोषसिद्धि को कायम नहीं रखा जा सकता – दोषसिद्धि अपास्त – अपील मंजूर।

B. Penal Code (45 of 1860), Section 302 – Medical/Ocular Evidence & Related/Interested Witnesses **– Held – Relation between appellant and deceased were inimical due to property issues – Prosecution witnesses are the interested witnesses – Contradiction between medical and ocular evidence cannot be ignored nor primacy can be given to ocular evidence because the said evidence is coming from related & interested witnesses – Not safe to record conviction. (Para 25 & 26)**

ख. दण्ड संहिता (1860 का 45), धारा 302 – चिकित्सीय/चाक्षुष साक्ष्य व संबंधी/हितबद्ध साक्षीगण – अभिनिर्धारित – संपत्ति विवाद्यक के कारण अपीलार्थी एवं मृतक के मध्य शत्रुतापूर्ण संबंध थे – अभियोजन साक्षीगण हितबद्ध साक्षीगण हैं – चिकित्सीय एवं चाक्षुष साक्ष्य के मध्य विरोधाभास को अनदेखा नहीं किया जा सकता, न ही चाक्षुष साक्ष्य को प्रधानता दी जा सकती है क्योंकि उक्त साक्ष्य, संबंधी व हितबद्ध साक्षीगण से आ रहा है – दोषसिद्धि अभिलिखित करना सुरक्षित नहीं।

C. Criminal Practice – Related & Interested Witness **– Held – 'Related' is not equivalent to 'interested' – Witness may be called 'interested' only when he derives some benefit from result of a litigation or in seeing the accused person punished – No hard and fast rule that evidence of 'interested' witness cannot be taken into consideration, burden is on Courts to consider it with care, caution and circumspection – Relationship can never be a factor to effect credibility of witness as it is not always possible to get independent witness. (Para 24)**

ग. दाण्डिक पद्धति – संबंधी व हितबद्ध साक्षी – अभिनिर्धारित – 'संबंधी', 'हितबद्ध' के समतुल्य नहीं – साक्षी को केवल तब 'हितबद्ध' कहा जा सकता है जब उसे मुकदमेबाजी के परिणाम से अथवा अभियुक्तगण को दण्डित होता देख, कुछ लाभ व्युत्पन्न होता है – कोई पक्का नियम नहीं है कि 'हितबद्ध' साक्षी के साक्ष्य को विचार में नहीं लिया जा सकता, इसे सतर्कता, सावधानी एवं एहतियात के साथ विचार में लेने का भार न्यायालयों पर है – संबंध कभी भी साक्षी की विश्वसनीयता को प्रभावित करने के लिए एक कारक नहीं हो सकता, क्योंकि स्वतंत्र साक्षी मिलना हमेशा संभव नहीं होता है।

Cases referred:

(2009) 15 SCC 612, (2016) 10 SCC 220, 1994 SCC Suppl. (2) 289, (2008) 3 SCC 795, 1953 AIR 415, (2007) 14 SCC 16, (2011) 6 SCC 288, (2011) 9 SCC 569, (2010) 10 SCC 259, 1976 (4) SCC 369, 2008 (16) SCC 73, 2018 (3) SCC 66, 2018 (5) SCC 549, (2018) 5 SCC 435.

Abhishek Tiwari, amicus curiae for the appellant.
Brindawan Tiwari, G.A. for the respondent.
A. Usmani, for the complainant.

J U D G M E N T

The Judgment of the Court was delivered by : **SUJOY PAUL, J. :-** The appellant alongwith two other persons, namely, Smt. Savitri Bai and Ms. Anjali were tried for committing offence under section 302 of Indian Penal Code (IPC) in S.T.No.113/07. The court below by judgment dated 07.06.2008 acquitted the other co-accused but convicted the appellant under section 302 of IPC and directed him to undergo life imprisonment with fine of Rs.25,000/- with default stipulation.

2. Briefly stated, the story of the prosecution is that on 31.3.2006 Nidhish Tiwari (P.W.1) lodged F.I.R (Ex.P/1) in P.S. Surkhi that he was sitting with his brother Binu Tiwari in front of his house. The appellant and his mother Savitri Bai started abusing his family members. When objected by the complainant, Savitri Bai stated unless one is murdered, she will not be satisfied. At the instance of Savitri Bai, appellant brought a gun and fired at Ashish on his chest. Raju who was starting (sic : standing) nearby also suffered bullet injury. Ashish was taken to hospital by Binu, Raju and Bali in the jeep of Sharad Tiwari. Upon receiving the information about the incident, F.I.R for committing the offence under section 307 of IPC was registered. At sagar hospital, Doctor declared Ashish as dead. Dr. B.K.Khare conducted the postmortem and prepared the report Ex.P/24. Excessive bleeding because of bullet injuries and shock was the reason of death. Because of death of Ashish, the offence is converted into section 302 of IPC. On completion of investigation, challan was filed against the accused persons under section 302, 302/34, 307 and 307/34 of IPC. Accused persons abjured the guilt and prayed for full fledged trial.

3. The court below by impugned judgment acquitted mother and sister of the appellant. The appellant was held guilty of committing offence under section 302 of IPC.

4. Shri Abhishek Tiwari, learned *amicus curiae* urged that the eye witness were solely interested witnesses. They stand to benefit from the impugned judgment. Accused and the appellant are members of one extended family which can be seen from the statement of Nidhish Tiwari (P.W.1) and Shubhashish Tiwari (P.W.2). There is a long standing property dispute between them. There are only four members in the appellant's family and their houses are adjacent. The eye witnesses share the same hospitality (sic: hostility) which the deceased share with the appellant. Not only this, the eye witness and deceased were history sheeters which can be seen from the statement of Nidish Tiwari (P.W.1) and Subhashish Tiwari (P.W.2). The statements of eye witnesses needs to be examined minutely.

5. The incident had taken place during "Navratri" i.e 31.3.2006. The investigating authority could not find out any independent witness corroborating

the prosecution story. No blood mixed soil etc. was recovered from the place of incident. There are material contradictions between the court statements and statements recorded under section 161 Cr.P.C of the eye witnesses. Bali Yadav (P.W.3) and Raju Karbariya (P.W.4) who were with the deceased at the time of incident had turned hostile. They took the name of one Laxman who had fired the fatal shot on deceased. The eye witnesses have deposed that shot was fired from a distance of 10 feet. The ballistic expert Choudhary Narendra Singh (P.W.25) in his examination in chief and cross-examination has punctured the story of prosecution. As per his version, the shot was fired from a distance of 84 feet. The seized shotgun was rusted and probably not used for last two years. Though the gun was capable of firing whether it fired that day or not could not be established by he (sic : the) prosecution. Reliance is placed on Modi's Medical Jurisprudence (25 Edition page 636). It is further urged that prosecution has failed to elicit from its own expert as to how fatal shot could have been fired from a distance of 10 feet. This establishes that eye witnesses implanted themselves later on owing to the old property dispute. Shri Tiwari argued that in a near shot, a very large surface area, apart from the wound, becomes black because of the gun powder. Blackness was found only inside the wound in this case. This happens because of expanding gases, gun powder gets mixed with the pellets. The shot was evidently fired from a long range i.e greater than 4 meter. The formula is the diameter of the spread of pellets (in inches) is equal to the range (in yards). The spread in this case was 28 inches. Hence, the expert opined that the shot was fired from 28 yards or 84 feet. In support of this contention, he placed reliance on the textbook of Forensic Medicine and Toxicology by Anil Aggrawal and judgment of Supreme Court in *State of Punjab Vs. Rajinder Singh*-(2009) 15 SCC-612.

6. The next contention is that four guns viz (i) shotgun, (ii) two *Bharmars,* (iii) one air gun were seized in the same crime number. Besides this, Abhay (original accused No.4) was allegedly carrying a country made pistol (Katta). The Bharmar being smooth bore could also have fired the shot. These guns were never sent to FSL Lab. In absence thereof, it cannot be said that prosecution has established its case beyond reasonable doubt.

7. The investigating agency did a witch hunt for two months and found no evidence against the accused persons. The arrest and seizure took place only on 31.5.2006. The investigating agency was under pressure and even attempt was made to pressurize the court below.

8. Learned *amicus curiae,* in support of aforesaid contentions placed reliance on following judgments *State of Punjab Vs. Rajinder Singh*-(2009) 15 SCC-612, *Mahavir Singh Vs. State of M.P.*-(2016) 10 SCC-220, *Maniram Vs. State of U.P.*-1994 SCC, Supl.(2)-289, *Puran Singh Vs. State of Uttaranchal*-(2008) 3 SCC-795, *Mohinder Singh Vs. State*-1953 AIR-415 and *Mahmood and*

another Vs. State of Uttar Pradesh-(2007) 14 SCC-16. In addition to oral submissions, Shri Tiwari submitted written submissions raising the same points.

9. *Per contra,* Shri Brindawan Tiwari, learned G.A. supported the impugned judgment and urged that there is direct evidence of the eye witnesses in the present case. F.I.R was lodged within two months of the incident. The X-ray incharge Dr. J.R.Uikey (P.W.24) proved Ex.P/18) which shows that in the entire front body of deceased, the pellet injuries were there. Dr. V.K.Khare (P.W.22) who conducted the postmortem clearly deposed that punctured wound have red/ black colour. The related/ interested witnesses cannot be discarded in view of *Brahmswaroop Vs. State of U.P.*- (2011) 6 SCC-288.

10. Shri A. Usmani, learned counsel, for the complainant placed reliance on statement of Dr.V.K.Khare (P.W.22). He argued that puncture/ blackness of wound shows that it has been caused by the gun "Article A". He also placed reliance on the opinion at page-125. Shri Usmani by placing reliance on *Mahmood and another Vs. State of Uttar Pradesh*-(2007) 14 SCC-16 and *State of M.P. Vs. Kalyan Singh*-(2011) 9 SCC-569 urged that there is no illegality or perversity in the impugned judgment which warrants interference in the present appeal.

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

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

13. The Court below on the basis of statement of Dr. Dushyant Kumar (PW/12) held that Ashish was brought to the hospital dead. He died because of excessive bleeding and bullet/gunshot injury. In the front portion of body of Ashish, 56 gunshot injuries were found which were mainly on his chest, stomach, face, arms and thighs. Most of the pallets (sic: pellets) caused injuries on chest and stomach. All the wounds caused by pallets (sic: pellets) were punctured wounds. The size of such wounds were 1/2 x 1/2 cm in diameter. The colour of wound was red and black.

14. The finding in the impugned judgment is mainly based on the statement of Nidheesh Tiwari (PW/1), Shubhashish Tiwari (PW/2) and Sushil Tiwari (PW/6). These witnesses are admittedly family members/relatives of deceased. The Court below opined that there is no inconsistency in the material particulars given by these eye witnesses. They satisfactorily and beyond reasonable doubt established that appellant caused aforesaid gunshot injury on the person of Ashish because of which he died. In addition, statement of Dr. Jinesh Diwakar (PW/14) was relied upon by the Court below coupled with the statement of Dr. B.K. Khare (PW/22) who conducted the Post Mortem of Ashish. PW/14 proved the X Ray of deceased Ex.P/18 whereas PW/22 proved the P.M. Report. Since incident was reported to police and FIR was lodged within half an hour, the Court below found substance

in the story of prosecution. The statement of Narendra Singh (PW/25), a senior scientific officer, FSL Sagar was not given weight for the reason it is just an opinion which cannot prevail over ocular evidence.

15. As noticed, learned Amicus Curiae Shri Abhishek Tiwari criticized the judgment on the ground (i) PW/1 and PW/2 are not only brothers/close relatives, they carry same hostility with the appellant which is evident from their deposition. Thus, conviction solely based on such statements of interested and related witnesses needs to be disturbed; (ii) in the factual matrix of present case, the Court below erred in not giving due weightage to the statement of expert (PW/25).

16. The aforesaid argument of appellant needs careful consideration. Nidheesh Tiwari (PW/1) clearly admitted that murder of his brother is an outcome of a property dispute amongst the family members. Indisputably, the appellant, deceased and PW/1 and PW/2 belong to same family. PW/1 clearly stated that appellant fired his brother Ashish from a distance of 10 feet. There was a single gunshot fired on him by appellant. In Para 24 of cross examination, he candidly admitted that certain lands of his and family of appellant are different whereas certain lands are common. In Para 31, he has admitted that he was not in talking terms with Ashish. He contested the election of Sarpanch and lost the same. The accused persons did not support him in the said election.

17. Shubhashish Tiwari (PW/2) also deposed that appellant fired on Ashish from a distance of 10-12 feet. A careful reading of statement of this witness also clearly shows that there was a previous enmity between the accused persons and family of deceased.

18. Bali Yadav (PW/3) and Raju Karbaria (PW/4) accepted that Ashish died because of a gunshot injury but did not take the name of appellant as assailant. Indeed, they took name of one Laxman who caused gunshot injuries because of which Ashish died. These witnesses were declared as hostile by the prosecution. They did not accept that Ex.P/4 and P/5 are their statements.

19. Similarly, Sharad Kumar Tiwari (PW/5) did not take the name of appellant as assailant. Although this witness admitted that he took Ashish to the hospital alongwith other persons. This witness was also declared as hostile.

20. The 12 Bore Gun No.3300902 was seized through Ex.P/13 and marked as Article 1. The seizure witnesses Vikas Kesarwani (PW/11) and PW/16 turned hostile and stated that no weapon was seized in their presence.

21. Narendra Singh (PW/25) is a senior scientific officer of FSL Sagar. This witness stated that deceased was wearing a Half Sleeve T Shirt (Article C2). 47 holes were found on this T Shirt. The measurement of these holes was

approximately 0.1 x 0.1 inch which were spread in the area of 27 x 28 inch. In the trouser of deceased (Article C3), ten holes of same size were found. Same is the condition of the underwear of Ashish wherein seven holes of same size were found. This witness stated that the said gun was full of rust which shows that it has not been used for last 2 years. This expert witness clearly deposed that the holes found on the clothes of deceased (Article C1) could appear if gunshot injury is caused from a distance of 28 yards or 84 feet. He, on more than one occasion, deposed that the size of holes on the clothes of deceased shows that gunshot injury is not caused from a distance of 10-12 feet. It is caused by a gun like Article A1 from a distance of 84 feet. The holes/injury of this nature cannot be caused if gunshot is fired from a distance of 10-12 feet. As noticed above, this expert evidence was not believed by the Court below for the simple reason that it is only an opinion and such opinion cannot be accepted when ocular evidence is trustworthy.

22. Before dealing with this aspect, it is apposite to consider the judgments cited by learned Amicus Curiae. The judgment of *Rajindar Singh* (supra) was relied upon to contend that in that case fatal injury was caused by a shot gun but injury was found to be by a gunshot fired by rifle. Since injuries on the person were not explained, it caused a dent on the prosecution story. In *Mahaveer Singh* (supra) and in (2007) 14 SCC 16 *(Mahmood v. State of U.P.),* it was held that if there exists a contradiction between medical evidence and ocular evidence, it can be held that the testimony of a witness has greater evidentiary value vis a vis the medical evidence. When medical evidence makes ocular testimony improbable, it becomes a relevant factor in the process of evaluation of evidence. If medical evidence goes far that it completely rules out all possibility of ocular evidence being proved, the ocular evidence may be disbelieved. Reference was made to a previous judgment (2010) 10 SCC 259 *(Abdul Sayeed vs. State of M.P.).* In our opinion, this judgment is very relevant and important in the instant case where ocular evidence does not match the expert evidence and eyebrows are raised on the ocular evidence because its coming from the mouth of related and interested witnesses. However, we will consider this aspect at appropriate stage in this judgment.

23. The judgment of *Mohinder Singh* (supra) was pressed in support of a point that in a case where death is due to injuries and wounds caused by a lethal weapon, it has always been considered to be the duty of the prosecution to prove by expert evidence that it was likely or at least possible for the injuries to have been caused with the weapon with which and in the manner in which they are alleged to have been caused. A duly qualified expert alone could ascertain whether injuries attributed to the appellant were caused by a gun from a close range as it suggested in the evidence. If ocular evidence is diametrically opposite to expert evidence, the conviction wholly based upon on oral testimony cannot be upheld.

24. In view of aforesaid principles laid down by Supreme Court the factual matrix of present case needs to be tested. The Court below in the impugned judgment held the appellant as guilty mainly on the basis of statement of Nidheesh Tiwari (PW/1) and Shubhashish Tiwari (PW/2). The Court below has not paid any heed to the fact that there exists a previous enmity between the family of deceased and accused persons. We are not oblivious of the settled legal position that 'related' is not equivalent to 'interested'. A witness may be called 'interested' only when he derives some benefit from result of a litigation or in seeing the accused persons punished. Similarly, there is no hard and fast rule that evidence of 'interested' witness cannot be taken into consideration. The only burden that is cast upon Courts is that such evidence must be considered with care, caution and circumspection. Relationship can never be a factor to effect credibility of witness as it is not possible always to get an independent witness [*See* 1976 (4) SCC 369 *(Sarwan Singh vs. State of Punjab),* 2008 (16) SCC 73 *(State of U.P. v. Kishanpal)* and 2018 (3) SCC 66 *(Latesh v. State of Maharashtra)]*

25. In a recent judgment reported in 2018 (5) SCC 549 *(Ganapathi and Anr. vs. State of T.N.),* the aforesaid legal position in relation to related witnesses was reiterated. In view of these judgments, it is clear like noonday that in an incident like the present one which had taken place at around 10:30 pm in the night in front of house of deceased, normally family members would be the natural witnesses. Thus, their statements cannot be discarded solely on the ground that they are related witnesses being family members. However, while considering the evidentiary value of statements of family members it needs to be seen whether they are merely related witnesses or interested as well. The Court below has failed to examine this facet whether they were interested witness or not. PW/1 and 2, in our view, are interested witnesses because admittedly their relations with the deceased and his family members (PW/1 & 2) were inimical. The relations between appellant accused and PW/1 & 2 were strained over property issues. Joint properties became reason because of which they were in inimical terms, hence it was not safe to record conviction on the basis of statements of PW/1 & 2 by ignoring the statement of expert witness PW/25. More so, when two prosecution witnesses have deposed that gunshot injury was actually caused by one Laxman and not by appellant Ajay. The Supreme Court recently in (2018) 5 SCC 435 *(Sudhakar v. State)* disbelieved the statements of PW/1 & 5, who were related witnesses because relation between the appellant/accused and said PWs were strained over property issues and they were in inimical terms. This judgment in our view is squarely applicable and it can be clearly said that PW/ 1 & 2 of instant case also had animosity with the appellant and they were interested in getting the appellant-accused punished. [*See Kishanpal* (supra)]

26. Apart from this, in view of judgment of *Mohinder Singh* (supra), we are of the opinion that in a case of this nature, where death is caused by a lethal weapon,

it was the duty of prosecution to prove by expert evidence that such injuries were possibly caused with a weapon allegedly used by appellant for murder. PW/1 & 2's statements alone are not sufficient to hold the appellant as guilty. We are unable to reject the evidence of PW/25 in view of nature of wounds found on the person of deceased. In other words, the contradiction between medical and ocular evidence in this case cannot be ignored nor primacy can be given to ocular evidence because the said evidence is coming from the related and interested witnesses. The prosecution has failed to discharge its duty to prove by expert evidence that injuries were possible from the weapon which is allegedly used by the appellant. [See *Mohindar Singh* (supra)]. Hence, the appellant deserves to be acquitted by getting the benefit of doubt.

27. In view of foregoing analysis, in our view, the prosecution has not proved its case beyond reasonable doubt before the Court below. It will not be in the interest of justice to give stamp of approval to the impugned judgment. Resultantly, the impugned judgment dated 07.06.2008 passed in ST. No.113/07 is set aside. If appellant's presence in the prison is not required in any other case, he be released forthwith. The appeal is allowed.

Appeal allowed

I.L.R. [2019] M.P. 2106

CIVIL REVISION

Before Mr. Justice Vishal Dhagat

C.R. No. 619/2019 (Jabalpur) decided on 1 October, 2019

ANKUR DUBEY ...Applicant

Vs.

JAYSHREE PANDEY …Non-applicant

A. Civil Procedure Code (5 of 1908), Section 15 and Order 7 Rule 11 – Pecuniary Jurisdiction **– Held – Every suit shall be instituted in the Court of lowest grade competent to try it – Suit valued at Rs. 57,75,655/- and Civil Judge Class-I, does not have jurisdiction to hear the matter – Suit is dismissed – Revision allowed. (Paras 9 to 12)**

क. सिविल प्रक्रिया संहिता (1908 का 5), धारा 15 एवं आदेश 7 नियम 11 – धन संबंधी अधिकारिता – अभिनिर्धारित – प्रत्येक वाद, उसका विचारण करने में सक्षम निम्नतम श्रेणी के न्यायालय में संस्थित किया जायेगा – वाद का मूल्य 57,75,655/– रू. है तथा व्यवहार न्यायाधीश वर्ग–I को मामले की सुनवाई करने की अधिकारिता नहीं है – वाद खारिज किया जाता है – पुनरीक्षण मंजूर।

B. Civil Procedure Code (5 of 1908), Order 7 Rule 11 – Scope – **Held – Application filed under Order 7 Rule 11 is to be considered on the basis of pleadings made by plaintiff in the suit. (Para 8)**

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 11 – विस्तार – **अभिनिर्धारित – आदेश 7 नियम 11 के अंतर्गत प्रस्तुत आवेदन पर, वादी द्वारा वाद में किये गये अभिवचनों के आधार पर विचार किया जाना है।**

C. Court Fees Act (7 of 1870), Section 7(iv)(c) – Ad Valorem Court fees **– Held – Plaintiff claiming 1/3rd share in property and seeking declaration of sale deed as null and void, though she is not a party to the sale deed – *Ad valorem* court fees on 1/3rd value of the registered sale deed is payable. (Para 9)**

ग. न्यायालय फीस अधिनियम (1870 का 7), धारा 7(iv)(सी) – मूल्यानुसार न्यायालय फीस **– अभिनिर्धारित – वादी द्वारा संपत्ति में एक तिहाई भाग का दावा तथा विक्रय विलेख को अकृत एवं शून्य करने की घोषणा चाही जाना, यद्यपि वह विक्रय विलेख का एक पक्षकार नहीं है – रजिस्ट्रीकृत विक्रय विलेख के एक तिहाई मूल्य पर मूल्यानुसार न्यायालय फीस देय है।**

Deepak Okhade, for the applicant.
Devdatt Bhave, for the non-applicant No. 1.
T.K. Khadka, P.L. for the non-applicant No. 11/State.

(Supplied: Paragraph numbers)

JUDGMENT

VISHAL DHAGAT, J. :- Applicant has filed the present civil revision against order dated 06.09.2019 passed in Civil Suit No.337/2018 by III Civil Judge Class-I, Satna.

2. Applicant has filed an application under Order 7 Rule 11 of the Code of Civil Procedure for rejection of civil suit on the ground that the suit is valued as per the whims of the plaintiff and the suit is filed before the Court which has no jurisdiction to hear the matter. Valuation of the suit was done incorrectly i.e. suit was undervalued and the court fees which is paid on the suit is insufficient. Learned trial Court has partly allowed the application and has directed the applicant to pay the court fees of Rs.12.5/- on the civil suit.

3. Counsel appearing for the non-applicant No.1 submitted that Civil Revision is not maintainable. It is submitted by him that even if the application under Order 7 Rule 11 C.P.C. is allowed then also the suit cannot be rejected for inadequate payment of court fees on the suit and he made a prayer for dismissal of the civil revision.

4. Considered the arguments of the counsel appearing for both the parties.

5. The civil suit is filed by the non applicant No.1 seeking relief of declaration of title in respect of 1/3rd share of the suit property, for declaration of judgment and decree dated 22.04.2018 to be null and void to the extent of plaintiff's interest and also to declare that registered sale deed dated 26.06.2018 and 03.07.2018 to the extent of plaintiff's interest be declared null and void. Plaintiff has also made a prayer for grant of relief of permanent injunction.

6. The civil suit is valued at Rs.57,75,655/- for territorial jurisdiction. This valuation and payment of court fees on such valuation is challenged by filing application for rejection of civil suit.

7. The land in question was shown as agricultural land and court fees was paid as per the land revenue to be paid on the said land. It is pleaded that plaintiff has averred and admitted in the plaint that the land is commercial in nature and a building is constructed on the land in question and on objection raised the value of land was determined at Rs.1,30,00,000/-.

8. Application filed under Order 7 Rule 11 C.P.C. is to be considered on the basis of pleadings made by plaintiff in the suit. Respondent No.1/plaintiff made averment in para 10 of the plaint that a Pakka house is built on 1250 square feet and a shop is built on 1320 square feet of land. It is further pleaded by the plaintiff that sale deed dated 26.06.2018 and 03.07.2018 may be declared null and void in respect of 1/3rd of his share over suit property.

9. As plaintiff/non-applicant No.1 wants to avoid the sale deed dated 26.06.2018 though she is not a party to the sale deed, therefore, she will be required to pay ad-valorum court fees on 1/3rd value of the registered sale deed dated 26.06.2018 and 03.07.2018. Further, the suit is valued at Rs.57,75,655/- and Civil Judge Class-I does not have jurisdiction to hear the civil suit.

10. As per Section 15 of the Code of Civil Procedure, 1908 every suit shall be instituted in the Court of lowest grade competent to try it. The word used in the section is "shall".

11. In view of the aforesaid, civil suit is to be instituted in the Court of competent jurisdiction who is empowered to hear the matter. Since this case has been filed before court of Civil Judge Class-I which is a court of limited pecuniary jurisdiction and has no jurisdiction to hear the matter, therefore, court below had committed an error in not allowing the application filed under Order 7 Rule 11 C.P.C. As the suit is not instituted in the court of competent jurisdiction.

12. In view of provisions of Section 15 of the Code of Civil Procedure read along with Order 7 Rule 11 C.P.C., the civil suit is dismissed. Order dated

06.09.2019 passed by Civil Judge Class-I, Satna is set aside and civil suit is dismissed.

13. Accordingly, this Civil Revision is allowed.

Revision allowed

I.L.R. [2019] M.P. 2109
CIVIL REVISION
Before Mr. Justice B.K. Shrivastava
C.R. No. 448/2018 (Jabalpur) decided on 1 October, 2019

SIDDHESHWARI DEVI (SMT.) & anr. ...Applicants

Vs.

KARAN HORA & ors. …Non applicants

A. Civil Procedure Code (5 of 1908), Section 11 & Order 7 Rule 11 – Principle of Res-Judicata **– Held – Previous suit dismissed under Order 9 Rule 8 CPC after taking evidence – Records of previous suit and present suit reveals that land in dispute and the cause of action is the same – Second suit is not tenable and liable to be rejected – Revision allowed. (Paras 15 to 17)**

क. सिविल प्रक्रिया संहिता (1908 का 5), धारा 11 व आदेश 7 नियम 11 – पूर्व–न्याय का सिद्धांत – अभिनिर्धारित – पूर्ववर्ती वाद को साक्ष्य लेने के पश्चात्, आदेश 9 नियम 8 सि.प्र.सं. के अंतर्गत खारिज किया गया – पूर्ववर्ती वाद एवं वर्तमान वाद के अभिलेख प्रकट करते हैं कि विवादित भूमि एवं वाद हेतुक समान है – द्वितीय वाद मान्य नहीं है एवं अस्वीकार किये जाने योग्य है – पुनरीक्षण मंजूर।

B. Civil Procedure Code (5 of 1908), Section 11 & Order 7 Rule 11 – Nature & Scope **– Held – Provision of Order 7 Rule 11 has not been exhausted – Some other instances may also be taken into consideration for abiding the vexatious and frivolous litigation – Question of *res-judicata* may also be considered at this stage, if for decision of aforesaid question, evidence is not required – Mainly, pleadings of plaint should be considered – If *prima facie*, suit appears to be barred by any laws or *res-judicata*, Court may pass order of rejection of plaint under Order 7 Rule 11 CPC. (Para 13)**

ख. सिविल प्रक्रिया संहिता (1908 का 5), धारा 11 व आदेश 7 नियम 11 – स्वरूप व व्याप्ति – अभिनिर्धारित – आदेश 7 नियम 11 के उपबंध को निःशेष नहीं किया गया है – तंग करने वाला एवं तुच्छ मुकदमा जारी रहने के लिए कुछ अन्य बातों को भी विचार में लिया जा सकता है – पूर्व–न्याय के प्रश्न को भी इस प्रक्रम पर विचार में लिया जा सकता है यदि उपरोक्त प्रश्न के विनिश्चय हेतु साक्ष्य अपेक्षित नहीं है – मुख्यतः, वाद पत्र के अभिवचनों को विचार में लिया जाना चाहिए – यदि प्रथम दृष्ट्या, वाद, किसी विधि अथवा पूर्व–न्याय द्वारा वर्जित प्रतीत होता है तब न्यायालय, आदेश 7 नियम 11 सि.प्र.सं. के अंतर्गत वादपत्र को अस्वीकार करने का आदेश पारित कर सकता है।

Cases referred:

I.L.R. 2009 M.P. 3167, I.L.R. 2010 M.P. 1588, AIR 2005 SC 2499, I.L.R. 2005 M.P. 1187=2006 [1] MPLJ 377.

Ajay Gupta, for the applicants.
Ravi Nandan Singh with *Akshat Arjariya*, for the non-applicants.

O R D E R

B.K. SHRIVASTAVA, J. :- This revision has been preferred under Section 115 of Civil Procedure Code against the order dated 18.05.2018 passed by Shri R.K. Soni, First Additional Judge to the Court of First Additional District Judge, Bhopal in Civil Suit No.16-A/2013 by which the Court dismissed the application filed by petitioners under Order VII Rule 11 of CPC.

2. It appears from the record that Karan Hora filed a Civil Suit No.16-A/2013 before the lower Court on 01.01.2013 for declaration of title and declaration regarding the sale deed as null and void. The defendants No.14, 15, 17 and 18 (petitioners before this Court) filed an application under Order VII Rule 11 of CPC on 16.04.2018. It is stated in the application that previously Civil Suit No.295-A/1998 was filed by Narayan Singh, Suresh Singh, Bhagwat Singh and Jaswant Singh for declaration and permanent injunction against Abdul Kuddus Khan, Bhopal District Cooperative Land Development Bank and Ram Singh etc. During the pendency of that suit the Bank auctioned the disputed land and sold out to Siddeshwari Devi Defendant No.14/petitioner No.1. Thereafter Siddeshwari Devi was also made party in that suit. The suit was based upon the pleadings that Narayan Singh etc. purchased the aforesaid land from previous owner Abdul Kuddus Khan on 31.07.1989. The aforesaid suit was dismissed on 15.05.2006 under Order IX Rule 8 of CPC, therefore, new suit is not tenable. It was requested that the plaint should be rejected under Order VII Rule 11 (d) of CPC.

3. The plaintiff of that previous case respondents No.3 to 5 and 6 to 9 filed the reply of the aforesaid application on 17.04.2018. Very short reply was filed and it was stated that the application has been filed for ulterior motives and to cause delay in disposal of the case. The provision of *res judicate* (sic: *res judicata*)is not applicable and there is no violation of the law as alleged.

4. After hearing both the parties, learned Court passed the order impugned on 18.05.2018 and dismissed the said application. The lower court said both cases are different in nature and the relief is also different, therefore, it cannot be said that both cases are based on the same cause of action. The Court held that the second suit is not barred.

5. It is submitted by the petitioners that the trial Court committed mistake by rejecting the aforesaid application. The plaintiff himself disclosed the facts of the

previous case. If the pleadings of both cases are taken into consideration then it appears that same cause of action has been stated. The previous suit was dismissed and if no action was taken against the dismissal of the previous suit then matter came to an end. The new suit is also based upon the same pleadings and the averments, therefore, the revision should be allowed and the order impugned be set aside by rejecting the plaint filed in new suit.

6. On the other side, learned senior counsel for the respondents submits that the trial Court did not commit any mistake by dismissing the application. The new suit was filed in 2013. The written statement was filed in 2015 and the application under Order VII Rule 11 of CPC has been filed in 2018. Therefore, it appears that the petitioners are interested only to cause delay in disposal of the suit. The parties are different and the cause of action is also different. The conduct of the petitioners should also be seen and the revision should be dismissed.

7. It will be useful to refer Rule 11 of Order VII of CPC, which is as under:-

> "11.**Rejection of plaint.**-The plaint shall be rejected in the following cases:-
>
> (a) where it does not disclose a cause of action;
>
> (b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;
>
> (c) where the relief claimed is properly valued but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;
>
> (d) where the suit appears from the statement in the plaint to be barred by any law;
>
> (e) where it is not filed in duplicate;
>
> (f) where the plaintiff fails to comply with the provisions of rule 9."

8. In the case of *Karim Bhai Vs. State Of Maharashtra & Ors.,* I.L.R. 2009 M.P. 3167, the Court held that the instances as given in Order VII Rule 11 cannot be regarded as exhaustive of all the cases, in which the Court can reject the plaint or is limiting the inherent powers of the Court in respect thereof. The provisions are procedural and enacted with an aim and object to prevent vexatious and frivolous litigation. The Court also said that it is required to see that the vexatious and frivolous litigation should not be allowed to proceed so as to kill the time of Court for nothing. Where the plaint does not disclose the cause of action, mere writing by the plaintiff that he is having cause of action, would not itself sufficient to hold

that plaintiff has disclosed the cause of action. The Court says in Paras 22 to 24 as under:-

> "**22**. Under Order VII Rule 11 CPC, a plaint shall be rejected on the ground mentioned in the Rule, but the instances as given cannot be regarded as exhaustive of all the cases, in which the Court can reject the plaint or is limiting the inherent powers of the Court in respect thereof. The provisions of Order VII Rule 11 CPC are procedural and they are enacted with an aim and object to prevent vexatious and frivolous litigation. The Court is also required to see that the vexatious and frivolous litigation should not be allowed to proceed so as to kill the time of the Court for nothing.
>
> **23.** According to me, the given case in hand is nothing but a vexatious and frivolous litigation, which is not permitted to proceed.
>
> **24.** I have gone through the reasonings assigned by the learned Appellate Court dismissing the appeal and I find those reasonings to be cogent. The decision of Klockner (Supra) placed reliance by the learned counsel for the appellants speaks that the powers under Order VII Rule 11 (a), CPC should not be exercised only on the ground that the plaintiff has no cause of action. According to me, the said decision is not applicable because taking the cumulative effect, apart from the reasonings, which have been assigned by the learned First Appellate Court and by this Court hereinabove, the plaint does not disclose a cause of action. Mere writing that the plaintiff is having cause of action would in itself is not sufficient to hold that the plaintiff has disclosed the cause of action. If all the circumstances are taken into cumulative effect, I am of the view that plaint does not disclose any cause of action."

9. In the case of *Shyama Prasad Datta & Ors. Vs. Arun Kumar Vasudeo & Ors.*, I.L.R. 2010 M.P. 1588, it has been held that if on the given facts the suit appears to be barred under some law that is on application of *principles of res judicata*, then the Court would be entitled to dismiss the suit applying the provisions contained under Order 7 Rule 11(c). The Court said that the earlier suit was filed by the Trust in which question of title, execution of gift deed were directly in issue and the Court decided the said issue against the Trust. In subsequent suit, the plaintiffs were claimed title through Trust without impleading the Trust. The Court held that if issues now can not be raised by the Trust, then any person claiming under Trust now cannot file suit and the suit is barred by principles of res *judicata*, the Court said in Para 16 as under:-

"**16**. It is to be seen that provisions of Section 11 of the Code of Civil Procedure would apply not only to the parties who were litigating earlier but, it shall apply to a case where the present dispute in the earlier suit was directly and substantially in issue, it was between the same party or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit. In such matter subsequent suit would be barred because of the findings in the earlier suit and the suit has been disposed of or decided in favour of or against some party. Undisputedly the earlier suit was filed by the Trust. The present plaintiffs are not claiming independently or in their personal rights. They are claiming under the Trust which on an earlier occasion had filed the suit and lost. The phrase 'between the parties under whom they or any of them claim' is not an empty formality. If the earlier suit was between same parties and it had come to its concluding end then any person claiming under that party which had earlier lost would not be allowed to raise the pleas or the issues which have already been decided by the earlier Courts. In the earlier suits if the question of title, execution of the gift deed and competence of Rai Bahadur P.C. Bose in executing the gift deed was directly in issue and the Courts decided the said issue against the trust. If the said issues now cannot be raised by the said trust then any person claiming under the trust now cannot file the suit."

10. In the aforesaid case of *Shyama Prasad Datta* (supra), the Court also said that while deciding an application filed under Order 7 Rule 11 CPC, the Court only has to see the pleadings in the plaint but at the same time it cannot be lost sight of that if on the given facts rather admitted facts the suit appears to be barred under some law that is on application of principles of res judicata, then the Court having powers to dismiss the suit by applying the provisions contained under Order 7 Rule 11(c) of the Code of Civil Procedure. The Court said in Para 19:-

"19. In so far as Shri Verma's argument relating to Order 7 Rule 11 C.P.C is concerned, true it is that while deciding an application filed under Order 7 Rule 11 C.P.C the Court only has to see the pleadings in the plaint but at the same time it cannot be lost sight of that if on the given facts rather admitted facts the suit appears to be barred under some law that is on application of principles of res judicata then the Court would be entitled to dismiss the suit applying the provisions contained under Order 7 Rule 11 (c) of the Code of Civil Procedure."

11. In *M/s. Makhija Construction and Enggr. Pvt. Ltd. vs. Indore Development Authority and others,* AIR 2005 SC 2499, it has been stated that principle of *res judicata* binds co-defendants if relief given or refused by

earlier decision involved a determination of an issue between co-defendant/co-respondents. In Paras 16 and 17 the Court said:-

> "**16.** However, the appellant is entitled to succeed on the ground that the order of the Division Bench disposing of Crescent's appeal operated as res judicata to bind not only Crescent but also Jagriti and the appellant. It makes no difference that Jagriti was a co-respondent with the appellant. The principle of res judicata has been held to bind co-defendants if the relief given or refused by the earlier decision involved a determination of an issue between co-defendants (or co-respondents as the case may be). This statement of the law has been approved as far back as in 1939 in Munni Bibi v. Trilokinath, 58 IA 158, 165, where it has been said that to apply the rule of res judicata as between co-defendants three conditions are requisite:-
>
> (1) There must be a conflict of interest between the defendants concerned; (2) it must be necessary to decide this conflict in order to give the plaintiff the relief he claims; and (3) the question between the defendants must have been finally decided.
>
> **17.**This view has been consistently followed by this Court. (See: Iftikhar Ahmed v. Sahid Meharban Ali, (1974) 2 SCC 151) where the principle was extended to bind co-plaintiffs; Mahboob Sahab v. Syed Ismail, AIR 1995 SC 1205)."

12. In *Ambika Prasad Bakshi Vs. Prabhu Dayal Mali And Ors.,*I.L.R. 2005 M.P. 1187 = 2006 [1] MPLJ 377, the Court said that the plea of res-judicata can be considered before filing written statement and any contrary view may defeat the object and purpose of Section 11 CPC. For application of principle of res judicata the Court said that sufficient material on record should be available to examine the identities as to parties of suit, subject matter of suit and jurisdiction of the Courts. The Court said in Para 9:-

> "9. While deciding this objection, this Court is required to look into the object of the principle of res judicata which is embodied in Section 11 of Code of Civil Procedure. The basis on which the said rule rests is founded on consideration of public policy. It is in the interest of public at large that the finality should attach to the Courts at large and decree also in the public interest and individuals should not be fixed again, in the same kind of litigation. If foundation for these two principles can be established from the material on record, application of Section 11 of Code of Civil Procedure is not liable to be deferred merely for want of written statement. This provision has already

been held mandatory by the Privy Council in Talluri Venkata Seshayya and others v. Thadikonda Kotiswara Rao and others , reported as AIR 1937 PC 1. In the decision reported in 1992 JLJ 25 the point for consideration was whether the application under Order 7 Rule 11 of Code of Civil Procedure may be decided before filing of the written statement. The point was decided by this Court with affirmation. Question whether the plea of bar of res judicata can be considered before filing of the written statement was not an issue in that case. Therefore, this authority cannot be treated as a precedent for the question involved herein. In order to ascertain the application of Section 11 of Code of Civil Procedure, there must be sufficient material on record to examine the identities as to:-

(1) Parties to the suit.
(2) Subject matter of the suit.
(3) Jurisdiction of the Courts."

13. Therefore, it is the settled position of law that the provision of Order VII Rule 11 has not been exhausted. Some other instances may also be taken into consideration for abiding the vexatious and frivolous litigation. The question of res *judicata* may also be considered at this stage, if for the decision of aforesaid question, the evidence is not required. Mainly the pleadings of plaint should be considered for deciding the aforesaid application. If prima facie it appears that the suit is barred by any law or res judicata , then the Court is not prohibited to pass an order for rejection of plaint under Order VII Rule 11 of CPC.

14. It appears from the pleadings and the documents submitted by the plaintiff before the lower Court that Abdul Kuddus Khan (defendant No.3 of previous suit and father of respondents No.2.1, 2.2 and husband of respondent No.2.3) was the real owner of the disputed land. He took a loan of Rs.1,16,000/- from Bank by creating the mortgage of disputed property. The previous suit No.295-A/1998 was filed by Suresh Singh, Bhagwat Singh, Jaswant Singh and Narayan Singh for declaration and permanent injunction. It was pleaded that Narayan Singh, Suresh, Bhagwat Singh and Jaswant Singh purchased the aforesaid land from the real owner Abdul Kuddus Khan by four sale deeds on 31.07.1989. It is also appeared from the record that respondents No.1 and 2 (Bank) of the previous suit sold the disputed land in auction to Siddeshwari Devi on 17.05.2000. Thereafter the plaintiff amended his plaint and Siddeshwari Devi was made party as defendant No.6. Narayan Singh expired during the pendency of previous suit. Therefore, his legal heirs were brought on record and they are respondents No.6 to 9 before this Court. The relief was claimed in previous suit to declare the plaintiff as owner of the land and a declaration was also sought that the land was not mortgaged with defendants No.1 and 2, therefore, defendants No.1 and 2 was not authorised to sale out the land to defendant No.4 or to any other person.

15. Order-sheets of previous suit has been filed as Annexure P/4, which indicate that the case was listed for evidence of defendants. Defendant witness Harihar Prasad Mishra was present but the plaintiff's Advocate was not present to cross examine the witness. The Court adjourned the case till 03:00 p.m. but when the counsel for the plaintiff not appeared then the Court closed the right of plaintiff to cross examine the defendant witnesses. On the same day the defendant declared his evidence as closed and the Court fixed the case for final arguments on 15.05.2006. Plaintiff and his Advocate were again absent on 15.05.2006. The Court postponed the hearing till 03:00 p.m. but when at 03:00 p.m. the case was taken the plaintiff remained absent. The Court dismissed the suit under Order IX Rule 8 of CPC. It appears that in absence of plaintiff the Court was unable to hear the final arguments and bound to dismiss the suit under Order IX Rule 8 of CPC. Therefore, it is clear that the previous suit No.295-A/1998 was dismissed on 15.05.2006 under Order IX Rule 8 of CPC.

16. As per pleadings, previous suit was filed by Suresh Singh, Bhagwat Singh, Jaswant Singh and Narayan Singh. During the pendency of the suit the defendant Bank auctioned the land, which was purchased by Siddeshwari Devi on 17.05.2000. Siddeshwari Devi was also party in the aforesaid suit. The respondents also said that injunction, Annexure P/1 was granted in the previous suit. It appears from the aforesaid order dated 17.11.1998 that the injunction was conditionally granted subject to furnishing the bail bond worth Rs.40,000/- and an undertaking. During arguments it has come into notice that the conditions was not fulfilled. No any bail bond or undertaking was furnished by the plaintiff. Therefore, it can be said that no injunction was in force. Narayan Singh (plaintiff No.4 of previous suit) sold the land in equal share to Purnendu Kumar Upadhyay and Rakesh Shukla on 18.11.2005. The aforesaid Rakesh Shukla sold his part to Karan Hora on 23.03.2010. Karan Hora is the plaintiff in second suit. On the other side, Siddeshwari Devi purchased the aforesaid land in auction conducted by the Bank on 17.05.2000. During pendency of the previous suit the auction was conducted because no injunction was in force. Siddeshwari Devi was also made party as defendant No.6 in the previous suit. The aforesaid Siddeshwari Devi sold the aforesaid land to M/s Kwality International and Abhijeet Buildcon Pvt. Ltd on 11.10.2012. Siddeshwari Devi executed two sale deeds. The first sale deed of 1.94 hectare of land was executed in favour of M/s Kwality International (defendant No.18 in new suit) and 4.05 hectare to Abhijeet Buildcon Pvt. Ltd (defendant No.17 in new suit).

17. Therefore, it appears that Karan Hora plaintiff of second suit is on the footing of Narayan Singh etc., who was plaintiff in the previous suit and the defendants are on the footing of Siddeshwari Devi who was defendant No.6 in the previous suit. The land in dispute is the same in both the suit. Abdul Kuddus Khan, who was the real owner of the land, took a loan of Rs.1,16,000/- from the Bank on

25.02.1988. Due to non payment of loan amount the Bank auctioned the disputed land, which was mortgaged with the Bank and Siddeshwari Devi purchased the aforesaid land during the pendency of previous suit. The new suit was also filed for declaration of title. Subsequent declaration is also sought to declare the sale deed as null and void, therefore, it is clear that the cause of action is also same. The parties cannot claim title more than of the previous owner. Because the previous suit was dismissed after taking the evidence, under Order IX Rule 8 of CPC, therefore, second suit is not tenable and the plaint was liable to be rejected. But the trial Court committed mistake by dismissing the application. The application, which was filed before lower Court having all details of previous case, but reply of the said application was only a formality. No any fact was denied in the aforesaid application but the trial Court overlooked the aforesaid aspect. Therefore, the order passed by the trial Court is not sustainable. The **revision is allowed**. The order dated 18.05.2018 passed in Civil Suit No.16-A/2013 is set-aside and the plaint of the new suit No.16-A/2013 is rejected.

Both the parties shall bear their own costs.

Revision allowed

I.L.R. [2019] M.P. 2117
CRIMINAL REVISION
Before Mr. Justice Anand Pathak
Cr.R. No. 972/2017 (Gwalior) decided on 19 August, 2019

MANUDATT BHARDWAJ & ors. ..Applicants

Vs.

SMT. BABITA BHARDWAJ …Non-applicant

***A. Protection of Women from Domestic Violence Act (43 of 2005), Sections 20, 23 & 26 and Criminal Procedure Code, 1973 (2 of 1974), Section 125 – Maintenance – Eligibility* – Held – Wife can seek interim maintenance/ maintenance under provisions of the Act of 2005 in addition to and alongwith any other relief including the relief of maintenance u/S 125 Cr.P.C. – Parallel receipt of interim maintenance/maintenance is certainly maintainable.**
(Para 8 & 10)

क. घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम (2005 का 43), धाराएँ 20, 23 व 26 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125 – भरणपोषण – पात्रता – अभिनिर्धारित – पत्नी, धारा 125 दं.प्र.सं. के अंतर्गत भरणपोषण का अनुतोष समाविष्ट करते हुए किसी अन्य अनुतोष के अतिरिक्त एवं साथ साथ, 2005 के अधिनियम के उपबंधों के अंतर्गत अंतरिम भरणपोषण/भरणपोषण चाह सकती है – अंतरिम भरणपोषण/भरणपोषण की समानांतर प्राप्ति निश्चित रूप से पोषणीय है।

***B. Protection of Women from Domestic Violence Act (43 of 2005), Section 20 and Criminal Procedure Code, 1973 (2 of 1974), Section 125 – Maintenance & Monetary Relief* – Held – Supreme Court concluded that monetary relief as referred in Section 20 of the Act of 2005 is different from maintenance. (Para 9)**

***ख. घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम (2005 का 43), धारा 20 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125 – भरणपोषण व आर्थिक अनुतोष* – अभिनिर्धारित – उच्चतम न्यायालय ने निष्कर्षित किया कि 2005 के अधिनियम की धारा 20 में यथा निर्दिष्ट आर्थिक अनुतोष, भरणपोषण से भिन्न है।**

Cases referred:

(2014) 10 SCC 736, 2016 (II) MPWN 73.

Anand Purohit, for the applicants.
Rahul Bansal on behalf of *S.K. Shrivastava*, for the non-applicant.

O R D E R

ANAND PATHAK, J. :- The present revision petition under Section 397, 401 of Cr.P.C. is preferred by the petitioner against the order dated 09-08-2017 passed by the 3rd Additional Sessions Judge, Gwalior in Criminal Appeal No.800162/2016 whereby the appeal preferred by the respondent has been allowed and awarded the maintenance of Rs.3,000/- as interim maintenance.

2. Precisely stated facts of the case are that the respondent married to petitioner No.1 -Manudatt Bhardwaj but due to domestic incompatibility, she was allegedly subjected to physical and mental harassment and removed from the household. Therefore, compelled by the circumstances, she filed an application under Section 23 of the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as 'the Act of 2005') before the trial Court for interim maintenance and residence.

3. The trial Court rejected the application. Appeal was preferred in which the appellate Court awarded Rs.3,000/- as interim maintenance but set off Rs.1500/- from the interim maintenance granted by competent Court under Section 125 of Cr.P.C. to the respondent. Petitioners are aggrieved by the grant of maintenance as awarded by the appellate Court, therefore, this revision has been preferred.

4. It is submitted by learned counsel for the petitioners that the appellate Court erred in reaching to the conclusion about maintenance aspect whereas no specific pleading has been made by the respondent about alleged cruelty committed by her in-laws and she is living at her parental home without any sufficient cause and therefore, she is not entitled for maintenance. Once she is already getting maintenance in the proceedings under Section 125 of Cr.P.C. and

also in the proceedings under Section 13 of the Hindu Marriage Act, 1955 (hereinafter referred to as 'the Act of 1955'), therefore, she is not entitled to get additional maintenance in absence of allegation of violence being proved.

5. On the other hand, learned counsel for the respondent opposed the prayer and submitted that the appellate Court has passed the order of grant of maintenance although the order has been passed in favour of respondent but still it needs modification because the amount cannot be adjusted with the interim maintenance awarded under Section 125 of Cr.P.C. Similarly, quantum is towards lower side because the respondent deserves Rs.10,000/- per month for her livelihood. He relied upon the judgment of Hon'ble Apex Court in the matter of *Juveria Abdul Majid Patni Vs. Atif Iqbal Mansoori and another,* (2014) 10 SCC 736 and the judgment of this Court in the matter of *Vishal Rathor Vs. Smt. Rakhi alias Priti Rathor,* 2016 (II) MPWN 73. Learned counsel for the respondent further informed that for modification of the order separate Cr.R.No.5184/2018 has also been filed. Thus, prayed for dismissal of petition.

6. Heard learned counsel for the parties and perused the documents appended thereto.

7. In the case in hand, petitioners have challenged the order dated 09-08-2017 on the ground that respondent is already getting maintenance under Section 125 of Cr.P.C. and proceedings under Section 13 of the Act of 1955. Although no document has been placed on record to indicate that any maintenance has been received by the respondent under Section 13 of the Act of 1955 nor any document has been placed for grant of maintenance under Section 125 of Cr.P.C. but since the appellate Court has taken note of interim maintenance granted by the Family Court under Section 125 of Cr.P.C., therefore, contention regarding interim maintenance under Section 125 of Cr.P.C. can be taken into account and other arguments regarding interim maintenance under Section 13 of the Act of 1955 is hereby rejected.

8. So far as question regarding parallel receipt of interim maintenance/ maintenance is concerned it is certainly maintainable. Respondent under Section 26 of the Act of 2005 can seek relief in addition to and along with any other relief that aggrieved person may seek in such suits or legal proceedings before the Civil or Criminal Court. Section 26 of is hereby reproduced for ready reference:

> ***"26. Relief in other suits and legal proceedings-***
>
> *(1) Any relief available under sections 18, 19, 20, 21 and 22 may also be sought in any legal proceeding, before a civil court, family court or a criminal court, affecting the aggrieved person and the respondent whether such proceeding was initiated before or after the commencement of this Act.*

> *(2) Any relief referred to in sub-section (1) may be sought for in addition to and along with any other relief that the aggrieved person may seek in such suit or legal proceeding before a civil or criminal court.*
>
> *(3) In case any relief has been obtained by the aggrieved person in any proceedings other than a proceeding under this Act, she shall be bound to inform the Magistrate of the grant of such relief.*

9. The Hon'ble Apex Court in the case of *Juveria Abdul Majid Patni* held that monetary relief as referred in Section 20 is different from maintenance. Relevant extract is reproduced below:

> *" The monetary relief as stipulated under Section 20 is different from maintenance, which can be in addition to an order of maintenance under Section 125 CrPC or any other law. Such monetary relief can be granted to meet the expenses incurred and losses suffered by the aggrieved person and child of the aggrieved person as a result of the domestic violence, which is not dependent on the question whether the aggrieved person, on the date of filing of the application under Section 12 is in a domestic relationship with the respondent."*

10. The respondent/wife can seek interim maintenance/maintenance under the provisions of the Act of 2005 in addition to and along with any other relief including the relief of maintenance under Section 125 of Cr.P.C.

11. Therefore, contention of the petitioners sans merits. So far as question regarding separate living is concerned it is a matter of evidence and that shall be decided by leading evidence. No illegality has been caused by Court below. Under the limited scope of revisional jurisdiction, instant revision lacks merits and is hereby dismissed.

12. Revision petition sans merits and is hereby **dismissed.**

Revision dismissed

I.L.R. [2019] M.P. 2121

CRIMINAL REVISION

Before Mr. Justice Vivek Rusia

Cr.R. No. 3372/2019 (Indore) decided on 27 August, 2019

JITENDRA & ors. ...Applicants

Vs.

STATE OF M.P. …Non-applicant

***A. Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 8/20 & 36(A)(4) and Criminal Procedure Code, 1973 (2 of 1974), Section 167(2) – Bail* – Held – Magistrate rejected the application u/S 167(2) Cr.P.C. on 28.05.2019 and thereafter challan has been filed on 09.06.2019 – Since challan is filed beyond the period of 60 days, therefore right u/S 167(2) Cr.P.C. is not to be treated as extinguished or frustrated – Impugned order quashed – Applicants directed to be released on bail – Revision allowed.**

(Para 12 & 16)

क. स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 8/20 व 36(A)(4) एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 167(2) – जमानत – अभिनिर्धारित – मजिस्ट्रेट ने 28.05.2019 को धारा 167(2) दं.प्र.सं. के अंतर्गत आवेदन को अस्वीकार किया एवं तत्पश्चात् 09.06.2019 को चालान प्रस्तुत किया गया है – चूंकि चालान को 60 दिनों की अवधि से परे प्रस्तुत किया गया इसलिए धारा 167(2) दं.प्र.सं. के अंतर्गत के अधिकार को समाप्त या विफल होना नहीं समझा जाना चाहिए – आक्षेपित आदेश अभिखंडित – आवेदकगण को जमानत पर छोड़ने के लिए निदेशित किया गया – पुनरीक्षण मंजूर।

***B. Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 2(vii-a) & 36(A)(4) and Central Government Notification, 2001 – Commercial Quantity – Period of Filing Challan* – Held – In present case, 20 kgs of 'ganja' seized – Commercial quantity would be any quantity greater than the quantity specified by Central Government Notification, which is specified as 20 Kgs for 'ganja' – Thus, commercial quantity for 'ganja' would be more than 20 kgs and not 20 kgs – If more than 20 kgs would have been seized, then period of filing challan would have been 180 days. (Para 9 & 10)**

ख. स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 2(viii-a) व 36(A)(4) एवं केन्द्रीय सरकार अधिसूचना, 2001 – वाणिज्यिक मात्रा – चालान प्रस्तुत करने की अवधि – अभिनिर्धारित – वर्तमान प्रकरण में, 20 किलोग्राम 'गांजा' जब्त – वाणिज्यिक मात्रा, केन्द्र सरकार की अधिसूचना द्वारा विनिर्दिष्ट मात्रा, जो कि 'गांजा' हेतु 20 कि.ग्रा. के रूप में विनिर्दिष्ट है, से अधिक की कोई मात्रा होगी – अतः, 'गांजा' हेतु वाणिज्यिक मात्रा 20 कि.ग्रा. से अधिक की होगी और न कि 20 कि.ग्रा. – यदि 20 कि.ग्रा. से अधिक जब्त किया गया होता तब चालान प्रस्तुत करने की अवधि 180 दिन होती।

Cases referred:

LAWS (HPH) 2003-6-2, 2001 Cr.L.R. [SC] 452, (1994) 5 SCC 410, (2001) 5 SCC 453, (2012) 12 SCC 1, (2018) 4 SCC 405.

Sanjay Sharma, for the applicants.
Yogesh Gupta, G.A. for the non-applicant/State.

O R D E R

VIVEK RUSIA, J. :- The petitioners have filed the present revision u/s. 397 read with Section 401 of Cr.P.C. against order dated 28.5.2019 whereby application filed u/s. 167(2) of Cr.P.C. has been rejected.

2. As per prosecution case, on 25.03.2019, on a discreet information, the police stopped Maruti Swift Car bearing Registration No.MP-09-CL-6626. It was found that the vehicle was being driven by the petitioner no.1 and two other petitioners were sitting on the back seat of the car and the plastic bag was found also below the back seat containing 20 Kgs 'Ganja'. After following the due procedure prescribed under law , the police arrested them and after completing the investigation, filed the charge-sheet under section 8/20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act' for short).

3. The petitioners filed an application under Section 167 (2) of Cr.P.C. before the Special judge who is having power of the magistrate under on the ground that the challan has not been filed within 60 days from the date of arrest; hence they are entitled for release on bail. The learned trial Court has rejected the application on the ground that 20 Kgs 'Ganja' was recovered from the petitioners which is a commercial quantity and under the provisions of Section 36(A)(4) of the NDPS Act and the period u/s. 167(2) of Cr.P.C. for filing the challan is 180 days which can be extended up to one year.

4. After rejection of the application by order dated 28.5.2019, the petitioners approached this Court by way of application u/s. 439 of Cr.P.C. (M.Cr.C. No.24989/2019) for grant of bail on the ground of 167(2) of Cr.P.C. Vide order dated 25.6.2019, this Court rejected the application as the petitioners did not file regular bail application u/s. 439 of Cr.P.C. before the Sessions Court before approaching this Court and observed that if they are aggrieved by order dated 28.05.2019 then they have a remedy of challenging order dated 28.5.2019 by way of a revision. Therefore, they have filed the present revision before this Court. It is made clear that they have not filed the application u/s. 439 of Cr.P.C. for grant of bail so far.

5. I have heard the learned counsel appearing for the parties and perused case-diary and the material available on record.

6. Shri Sanjay Sharma, learned counsel appearing for the petitioner, submitted that as per prosecution story, 20 Kg. of 'Ganja' was recovered from the possession of the petitioners, which is less than commercial quantity, therefore, the prosecution ought to have filed the challan within 60 days from the date of arrest. The petitioners were arrested on 28.3.2019 and 61 days in the custody were completed on 27.5.2019, thereafter, challan was filed on 9.6.2019, therefore, they rightly filed an application u/s. 167(2) of the Cr.P.C. Learned Special Judge has wrongly rejected the application on 28.5.2019. Learned Special Judge has wrongly rejected the application on the ground that 20 Kg. of 'Ganja' commercial quantity. He submits the word "commercial quantity" is defined in Section 2 (vii-a) of the NDPS Act and according to which, in relation to narcotic drugs and psychotropic substances, means any quantity greater than the quantity specified by the Central Government by notification in the Official Gazette. The Central Government had issued notification dated 19.10.2001, in which, commercial quantity is mentioned as 20 Kg., therefore, u/s. 36-A(4) for the offences punishable u/s. 19, 24 and 27A of the Act of 1985 involving commercial quantity, the period of filing challan is 180 days, hence the petitioners are entitled to be released on bail u/s. 167(2) of the Cr.P.C. In support of his contention, he has placed on the judgment of Full Bench of High Court of Himanchal Pradesh in the case of *Katto V/s. The State of Himanchal Pradesh* : LAWS (HPH) 2003-6-2.

7. Learned counsel for the petitioners further stated that as the alleged recovery of 20 Kg. 'Ganja' in terms of provisions prescribed in Section 20 (b) (B) of the Act of 1985, the maximum punishment can be awarded to the petitioners up to 10 years. Since the Police has failed to submit the final report u/s. 173 (2) of Cr.P.C. within 60 days, therefore the petitioners have now become entitled to be released on bail in terms of the provisions prescribed in Section 167(2) of the Cr.P.C. He further relied on the judgment of apex Court in the case of *Rajeev Choudhary V/s. State (N.C.T.) of Delhi* : 2001 Cr.L.R. [SC] 452, because offence u/s. 386 of IPC the punishment could be for 10 years or less.

8. *Per contra*, Shri Yogesh Gupta, learned Govt. Advocate appearing for the respondent/State, argued that the petitioners had filed an application u/s. 167(2) of the Cr.P.C. on 27.5.2019 i.e. on 61st day of their arrest, which had been rejected by learned Special Judge on 28.5.2019 and thereafter, they remained silent and the prosecution filed the challan on 9.6.2019. Thereafter, they approached this Court on 12.6.2019 by way of M.Cr.C. No.24989/2019 u/s. 439 of Cr.P.C. for grant of bail on the ground of violation of Section 167(2) of the Cr.P.C. which has been dismissed by this Court as not maintainable. Now the petitioners have approached this Court by way of present revision but the right to get bail u/s. 167(2) of the Cr.P.C. does not survive and extinguished for the release on bail because the challan had already been filed. In support of his contention he has placed reliance over the judgment of Constitutional Bench of apex Court in the case of *Sanjay*

Dutt V/s. State through CBI, Bombay : (1994) 5 SCC 410. Appreciation & Conclusion....

9. Undisputedly, as per prosecution story, quantity of 20 Kg. of 'Ganja' was recovered from the conscious possession of the present petitioners. They were arrested on 25.3.2019 and sent to judicial custody by the Special Judge on 28.3.2019. On completion of 61 days in custody, on 27.5.2019, they filed an application u/s. 167(2) of the Cr.P.C. Learned Special Judge has rejected the application vide order dated 28.5.2019 as the time for filing of challan is 90 days because the seized quantity of contraband is commercial quantity. The word "commercial quantity" is defined in Section 2(vii-a) of the Act of 1985, which is reproduced below :

> **"2(vii-a). - "commercial quantity"**, in relation to narcotic drugs and psychotropic substances, means any quantity greater than the quantity specified by the Central Government by notification in the Official Gazette."

According to the aforesaid definition, in relation to narcotic drug and psychotropic substances, any quantity greater than the quantity specified by the Central Government is a commercial quantity. The Central Government published the notification for small quantity and commercial quantity of narcotic drugs and psychotropic substances on 19.10.2001. Column 5 and 6 of the said table provides the quantity in accordance with articles mentioned in Column 2 to 4 of the said table. Entry 55 relates to 'Ganja', which is reproduced below :

Sl.No.	Name of Narcotic Drug and psychotropic substance (International non-proprietory name (INN)	Other non-propriety name	Chemical Name	Small Quantity (in gm.)	Commercial Quantity (in gm./kg.)
55	Ganja			1000	20 kg.

10. According to the aforesaid table, small quantity is 1000 gms. and the commercial quantity is 20 kg. Any quantity of Ganja between these two figure would be non-commercial quantity as per definition given in Section 2 (vii-a) of the Act of 1985. It is correct that as per aforesaid definition, the commercial quantity would be any quantity greater than the quantity specified by the Central Government by way of notification in the Official Gazette and the commercial quantity is specified it as 20 kg., therefore, the commercial quantity would be more than 20 kg. of 'Ganja'. It appears that under bonafide belief that 20 Kg ganja is Commercial Quantity , the prosecution did not file charge sheet within 60 days.

If the quantity of seized contraband is less than the commercial quantity, but greater than the small quantity, as per Section 22(b), same would be punishable by rigorous imprisonment for a term which may extend to 10 years and with fine. It means, the punishment would be 10 years or less than 10 years and according to, u/s. 36-A(4) for the offence punishable u/s. 19, 24 or 27A, the period of filing challan u/s. 167(2) of Cr.P.C. would be 180 days.

11. Under the proviso to Section 167(2) of the Cr.P.C., the Magistrate may authorise the detention of the accused person otherwise than in the custody of the police, beyond the period of 15 days, but no Magistrate shall authorise detention of the accused in custody for the period exceeding 90 days where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years. Therefore, this case is covered by the provisions contained in proviso (a)(ii) to Section 167(2) of Cr.P.C.

12. The only question which requires consideration by this Court is, whether at this stage, the petitioners are liable to be released from the custody on bail when the challan has already been filed on 9.6.2019. This issue came up for consideration before the Constitution Bench of apex Court in the case of *Sanjay Dutt* (supra), in which, it has been held that the indefeasible right of the accused does not survive or remain enforceable on the challan being filed, if already not availed of. Para 48 is reproduce below:-

> ***48**. We have no doubt that the common stance before us of the nature of indefeasible right of the accused to be released on bail by virtue of Section 20(4)(bb) is based on a correct reading of the principle indicated in that decision. The indefeasible right accruing to the accused in such a situation is enforceable only prior to the filing of the challan and it does not survive or remain enforceable on the challan being filed, if already not availed of. Once the challan has been filed, the question of grant of bail has to be considered and decided only with reference to the merits of the case under the provisions relating to grant of bail to an accused after the filing of the challan. The custody of the accused after the challan has been filed is not governed by Section 167 but different provisions of the Code of Criminal Procedure. If that right had accrued to the accused but it remained unenforced till the filing of the challan, then there is no question of its enforcement thereafter since it is extinguished the moment challan is filed because Section 167 CrPC ceases to apply. The Division Bench also indicated that if there be such an application of the accused for release on bail and also a prayer for extension of time to complete the investigation according to the proviso in Section 20(4)(bb), both of them should be considered together. It is obvious that no bail can be given even in such a case unless the prayer for extension of the period is rejected. In short, the grant of bail in such a situation is also subject to refusal of the prayer for extension of time, if*

such a prayer is made. If the accused applies for bail under this provision on expiry of the period of 180 days or the extended period, as the case may be, then he has to be released on bail forthwith.

13. In the case of *Uday Mohanlal Acharya v. State of Maharashtra*, (2001) 5 SCC 453, the Supreme Court of India has held as under :-

With the aforesaid interpretation of the expression "availed of" if the charge-sheet is filed subsequent to the availing of the indefeasible right by the accused then that right would not stand frustrated or extinguished, necessarily therefore, if an accused entitled to be released on bail by application of the proviso to sub-section (2) of Section 167, makes the application before the Magistrate, but the Magistrate erroneously refuses the same and rejects the application and then the accused moves the higher forum and while the matter remains pending before the higher forum for consideration a charge-sheet is filed, the so-called indefeasible right of the accused would not stand extinguished thereby, and on the other hand, the accused has to be released on bail. Such an accused, who thus is entitled to be released on bail in enforcement of his indefeasible right will, however, have to be produced before the Magistrate on a charge-sheet being filed in accordance with Section 209 and the Magistrate must deal with him in the matter of remand to custody subject to the provisions of the Code relating to bail and subject to the provisions of cancellation of bail, already granted in accordance with the law laid down by this Court in the case of Mohd. Iqbal v. State of Maharashtra

14. In case of *Sayed Mohd. Ahmad Kazmi v. State* (*Govt. of NCT of Delhi*), (2012) 12 SCC1, again the Supreme Court of India has retreated (sic: reiterated) as under:-

26. *The circumstances in this case, however, are different in that the appellant had exercised his right to statutory bail on the very same day on which his custody was held to be illegal and such an application was left undecided by the Chief Metropolitan Magistrate till after the application filed by the prosecution for extension of time to complete investigation was taken up and orders were passed thereupon.*

27. *We are unable to appreciate the procedure adopted by the Chief Metropolitan Magistrate, which has been endorsed by the High Court and we are of the view that the appellant acquired the right for grant of statutory bail on 17-7-2012, when his custody was held to be illegal by the Additional Sessions Judge since his application for statutory bail was pending at the time when the application for extension of time for continuing the investigation was filed by the prosecution. In our view, the right of the appellant to grant of statutory bail remained unaffected by the subsequent application and both the Chief Metropolitan Magistrate and the High Court erred in holding otherwise.*

15. Again, this issue came up for consideration before the Three Judges Bench of apex Court in the case of *Rambeer Shokeen V/s. State (NCT of Delhi)* : (2018) 4 SCC 405. in which, the law laid down in the case of *Sanjay Dutt* (supra) has been followed and held that no right had accrued to the appellant before filing of the charge-sheet; at best, it was an inchoate right, if the prayer for extension of period of filing the challan is pending and expressly rejected by the Court. Finally, the apex Court has held that the right to grant statutory bail would have enured to the accused only after rejection of the request for extension of time prayed by the Addl. Public Prosecutor

16. In the present case, learned Magistrate has rejected the application filed u/s. 16(2) of Cr.P.C. on 28.5.2019 and thereafter, prosecution filed the challan on 9.6.2019 . Hence the petitioners are entitled for bail because the challan is filed on 9.6.2019 beyond the period of 60 days, therefore, the right u/s. 167(2) of Cr.P.C. is not to be treated to be extinguished or frustrated.

Hence the revision petition is allowed, the impugned order dated 28.5.2019 whereby application filed u/s. 167(2) of Cr.P.C. has been rejected, is hereby quashed. That the applicants should be released on bail on such terms and conditions to the satisfaction of the learned Special Judge, and further the Special Judge would be entitled to deal with the applicants in accordance with law, since the charge-sheet has already been filed.

Revision allowed.

I.L.R. [2019] M.P. 2127
CRIMINAL REVISION
Before Mr. Justice Rajendra Kumar Srivastava
Cr.R. No. 2704/2019 (Jabalpur) decided on 12 September, 2019

PRAVEEN UPADHYAY & ors. ...Applicants

Vs.

SMT. RAJNI UPADHYAY …Non-applicant

***A. Protection of Women from Domestic Violence Act (43 of 2005), Section 12 – Maintainability* – Held – On 05.08.2017 wife lodged FIR u/S 498-A IPC where in her statement u/S 161 Cr.P.C., no allegation was made against A-2, 3 & 4, but later, on 13.01.2018 she filed application u/S 12 of the Act of 2005 alleging against them – Allegations are an afterthought and they have been implicated because of close relation with husband – *No prima facie* case against them – Proceedings against them is purely misuse of process of law and thus set aside – Revision partly allowed. (Paras 18, 19, 24 & 25)**

क. घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम (2005 का 43), धारा 12 – पोषणीयता – अभिनिर्धारित – दिनांक 05.08.2017 को पत्नी ने भा.दं.सं. की धारा 498–A के अंतर्गत प्रथम सूचना प्रतिवेदन दर्ज कराया जहां दं.प्र.सं. की धारा 161 के अंतर्गत उसके कथन में, ए–2, 3 व 4 के विरूद्ध कोई अभिकथन नहीं किया गया था, परंतु बाद में, दिनांक 13.01.2018 को उसने 2005 के अधिनियम की धारा 12 के अंतर्गत उनके विरूद्ध अभिकथन करते हुए आवेदन प्रस्तुत किया – अभिकथन एक पश्चात् कल्पना हैं तथा पति के साथ करीबी रिश्ता होने के कारण उन्हें आलिप्त किया गया – उनके विरूद्ध कोई प्रथम दृष्ट्या प्रकरण नहीं – उनके विरूद्ध कार्यवाहियां पूर्ण रूप से विधि की प्रक्रिया का दुरूपयोग है एवं इसलिए अपास्त – पुनरीक्षण अंशतः मंजूर।

***B. Protection of Women from Domestic Violence Act (43 of 2005), Section 12 & 27 – Territorial Jurisdiction* – Held – Wife can file a petition where she temporarily resides – Wife, after dispute, living at parental home at Barely, where she can file the application. (Para 5 & 6)**

ख. घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम (2005 का 43), धारा 12 व 27 – क्षेत्रीय अधिकारिता – अभिनिर्धारित – पत्नी वहां याचिका प्रस्तुत कर सकती है जहां वह अस्थायी रूप से रहती है – पत्नी, विवाद के पश्चात् पैतृक घर बरेली में रह रही है, जहां वह आवेदन प्रस्तुत कर सकती है।

***C. Protection of Women from Domestic Violence Act (43 of 2005), Sections 12, 18 & 31 and Criminal Procedure Code, 1973 (2 of 1974), Section 468 & 472 – Limitation – Applicability* – Held – Section 468 Cr.P.C. is applicable in relation to offences and not to application – No limitation period prescribed for application u/S 12 of the Act – Wife claiming maintenance which is a continuous cause, she cannot be debarred from it – Limitation u/S 468 Cr.P.C. is applicable only when there is a violation of protection order passed u/S 18 and consequently offence is committed u/S 31 of the Act of 2005 – Application however filed within one year, is not barred by limitation. (Paras 13 to 16)**

ग. घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम (2005 का 43), धाराएँ 12, 18 व 31 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 468 व 472 – परिसीमा – प्रयोज्यता – अभिनिर्धारित – दं.प्र.सं. की धारा 468 अपराधों के संबंध में लागू है तथा न कि आवेदन पर – अधिनियम की धारा 12 के अंतर्गत आवेदन हेतु कोई परिसीमा अवधि विहित नहीं है – पत्नी द्वारा भरणपोषण का दावा किया जाना जो एक निरंतर हेतुक है, उससे उसे विवर्जित नहीं किया जा सकता – दं.प्र.सं. की धारा 468 के अंतर्गत परिसीमा केवल तब लागू होती है, जब 2005 के अधिनियम की धारा 18 के अंतर्गत पारित हुये संरक्षण आदेश का उल्लंघन होता है तथा परिणामस्वरूप धारा 31 के अंतर्गत अपराध कारित होता है – आवेदन तथापि एक वर्ष के भीतर प्रस्तुत किया गया, परिसीमा द्वारा वर्जित नहीं है।

***D. Protection of Women from Domestic Violence Act (43 of 2005), Section 12 – Complaint Against Female Members – Maintainability* – Held –**

Apex Court concluded that remedies under Act of 2005 are available against female family members and others including non adult also. (Para 17)

घ. घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम (2005 का 43), धारा 12 – महिला सदस्यों के विरूद्ध परिवाद – पोषणीयता – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि 2005 के अधिनियम के अंतर्गत उपचार, परिवार की महिला सदस्यों तथा अन्य जिसमें अवयस्क भी शामिल है, के विरूद्ध उपलब्ध है।

***E. Limitation Act (36 of 1963), Article 137 – Period of Limitation – Practice* – Held – As per Article 137, any other application for which no period of limitation is provided, limitation period would be three years when the right to apply accrues – Application u/S 12 of the Act of 2005 filed within one year and is thus not barred by Limitation. (Para 8 & 16)**

ड. परिसीमा अधिनियम (1963 का 36), अनुच्छेद 137 – परिसीमा की अवधि – पद्धति – अभिनिर्धारित – अनुच्छेद 137 के अनुसार, कोई भी अन्य आवेदन जिसके लिए परिसीमा की कोई अवधि उपबंधित नहीं है, परिसीमा अवधि, आवेदन करने का अधिकार प्रोद्भूत होने की तिथि से तीन वर्ष होगी – 2005 के अधिनियम की धारा 12 के अंतर्गत आवेदन एक वर्ष के भीतर प्रस्तुत किया गया तथा इसलिए परिसीमा द्वारा वर्जित नहीं है।

Cases referred:

(2011) 2 SCC 588, (2018) SCC Online DEL 12956, 2010 (1) MPHT page 133, Crimes 2008 (2) page No. 235, (2016) 10 SCC 165, 1992 SCC (Cri) 426.

Vijay Kumar Shukla, for the applicant.
Amit Kumar Choubey, for the non-applicant.

O R D E R

RAJENDRA KUMAR SRIVASTAVA, J. :- Petitioners/non-applicants filed this Criminal Revision under Section 397/401 of the Cr.P.C. against the order dated 13.05.2019, passed by the learned Judicial Magistrate first Class, Bareli, District Raisen, in MJC No. 04/2019, whereby learned Judicial Magistrate First Class dismissed the objection presented by the petitioners/non-applicants before the trial Court.

2. Case of respondent in short is that in the trial Court, marriage of respondent was solemnized with petitioner No.1/non-applicant on 01.07.2009. Petitioner/non-applicant No.2 is brother-in-law, petitioner/non-applicant No.3 is father-in-law, petitioner/non-applicant No.4 is sister-in-law and petitioner/non-applicant No. 5 is mother-in-law of respondent. After marriage, respondent was living with petitioners/non-applicants. After some time of marriage, petitioners/non-applicants humiliated and tortured her and they demanded dowry to her. Therefore, brother of respondent had given Rs. 5 lakhs to the petitioners/non-applicants. Thereafter, petitioners/non-applicants again started

demand of Rs. 5 lakhs to the respondent. Due to non fulfillment of demand of dowry, petitioners/non-applicants had thrown her out from their house. Since then respondent is living at her paternal house. So, this is a case of domestic violence. Therefore, respondent filed an application under Section 12 of Domestic Violence Act. Apart from that she filed an application under Section 23 of Domestic Violence Act. Petitioners/non-applicants appeared before the Trial Court and raised objection for maintainability of the petition on the ground of jurisdiction. They submitted before the Trial Court that respondent can not get any relief from women members of his family. Therefore, this case is not maintainable against the petitioners/non-applicants No. 4 and 5. Incident was occurred at Hoshangaad said to alleged before one year and 8 months. So, this petition is barred by limitation. Respondent/complainant did not comply the provision of Section 468 of Cr.P.C. Respondent can only demand of maintenance from her husband. She can not get maintenance other petitioners/non-applicants. She can also not demand to right of living in the disputed house of petitioners/non-applicants No. 2 to 5. They prayed to Court to dismiss the petition but learned Trial Court dismissed the objection raised by the petitioners/non-applicants.

3. Learned counsel for the petitioners/non-applicants submits that impugned order dated 13.05.2019 is illegal, arbitrary and contrary to law, therefore, liable to be set aside. Incident occurred at Hoshangabad and case was registered under Section 498-A/34 of IPC also there. Therefore, petition is not maintainable at the Court of Bareli, District Raisen. Case under Section 498-A/34 of IPC was registered at Hoshangabad. Respondent/complainant may seek relief only against male members of the family. Complainant cannot seek relief for separate residential accommodation because the family of the petitioners is joint family. Complainant can also not seek any relief for compensation against the petitioners/non-applicants No. 2 to 5. Therefore, he prays for setting aside the order dated 13.05.2019 in Complaint case MJC No. 04/2019.

4. Learned counsel for the respondent/complainant submits that case is maintainable under the Protection of Women from Domestic Violence Act, 2005.The petitioners have continuously tortured and humiliated her thus they all are responsible and liable to be prosecuted under Domestic Violence Act. So far as territorial jurisdiction case is concerned, the petitioners have demanded dowry in her parental house on 05.03.2017. Thus, the case is maintainable is the territorial jurisdiction of District Raisen. Therefore, the order of trial Court is proper. There is no interference warranted in the impugned order.

5. Before proceeding further, it is appropriate to first read Section 27 of Protection of Women From Domestic Violence Act, 2005 which is quoted as under:-

" ***Protection of Women From Domestic Violence Act, 2005***—

Section 27 Jurisdiction-*(1) The court of Judicial Magistrate of the first class or the Metropolitan Magistrate, as the case may be, within the local limits of which—*

(a) the person aggrieved permanently or temporarily resides or carries on business or is employed; or

(b) the respondent resides or carries on business or is employed; or

(c) the cause of action has arisen, shall be the competent court to grant a protection order and other orders under this Act and to try offences under this Act.

(2) Any order made under this Act shall be enforceable throughout India."

6. It is evident from the aforesaid Section respondent/wife can file a petition, where, she temporarily resides. After the incident, respondent / wife is residing her parental home. Therefore, the Court of Judicial Magistrate First Class, Barely has jurisdiction to proceed the case.

7. Another ground which has been taken by the petitioner's counsel is that complainant has filed an application under section 12 of Protection of Women from Domestic Violence Act, 2005 is barred by limitation in view of the provision of Section 468 Cr.P.C. He stated that according to complainant, on 09.06.2016, when she came to her matrimonial house, she was driven out of the house making allegation of theft and since then she is residing in her parental house. An application was filed on 31.01.2018 after passing period of more than one year, thus, same is barred by limitation.

8. On perusal of provision of Section 12 of D.V. Act, it appears that no limitation period is prescribed for filing an application under the Act. At this juncture, it is necessary to mention that under Schedule of limitation Act, Article 137 provides that any other application for which no period of limitation is provided elsewhere in the Division, the limitation period will be three years when the right to apply accrues. In the petition, no fact mentioned that as to how petitioner is saying limitation period is one year for filing this application. Since, the petitioner is argued on the point of the provision of Section 468 of Cr.P.C., therefore, this Court deals with all the legal aspects in this regard. On perusal of order passed by learned trial Court it appears that the petitioner has also raised the same issue before the trial Court and relied the judgment of Hon'ble Apex Court in the case of *Inderjit Singh Grewal Vs. State of Punjab* and another reported in (2011)2 SCC 588. It is necessary to quote relevant para of the judgment of Hon'ble Supreme Court passed in *Inderjit Singh Grewal's* case. Same is quoted as under:-

" 32. Submissions made by Shri Ranjit Kumar on the issue of limitation, in view of the provisions of Section 468 Cr.P.C., that the complaint could be filed only within a period of one year from the date of the incident seem to be preponderous in view of the provisions of Sections 28 and 32 of the Act 2005 read with Rule 15(6) of The Protection of Women from Domestic Violence Rules, 2006 which make the provisions of Cr.P.C. applicable and stand fortified by the judgments of this court in Japani Sahoo v. Chandra Sekhar Mohanty, and Noida Entrepreneurs Association v. Noida."

9. On careful reading of above cited judgment it appears that same has been passed by the Hon'ble Apex Court in reference to provision of Sections 12, 28 and 32 read with rule 15(6) of D.V. Act. These provisions and rules are also quoted as under:-

" ***Section 12. Application to Magistrate.—***

(1) An aggrieved person or a Protection Officer or any other person on behalf of the aggrieved person may present an application to the Magistrate seeking one or more reliefs under this Act:

Provided that before passing any order on such application, the Magistrate shall take into consideration any domestic incident report received by him from the Protection Officer or the service provider.

(2) The relief sought for under sub-section (1) may include a relief for issuance of an order for payment of compensation or damages without prejudice to the right of such person to institute a suit for compensation or damages for the injuries caused by the acts of domestic violence committed by the respondent: Provided that where a decree for any amount as compensation or damages has been passed by any court in favour of the aggrieved person, the amount, if any, paid or payable in pursuance of the order made by the Magistrate under this Act shall be set off against the amount payable under such decree and the decree shall, notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), or any other law for the time being in force, be executable for the balance amount, if any, left after such set off.

(3) Every application under sub-section (1) shall be in such form and contain such particulars as may be prescribed or as nearly as possible thereto.

(4) The Magistrate shall fix the first date of hearing, which shall not ordinarily be beyond three days from the date of receipt of the application by the court.

(5) The Magistrate shall endeavour to dispose of every application made under sub-section (1) within a period of sixty days from the date of its first hearing.

*" **Section 28. Procedure.**—(1) Save as otherwise provided in this Act, all proceedings under sections 12, 18, 19, 20, 21, 22 and 23 and offences under section 31 shall be governed by the provisions of the Code of Criminal Procedure, 1973 (2 of1974).*

(2) Nothing in sub-section (1) shall prevent the court from laying down its own procedure for disposal of an application under section 12 or under sub-section (2) of section 23.

Section 32. Cognizance and proof.—*(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the offence under sub-section (1) of section 31 shall be cognizable and non-bailable.*

(2) Upon the sole testimony of the aggrieved person, the court may conclude that an offence under sub-section (1) of section 31 has been committed by the accused. "

10. Further, rules 15(6) of the Protection of Women from Domestic Violence Rules, 2006 is also reproduced as under:-

" (6) When charges are framed under section 31 or in respect of offences under section 498A of the Indian Penal Code, 1860 (45 of 1860), or any other offence not summarily triable, the Court may separate the proceedings for such offences to be tried in the manner prescribed under Code of Criminal Procedure, 1973 (2 of 1974) and proceed to summarily try the offence of the breach of Protection Order under section 31, in accordance with the provisions of Chapter XXI of the Code of Criminal Procedure, 1973 ."

11. To settle the legal position, it is also necessary to consider Section 18 of D.V. Act which is also reproduced as under:-

*"**18. Protection orders**.—The Magistrate may, after giving the aggrieved person and the respondent an opportunity of being heard and on being prima facie satisfied that domestic violence has taken place or is likely to take place, pass a protection order in favour of the aggrieved person and prohibit the respondent from—*

(a) committing any act of domestic violence;

(b) aiding or abetting in the commission of acts of domestic violence;

(c) entering the place of employment of the aggrieved person or, if the person aggrieved is a child, its school or any other place frequented by the aggrieved person;

(d) attempting to communicate in any form, whatsoever, with the aggrieved person, including personal, oral or written or electronic or telephonic contact;

(e) alienating any assets, operating bank lockers or bank accounts used or held or enjoyed by both the parties, jointly by the aggrieved person and the respondent or singly by the respondent, including her stridhan or any other property held either jointly by the parties or separately by them without the leave of the Magistrate;

(f) causing violence to the dependants, other relatives or any person who give the aggrieved person assistance from domestic violence;

(g) committing any other act as specified in the protection order."

12. On careful reading of these provisions, it appears that Section 12 provides a remedy to aggrieved person or protection officer to file an application to the magistrate seeking one or more relief under D.V. Act. Thereafter, the Magistrate may pass a protection order under Section 18 of D.V. Act if on being heard the aggrieved person and the respondent, he finds that any domestic violence has taken place or is likely to take place. In the reference of Sections 18, Section 31 provide the penalty for breach of protection order by the respondent and if it is found that the respondent breaches of protection order or of an interim protection order, he commits offence under the D.V. Act and same shall be punishable with imprisonment of either description for a term which may extend to one year, or with fine which may extend to twenty thousand rupees, or with both. Provision of section 28 speaks about the applicability of Cr.P.C in D.V Act with regard to all proceedings under Sections 12, 18, 19, 20, 21, 22 and 23 and offences under section 31 of D.V. Act. Section 32 makes the offence under section 31 cognizable and non bailable. Rule 15(6) provides about the discretion of magistrate to separate proceeding in respect to charges framed under Section 31 of DV Act or Section 49(A) or any other offences is not summarily triable and provides the power to proceed to summarily try the offence of the breach of protection order under Section 31, in accordance with the provision of chapter XXI of the Cr.P.C.

13. Now, from above discussion, it is gathered that the section 31 of D.V act is offence to breach protection order passed by learned Magistrate whereas Sections 12,18,19,20,21 and 23 are procedural provision under D.V. Act. Now the question remains with regard to applicability of Section 468 Cr.P.C in D.V. Act. to the context of issue involved in the present case. Let read the section 468 Cr.P.C.

*" **468. Bar to taking cognizance after lapse of the period of limitation-** (1) Except as otherwise provided elsewhere in this Code, no Court shall take cognizance of an offence of the category specified in sub- section (2), after the expiry of the period of limitation.*

(2) The period of limitation shall be-

(a) six months, if the offence is punishable with fine only

(b) one year, if the offence is punishable with imprisonment for a term not exceeding one year;

(c) three years, if the offence is punishable with imprisonment for term exceeding one year but not exceeding three years.

(3) For the purposes of this section, the period of limitation in relation to offences which may be tried together, shall be determined with reference to the offence which is punishable with the more severe punishment or, as the case may be, the most severe punishment."

14. It appears that Section 468 Cr.P.C. deals with bar to take cognizance after lapse of the period of limitation and according to it Court can not take cognizance in respect to offence punishable with fine, upto one year and one year to three years if the period of 6 months, 1 year and 3 years, respectively have been expired. Therefore, it is not in dispute section 468 Cr.P.C deals with bar for taking cognizence (sic: cognizance) with respect to offence not to application. Further, Section 472 provides the provision of continuing offence and in the case of a continuing offence, a fresh period of limitation shall begin to run at every moment of the time during which the offence continues. Now the question arises is there any limitation period to file an application under Section 12 of D.V.Act before the Court and the proceeding of Section 12 of D.V. Act is a continuous cause of action or not?

15. The High Court of Delhi dealt with the issue in the case of *Anthony Jose Vs. State of NCT of Delhi and others* reported in (2018) SCC Online DEL 12956 and held that non providing of maintenance is a continuous cause of action and wife would not debar for seeking maintenance under Section 12 of D.V. Act and the complaint thereon cannot be dismissed being barred by limitation.

16. In the present case, it appears that in her application filed by the respondent, she has claimed the maintenance from the petitioner. Therefore, now settled legal position is that no limitation period has been prescribed for an application under Section 12 of D.V Act and non providing of maintenance is continuous cause and wife cannot be debarred to seek the maintenance under Section 12 of D.V. Act and her complaint cannot be dismissed being barred by limitation. The applicability of limitation period under Section 468 of Cr.P.C. comes into the picture only when there is violation of protection order passed under Section 18 of D.V Act and consequently offence is committed under Section 31 of D.V. Act. In the present case respondent has not filed any proceeding with regard to breach of protection order by the petitioner/non applicant. Apart from that in the complainant (sic: complaint), filed by the complainant under Section 12 of D.V. Act, it is apparent that though she was driven out of the house on 09.06.2016 but she further specifically alleged that on 05.03.2017, petitioners/non-applicants came to her parental house and demanded dowry. As the application filed on 31.01.2018, even within a period of one year, is not barred by limitation. The principle laid down in the *Inderjit Singh's* Case is not adverted

to this case. Hence, the ground took by the petitioner's counsel with regard to limitation is hereby discarded.

17. Learned counsel for the petitioners/accused submits that under Sections 12 and 22 of Domestic Violence Act, the complainant may seek relief only from the male members not female members of the family of petitioner No.1. Therefore, petition is not maintainable against female members of family of petitioner No.1. In this regard the petitioners have placed reliance in the case of *Tahmeena Qureshi Vs. Sajiya* reported in 2010(1) MPHT page 133 and *Ajaykant Sharma Vs. Smt. Alka Sharma*, Crimes 2008(2) page No. 235 but the Hon'ble Apex Court in the case of *Hiral P. Harsora and others Vs. Kusum Narottamdas Harsora And Ors* reported in (2016)10 SCC 165. The Hon'ble Apex Court held that the remedies under the Act of 2005 are available even against female family members and others including non adult. So in view of this, petition is maintainable against the family members of petitioner No.1 under Protection of Women of Domestic Violence Act, 2005.

18. Learned counsel for the petitioners/accused submits that petitioner/ accused No.2 is brother-in-law, petitioner/accused No.3 is father-in-law and petitioner/accused No.4 is sister-in-law of respondent/complainant. Respondent/ complainant lodged the FIR on 05.08.2017, thereafter FIR was registered under Section 498-A of IPC against the petitioner/non-applicant No.1 and petitioner/non-applicant No. 5. The statements under Section 161 of Cr.P.C. has also been recorded of the respondent/complainant. These documents are un-controverted documents. Therefore, these documents can be seen in this petition.

19. It is true that respondent/complaint (sic: complainant) lodged a complaint against petitioners/accused No.1 and 5 on 05.08.2017. FIR was registered under Section 498-A of IPC against the petitioners No. 1 and 5. It is evident from these documents, no allegation made by the respondent/complainant against the petitioners/non-applicant Nos. 2, 3 and 4. It is admitted fact that after 05.08.2017, respondent/complainant did not live with petitioners/non-applicants. So it is evident that respondent/complainant did not alleged any fact of humiliating and torturing against the petitioners/non-applicants No. 2, 3 and 4. She admitted this fact in her complaint that she lived happily about 8 months in matrimonial house. Thereafter, petitioner/non-applicant No. 1 had come Hoshangabad, So she lived with him at Hoshangabad. Her mother-in-law used to come at Hoshangabad and tortured and humiliated her. So it is evident that respondent/complainant did not allege any fact against the petitioner/non-applicants No. 2, 3 and 4. She has filed a petition under Section 12 of Domestic Violence Act. On 13.01.2018 alleging against petitioners/non-applicant No. 2, 3 and 4. She alleged that these petitioners/non-applicant demanded dowry and due to non fulfillment of the same they tortured and humiliated her. Therefore, it is evident that allegation of

petitioners/non-applicants No. 2, 3 and 4 are afterthought. Petitioners/non-applicant No. 2, 3 and 4 have been implicated in this case only to relation with petitioner/non-applicant No.1. Thus, prima facie no case is made out against them. Therefore, the proceedings continuous against petitioners/non-applicants No.2, 3 and 4 be considered is purely misused of process of law.

20. In the case of State of *Harayana Vs. Bhajan Lal and others* reported in 1992 SCC (Cri) 426 the Hon'ble Apex court has held as under:-

> *"(1) where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused;*
>
> *(2) where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code;*
>
> *(3) where the un-controverted allegations made in the FIR or 'complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused;*
>
> *(4) where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code;*
>
> *(5) where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused;*
>
> *(6) where there is an express legal bar engrafted in any of the provisions of the code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party;*
>
> *(7) where a criminal proceeding is manifestly attended with malafide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."*

21. The Hon'ble Apex court has laid down seven guide lines for exercising the inherent power of High Court under Section 482 of Cr.P.C. for quashing the FIR.

22. Having read the above said principles, it is manifest that High Court should use its inherent power under Section 482 of Cr.P.C. to secure the ends of justice or to prevent an abuse of the process of any Court, but while exercising its power the high Court must evaluate whether the ends of justice would justify the exercise of the inherent power.

23. No case is made out against the petitioners/non-applicant No. 2, 3 and 4. So inherent power can be invoked to set aside order dated 13.05.2019, passed by the learned Judicial Magistrate first Class, Bareli, District Raisen, in MJC No. 04/2019, in regard of petitioners No. 2, 3 and 4.

24. As far as petitioners/non-applicant No. 1 and 5 are concerned, there is prima facie allegation about torturing and harassing the respondent/complainant is available on the record, allegation will be investigated at the trial. So at this stage case of petitioner No. 1 and 5 is not appropriate to invoke inherent jurisdiction of the Court to set aside the proceeding.

25. Accordingly, this revision is **partly allowed**. Impugned order dated 13.05.2018 in MJC No. 4/2019 pending before JMFC, Bareli District Raisen is hereby set aside in relation to petitioners No. 2 to 4. Proceeding of MJC No. 4/2019 shall be continued with regard to petitioners No. 1 and 5 and any findings passed by this Court shall not affect the case of petitioner No. 1 and 5 in any manner. Needless to say the learned trial Court shall proceed with the trial on his own discretion with being influenced from order of this Court.

Revision partly allowed.

I.L.R. [2019] M.P. 2138
CRIMINAL REVISION
Before Smt. Justice Anjuli Palo
Cr.R. No. 5577/2018 (Jabalpur) decided on 23 September, 2019

KAPIL ...Applicant

Vs.

STATE OF M.P. …Non-applicant

A. Penal Code (45 of 1860), Section 182 and Criminal Procedure Code, 1973 (2 of 1974), Section 195(1)(a)(i) – Complaint by Court/Private Party – Maintainability **– Held – No complaint is necessary for commission of offence which is not related to any Court proceeding – In present case, complaint was not at the instance of private party but was at the instance of investigating agency – Provision of Section 195(1)(a)(i) is not applicable – Proceeding maintainable – Revision dismissed. (Para 11 & 16)**

क. दण्ड संहिता (1860 का 45), धारा 182 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 195(1)(a)(i) – न्यायालय / निजी पक्षकार द्वारा परिवाद – पोषणीयता – अभिनिर्धारित – ऐसे अपराध जो न्यायालय की किसी कार्यवाही से संबंधित नहीं है, के कारित होने पर कोई परिवाद आवश्यक नहीं है – वर्तमान प्रकरण में, परिवाद निजी पक्षकार के कहने पर नहीं बल्कि अन्वेषण एजेंसी के कहने पर दायर किया गया – धारा 195(1)(a)(i) का उपबंध लागू नहीं होता – कार्यवाही पोषणीय – पुनरीक्षण खारिज।

***B. Penal Code (45 of 1860), Section 211 and Criminal Procedure Code, 1973 (2 of 1974), Section 195(1)(b)(i) – Cognizance – Ingredients – Held* – For taking cognizance of offence u/S 211 IPC, making of complaint in writing is mandatory when the offence is alleged to have been committed, in or in relation to any proceedings in Court by that or any Court to which that Court is administratively subordinate. (Para 10 & 11)**

ख. दण्ड संहिता (1860 का 45), धारा 211 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 195(1)(b)(i) – संज्ञान – घटक – अभिनिर्धारित – भा.दं.सं. की धारा 211 के अंतर्गत अपराध का संज्ञान लेने के लिए, ऐसे न्यायालय या किसी अन्य न्यायालय जिसके वह न्यायालय प्रशासनिक रूप से अधीनस्थ है, द्वारा लिखित में परिवाद करना आज्ञापक है जब ऐसे अपराध के बारे में यह अभिकथित है कि वह किसी न्यायालय में की कार्यवाही में या उसके संबंध में किया गया है।

***C. Criminal Procedure Code, 1973 (2 of 1974), Section 227 & 228 – Framing of Charge* – Held – Facts cannot be adjudicated at the initial stage of framing of charge and without taking evidence on record – No interference required under the revisional jurisdiction. (Para 13)**

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 227 व 228 – आरोप की विरचना – अभिनिर्धारित – आरोप विरचना के प्रारंभिक प्रक्रम पर तथा साक्ष्य के अभिलेख पर लिये बिना, तथ्यों का न्यायनिर्णयन नहीं किया जा सकता – पुनरीक्षण अधिकारिता के अंतर्गत किसी हस्तक्षेप की आवश्यकता नहीं।

***D. Penal Code (45 of 1860), Section 182 – False Information – Ingredients* – Held – Gist of offence u/S 182 IPC is giving false information so as to cause the public servant to act upon it – Offence is complete when the information bleaches the public servant – FIR indicates that on basis of false information by applicant regarding offence committed with him u/S 307/34 IPC, report was lodged by Complainant. (Para 8 & 9)**

घ. दण्ड संहिता (1860 का 45), धारा 182 – मिथ्या सूचना – घटक – अभिनिर्धारित – भा.दं.सं. की धारा 182 के अंतर्गत अपराध का तात्पर्य मिथ्या सूचना देना है ताकि लोक सेवक उस पर कार्रवाई करे – अपराध पूर्ण होता है, जब जानकारी लोक सेवक को विरंजित करती है – प्रथम सूचना प्रतिवेदन यह इंगित करता है कि भा.दं.सं. की धारा 307/34 के आवेदक के साथ कारित हुए अपराध के संदर्भ में उसके द्वारा दी गई मिथ्या सूचना के आधार पर, परिवादी द्वारा प्रतिवेदन दर्ज किया गया था।

E. Arms Act (54 of 1959), Section 25 & 27 – Ground **– Held – Police recovered unlicensed country made pistol and cartridges from possession of applicant – Sufficient to implicate him for offence u/S 25 & 27 of the Act of 1959. (Para 9)**

ड. आयुध अधिनियम (1959 का 54), धारा 25 व 27 – आधार – अभिनिर्धारित **– पुलिस ने आवेदक के कब्जे से बिना अनुज्ञप्ति वाली देशी पिस्तौल एवं कारतूस बरामद किये – उसे 1959 के अधिनियम की धारा 25 व 27 के अंतर्गत अपराध के लिए आलिप्त करने हेतु पर्याप्त है।**

Cases referred:

(2017) 14 SCC 855, (2004) 7 SCC 659, (2012) 9 SCC 460, (2017) 3 SCC 198.

Amit Dubey, for the applicant.
Som Mishra, G.A. for the non-applicant/State.

O R D E R

ANJULI PALO, J :- This revision has been filed by the applicant against the order dated 03.10.2018, passed by Second Additional Sessions Judge, Burhanpur in Sessions Trial No.64/2017, whereby the charges under Sections 182, 195 & 211 of I.P.C. and Sections 25 & 27 of the Arms Act have been framed against him.

2. In brief, the prosecution case is that, on 26.04.2017 one Murlidhar Choudhari, uncle of applicant - Kapil, lodged an FIR against Yashika and two other persons, stating that the applicant and Yashika were having love affair. However, Yashika's marriage was settled with another boy. Therefore, she avoided the applicant. Jilted with this, applicant -Kapil went to the house of Yashika. This information was received by Murlidhar on his cellphone. On this information, Murlidhar reached the house of Yashika and found motorcycle of his nephew Kapil. At a distance, he found Kapil having recieved (sic: received) a gunshot injury on his waist. Applicant - Kapil narrated to Murlidhar that with an intention to kill him,Yashika and his companions shot at him. Murlidhar and others brought injured Kapil to the District Hospital, Burhanpur for treatment. As stated above, Murlidhar lodged the FIR against Yashika and others. Police registered offence under Section 307/34 of I.P.C. against Yashika and her companions. During investigation, police found that to teach lesson and create obstruction in the marriage of Yashika, applicant - Kapil to falsely implicate Yashika and others by using a country made pistol caused gunshot injury on himself at his waist. Hence, police registered offences under Sections 182, 195 & 211 of I.P.C. and Sections 25 & 27 of the Arms Act against applicant - Kapil.

3. Learned trial Court framed charges under Sections 182, 195 & 211 of I.P.C. and Sections 25 & 27 of the Arms Act against the applicant.

4. Applicant has challenged the aforesaid order on the grounds that he has not committed any offence and he has been falsely implicated by the police. He had neither given any false information to any public servant, nor lodged the FIR against anyone. In fact, FIR has been lodged by his uncle Murlidhar. As per law, complaint ought to have been made by public servant against Murlidhar. Hence, applicant is liable to be discharged from the charges levelled against him.

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

6. As per the case diary, on 26.04.2017 applicant - Kapil was brought to the District Hospital, Burhanpur. The doctor found a gunshot injury on the left side of his hypochondrium region and he was admitted for further treatment. He referred the applicant to the Surgical Specialist, for further treatment.

7. Police seized a countrymade pistol (*katta*) with live cartridge and empty cartridge from the applicant and recorded the statements of some witnesses. Witnesses have stated that the applicant himself wanted to assault Yashika, because her marriage was settled with another boy. Applicant and Yashika had an affair. Police also recovered other articles from the applicant, which show that the applicant had falsely implicated Yashika and others for committing the offence punishable under Section 307/34 of I.P.C. Police sent all the seized articles to FSL. FSL report is positive. Hence, police filed charge-sheet against him under Sections 182, 195 & 211 of I.P.C. and Sections 25 & 27 of the Arms Act.

8. Gist of offence under Section 182 of I.P.C. is giving of false information so as to cause the public servant to act upon it. The offence is complete when the information bleaches the public servant concerned.

Section 182 of I.P.C. read as under:-

> **"182. False information, with intent to cause public servant to use his lawful power to the injury of another person-** Whoever gives to any public servant any information which he knows or believes to be false, intending thereby to cause, or knowing it to be likely that he will thereby cause, such public servant:-
>
> (a) to do or omit anything which such public servant ought not to do or omit if the true state of facts respecting which such information is given were known by him, or
>
> (b) to use the lawful power of such public servant to the injury or annoyance of any person,
>
> shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both."

9. In the present case, FIR dated 26.04.2017 indicates that on the basis of false information given by the applicant regarding the offence committed with him under Section 307/34 of I.P.C. against Yashika and others, caused Murlidhar to lodge the FIR against Yashika and others. Police recovered unlicenced (sic: unlicensed) country made pistol and cartridges from the possession of the applicant, which is sufficient to implicate him for the commission of the offence punishable under Sections 25 and 27 of the Arms Act. In such circumstances, the applicant is not entitled to be discharged from the offences under Sections 25 and 27 of the Arms Act.

10. For taking cognizance of offence under Section 211 of I.P.C. - making of complaint in writing is mandatory, when the offence is alleged to have been committed, in or in relation to any proceedings in Court, by that or any Court to which that Court is administratively subordinate (vide Section 195 (1)(b)(i) of Cr.P.C., 1973).

11. Learned counsel for the applicant contended that the applicant cannot be prosecuted as per the provisions of Sections 195 (1) (a) and 195 (1)(b) of Cr.P.C. as no complaint in writing has been made by any public servant. This Court is not inclined to accept such a contention, because the offence registered against the applicant is at the initiation of Police Inspector itself, who had investigated the matter which was based on the report lodged by Murlidhar on behalf of the applicant.

12. In the case of *Central Bureau of Investigation vs. M. Sivamani* [(2017) 14 SCC 855], Hon'ble the Supreme Court has held

> "Motor accidents claim petition was filed seeking compensation of Rs.22,00,000/- for death of M in a road accident which was partly upheld and Rs.14,97,000/- was awarded - On appeal of Insurance Company, High Court ordered investigation by CB CID into the allegation that claim was false - Subsequently, matter was taken over by CBI under directions of High Court which let CBI to file impugned charge-Sheet under Section 120-B read with Sub-Section 182, 420, 468, 468 read with Section 471 I.P.C. and Section 13(2) read with Section 13(1)(d), Prevention of Corruption Act, 1988 read with Section 511 I.P.C. against A-1 to A-9 (respondent herein is A-5) - According to CBI, Insurance Company was cheated by A-1 by making false claim in connivance with other accused - M sustained injuries by falling on his own from a scooter and not in an accident as alleged - Different accused were given different roles in conspiracy -Role given to respondent, who is an advocate, was of misrepresentation and producing false evidence, knowing the true facts.
>
> During pendency of proceedings, respondent moved a petition pleading bar under Section 195(1) (a)(i) Cr.P.C. by submtting that

cognizance in respect of offence under Section 182 IPC could not be taken except "on the complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate", which was dismissed - However, in revision, High Court reversed such order of trial court and quashed proceedings against respondent - Whether there is non-compliance with Section 195(1)(a)(i) Cr.P.C. in Court taking cognizance of offence in question i.e. Section 182 IPC - Contention of appellant CBI herein, that object and purpose of bar created under law against taking cognizance in respect of specified offences is to control frivolous or vexatious proceedings by private parties.

Held, while bar against cognizance of a specified offence is mandatory, the same has to be understood in contest of purpose for which such a bar is created - The bar is not intended to take away remedy against a crime but only to protect an innocent person against false or frivolus proceedings by a private person - Expression "the public servant or his administrative superior" [in Section 195(1)(a) Cr.P.C.] cannot exclude High Court - It is clearly implicit in the direction of High Court, that it was necessary in the interest of justice to take cognizance of offence in question - Direction of High Court is on a part with the direction of an administrative superior public servant to file a complaint in writing in terms of statutory requirement - Protection intended by section against a private person filing a frivolus complaint is taken are of when High Court finds that matter was required to be gone into in pulic interest -Such direction cannot be rendered futile by invoking Section 195 to such a situation - Once High Court directs investigation into a specified offence mentioned in Section 195, bar under Section 195(1)(a) cannot be pressed into service - Hence, view taken by High Court in revision will frustrate the object of law and cannot be sustained - Accordingly, impugned order is set aside - Since matters are pending for last more than 15 years, proceedings are requested to be concluded as far as possible within six months."

13. In the light of the aforesaid principle laid down by the Supreme Court the objection raised by the applicant is not sustainable as he contended that he had not committed any offence and police has wrongly stated that he has fired himself and falsely implicated Yashika and others. These facts cannot be adjudicated at this stage of framing of charge without taking any evidence on record. Hence, under the revisional jurisdiction this Court is not inclined to interfere in the impugned order of the learned trial Court. In this regard, reliance can be placed on the case of *State of Maharashtra vs. Jagmohan Singh Kuldip Singh Anand* (2004) 7SCC 659, Hon'ble the Supreme Court has held that:- :-

"Revisional power of High Court cannot be exercised as a second appellate power. In exercise of revisional power High Court cannot

undertake in depth and minute re-examination of entire evidence and upset concurrent findings of trial Court and first appellate Court."

14. In the case of *Amit Kapoor vs. Ramesh Chander and another,* [(2012) 9 SCC 460], Hon'ble the Supreme Court has held that:-

> "At the initial stage of framing of a charge, the court is concerned not with proof but with a strong suspicion that the accused has committed an offence, which, if put to trial, could prove him guilty. All that the court has to see is that the material on record and the facts would be compatible with the innocence of the accused or not. The final test of guilt is not to be applied at that stage."
>
> Thereafter, it has also been held as under :-
>
> "Another well-accepted norm is that the revisional jurisdiction of the higher court is a very limited one and cannot be exercised in a routine manner. One of the inbuilt restrictions is that it should not be against an interim or interlocutory order. The Court has to keep in mind that the exercise of revisional jurisdiction itself should not lead to injustice ex facie. Where the Court is dealing with the question as to whether the charge has been framed properly and in accordance with law in a given case, it may be reluctant to interfere in exercise of its revisional jurisdiction unless the case substantially falls within the categories aforestated. Even framing of charge is a much advanced stage in the proceedings under the Cr.P.C."

15. Similarly, in the case of *State of Rajasthan Vs.Fatehkaran Mehdu*, (2017) 3 SCC 198 Hon'ble the Supreme Court has held that :-

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

> to trial, could prove his guilt. The framing of charge is not a stage, at which stage final test of guilt is to be applied. Thus, to hold that at the stage of framing the charge, the court should form an opinion that the accused is certainly guilty of committing an offence, is to hold something which is neither permissible nor is in consonance with scheme of Code of Criminal Procedure." [See also : AIR 2019 SCC 2499 *State of Gujarat vs. Afroz Mohammed Hasanfatta*]

16. After going through the above discussions, in the opinion of this Court, in the present case provision of Section 195(1)(a)(i) of Cr.P.C. is not applicable, as no complaint is necessary for the commission of offence which is not related to any Court proceeding and as it was not at the instance of any private party, but was at the instance of the investigating agency.

17. Accordingly, the revision stands dismissed.

Revision dismissed.

I.L.R. [2019] M.P. 2145
CRIMINAL REVISION
Before Mr. Justice B.K. Shrivastava
Cr.R. No. 3145/2019 (Jabalpur) decided on 15 October, 2019

AMIT KUMAR ...Applicant

Vs.

STATE OF M.P. …Non-applicant

***A. Penal Code (45 of 1860), Section 376 (2)(n) & 506-II – Framing of Charge – Rape on Pretext of Marriage* – Held – Prosecutrix, a married woman having a child, started living with accused as husband and wife, without getting decree of divorce and knowing fully that accused was also a married person – *Prima Facie*, she herself gave consent for sexual intercourse – It cannot be presumed that consent was obtained giving false assurance of marriage – Charge quashed – Application allowed.**

(Paras 14 to 18)

क. दण्ड संहिता (1860 का 45), धारा 376(2)(n) व 506–II – आरोप विरचित किया जाना – विवाह के बहाने बलात्संग – अभिनिर्धारित – अभियोक्त्री एक विवाहित महिला जिसका एक बालक है, ने यह पूर्ण रूप से ज्ञात होते हुए कि अभियुक्त भी एक विवाहित व्यक्ति है और विवाह विच्छेद की डिक्री प्राप्त किये बिना अभियुक्त के साथ पति–पत्नी के रूप में निवास करना आरंभ किया – प्रथम दृष्ट्या, उसने स्वयं लैंगिक संभोग हेतु सहमति दी – यह उपधारणा नहीं की जा सकती कि विवाह का मिथ्या आश्वासन देकर सहमति अभिप्राप्त की गई थी – आरोप अभिखंडित – आवेदन मंजूर।

B. Penal Code (45 of 1860), Section 375 – Consent **– Held – Consent for the purpose of Section 375 requires voluntary participation not only after exercise of intelligence based on knowledge of the significance and moral quality of the act, but also after having fully exercised the choice between resistance and assent – Whether there was any consent or not is to be ascertained only on a careful study of all relevant circumstances. (Para 8)**

ख. दण्ड संहिता (1860 का 45), धारा 375 – सहमति – अभिनिर्धारित – धारा 375 के प्रयोजन हेतु सहमति में, न केवल कृत्य की नैतिक गुणवत्ता एवं महत्व के ज्ञान पर आधारित बुद्धिमत्ता के प्रयोग के पश्चात् बल्कि विरोध एवं सहमति के बीच पसंद के पूर्ण रूप से प्रयोग करने के पश्चात्, स्वेच्छयापूर्ण सहभाग अपेक्षित है – क्या कोई सहमति थी अथवा नहीं इसका अभिनिश्चय केवल सभी सुसंगत परिस्थितियों के सावधानीपूर्वक अध्ययन करने पर किया जाता है।

C. Penal Code (45 of 1860), Section 90 – Consent **– Held – Section 90 though does not define "consent" but describes what is not "consent" – Consent may be express or implied, coerced or misguided, obtained willingly or through deceit – If consent is given by complainant under misconception of fact, it is vitiated. (Para 7 & 8)**

ग. दण्ड संहिता (1860 का 45), धारा 90 – सहमति – अभिनिर्धारित – यद्यपि धारा 90 ''सहमति'' को परिभाषित नहीं करती परंतु क्या ''सहमति'' नहीं है वर्णित करती है – सहमति, अभिव्यक्त या विवक्षित, प्रपीड़क या भ्रामक, रजामंदी से या प्रवंचना से अभिप्राप्त हो सकती है – यदि परिवादी द्वारा तथ्य के भ्रम अंतर्गत सहमति दी गई है, वह दूषित है।

Cases referred:

(2003) 4 SCC 46 : (AIR 2003 SC 1639), 2019 CrLJ 1169, (2005) 1 SCC 88 : (AIR 2005 SC 203), (2013) 7 SCC 675 : (AIR 2013 SC 2071), 2018 (3) All Cri LR 84 (SC).

Ramesh Kumar Tamrakar, for the applicant.
R.N. Yadav, P.L. for the non-applicant/State.

O R D E R

B. K. SHRIVASTAVA, J :- This revision has been filed on 28.6.2019 under section 397/401 of the Code of Criminal Procedure, 1973 against the order dated 28.3.2019 passed in Sessions Trial No.83/2019 by the 18th Additional Sessions Judge, Bhopal.

2. By the impugned order, the learned lower Court framed the charges against the petitioner under sections 376(2)(n) and 506-II of IPC, which are as under:-

"प्रथम– आपने दिनांक 11/06/18 को समय लगभग 10.00 बजे संजय होटल स्टेशन बजरिया भोपाल में व इसके एक– डेढ़ वर्ष पूर्व से अभियोक्त्री टीना गढ़वाल को शादी का झांसा देकर, उसकी सहमति के बिना जबरदस्ती उसके साथ बार–बार बलात्संग कारित किया। आपका उक्त कृत्य धारा 376(2) (एन) भा.द.वि. के अंतर्गत दण्डनीय अपराध होकर इस न्यायालय के संज्ञान में है।

द्वितीय– आपने उक्त दिनांक, समय व स्थान पर अभियोक्त्री को जान से मारने की धमकी देकर संत्रास कारित करने के उद्‌देश्य ये आपराधिक अभित्रास कारित किया। तद् द्वारा आपने ऐसा कृत्य किया है जो धारा 506 भाग–2 भा.द.वि. के अंतर्गत दण्डनीय अपराध होकर इस न्यायालय के संज्ञान में है।"

3. It appears from the record that the prosecutrix lodged the first information report on 27.6.2018 in the Police Station Bajaria, District Bhopal. Upon the aforesaid report, the police registered the FIR No.241/2018 under sections 376 and 506 of IPC. After investigation, Challan No.111/2018 was filed before the Judicial Magistrate First Class, Bhopal, who committed the case to the Court of Sessions and on 22.10.2019 the Sessions Trial No.83/2019 was registered and the case was made over the Court of 18th Additional Sessions Judge, Bhopal on 7.2.2019. The trial court framed the charges under sections 376(2)(n) and 506-II of IPC on 28.3.2019. Case is pending for recording of the evidence of prosecution witnesses.

4. It is submitted by the petitioner that prosecutrix is a married woman, who was married with Rakesh Gohiya since 7-8 years back from the date of incident. She is also having a child. The petitioner and prosecutrix both are resided in the same locality. The trial court committed mistake by framing the charges. It should have been held that from the fact and circumstances of the case *prima facie* no sufficient ground is found to proceed further. It is also submitted that the husband of prosecutrix has filed a suit under section 13 of the Hindu Marriage Act for divorce. The prosecutrix was residing in her parental house since 3 to 4 years back. Therefore, it would not be possible for the petitioner to make a false promise to marry in near future. The petitioner also lodged various reports against the prosecutrix to the Superintendent of Police, Hoshangabad on 12.4.2018 and 28.4.2018. He also filed whatsapp screen shots of the prosecutrix as Document No.5. The prosecutrix was able to knew all the circumstances and was in the position to give the consent for committing sexual intercourse with her. She was a consenting party. There was no any false promise by the petitioner. Therefore, the petitioner ought to be discharged. But the trial court framed the charges without any sufficient ground. Therefore, it is prayed that the charges be set aside and the petitioner be discharged.

5. On the other side, the State strongly opposed the petition. It is submitted by the State that sufficient grounds are available in the evidence collected by the prosecution during the investigation. The trial court has not committed any

mistake by framing the charges against the petitioner. The defence of accused cannot be seen at the stage of framing of charges. Therefore, this revision is liable to be dismissed.

6. The petitioner placed the reliance upon the cases of *Uday Vs. State of Karnataka* (2003) 4 SCC 46, *Deepak Gulati Vs. State of Haryana* AIR 2013 SC 2071 and *Dr.Dhruvaram Murlidhar Sonar Vs. State of Maharashtra* 2019 CrLJ 1169. It is argued by the learned counsel that it has been held in aforesaid cases that Court must very carefully examine whether the accused had actually wanted to marry the victim or had malafide motive or had made a false promise to this effect only to satisfy his lust. In the present case, it appears that the prosecutrix was a consenting party. She is a woman of 28 years and living separately from his husband, who had already filed the suit for divorce. Therefore, there was no any possibility of marriage with the prosecutrix.

7. Section 90 of the Indian Penal Code defines the "Consent". Section says:-

> **" Section 90:** Consent known to be given under fear or misconception.- A consent is not such a consent as it intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception."

8. Thus, Section 90 though does not define **"consent"**, but describes what is not "consent". Consent may be express or implied, coerced or misguided, obtained willingly or through deceit. If the consent is given by the complainant under misconception of fact, it is vitiated. Consent for the purpose of Section 375 requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act, but also after having fully exercised the choice between resistance and assent. Whether there was any consent or not is to be ascertained only on a careful study of all relevant circumstances.

9. In the case of *Uday v. State of Karnataka* (2003) 4 SCC 46 : (AIR 2003 SC 1639), the prosecutrix who was about 19 years old girl had given consent to sexual intercourse with the accused with whom she was deeply in love, on a promise that he would marry her on a later date. The prosecutrix continued to meet the accused and often had sexual intercourse and became pregnant. A complaint was lodged on failure of the accused to marry her. It was held by Apex court that consent cannot be said to be given under a misconception of fact. The Apex Court said in paras 21 and 23 :-

> "21. It therefore appears that the consensus of judicial opinion is in favour of the view that the consent given by the prosecutrix to sexual

intercourse with a person with whom she is deeply in love on a promise that he would marry her on a later date, cannot be said to be given under a misconception of fact. A false promise is not a fact within the meaning of the Code. We are inclined to agree with this view, but we must add that there is no straitjacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact. In the ultimate analysis, the tests laid down by the courts provide at best guidance to the judicial mind while considering a question of consent, but the court must, in each case, consider the evidence before it and the surrounding circumstances, before reaching a conclusion, because each case has its own peculiar facts which may have a bearing on the question whether the consent was voluntary, or was given under a misconception of fact. It must also weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredient of the offence, absence of consent being one of them.

> 23. Keeping in view the approach that the court must adopt in such cases, we shall now proceed to consider the evidence on record. In the instant case, the prosecutrix was a grown-up girl studying in a college. She was deeply in love with the appellant. She was, however, aware of the fact that since they belonged to different castes, marriage was not possible. In any event the proposal for their marriage was bound to be seriously opposed by their family members. She admits having told so to the appellant when he proposed to her the first time. She had sufficient intelligence to understand the significance and moral quality of the act she was consenting to. That is why she kept it a secret as long as she could. Despite this, she did not resist the overtures of the appellant, and in fact succumbed to them. She thus freely exercised a choice between resistance and assent. She must have known the consequences of the act, particularly when she was conscious of the fact that their marriage may not take place at all on account of caste considerations. All these circumstances lead us to the conclusion that she freely, voluntarily and consciously consented to having sexual intercourse with the appellant, and her consent was not in consequence of any misconception of fact."

10. In the case of *Deelip Singh alias Dilip Kumar v. State of Bihar*, (2005) 1 SCC 88 : (AIR 2005 SC 203), the question was before the court that " *whether the tacit consent given by the prosecutrix was the result of a misconception created in her mind as to the intention of the accused to marry her?"*. In this case the girl lodged a complaint with the police stating that she and the accused were neighbours and they fell in love with each other. One day in February, 1988, the accused forcibly raped her and later consoled her by saying that he would marry

her. She succumbed to the entreaties of the accused to have sexual relations with him, on account of the promise made by him to marry her, and therefore continued to have sex on several occasions. After she became pregnant, she revealed the matter to her parents. Even thereafter, the intimacy continued to the knowledge of the parents and other relations who were under the impression that the accused would marry the girl, but the accused avoided marrying her and his father took him out of the village to thwart the bid to marry. The efforts made by the father of the girl to establish the marital tie failed. Therefore, she was constrained to file the complaint after waiting for some time. With this factual background, the Court referred the case of *Uday Vs. State of Karnataka* (supra) and held that the girl had taken a conscious decision, after active application of mind to the events that had transpired. It was further held that at best, it is a case of "breach of promise to marry" rather than a case of "false promise to marry", for which the accused is prima facie accountable for damages under civil law. The Apex court said :-

> "The remaining question is whether on the basis of the evidence on record, it is reasonably possible to hold that the accused with the fraudulent intention of inducing her to sexual intercourse, made a false promise to marry. We have no doubt that the accused did hold out the promise to marry her and that was the predominant reason for the victim girl to agree to the sexual intimacy with him. PW 12 was also too keen to marry him as she said so specifically. But we find no evidence which gives rise to an inference beyond reasonable doubt that the accused had no intention to marry her at all from the inception and that the promise he made was false to his knowledge. No circumstances emerging from the prosecution evidence establish this fact. On the other hand, the statement of PW 12 that "later on", the accused became ready to marry her but his father and others took him away from the village would indicate that the accused might have been prompted by a genuine intention to marry which did not materialise on account of the pressure exerted by his family elders. It seems to be a case of breach of promise to marry rather than a case of false promise to marry. On this aspect also, the observations of this Court in Uday case at para 24 come to the aid of the appellant".

11. In the case of *Deepak Gulati v. State of Haryana*, (2013) 7 SCC 675 : (AIR 2013 SC 2071), the Apex Court has drawn a distinction between **rape** and **consensual sex**. This is a case of a prosecutrix aged 19 years at the time of the incident. She had an inclination towards the accused. The accused had been giving her assurances of the fact that he would get married to her.

The prosecutrix, therefore, left her home voluntarily and of her own free will to go with the accused to get married to him. She called the accused on a phone number given to her by him, to ask him why he had not met her at the place that had been pre-decided by them. She also waited for him for a long time, and when he finally

arrived, she went with him to a place called Karna Lake where they indulged in sexual intercourse. She did not raise any objection at that stage and made no complaints to anyone. Thereafter, she went to Kurukshetra with the accused, where she lived with his relatives. Here too, the prosecutrix voluntarily became intimate with the accused. She then, for some reason, went to live in the hostel at Kurukshetra University illegally, and once again came into contact with the accused at Birla Mandir there. Thereafter, she even proceeded with the accused to the old bus-stand in Kurukshetra, to leave for Ambala so that the two of them could get married at the court in Ambala. At the bus station, the accused was arrested by the police. The Court held that the physical relationship between the parties had clearly developed with the consent of the prosecutrix as there was neither a case of any resistance nor had she raised any complaint anywhere at any time, despite the fact that she had been living with the accused for several days and had travelled with him from one place to another. The Court further held that it is not possible to apprehend the circumstances in which a charge of deceit / rape can be levelled against the accused.

12. In *Shivashankar @ Shiva v. State of Karnataka and Anr.,* 2018 (3) All Cri LR 84 (SC) [Criminal Appeal No.504 of 2018, disposed of on 6th April, 2018] the Court observed that it is difficult to hold that sexual intercourse in the course of a relationship which has continued for eight years is 'rape', especially in the face of the complainant's own allegation that they lived together as man and wife. The Apex Court held as under:-

> "In the facts and circumstances of the present case, it is difficult to sustain the charges levelled against the appellant who may have possibly, made a false promise of marriage to the complainant. It is, however, difficult to hold sexual intercourse in the course of a relationship which has continued for eight years, as 'rape' especially in the face of the complainant's own allegation that they lived together as man and wife".

13. Recently, in the case of *Dr. Dhruvaram Murlidhar Sonar v. State of Maharashtra* and Ors. 2019 CRI. L. J. 1169, it was an admitted position that the appellant was serving as a Medical Officer in the Primary Health Centre and the complainant was working as an Assistant Nurse in the same health centre and that the (sic : she) is a widow. It was alleged by her that the appellant informed her that he is a married man and that he has differences with his wife. Admittedly, they belong to different communities. It was also alleged that the accused / appellant needed a month's time to get their marriage registered. The complainant further states that she had fallen in love with the appellant and that she needed a companion as she was a widow. She has specifically stated that *" as I was also a widow and I was also in need of a companion, I agreed to his proposal and since then we were having love affair and accordingly we started residing together. We*

used to reside sometimes at my home whereas sometime at his home." Thus, they were living together, sometimes at her house and sometimes at the residence of the appellant. They were in a relationship with each other for quite some time and enjoyed each other's company. It was also clear that they had been living as such for quite sometime together. When she came to know that the appellant had married some other woman, she lodged the complaint. The Apex court reffered (sic: referred) the case of *Uday v. State of Karnataka* (2003) 4 SCC 46 = AIR 2003 SC 1639, *Deelip Singh alias Dilip Kumar v. State of Bihar,* (2005) 1 SCC 88 = AIR 2005 SC 203 *Deepak Gulati v. State of Haryana,* (2013) 7 SCC 675 = AIR 2013 SC 2071, and held in 20 as under :-

> "20. Thus, there is a clear distinction between rape and consensual sex. The court, in such cases, must very carefully examine whether the complainant had actually wanted to marry the victim or had mala fide motives and had made a false promise to this effect only to satisfy his lust, as the later falls within the ambit of cheating or deception. There is also a distinction between mere breach of a promise and not fulfilling a false promise. If the accused has not made the promise with the sole intention to seduce the prosecutrix to indulge in sexual acts, such an act would not amount to rape. There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused and not solely on account of the misconception created by accused, or where an accused, on account of circumstances which he could not have foreseen or which were beyond his control, was unable to marry her despite having every intention to do. Such cases must be treated differently. If the complainant had any malafide intention and if he had clandestine motives, it is a clear case of rape. The acknowledged consensual physical relationship between the parties would not constitute an offence under Section 376 of the IPC."

The court again said that :-

> "It is not her case that the complainant has forcibly raped her. She had taken a conscious decision after active application of mind to the things that had happened. It is not a case of a passive submission in the face of any psychological pressure exerted and there was a tacit consent and the tacit consent given by her was not the result of a misconception created in her mind. We are of the view that, even if the allegations made in the complaint are taken at their face value and accepted in their entirety, they do not make out a case against the appellant. We are also of the view that since complainant has failed to prima facie show the commission of rape, the complaint registered under Section 376(2)(b) cannot be sustained."

14. In the instant case, the prosecutrix herself lodged the first information report in which it is stated that she is a student of B.A., who is residing at Bhopal

for doing her study. She knows the accused since 3 years back, who is also resided in the same locality. She used to meet the accused and the accused assured her to marry. Then she became agree and both were living together as husband and wife. During this period, the accused got an employment and had gone to Ujjain. The accused always used to tell that he will marry her. On 11.6.2018 accused called the prosecutrix by telephone at Sanjay Hotel, Station Road, Bhopal. When the prosecutrix reached there and asked him to marry, then the accused denied by saying that his parents are not agree. When she was in hotel, the accused also committed sexual intercourse with her consent. It is also stated in the FIR that the prosexutrix (sic : prosecutrix) told the accused that if he will not marry, then she will report the matter to the police. The accused threatened her and asked that if she reported the matter to police, he will kill him. On 25.6.2018 the accused married with another woman. This fact came into the knowledge of prosecutrix through the facebook. Thereafter, she lodged the report.

15. The prosecutrix also examined under section 164 of CrPC by the Judicial Magistrate. In this statement, she also said that previously her marriage was took place at Gadarwara but her husband was used to beat her after drinking the liquor. Therefore, she left the house of husband and came to Hoshangabad. The accused was also a married person. His marriage was took place at Indore, but he was not residing with his wife at Bhopal. It is also stated that the accused disclosed the fact of his marriage and said the prosecutrix that both are previously married so they can perform the marriage with each other. It was also stated that the accused disclosed the fact that he did not take the divorce from his wife. The prosecutrix went to Ujjain on 27.1.2018 and spent 8 days with the accused in his house. It is also stated in Para 4 that they performed sexual relations during the period of 1/2 years.

16. The facts of first marriage and the pendency of divorce case have been admitted by the prosecutrix. Document Annexure D-2 shows that Rakesh Gohiya, husband of prosecutrix, filed a petition under section 13 of the Hindu Marriage Act on 24.11.2016 and the prosecutrix herself filed the written statement dated 4.9.2017. In her written statement, she admitted that she was married with Rakesh Gohiya on 22.4.2008 and out of their wedlock a son was born, who is aged about 7 years. It is also admitted in the aforesaid pleadings that a case of section 498-A of IPC was filed by the prosecurix (sic: prosecutrix) against her husband but after sometime she compromised the matter on 26.9.2014 and the Court acquitted her husband. In Para 25 of the written statement, the prosecutrix herself said that there is no any cause of action arises for passing the decree of divorce . In the last, she requested to dismiss the application for divorce.

17. Therefore, it appears from the entire documents that the prosecutrix was a married woman. She was facing a trial of Hindu Marriage Act. Her husband filed

the suit for divorce but she was not agree to give the divorce. Therefore, she filed her written statement opposing the prayer of divorce. This conduct shows that the prosecutrix was not willing to obtain the decree of divorce from her husband. She has already admitted in her statement before the Magistrate that the accused disclosed the fact that he is a married person and both were having the knowledge that the marriage between them cannot be solemnized without getting the decree of divorce from their previous partners. The prosecutrix herself started living with the accused as a wife. In the aforesaid situation, it may be clearly presumed that the prosecutrix herself gave the consent for sexual intercourse. She was having knowledge that her marriage with the accused is not possible because the accused is already a married person and she is already a married woman. She was living with the accused as husband and wife without getting the decree of divorce from her husband. Therefore, *prima facie* it appears that the prosecurix (sic: prosecutrix), who is a married woman aged about 28 years, was a consenting party and the act of sexual intercourse was committed with the consent of each other. In the aforesaid situation, it cannot be presumed that any false assurance was given by the accused and the consent was obtained by him by giving false assurance.

18. Therefore, the trial court committed the mistake by framing the charges. Hence, the petition is allowed. The impugned order is set aside and the charges framed against the petitioner are hereby quashed. His bail bonds are discharged.

Revision allowed.

I.L.R. [2019] M.P. 2154
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice S.A. Dharmadhikari
M.Cr.C. No. 15323/2019 (Gwalior) decided on 2 July, 2019

R.K. MITTAL ...Applicant

Vs.

STATE OF M.P. …Non-applicant

***A. Criminal Procedure Code, 1973 (2 of 1974), Section 216 – Alteration/Addition of Charge – Power of Court* – Held – Court shall not entertain applications as a matter of right by the parties, however parties to proceedings can make submissions/applications and Cr.P.C. empowers the Courts to entertain the submissions made for bringing the factual aspects to notice of Court that additional charge requires to be framed. (Para 10 & 11)**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 216 – आरोप में परिवर्तन/परिवर्धन – न्यायालय की शक्ति – अभिनिर्धारित – न्यायालय, पक्षकारों द्वारा अधिकार के रूप में आवेदनों को ग्रहण नहीं करेगा, तथापि कार्यवाहियों के पक्षकार

निवेदन/आवेदन कर सकते हैं तथा दं.प्र.सं. इस तथ्यात्मक पहलुओं को न्यायालय के ध्यान में लाने के लिए कि अतिरिक्त, आरोप विरचित किया जाना अपेक्षित है, किये गये निवेदनों को ग्रहण करने हेतु न्यायालयों को सशक्त करती है।

***B. Criminal Procedure Code, 1973 (2 of 1974), Section 216 – Alteration/Addition of Charge – Opportunity of Hearing – Principle of Natural Justice* – Held – If prosecution makes the submissions bringing the factual aspects to notice of Court that additional charge requires to be framed, fullest opportunity should be given to accused to defend himself and after providing such opportunity, Court is empowered to pass appropriate order u/S 216 Cr.P.C. – Impugned order passed after independent application of mind following the principle of natural justice – Application dismissed.**

(Para 10 & 11)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 216 – आरोप में परिवर्तन /परिवर्धन – सुनवाई का अवसर – नैसर्गिक न्याय का सिद्धांत – अभिनिर्धारित – यदि अभियोजन तथ्यात्मक पहलुओं को न्यायालय के ध्यान में लाते हुए निवेदन करता है कि अतिरिक्त आरोप विरचित किया जाना अपेक्षित है, अभियुक्त को अपना बचाव करने के लिए पूरा अवसर दिया जाना चाहिए तथा उक्त अवसर प्रदान करने के पश्चात्, न्यायालय दं.प्र.सं. की धारा 216 के अंतर्गत समुचित आदेश पारित करने हेतु सशक्त है – आक्षेपित आदेश, नैसर्गिक न्याय के सिद्धांत का पालन करते हुए स्वतंत्र रूप से मस्तिष्क का प्रयोग करने के पश्चात् पारित किया गया – आवेदन खारिज।

Cases referred:

(2017) 3 SCC 347, AIR 1970 SC 359.

R.K. Sharma with *M.K. Choudhary*, for the applicant.
Sanjeev Mishra, G.A. for the non-applicant-State.

ORDER

S.A. DHARMADHIKARI, J.:- In this petition, under section 482 of the Cr.P.C., petitioner has assailed the order dated 15/10/2018 passed by Judicial Magistrate First Class, Gwalior in Criminal Case No. 17254/2013, whereby the trial Court has allowed the application filed by the prosecution under section 216 of the Cr.P.C. seeking addition of charge under section 304-A of the IPC. The corresponding order dated 12/2/2019 passed by VIII Additional Sessions Judge, Gwalior in Criminal Revision No.413/2018 affirming the order of trial Court, is also under challenge in this petition.

2. Brief facts leading to filing of this case are that on 14/11/13 complainant Makhan Prajapati filed a written complaint before Police Station Inderganj, District Gwalior, alleging therein that the petitioner with an intent to dismantle his own house engaged the brother of complainant namely Devki Prajapati. While

demolishing the house, the *Chhaja* (projection) of the building fell down on Devki Prajapati, whereby he sustained injuries on his leg and was taken to hospital for treatment. On the basis of the aforesaid complaint, FIR was registered on 16/12/13. After completion of the investigation, charge-sheet was filed on 26/12/13 for the offences punishable under section 288 and 338 of the IPC. Injured Devki Prajapati was discharged from hospital. However, he died on 5/1/14. Thereafter, police filed supplementary charge-sheet enhancing section 304-A of the IPC.

3. The trial Court framed charges under sections 288 and 338 of the IPC on 16/10/2015. After framing of charges, three witnesses were examined. Assistant District Prosecution Officer filed an application under section 216 of the Cr.P.C. on 23/7/18 praying for addition of charge under section 304-A of the IPC. The learned trial Court vide order dated 15/10/18 allowed the said application under section 216 of the Cr.P.C. The said order has been affirmed by the learned Revisional Court.

4. Shri Sharma, learned Senior Counsel appearing for the petitioner contended that no offence under section 304-A of the IPC is made out against the petitioner. He further submitted that the trial Court, as well as, the Revisional Court have erred in entertaining the application filed by the prosecution under section 216 of the Cr.P.C., inasmuch as the said provision can be invoked only *suo motu* by the trial Court and not at the instance of any party, neither *de facto* complainant, nor accused, nor prosecution has any vested right to seek any addition or alteration of charge since the same is not provided under section 216 of the Cr.P.C. For this, reliance has been placed on decision of the Apex Court in the case of *P.Kartikalakshmi Vs. Sri Ganesh and another* ((2017)3 SCC 347). Accordingly, it is prayed that the impugned order may be set aside as the application itself is not maintainable.

5. On the other hand, learned Public Prosecutor has supported the impugned order and prayed that no interference is warranted. It is further contended that supplementary charge-sheet was filed in which offence under section 304-A of the IPC was enhanced. However, the trial Court failed to take note of such development and ultimately when the charges came to be framed against the petitioner, they were confined to sections 288 and 338 of the IPC. Therefore, the prosecution thought it proper to bring it to the notice of the Court, hence application under section 216, Cr.P.C. was moved. Section 216 provides that the trial Court can alter or amend the charge before passing the final judgment. It is further submitted that the objection raised by learned Senior Counsel is quite technical in nature and the prosecution was fully justified in seeking addition of said charge, moreso when the requisite power is available with the trial Court under section 216 of the Cr.P.C.

6. Heard, learned counsel for the parties.

7. Before adverting to the merits of the rival contentions, it would be worthwhile to advert to section 216, Cr.P.C., which reads thus:-

> "216. Court may alter charge.
>
> (1) Any Court may alter or add to any charge at any time before judgment is pronounced.
>
> (2) Every such alteration or addition shall be read and explained to the accused.
>
> (3) If the alteration or addition to a charge is such that proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the Court may, in its discretion, after such alteration or addition has been made, proceed with the trial as if the altered or added charge had been the original charge.
>
> (4) If the alteration or addition is such that proceeding immediately with the trial is likely, in the opinion of the Court, to prejudice the accused or the prosecutor as aforesaid, the Court may either direct a new trial or adjourn the trial for such period as may be necessary.
>
> (5) If the offence stated in the altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the altered or added charge is founded.

8. Thus, a bare perusal of the above provision goes to show that the trial Court can add or alter any charge at any time before the judgment is pronounced. Further, the Apex Court in the case of *P. Kartikalakshmi* (Supra) has held as under :-

> "6. Having heard the learned counsel for the respective parties, we find force in the submission of the learned Senior Counsel for Respondent 1. Section 216 Cr.P.C. empowers the Court to alter or add any charge at any time before the judgment is pronounced. It is now well settled that the power vested in the Court is exclusive to the Court and there is no right in any party to seek for such addition or alteration by filing any application as a matter of right. It may be that if there was an omission in the framing of the charge and if it comes to the knowledge of the Court trying the offence, the power is always vested in the Court, as provided under Section 216 Cr.P.C. to either alter or add the charge and that such power is available with the Court at any time before the judgment is pronounced. <u>It is an enabling provision for the Court to exercise its power under certain contingencies which comes to its notice or brought</u>

to its notice. In such a situation, if it comes to the knowledge of the Court that a necessity has arisen for the charge to be altered or added, it may do so on its own and no order need to be passed for that purpose. After such alteration or addition when the final decision is rendered, it will be open for the parties to work out their remedies in accordance with law.

7. We were taken through Section 221 and 222 Cr.P.C. in this context. In the light of the facts involved in this case, we are only concerned with Section 216 Cr.P.C. We, therefore, do not propose to examine the implications of the other provisions to the case on hand. We wish to confine ourselves to the invocation of Section 216 and rest with that. In the light of our conclusion that the power of invocation of Section 216 Cr.P.C. is exclusively confined with the Court as an enabling provision for the purpose of alteration or addition of any charge at any time before pronouncement of the judgment, we make it clear that no party, neither de facto complainant nor the accused or for that matter the prosecution has any vested right to seek any addition or alteration of charge, because it is not provided under section 216 Cr.P.C. If such a course to be adopted by the parties is allowed, then it will be well-nigh impossible for the criminal court to conclude its proceedings and the concept of speedy trial will get jeopardised.

8. In such circumstances, when the application preferred by the appellant itself before the trial court was not maintainable, it was not incumbent upon the trial court to pass an order under Section 216 Cr.P.C.. Therefore, there was no question of the said order being revisable under Section 397 Cr.P.C. The whole proceeding, initiated at the instance of the appellant, was not maintainable. Inasmuch as the legal issue had to be necessarily set right, we are obliged to clarify the law as is available under Section 216 Cr.P.C. To that extent, having clarified the legal position, we make it clear that the whole proceedings initiated at the instance of the appellant was thoroughly misconceived and vitiated in law and ought not to have been entertained by the trial court. As rightly pointed out by the learned Senior Counsel for Respondent 1, such a course adopted by the appellant and entertained by the court below has unnecessarily provided scope for protraction of the proceedings which ought not to have been allowed by the court below"

(Emphasis supplied)

9. While addressing upon the point in issue, it is also pertinent to refer to decision of the Apex Court in the case of *Kantilal Chandulal Mehta Vs. State of Maharashtra* (AIR 1970 SC 359), wherein the Apex Court has held as under:-

"In our view the Criminal Procedure Code gives ample power to the courts to alter or amend a charge whether by the trial court or by the appellate court provided that the accused has not to face a charge for a

new offence or is not prejudiced either by keeping him in the dark about that charge or in not giving a full opportunity of meeting it and putting forward any defence open to him, on the charge finally preferred against him."

10. A juxtaposed perusal of the above said two decisions, clearly goes to show that no party has got a vested right to file an application and the Court need not entertain any such application filed by the parties, in order to afford a speedy justice to the parties. The Court itself can apply its mind to the facts and circumstances of the case and if necessary, add or frame an additional charge by its own under section 216 of Cr.P.C. But, the above said decisions of the Apex Court itself clear the doubt that in the event Court does not apply its mind for the purpose of framing of additional charge, but, if it is brought to the notice of the Court by any of the parties to the proceedings that an additional charge has to be framed, then also the Court can take that information to pass appropriate order. Therefore, it goes without saying that the provision of 216, Cr.P.C. has given power to the Courts either to apply its own mind to the facts and circumstances available on record or it can also entertain the submissions made by the parties or if the fact that additional charge has to be framed is brought to the notice of the Court, such bringing of the factual aspects by any of the parties can be entertained by the Court. Therefore, the decision has to be understood in such a manner that in any case, the Court shall not entertain the applications, as a matter of right by the parties. However, the parties to the proceedings can make submissions and the Cr.P.C. empowers the Courts to entertain the submissions made for bringing it to the notice of the Court that additional charge requires to be framed. In the aforesaid decision, the Apex Court has also made it clear that without bringing it to the notice of the accused, without causing prejudice to him, no addition or alteration of charge shall be made by the Courts. Therefore, if the factual aspects of the case for the purpose of framing additional charge are brought to the notice of the Court either on the basis of evidence or by way of submission to the Court, fullest opportunity should be given to the accused for the purpose of defending himself as to why the additional charge should not be framed against him. After providing such opportunity, the Court is empowered to pass appropriate order under Section 216 Cr.P.C. Ultimately, both the judgments render a guideline that an opportunity should be given to the parties to the proceedings to bring it to the knowledge of the Court as and when required that an additional charge requires to be framed in such a case. In such an eventuality, as a matter of principle of natural justice, an opportunity should be given to the accused to defend himself as to why such charge should not be framed.

11. Therefore, this Court is of the considered opinion that the learned Court below has entertained the application in this particular case, which can very well be treated as a factual aspect brought to the notice of the Court by the prosecution

and the learned Court below has applied the principles of natural justice and provided fullest opportunity to the accused and after hearing, has taken the decision to frame charge under section 304-A of the IPC. In the case in hand, after the death of the injured, a supplementary charge-sheet was filed by the prosecution indicating enhancement of section 304-A of the IPC. However, the same escaped the notice of the Court and the Court below in the impugned order has categorically mentioned that due to inadvertence, such charge remained to be framed. Therefore, it cannot be said that the Court below has only acted on the application made by the prosecution, but, in fact, the order impugned has been passed after independent application of mind to the facts of the case by the trial Court in accordance with principles of natural justice.

12. Accordingly, no illegality or perversity is found in the orders impugned passed by the Courts below, so as to warrant any interference. The petition fails and is, accordingly, dismissed.

Application dismissed.

I.L.R. [2019] M.P. 2160
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice Rajeev Kumar Shrivastava
M.Cr.C. No. 8309/2019 (Gwalior) decided on 26 September, 2019

MALA @ GUNMALA LODHI (SMT.) & ors. ...Applicants

Vs.

STATE OF M.P. & ors. …Non-applicants

***A. Evidence Act (1 of 1872), Section 45 – Medico Legal Case (MLC) – Competent Authority* – Held – There is no criteria of doing MLC either by a government doctor or by a private doctor – MLC can be done by a person having special knowledge in the specific field – If any MLC is done by a specially skilled person following the prescribed procedure, it shall be considered as MLC. (Para 11)**

क. साक्ष्य अधिनियम (1872 का 1), धारा 45 – चिकित्सा विधिक प्रकरण (एम. एल.सी.) – सक्षम प्राधिकारी – अभिनिर्धारित – एक सरकारी चिकित्सक या एक निजी चिकित्सक द्वारा एम.एल.सी. तैयार करने का कोई मानदंड नहीं है – एम.एल.सी., विनिर्दिष्ट क्षेत्र में विशेष ज्ञान रखने वाले किसी व्यक्ति द्वारा तैयार किया जा सकता है – यदि कोई एम.एल.सी., एक विशेष रूप से कुशल व्यक्ति द्वारा विहित प्रक्रिया का पालन करते हुए तैयार की जाती है, तो उसे एम.एल.सी. माना जाएगा।

***B. Criminal Practice – Medico Legal Case (MLC)* – Procedure, duties and jurisdiction of Medical Officer discussed and explained.**
(Paras 5 to 7)

ख. दाण्डिक पद्धति – चिकित्सा विधिक प्रकरण (एम.एल.सी.) – **प्रक्रिया, चिकित्सा अधिकारी के कर्तव्य व अधिकारिता विवेचित एवं स्पष्ट किये गये।**

Cases referred:

AIR 2010 SC 1162, AIR 2012 SC 3046.

G.P. Chaurasiya, for the applicants.
K.P.S. Sengar, P.L. for the non-applicant Nos. 1 to 4/State.
R.K. Sharma with *V.K. Agarwal*, for the non-applicant Nos. 5 & 6.

O R D E R

RAJEEV KUMAR SHRIVASTAVA, J.:- This petition has been filed by the applicant under Section 482 of the Criminal Procedure Code, 1973 (CrPC) praying for the following reliefs:-

> **1** यह कि, प्रतियाचिकाकर्ता क्रमांक–3 के पत्र दिनांक 05/12/2013 के अनुसार किसी निजी अस्पताल/नर्सिग होम को मध्य प्रदेश उपचार्या गृह तथा रूजोपचार संबंधी स्थापना में रजिस्ट्रीकरण तथा अनुज्ञापन नियम 1997 (यथासशंोधित 2008) के अन्तर्गत पंजीकृत किया जाता है एम.एल.सी. हेतु इस कार्यालय द्वारा किसी भी निजी अस्पताल/नर्सिग होम को द्वारा अधिकृत नही किया गया है, के बावजूद भी प्रतियाचिकाकर्ता क्रमांक–4 द्वारा अनैतिक एवं अवैधानिक रूप से एम.एल.सी रिपोर्ट अपराध क्रमांक–325/2017 में प्रस्तुत किये जाने के आधार पर।
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> **2.** यह कि, प्रतियाचिकाकर्ता क्रमांक'–6 को एम.एल.सी. करने का अधिकार न होते हुये भी माननीय अधीनस्थ विचारण न्यायालय द्वारा दिनांक 07/01/2019 को प्रतियाचिकाकर्ता क्रमांक–6 को एम.एल.सी. के संबंध में नियम विरूद्ध रूप से समन जारी कर कथन कराये जाने के आधार पर।
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> **3.** यह कि, मध्य प्रदेश उपचार्या गृह तथा रूजोपचार संबंधी स्थापना में रजिस्ट्रीकरण तथा अनुज्ञापन नियम 1997 (यथासंशोधित 2008) के अन्तर्गत उक्त एम.एल.सी. रिपोर्ट को रिकार्ड पर न लिये जाने के आधार पर।
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> **4.** यह कि, याचिकाकर्तागण द्वारा अन्य आधार माननीय न्यायालय के समक्ष वक्त बहस मौखिक रूप से निवेदित किये जावेंगे।
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> अतः माननीय न्यायालय से निवेदन है कि याचिकाकर्तागण की याचिका स्वीकार कर न्यायालय चतुर्थ अतिरिक्त सत्र न्यायाधीश ग्वालियर में विचाराधीन प्रकरण क्रमांक–121/2018 एस.टी. में प्रतियाचिकाकर्ता क्रमांक–6 द्वारा की गई एम.एल.सी. को निरस्त किये जाने की कृपा करें।

2. Briefly stated the facts of the case are that respondent No.6-Dr. R.N.Gupta has retired from the post of Medical Officer in December 2009 and is working as Medico Legal Officer in Sahara Hospital, Gwalior. He conducted MLC of injured Kalyan Singh and Manoj Singh, which was filed by the prosecution in a pending

Sessions Trial No.121/2018. The stand of learned counsel for the applicants is that the said MLC has not been conducted by a Government Doctor at Govt. Hospital and it was conducted in a private nursing home by the aforesaid Doctor, therefore, Dr. R.N. Gupta may not be examined by the prosecution and the MLC cannot be considered/exhibited/taken on record.

3. Per Contra, learned counsel for the respondent has strongly opposed the prayer and has prayed for dismissal of the petition filed under Section 482 of Cr PC.

4. Heard learned counsel for the rival parties and perused the available record.

5. Medico Legal Case (MLC) can be defined as a case of injury or ailment etc., wherein investigation by the legal enforcing agencies is essential to fix the responsibility with regard to cause of injury or ailment. It can also be said that Medico Legal Case is of integral part of medical practice that is frequently encountered by Medical Officer. Whenever in case of injury or ailment where the attending doctor after taking history and clinical examination, considers that investigation by law enforcing agency is warranted to ascertain circumstance and to fix the responsibility regarding the said injury or ailment according to law, such doctor should label such case as Medico Legal Case (MLC) and the decision to label a case as MLC should immediately be informed to concerned law enforcing agency or otherwise if any law enforcing agency has approached to a doctor along with an injured person then a Medical Officer may conduct MLC. That means, in exigency under which any person is found to be treated immediately, either the patient himself or with the help of his known person reaches to the Medical Officer or any exigency is produced before the Medical Officer by the law enforcing agency, the nearest medical expert, who is having specific knowledge in the field, is competent to conduct the MLC.

6. The first and foremost duty of a Medical Officer is to label the case as Medico Legal Case on the basis of his sound professional knowledge after taking detailed history as well thorough clinical examination. This duty is a pious duty and it should be based on profound principle of taking oath of his or her profession.

7. At this stage, it is relevant to mention here that Attending Casualty Medical Officer or Medical Officer, who is on duty only has authority to decide whether the case is to be registered as Medico Legal or not. This is the exclusive jurisdiction of the concerned Chief Medical Officer or Medical Officer, who is on duty to register/label a case as MLC or not. No other person can induce or pressurise or interfere in the aforesaid jurisdiction of Attending Casualty Medical Officer or Medical Officer. It is also relevant to mention here that only verbal

communication with the police does not mean registering a Medico Legal Case. All the communications in this regard should be written and relevant form is required to be filled by the Doctor concerned.

8. Section 45 of the Evidence Act runs as under:-

> "when the Court has to form an opinion upon a point of foreign law or of science or art, or as to identity of handwriting or finger impression, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity of handwriting or finger impressions are relevant facts."

9. Section 45 of Evidence Act specifies *" persons specially skilled"* (in their specific fields). That means, any person who is having special skills by doing/completing any specific course/getting degree etc., such person's opinion must be based within the periphery of his special skill. (See, *Malay Kumar Ganguly vs. Sukumar Mukherjee* [AIR 2010 SC 1162]).

10. In *Dayal Singh v. State of Uttaranchal* [AIR 2012 SC 3046], it is observed that the purpose of an expert opinion is primarily to assist the Court in arriving at a final conclusion. Such report is not binding upon the Court. If eye-witnesses' evidence and other prosecution evidence are trustworthy, have credence and are consistent with the eye version given by the eye-witnesses, the Court will be well within its jurisdiction to discard the expert opinion.

11. In the light of above, it is apparently clear that there is no criteria of doing MLC either by a government doctor or by a private doctor. MLC can be done by the skill of a person, who is having special knowledge in the specific field. Therefore, if any MLC is done in accordance with the procedure as mentioned above by any specially skilled person shall be considered as MLC. However, the prescribed procedure is required to be followed.

12. For the aforesaid discussion, the present petition filed under Section 482 of CrPC is hereby dismissed being devoid of merits and the order passed by the trial Court is affirmed.

Application dismissed

I.L.R. [2019] M.P. 2164
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice Shailendra Shukla
M.Cr.C. No. 8704/2019 (Indore) decided on 3 October, 2019

PRAVEEN ...Applicant

Vs.

AMIT VERMA …Non-applicant

***A. Penal Code (45 of 1860), Section 415 & 420 and Criminal Procedure Code, 1973 (2 of 1974), Section 482 – Ingredients & Grounds* – Held – Parties were unacquainted with each other and cheque of respondent got dishonoured in the first instance and subsequent attempts of complainant to get his money back failed – Respondent on one pretext or the other did not honour his commitment – Intention to deceive is perceivable from the very beginning – Cheating as described u/S 415 is attracted – JMFC directed to register case u/S 420 IPC – Application allowed. (Para 26 & 27)**

क. दण्ड संहिता (1860 का 45), धारा 415 व 420 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – घटक व आधार – अभिनिर्धारित – पक्षकार एक दूसरे से अपरिचित थे एवं प्रतिवादी का चेक प्रथम बार में अनादृत हुआ तथा परिवादी द्वारा अपने पैसे वापस पाने के पश्चात्वर्ती प्रयत्न विफल रहे – प्रत्यर्थी ने कोई ना कोई बहाना कर अपनी प्रतिबद्धता का आदरण नहीं किया – प्रवंचना का आशय प्रारंभ से ही बोधगम्य है – धारा 415 के अंतर्गत वर्णित छल आकर्षित होता है – न्यायिक मजिस्ट्रेट प्रथम श्रेणी को भा.दं.सं. की धारा 420 के अंतर्गत प्रकरण पंजीबद्ध करने हेतु निदेशित किया गया – आवेदन मंजूर।

***B. Penal Code (45 of 1860), Section 415 & 420 – Nature of Dispute – Civil/Criminal* – Held – Had there been a history of commercial transaction between parties, subsequent dishonour of cheque in a later commercial transaction would show that transaction was a breach of contract only and dispute is of a civil nature. (Para 26)**

ख. दण्ड संहिता (1860 का 45), धारा 415 व 420 – विवाद का स्वरूप – सिविल/आपराधिक – अभिनिर्धारित –यदि पक्षकारों के मध्य वाणिज्यिक संव्यवहार का इतिहास रहा होता तब बाद के वाणिज्यिक संव्यवहार में चेक का पश्चात्वर्ती अनादरण यह दर्शाएगा कि संव्यवहार केवल एक संविदा का भंग था तथा विवाद सिविल स्वरूप का है।

***C. Penal Code (45 of 1860), Section 415 & 420 – Intention* – Held – Apex Court concluded that in such matters what is important to consider is intention of accused at the time of inducement – If intention was dishonest at the very first time when the promise was made and contract was entered into, then offence of cheating is made out. (Para 22)**

ग. दण्ड संहिता (1860 का 45), धारा 415 व 420 – आशय – **अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि ऐसे मामलों में उत्प्रेरणा के समय अभियुक्त का आशय क्या है, यह विचार में लिये जाने हेतु आवश्यक है – यदि प्रथम बार में ही, जब वचन दिया गया था तथा संविदा की गई थी, आशय बेईमानी करने का था तो छल का अपराध बनता है।**

Cases referred:

Laws (SC) 1993 3 4, Laws (MAD) 1994 3 45, LAWS (MPH) 2004 Page 355, (2015) 8 SCC 293, (2007) 10 SCC 110, 2006 (6) SCC 736, (2016) 1 SCC 348, 2005 (10) SCC 228, (2006) 6 SCC 736, (2000) 2 SCC 636.

Sarit Sanyal, for the applicant.
Anuj Bhargava, for the non-applicant.

O R D E R

SHAILENDRA SHUKLA, J.:-Submissions were made on petition under Section 482 of Cr.P.C. against the order passed by 8th ASJ, Indore on 25.6.2018 in Cri. Revision No.118/2018, whereby the court has refused to register the complaint under Section 420 IPC and has affirmed the order pronounced on 1.3.2018 by the JMFC has refused to registered the complaint under Section 406 and 420 of IPC.

2. The petitioner Praveen had filed a complaint case against the respondent to the fact that the complainant had sent a consignment to the respondent valued at Rs.1,19,306/- and Rs.2,55,868 and the respondent gave two cheques 046853 and 046855 on 15.4.2017 and 25.4.2017 as a measure of repayment of the consignment received by him. Both these cheques were however, dishonored on 14.7.2017. The complainant was not aware of the limitation period provided under Section 138 of N.I. Act and, therefore, could not give notice to the respondent within the stipulated time period and hence, no case could be filed under Section 138 of N.I. Act. Hence, he has been compelled to file complaint case under Section 406 and 420 of IPC.

3. The trial court vide order dated 1.3.2018 was of the considered opinion that the complainant could not show that the intention of the respondent was to cheat the complainant from the beginning. Thus, no case for cheating was made out. This order was challenged before the revisional court. The revisional court referred to the definition of cheating as under Section 415 of IPC and was of the opinion that the complainant has not been able to show that the respondent was from very inception not inclined to make the repayment and, therefore, no case for cheating was made out.

4. Aggrieved, the petitioner has filed the petition under Section 482 of Cr.P.C., seeking registration of the complaint case under Section 406 and 420 of IPC.

5. It has been prayed that the order passed in Cri.R.No.188/2018 passed by the 8th ASJ, Indore be set aside and direction be made to register the case under Section 420 of IPC. Two citations has been submitted in support of the complainant. These are *Rajesh Bajaj V/s. State* (Govt. of NCT Delhi). Laws (SC) 1993 3 4 and *S. Muthu Kumar V/s. State,* Laws (MAD) 1994 3 45.

6. In the case of *Rejesh Bajaj* (supra), the Apex Court, while considering as to whether an offence of cheating is made out or not from given set of facts, held that the intention of the persons who induces the victim of his representation should be seen and not the nature of the transaction which would become decisive in discerning whether there was commission of offence of cheating or not.

7. When the complainant has stated in the body of the complaint that he was induced to believe that the non-applicant would honour the payment on receipt of invoices and that the complainant realised later that the intentions of the non-applicant were not clear who had, after receiving the goods, had sold them to others and still he did not pay the money, averments would prima-facie make out a case for investigation by the authorities.

8. The Apex Court went on to observe as under :-

> *" The High Court seems to have adopted a strictly hyper-technical approach and sieved the complaint through a cullendar of finest gauzes for testing the ingredients under Section 415 , IPC. Such an endeavour may be justified during trial, but certainly not during the stage of investigation. At any rate, it is too premature a stage for the High Court to step in and stall the investigation by declaring that it is a commercial transaction simplicitor wherein no semblance of criminal offence is involved."*

9. The Apex Court recalled the note of caution in respect of quashment of criminal proceedings as laid down in the case of *State of Haryana & others vs. Bhajan Lal & others* in following terms :-

> *" We also give a note of caution to the effect that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases; that the court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the court to act according to its whim or caprice."*

10. The Madras High Court in the case of *S. Muthu Kumar* (supra), the Court noted that the complainant had specifically stated as follows:-

> *" Thus the accused has fraudulently and dishonestly induced the complainant to deliver goods to him on the pretext of issuing the said cheque knowing fully well that the cheque will not be honoured."*

11. Observing thus, it was held that offence of cheating was indeed made out.

12. Yet another citation of *Santosh Choubey vs. Pankaj Gulati,* LAWS (MPH) 2004 Page 355 has also been referred to.

13. As per the facts of this case, the complainant collected amounts from students who were admitted in a training course run by AISECT. As per the terms of the contract, the complainant was entitled to royalty @ 5%. Further, from the affiliation fees, share of 40% and commission of renewal fees @ 25% was payable to him. However, the applicant retained the entire amount and even refused to refund the security amount of Rs.50,000/-. A criminal case was registered under Sections 406 and 420 of IPC. The High Court relying upon the case of *Rejesh Bajaj* (supra) refused to quash the criminal proceedings under Sections 406 and 420 of IPC. Thus, as per the citations referred to above, it has been laid down by the Courts that if the complaint specifically carries averments regarding cheating, an offence under Section 420 of IPC, if registered, the same ought not to be quashed.

14. On this analogy, learned counsel for the applicant submits that the non-applicant purchased detergent soaps from the complainant and gave two cheques which were dishonoured and when notices were sent to the non-applicant, the non-applicant flatly denied having received any detergent soaps whereas, in the mobile recording, non-applicant has admitted to have received detergent soaps which shows that clear intention of the non-applicant to commit offence of cheating with the complainant.

15. Per contra, learned counsel for the respondent has referred to some citations, which purport to clarify as to whether the offence of "cheating" is attracted in the given set of circumstances or not. In *Vesa Holdings Pvt. Ltd. & Anr. V/s. State of Kerala & Ors.* reported as (2015) 8 SCC 293 it has been held that at the time of making initial promise if there is culpable intention to cheat, the offence of cheating would not be attracted. Para 12 and 13 of this citation are relevant which are reproduced as under :-

> *" 12. From the decisions cited by the appellant, the settled proposition of law is that every breach of contract would not give rise to an offence of cheating and only in those cases breach of contract would amount to cheating where there was any deception played at the very inception. If the intention to cheat has developed later on, the same cannot amount to*

cheating. In other words for the purpose of constituting an offence of cheating, the complainant is required to show that the accused had fraudulent or dishonest intention at the time of making promise or representation. Even in a case where allegations are made in regard to failure on the part of the accused to keep his promise, in the absence of a culpable intention at the time of making initial promise being absent, no offence under Section 420 of the Indian Penal Code can be said to have been made out.

13. It is true that a given set of facts may make out a civil wrong as also a criminal offence and only because a civil remedy may be available to the complainant that itself cannot be a ground to quash a criminal proceeding. The real test is whether the allegations in the complaint disclose the criminal offence of cheating or not. In the present case there is nothing to show that at the very inception there was any intention on behalf of the accused persons to cheat which is a condition precedent for an offence under Section 420 IPC. In our view the complaint does not disclose any criminal offence at all. Criminal proceedings should not be encouraged when it is found to be malafide or otherwise an abuse of the process of the court. Superior courts while exercising this power should also strive to serve the ends of justice. In our opinion, in view of these facts allowing the police investigation to continue would amount to an abuse of the process of court and the High Court committed an error in refusing to exercise the power under Section 482 of Criminal Procedure Code to quash the proceedings.

16. In the case of *Anil Ritolla V/s. State of Bihar & Anr.* reported as (2007) 10 SCC 110, the Apex Court in para 11 has observed as under :-

"11. There cannot be any doubt or dispute whatsoever that an offence can be committed even if the parties had entered into a commercial transaction. In Rajesh Bajaj (supra) this Court held so. But it is equally well settled that the allegations contained in the complaint petition must, prima facie, show inducement of the victim by the accused by making a representation. In a case of this nature, we are of the opinion that no case has been made out to form an opinion that the appellant had the requisite intention. "

17. It can thus be seen that in this citation, the Hon'ble Apex Court had considered the principles enunciated in the case of *Rajesh Bajaj* (supra). The court further referred to another citation of *Indian Oil Corporation V/s. NEPC India Ltd*, reported as 2006 (6) SCC 736, the relevant part of which is reproduced below :-

" 32. The essential ingredients of the offence of 'cheating' are :
(i) deception of a person either by making a false or misleading representation or by other action or omission (ii) fraudulent or

dishonest inducement of that person to either deliver any property or to consent to the retention thereof by any person or to intentionally induce that person to do or omit to do anything which he would not do or omit if he were not so deceived and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property. "

18. The Hon'ble Apex Court in the Case of *ARCI V/s. Nimra Cerglass Technics (P) Ltd*. reported as (2016) 1 SCC 348 further explained the definition between cheating and breach of contract as under :-

> " 16.Distinction between mere breach of contract and the cheating would depend upon the intention of the accused at the time of alleged inducement. If it is established that the intention of the accused was dishonest a the very time when he made a promise and entered into a transaction with the complainant to part with his property or money, then the liability is criminal and the accused is guilty of the offence of cheating. On the other hand, if all that is established that a representation made by the accused has subsequently not been kept, criminal liability cannot be foisted on the accused and the only right which the complainant acquires is the remedy for breach of contract in a civil court. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown at the beginning of the transaction. In S.W. Palanitkar & Ors. vs. State of Bihar & Anr. (2002)1 SCC 241, this Court held as under:
>
> > *21....In order to constitute an offence of cheating, the intention to deceive should be in existence at the time when the inducement was made. It is necessary to show that a person had fraudulent or dishonest intention at the time of making the promise, to say that he committed an act of cheating. A mere failure to keep up promise subsequently cannot be presumed as an act leading to cheating. "*

19. The Apex Court in this case again referred to another citation of *Anil Mahajan V/s. Bhor Industries Ltd.* reported as 2005 (10) SCC 228 in which it was observed as under :-

> *" 6. ....A distinction has to be kept in mind between mere breach of contract and the offence of cheating. It depends upon the intention of the accused at the time of inducement. The subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent, dishonest intention is shown at the beginning of the transaction."*

20. The Apex Court further referred to yet another case of the Apex Court which is *Indian Oil Corporation V/s. NEPC India Ltd*. (2006) 6 SCC 736 . Relevant observation in this case is as under :-

> *" 13. While on this issue, it is necessary to take notice of a growing tendency in business circles to convert purely civil disputes into criminal cases. This is obviously on account of a prevalent impression that civil law remedies are time consuming and do not adequately protect the interests of lenders/creditors. Such a tendency is seen in several family disputes also, leading to irretrievable break down of marriages/ families. There is also an impression that if a person could somehow be entangled in a criminal prosecution, there is a likelihood of imminent settlement. Any effort to settle civil disputes and claims, which do not involve any criminal offence, by applying pressure though criminal prosecution should be deprecated and discouraged.*

21. In the case of *In G. Sagar Suri vs. State of UP*, (2000) 2 SCC 636, this Court observed :-

> *" It is to be seen if a matter, which is essentially of civil nature, has been given a cloak of criminal offence. Criminal proceedings are not a short cut of other remedies available in law. Before issuing process a criminal court has to exercise a great deal of caution. For the accused it is a serious matter. This Court has laid certain principles on the basis of which High Court is to exercise its jurisdiction Section 482 of the Code. Jurisdiction under this Section has to be exercised to prevent abuse of the process of any court or otherwise to secure the ends of justice."*

22. Thus, in all these citations referred to by the respondent, the Apex Court has cautioned against converting a matter of civil nature pertaining to mere breach of contract into an offence of cheating and it has been held that what is important to consider is the intention of the accused at the time of inducement. If the court finds that the intention was dishonest at the very time when the promise was made and contract was entered into, then offence of cheating is made out.

23. The learned counsel for the petitioner submits that the intention of accused was not honourable and the manner in which he received the goods and thereafter denied the receipt of such goods and also the manner in which he issued the cheques which were only dishonored later on by the bank, exposes the intention of the accused, which was nothing but cheating and the action of the accused surpasses civil liability, but enters into realm of cheating as described under Section 415 of IPC.

24. After duly considering the submissions of both the learned counsel for the parties, the intention of the accused has to be gathered in order to consider as to whether it was breach of contract or acts of the respondent had the connotations of cheating as well.

25. The intention has to be gathered from the deposition of witnesses which was perused. The complainant-Praveen states that he is a distributor of Maharaj

Soap Industries Private Limited and the non-applicant-Amit Verma, in March 2017, contacted Praveen, after taking telephone number of complainant from online website. On 24.07.2017, non-applicant-Amit Verma had placed an order of consignment valued at Rs.1,19,000/-. The goods were delivered at Mhow godown on the same day. Non-applicant-Amit Verma gave cheque to person unloading the goods on the same day. This cheque was placed for encashment for 6-7 days later and 2-3 days after first cheque was put up before the Bank, Amit Verma again placed the purchase order of goods valued at Rs.1,81,000/-.The cheque was again given by non-applicant-Amit Verma. When non-applicant-Amit Verma was told that the first cheque has been dishonoured, he promised that he would send money through RTGS, but no money was transferred. When the second cheque bounced, non-applicant-Amit Verma told the complainant that his payment was to arrive from the market and that he would pay the whole amount in one month's time. Not stopping at the two orders, non-applicant-Amit Verma placed yet another order of Rs.75,000/- and he issued a cheque in respect of this amount as well. However, non-applicant-Amit Verma told the complainant that these cheques be placed for payment after interval of some days. The complainant-Praveen states that on 15.04.2019, he went to the non-applicant-Amit Verma for getting payment. The non-applicant-Amit Verma took back two cheques of second and third transaction from him and gave a joint cheque in respect of these transactions. However, that cheque also got bounced. The witness states that when he contacted non-applicant-Amit Verma, Amit Verma told him to send his Executive Officer, however, Executive Officer when sent to Amit Verma for payment, non-applicant-Amit Verma, on one pretext or the other, failed to make the payment. The Executive Officer of the complainant is Rajendra Kokate (PW-2) who has supported the statements of complainant-Praveen (PW- 1).

26. From the statements of these witnesses, it appears that there was no prior acquaintance between the complainant-Praveen and the non-applicant-Amit Verma and it was for the first time that the non-applicant-Amit Verma had placed the orders with the complainant and failed to honour his part of contract by making payment. Had there been a history of commercial transaction between both i.e. complainant-Praveen and the non applicant-Amit Verma, subsequent dishonour of cheque in a later commercial transaction would have clearly shown that the transaction was a breach of contract only and the dispute was of civil nature. However, looking to the facts that first both the parties were unacquainted with each other and the cheque of non-applicant got dishonoured in the first instance and subsequent attempts on the part of complainant to get his money back failed and the non-applicant on one pretext or the other did not honour his commitment, an intention to deceive the complainant is perceivable from the very beginning and therefore offence of 'cheating' as described under Section 415 of IPC gets attracted.

27. Consequently, this petition filed under Section 482 of Code of Criminal Procedure, 1973 stands allowed and the concerned JMFC is directed to register a case under Section 420 of Indian Penal Code, 1860 against the non-applicant-Amit Verma and proceed accordingly. Both the parties shall now appear before the learned Trial Court on **06.11.2019.**

28. The petition filed under Section 482 of Criminal Procedure Code, 1973 is disposed of, in above terms.

Certified copy as per Rules.

Application allowed.