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INDIAN LAW REPORT (M.P.) COMMITTEE

AUGUST 2020

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दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125 एवं हिन्दू विवाह अधिनियम (1955 का 25), धारा 11 – विधिक रूप से विवाहित पत्नी – अभिरक्षक – हकदारी – अभिनिर्धारित – यह निवेदन किया गया कि अपीलार्थी का पूर्व पति 1999 से लापता है और इसलिए उसने 2008 में प्रत्यर्थी से विवाह किया – पति ने 1955 के अधिनियम की धारा 11 के अंतर्गत एक प्रकरण प्रस्तुत किया जिसे खारिज किया गया तथा आदेश ने अंतिमता प्राप्त कर ली है – पक्षकारों ने चार वर्षों तक एक साथ सहवास किया है जिससे एक उपधारणा

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***Representation of the People Act (43 of 1951), Section 83(1)(a) & 86 and Civil Procedure Code (5 of 1908), Order 7 Rule 11 – "Concise Statement of Material Facts" & "Cause of Action"* – Returning Candidate/Respondent filed application under Order 7 Rule 11 CPC – Held – Petitioner mentioned entire details of his knowledge and defects in affidavit of respondent – Petition having a concise statement of material facts and discloses a triable issue or cause of action – Grounds taken by respondent in application under Order 7 Rule 11 CPC not sufficient for dismissal of petition – Application dismissed. [Ram Kishan Patel Vs. Devendra Singh] …1888**

लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 83(1)(a) व 86 एवं सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 11 – ''तात्विक तथ्यों का संक्षिप्त कथन'' व ''वाद हेतुक'' – निर्वाचित प्रत्याशी/प्रत्यर्थी ने आदेश 7 नियम 11 सि.प्र.सं. के अंतर्गत आवेदन प्रस्तुत किया – अभिनिर्धारित – याची ने प्रत्यर्थी के शपथपत्र में उसके ज्ञान एवं त्रुटियों के संपूर्ण विवरण उल्लिखित किये – याचिका में तात्विक तथ्यों का संक्षिप्त कथन है और एक विचारणीय विवाद्यक या वाद कारण प्रकट होता है – प्रत्यर्थी द्वारा आदेश 7 नियम 11 सि.प्र.सं. के अंतर्गत आवेदन में लिये गये आधार, याचिका की खारिजी हेतु पर्याप्त नहीं – आवेदन खारिज। (राम किशन पटेल वि. देवेन्द्र सिंह) **…1888**

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लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 83(1)(a) व 86 एवं सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 11 – वादपत्र का नामंजूर किया जाना – आधार जहां दी गई परिस्थितियों एवं प्रक्रमों के अंतर्गत आदेश 7 नियम 11 सि.प्र.सं. के

Service Law – Transfer – Frequent Transfers **– Held – Employer is the best judge to decide transfer of employee – There was a scuffle between petitioner and other employee – Transfer of petitioner to maintain discipline and normal functioning of department – No fault with transfer orders – Petition dismissed. [Chandragupt Saxena Vs. Bank of Baroda] …1882**

सेवा विधि – स्थानांतरण – बारंबार स्थानांतरण – अभिनिर्धारित – कर्मचारी के स्थानांतरण का विनिश्चय करने हेतु, नियोक्ता सर्वोत्तम निर्णायक है – याची और अन्य कर्मचारी के बीच हाथापाई हुई थी – अनुशासन बनाये रखने के लिए और विभाग का कामकाज सामान्य रखने के लिए याची का स्थानांतरण – स्थानांतरण आदेशों में कोई दोष नहीं – याचिका खारिज। (चन्द्रगुप्त सक्सेना वि. बैंक ऑफ बडौदा) **…1882**

Service Law – Transfer – Frequent Transfers **– Held – Petitioner, being a Manager, is senior officer of Bank and Apex Court opined that for superior or responsible posts, continued posting at one station is not conducive of good administration – Further, petitioner is neither a Class III nor Class IV employee, thus he do not deserves a protection from frequent transfer which may be given to them in a given fact situation. [Chandragupt Saxena Vs. Bank of Baroda] …1882**

सेवा विधि – स्थानांतरण – बारंबार स्थानांतरण – अभिनिर्धारित – याची एक प्रबंधक होने के नाते, बैंक का वरिष्ठ अधिकारी है और सर्वोच्च न्यायालय की राय है कि वरिष्ठ या जिम्मेदार पदों हेतु, लगातार एक ही स्थान पर पदस्थापना, अच्छे प्रशासन के लिए सहायक नहीं है – इसके अतिरिक्त, याची न तो एक वर्ग–III न ही वर्ग–IV कर्मचारी है अतः, वह बारंबार स्थानांतरण से संरक्षण का हकदार नहीं है, जो कि दिये गये तथ्य की स्थिति में उन्हें दिया जा सकता है। (चन्द्रगुप्त सक्सेना वि. बैंक ऑफ बडौदा) **…1882**

Service Law – Transfer – Personal Inconvenience – Scope of Interference **– Held – Transfer order can be interfered with if it violates any statutory provision (not policy guidelines), issued by incompetent authority, proved to be malafide or changes the service condition of employee to his detriment – Relevant circular regarding transfer of physically handicapped employees is directory in nature – Personal inconvenience etc. cannot be a ground to interfere with transfer order. [Chandragupt Saxena Vs. Bank of Baroda] …1882**

सेवा विधि – स्थानांतरण – व्यक्तिगत असुविधा – हस्तक्षेप की व्याप्ति – अभिनिर्धारित – स्थानांतरण आदेश में हस्तक्षेप किया जा सकता है यदि वह किसी कानूनी उपबंध (नीति दिशा–निदेश नहीं) का उल्लंघन करता हो, अक्षम प्राधिकारी द्वारा जारी किया गया हो, असद्भावपूर्वक होना साबित हुआ हो अथवा कर्मचारी की सेवा शर्त को उसके अहितकर बदलता हो – शारीरिक रूप से दिव्यांग कर्मचारियों के स्थानांतरण संबंधी सुसंगत परिपत्र निदेशात्मक स्वरूप के है – व्यक्तिगत असुविधा इत्यादि, स्थानांतरण

वसीयत – चुनाव का सिद्धांत व विबंध का सिद्धांत – अभिनिर्धारित – कोई पक्षकार जो किसी लिखत का लाभ लेता है उसे उसमें उल्लिखित सभी को स्वीकार करना होगा – पक्षकार यदि ज्ञानपूर्वक एक संविदा या हस्तांतरण–पत्र या एक आदेश के लाभों को स्वीकार करता है, वह ऐसी संविदा, हस्तांतरण पत्र या आदेश की विधिमान्यता या स्वयं पर बाध्यकारी प्रभाव से इंकार करने के लिए विबंधित है – एक व्यक्ति जो ''वसीयत'' के एक भाग का लाभ लेता है, ''वसीयत'' के शेष भाग को चुनौती नहीं दे सकता – पक्षकार को एक ही समय अनुमोदित तथा अस्वीकृत करने की अनुमति नहीं दी जा सकती। (भगवत शरण (मृतक द्वारा विधिक प्रतिनिधि) वि. पुरूषोत्तम) **(SC)…1795**

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THE INDIAN LAW REPORTS M.P. SERIES, 2020
(Vol.-3)

JOURNAL SECTION

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

MADHYA PRADESH STREET VENDORS (PROTECTION OF LIVELIHOOD AND REGULATION OF STREET VENDING) SCHEME, 2020

[Published in Madhya Pradesh Gazette (Extra-ordinary), dated 29 June 2020, page Nos. 404(22) to 404(44)]

Noti. 99 F-1-04-2017-18-3.- In exercise of the powers conferred by section 38 (1) of the Street Vendors (Protection of Livelihood and Regulation of Street Vending) Act, 2014 (No.7 of 2014) and all other powers enabling him in this behalf, the government of Madhya Pradesh, is pleased to make the following scheme for welfare & providing opportunity to street vendors to earn livelihood, namely :-

Scheme

1. Short title, Extent and Commencement:-

(1) This scheme may be called the Madhya Pradesh Street Vendors (Protection of Livelihood and Regulation of Street Vending) Scheme, 2020. (2) It shall extend to the whole State of Madhya Pradesh; (3) It shall come into force from the date of its publication in the Official Gazette of Madhya Pradesh.

2. Definitions.-

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

(a) **"Act"** means the Street Vendors (Protection of Livelihood and Regulation of Street Vending) Act, 2014 (no.7 of 2014);

(B) **"Festive Market"** means a market where sellers and buyers have traditionally congregated for the sale and purchase of products or services during festival season and has been determined as such by the Urban Local Authority on the recommendations of the Town Vending Committee;

(e) **"Form"** means Forms appended to this scheme;

(d) **"Heritage Market"** means a market which has completed more than fifty years in one place where sellers and buyers have traditionally congregated for the sale and purchase of products or services and has been determined as such by the Urban Local Authority on the recommendation of the Town Vending Committee;

(e) **"Natural Market"** means a market where sellers and buyers have traditionally congregated for the sale and purchase of niche products or services and has been determined as such by the Urban Local Authority on the recommendation of the Town Vending Committee;

(f) **"Night Market"** means a market where sellers and buyers have traditionally congregated for the sale and purchase of products or services after evening i.e. during night and has been determined as such by the Urban Local Authority on the recommendation of the Town Vending Committee;

(g) **"Plan"** means the plan prepared to promote the vocation of street vendors covering the matter contained in the First Schedule appended to the Act;

(h) **"Public Purpose"** in the context of the Act includes,-

(i) Widening of roads, streets, lanes;

(ii) Shifting the alignment of roads, streets, lanes;

(iii) Construction of flyovers without slip down roads;

(iv) Construction of underpasses;

(v) Development of land owned by public authorities for some public projects;

(vi) Laying of water, storm water or sewer lines;

(vii) Erecting intermediate pumping stations for the services;

(viii) Any project related with public transport like Bus Rapid Transit System, Metro etc;

(ix) Construction of Economically Weaker Section (EWS) housing;

(x) Development and maintenance of parks, gardens and recreational area;

(xi) Conservation of any eco system resource in vending Zone; and

(xii) Any other development work taken up by the Urban Local Authority and/or the State government, the beneficiary of which will be the community at large;

(i) **"Rules"** means the Madhya Pradesh Street Vendors (Protection of livelihood and Regulation of Street Vending) Rules, 2017;

(j) **"Seasonal Vendors"** means street vendors who carry out vending activities on specific seasons and has been determined as such by the Urban Local Authority on the recommendation of the Town Vending Committee;

(k) **"Section"** means section of the Act;

(l) **"Stationary Vendors"** means street vendors who carry vending activities on regular basis at a specific location e.g. those occupying space on the pavements or other public places and/or private areas either open/covered (with implicit or explicit consent) of the authorities;

(m) **"Weekly Market"** means a market where sellers and buyers have weekly congregated for the sale and purchase of products or services and has been determined as such by the Urban Local Authority on the recommendations of the Town Vending Committee.

(2) The works and expressions used but not defined in this scheme shall have the same meanings as assigned to them in the Act or the Rules.

3. Manner of conducting survey of street vendors.-

(1) The Town Vending Committee (TVC), after the date of commencement of this scheme shall conduct survey to identify all existing street vendors within the area of its jurisdiction and subsequent survey shall be carried out at least once in every 03 years.

(2) The Town Vending Committee (TVC) shall keep ward wise data of street vendors, in the survey.

(3) Manner of survey shall be as follows,-

(a) Street vendors will register themselves by putting their Aadhar and SAMAGRA through the portal prepared by Directorate, Urban Administration and Development;

(b) Urban local authorities shall be responsible for taking necessary and appropriate actions for motivation for self-registration of street vendors;

(c) An officer from the urban local authority or City Mission Manager, Deendayal Antyoday Yojna will be accountable for verification of such applications;

(d) Street vender will get identity card or certificate of vending through the portal or through Urban Local Authority.

4. Vending Certificate, Identity Card, Validity, Renewal, Cancellation or Suspension of Vending Certificates:

(1) Issuance of vending certificate:– The criteria for issuing vending certificate would be as under:-

(a) The street vendor indentified in the survey shall be issued certificate in form-2 by the Town Vending Committee within a maximum period of 30 days from the date of completion of survey.

(b) Vending Certificate shall not be issued to a street vendor; if he/she

(i) is not citizen of India and is not of sound mind;

(ii) has any other means of livelihood;

(iii) has any other vending site in any other place;

(iv) does not carry on the vending himself or through his family members who are above eighteen years of age;

(v) does not complete the age of eighteen years.

(c) Only one vending site shall be permitted to the applicant within the municipal jurisdiction.

(d) Street vendors shall provide undertaking on following points at the time of online application,-

(i) the vending certificate shall be used by the vendor only for self or dependents of family member;

(ii) the vending certificate can't be leased, rented or sold to any other person. An undertaking in this respect shall be submitted by the street vendors to the TVC;

(iii) the vendors shall confirm that they are not allocated any other public space, store within the limits of Urban Local Authority;

(iv) the vendors shall confirm that either of their dependent or family members (wife/son) has not been issued a vending certificate;

(v) the vendor shall not use vending certificate for the vending of any unethical and illegal business or any kind of drug/intoxicating substance;

(vi) the vendor will not use the certificate for vending any kind of explosive materials;

(vii) the vendor shall follow the sanitation and hygiene rules in vending zone;

(viii) the vendor shall not use any type of polythene bags;

(ix) the vendor shall follow the orders issued by the Urban Local Authority and State Government from time to time;

(x) the vendor shall abide and follow all the conditions mentioned in vending certificate;

(xi) all the information given in the application and documents submitted along with it are correct and bona-fide and if found otherwise, vending certificate shall be cancelled by the authority.

(e) New street vendors who wish to carry on street vending during the intervening period of two surveys, shall apply online through self-registration process. Online application will be a continue process.

(f) The vending certificate will have a photograph of the person carrying on vending activity and in case of family members involved in vending at vending site, in such

situation the said persons shall be covered in that photograph.

(g) Person who are carrying on street vending prior to commencement of the Act shall be given preference over the person who are intending to start street vending.

(h) The town vending committee (TVC) while considering for issue of vending certificate shall also give preference to senior citizen, physically challenged, single mother, widow as well as scheduled castes, scheduled tribes, other backward classes and minorities.

(i) Certificate shall not be issued to any vendor, if involved in any illegal or immoral occupation and/or in any occupation which is prohibited by the State Government or by the Urban Local Authority or who does not fulfill any condition mentioned in Form-2

(2) Validity of vending certificate.-

(a) vending certificate will be valid for a period of 5 years from the date of issuance;

(b) the vending certificate can be renewed for a further period of 3 years.

(3) Method and format to issue identity card to vendors.- Every person who is holding a vending certificate shall be issued with an identity card. The identity card shall be issued in **Form-4;**

(a) identity card will be issued under the signature of authorized officer of Urban Local Authority;

(b) identity card must contain a photograph which should be signed by issuing officer, with duly stamped;

(c) in case of loss or damage of identity card, the street vendor may apply for issuance of duplicate identity card to the town vending committee accompanied with an affidavit, copy of FIR and fee of fifty rupees.

(4) Application for Grant and Renewal of vending certificate.-

(a) Any person who intends to carry on business as street vendor, may apply through online portal with renewal fee.

(b) Renewal fee will be decided by the Urban Local Authority or Town Vending Committee time to time.

(c) The Town Vending Committee shall publish a list of defaulter street vendors who have failed to deposit the fees for renewal of vending certificate within specified time. After due date, one month notice for renewal shall be issued to those street vendors During the period of notice, the street vendor shall be liable to pay Rs. 20/- (Rupees Twenty only) per day as penalty in addition to fee;

(d) Street vendors who have not got their certificate renewed even after first notice served as specified in clause-'c' as above the town vending committee will take appropriate action.

(e) For the renewal of vending certificate the street vendor should dismantle/destroy all such permanent or temporary structure made by him, from the vending place.

(5) Cancellation or Suspension of Vending Certificates.-

(a) The Town vending committee may cancel the vending certificate of any street vendor on any one or more of the following grounds, namely:-

I. breach of any of the conditions of vending certificate mentioned in the Act or in this Scheme;

II. the Vending Certificate has been obtained on misrepresentation or suppression of material facts;

III. false document or photograph has been used;

IV. fails to pay the monthly rent and dues of the Urban Local Authority and.

(b) Where the Town Vending Committee, for reason to be recorded in writing, is satisfied that pending the question of cancellation of the vending certificate on any of the ground, it is necessary to suspend the street vendor from the vending activities for such period not exceeding thirty days as specified in the order may suspend the certificate and require such street vendor to show cause within 15 days from the date of issue of the order, as to why the suspension of vending activities should not be extended till the determination of the question of cancellation of such Vending Certificate.

(c) No order of cancellation of vending certificate shall be made, unless the person concerned has been given a reasonable opportunity of being heard.

(d) Where the Town Vending Committee has made an order cancelling the vending certificate of a street vendor, such vendor shall surrender his certificate of vending and identity card to the town vending committee within the period as specified in the order of cancellation and his name shall be struck off from the register maintained for the purpose.

(e) Street vendor may appeal its concern in grievance redressal committee.

(f) Street vendor should ensure that any illegal parking shall not be made around its vending place.

(g) Street vendor shall not use or create any sound or noise to attract the consumers.

(h) Due to security reasons or any emergency the vendor shall vacant the place immediately without asking any reason.

(i) Street vendor shall not damage any public property, if it is happened so the cost of repairing will be borne by the vendor.

(j) Electricity or water connection is not permissible at the vending place. The street vendor shall use renewable battery operated devices without sound or air pollution.

5. Vending Fess.-

(1) In order to meet the expenses for making arrangement of land and civic amenities, the Urban Local Authority shall charge the vending fee, as decided by it but not less than the amount as specified below,-

(a) as decided by urban local authority according to section 132 (g) of the Madhya Pradesh Municipal Corporation Act, 1956;

(b) as decided by urban local authority according to section 127 (g) of the Madhya Pradesh Municipalities Act, 1961.

(2) every year a minimum 5% increase in vending fees shall be imposed.

(3) manner of collecting vending fees,-

(a) for the purpose of deposit of money, whether as a fee, rent or fine or penalty, payable by the street vendors under the Act, Rules and the Scheme, every Town Vending Committee shall open a bank account in any scheduled bank, which shall be operated by such officer of the Town Vending Committee as the Urban Local Authority may direct;

(b) the street vendor may deposit the fees including monthly rent and such other fee in the account with his name and Registration Number allotted to him any may also be paid by any such process established by the Urban Local Authority;

(c) the Urban Local Authority concerned is free to make its own alternative arrangement for collection of fees, in consultation with Town Vending Committee.

(4) An annual audit of the account will be carried out by the Town Vending Committee as per prevailing laws.

6. Time sharing of vending zones.- The manner of distribution of the time of Vending:-

(1) the Town Vending Committee shall determine the vending time taking into account the availability of space and securing standards of female vendors;

(2) in allotting time span for vending the male and female vendors shall be treated equally without any discrimination in the rules and parameters concerned with such allotment;

(3) in case the number of vendors in vending zones exceeds the space available, vendors shall be allotted time-spans for vending in different shifts. This will provide equal opportunity to all vendors in the promotion of their livelihood and in maintaining standards of hygiene at the vending zone;

(4) where vending activities take place before the opening of markets that function in the location of such vending zone, vendors have to be given strict instructions to vacate the place before such opening. Further, they will also have to maintain cleanliness and order of such vending zones;

(5) the Town Vending Committee shall determine the vending activities on time-sharing basis depending on the market needs and space to the street vendors.

7. The Principles for Determining of Vending Zones as Restriction-Free-Vending Zones, Restricted-Vending Zones and No-Vending Zones.-

(1) Foot fall, status, road with and density of the vehicular and pedestrian movement shall be the deciding factor for determining vending and no vending zone.

(2) Town Vending Committee will decide free vending zones, restricted vending zones, no vending zones, special road or market in consultation with Urban Local Authority.

(3) The mobile vending shall be allowed on the road keeping the traffic and pedestrian movement in the view.

8. No Vending Zone.-

(1) Area of two hundred meters of the Secretariat, District Collectorate, offices of District Panchayat, Municipal Corporation, Municipality, Nagar Panchayat, Cantonment Board, Archaeological Survey of India and State Archaeological Monuments; and

(2) area of fifty meters from crossing of two or more on all sides and any declared heritage structure by Urban Local Authority;

(3) other areas as decided by Urban Local Authority.

9. Principles to determine the holding capacity of vending zone.-

(1) The following shall be the principles for determining the holding capacity of vending zone;

(a) 2.5% of the population of the ward or zone shall be accommodated;

(b) the holding capacity of a vending zone will be according to the vending site divided by the total area of the vending area.

(2) The following criteria may be kept in the mind by the Town Vending Committee in determining the vending zones, namely:-

(a) a maximum of 2 square meters area as 'vending area' shall be provided to each vendor/hawker;

(b) passage of 1.0/2.0 meter width in front of stalls/push carts shall be reserved as 'extension', for consumers/users to stand or buy goods;

(c) in no case, the carriageway shall be allowed to be used for street vending;

(d) if the width of road permits, street vending may be allowed on both sides of the road; and

(e) no vending activity shall be allowed at a distance of 50 meters from any junction/exit/entry of road.

10. Relocation and eviction of street vendors.-

(1) Whenever Town Vending Committee feels that there is a need to declare a zone or part of it to be no vending zone for any of the following public purpose-

(a) if the traffic is not convenient and systematically organized;

(b) if the vending zone is overcrowded;

(c) if the vending zone is in narrow track;

(d) at the time of widening of the road;

(e) in the event of violation of the master plan;

(f) in and around of the very special or important personality house, from safety point of view;

(g) on the side ways of vending zone, if there is proposal for telephone line, electric line, drainage construction, beautification of road side or if it is located on government land for other purpose;

(h) for any other public purpose not mentioned above;

then the Town Vending Committee shall recommend the same to the Urban Local Authority to relocate it at suitable place for vending.

(2) The urban Local Authority shall intimate the street vendors of that zone 30 days prior to date of declaration of no vending zone and should also intimate about the area in which the affected street vendors will be relocated.

(3) The notice should also mention the time line in which the vendors have to vacate the existing vending zone.

(4) If the street vendors fails to vacate the intended no vending zone within the period specified in the notice shall be liable for eviction as per law.

(5) Any Street Vendor who carry on business on vending activities without having a vending certificate or whose vending certificate has been cancelled under section-7 shall be evicted by the Urban Local Authority by taking appropriate and legal action.

11. Social Auditing.-

(1) The form and the manner for carrying out social audit of the activities of Town Vending Committee:-

(a) The Town Vending Committee shall constitute a unit of three members for the purpose of carrying out social audit of its activities required to be performed under the provisions of the Act, Rules or the Scheme.

(b) The social audit unit shall be an independent body and shall consist of-

(i) an eminent academician in the field of sociology;

(ii) an eminent social activist; and

(iii) a retired administrator.

(c) The social audit shall be carried out at least once in every three years. The schedule for conducting social audit shall be decided at least three months advance.

(d) The Town Vending Committee shall provide details of all relevant information to the audit unit, at least a fortnight before the social audit process commences. Such details include;

(i) status of implementation of the Act, Rules and the Scheme for the street vendors;

(ii) the record of the minutes of the meetings of the Town Vending Committee conducted in those years;

(iii) the record of all registered street vendors;

(iv) the record of appeals made before the local authority under section 11 of the Act;

(v) the record of all grievances or disputes brought before the grievance redressal committee constituted under section 20 of the Act;

(vi) the record of the total number of evictions taken place, confiscation of goods and the relocation of street vendors taken place in those years; and

(vii) the records of social audit reports, if any, taken place previously.

(2) Meeting and working of social audit unit.-

(a) The social audit unit shall conduct meetings and focus group discussions with street vendors on various aspects of the implementation of the Act, Rules and the Scheme.

(b) The audit unit shall record in writing the grievances of the street vendors on any issue or problem faced by them and record findings.

(c) The audit unit shall give adequate advance public notice of the social audit public meeting.

(d) The audit unit shall hold a social audit public meeting at the town vending committee office. The members of the committee and representatives of the local authority shall attend the meeting. The audit unit shall read out its findings at the meeting. The street vendors shall be encouraged to testify and the Town Vending Committee shall respond to each of the issues identified in the social audit by giving clarification and explanation to the affected party and the public as to why a certain action was taken or not taken.

(e) The local authority shall, on each findings of the social audit unit in the cases of gaps, lapses or deviations, fix responsibility and shall take immediate corrective measures or disciplinary action.

(f) The cost of conducting social audit shall be met from the budgetary provisions of the Town Vending Committee.

(g) The statutory requirement of conducting social audit shall not preclude any independent initiative to carry out normal audit of accounts.

12. The manner of maintenance of proper records and other documents by the Town Vending Committee, Urban Local Authority, Planning Authority and State Nodal Officer in respect of street vendors.-

(1) Online software may be developed by the Urban Administration & Development Department for keeping the records of the street vendors.

(2) The Urban Local Authority shall enter the data of the surveyed street vendors through online process.

(3) The certificate of vending and identity card may be generated online.

(4) The website of Urban Local Authority shall display the vending zones and details of street vendors.

13. Public health and hygiene.-

Following norms should be abided for keeping public health and hygiene;

(1) The Urban Local Authority shall provide street vendors a proper place for disposing of their waste materials in order to maintain a hygienic environment.

(2) The street vendor(s) shall use proper covered dustbin(s) for disposing of the waste materials, in accordance with the waste disposal norms set by urban Local Authority or Solid Waste Management system of Urban Local Authority. The street vendors shall also pay the sanitation charges as per the norms set by the Urban Local Authority for Solid Waste Management (SWM).

(3) The Urban Local Authority shall ensure and provide the street vendors clean and fresh water along with the electricity/street light facility wherever possible.

(4) The Urban Local Authority in order to maintain public health and hygiene shall provide toilets facility with adequate water and electricity.

(5) Appropriate number of dustbins shall be provided by the Urban Local Authority to dispose of the waste materials.

(6) Town Vending Committee may initiate group insurance scheme for the street vendors.

14. State Nodal Officers.-

(1) For the purpose of co-ordinating all matters relating to street vending at the state level, Commissioner, Urban Administration & Development Department shall appoint a State Nodal Officer who shall not be below the rank of Joint Director, Directorate of Urban Administration and Development.

(2) The Nodal officer shall have power to inspect or cause to be inspected, the record of Town Vending Committee as and when deems fit.

(3) The Nodal officer shall have, at least, a half-yearly meeting with the Urban Local Authority in order to update the status of street vendors and may take feedback from the street vendors for ensuring their social security and co-ordinate with the Urban Local Authority including the Town Vending Committee.

(4) The State Government, if requires, may issue executive instruction, from time to time, for greater interest of the street vendors and effective implementation of the Scheme.

Form-I

[See clause 3(5) (a)]

Street Vendor's Survey Format

Name of Urban Local Authority ……..

Date of survey .....……..

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Name of surveyor/organization ……..

Unique ID of vendor | | | | | | | | | | | | |

1.	Name of vendor	M/F-
2.	Father/Husband name	
3.	Date of birth	
4.	Education	
5.	Category	☐ General ☐ OBC ☐ SC ☐ ST ☐ Minority
6.	Address (residence)	…… ……
7.	Address of vending place (Name of Zone, Lane No. etc.)	
8.	Ward name & number	
9.	Contact no. (Mobile)	
10.	Aadhar no.	

11. Details of family members:

S.No.	Name	DOB	M/F	Education	Aadhar No.	Whether assisting in vending or not (Y/N)
1.						
2.						
3.						
4.						
5.						
6.						

12. Distance from residence to vending place :-

13.	Type of vending	☐ Food ☐ Vegetable ☐ Clothes ☐ Decorative Materials ☐ Shoes ☐ Housing material ☐ Others (Specify)
14.	Date since when involved in street vending	
15.	Have you received identity card?	☐ Yes ☐ No
16.	Are other family members also vendors?	☐ Yes ☐ No

17.	Have you received any training? (if so, give details)	
18.	Category of vendor	☐ Stationary ☐ Mobile
19.	Category of vending place	☐ Festive ☐ Natural ☐ Heritage ☐ Night ☐ Seasonal ☐ Weekly
20.	Status of work place	☐ Rent ☐ Public
21.	Vending Time	☐ Full Time ☐ Evening ☐ Morning ☐ Night
22.	Do you have any other means of livelihood, if Yes, give details	
23.	Average daily income	
24.	Any bank account (if yes mention the name of Bank and Branch Name)?	
25.	Is there a bank loan on you? (give details)	
26.	Registered as BPL/APL (BPL Card No.)	
27.	Any Insurance policy (if yes mention the name of Insurance policy)?	

Name and Signature/Thumb impression of Street Vendor

Name and Signature of Surveyor

Instruction for Survey Team/Agency:-

(a) Survey Team/ Agency will complete the survey work under the instruction and guidance of Town Vending Committee (TVC);

(b) Survey Team /Agency will collect information in assigned format and will also collect important documents to verify the information (Voter ID/Adhar Card/Driving License etc.);

(c) The Survey Team/agency will be time bound to complete the survey work;

(d) Database of information collected in the survey format will be immediately prepared by Survey Team/ Agency;

(e) Ward-wise survey of vendors will be completed by the Survey Team/Agency;

(f) During the survey, the survey Team/agency will not incite fear or foster greed in the street vendors or their family members.

(g) It should be ensured that as for as possible all street vendors are identified in the survey conducted.

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Form-2

[See clause 4(1)(a) and (i)]

Street Vendor Certificate

Photograph of vendor along with his/her family members if involved in vending with vendor (to be signed and seal of issuing officer)

Unique Registration No. ……

Name of Street Vendor ……..

Father/Husband name …….

Residential Address ……...

Name of Urban Local Authority …….

Name of Vending Zone ……

Name of Vending Place …….

Time of Vending ……

Details of vending goods/services …….

Category of Vending (whether Stationery or Mobile) ……

Name and details of the family members involved in vending with the vender;

S.No.	Name	Relation with Vendor	Age	Sex
1.				
2.				
3.				
4.				

Date of Issue:

Valid up to:

(Signature & Seal of Issuing Authority)

Note:- The vendor shall renew the Vending Certificate atleast a month before of its validity period ends.

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The Street Vending Certificate is granted under following conditions:-

(i) Vending certificate does not confer ownership of land, but only confers the use of land based on certain conditions;

(ii) The vendor shall not construct any permanent structure on allotted space;

(iii) The Urban Local Authority reserves the right to shift the street vendor to other location on the ground as provided under section 10;

(iv) The Vending Certificate cannot be transferred/leased/rented or sold to others. An undertaking is to be submitted by the Street Vendor to the Town Vending Committee;

(v) Street Vendor can sell only those articles of business for which Street Vending Certificate is issued;

(vi) Street Vendor can do his business on the specified location and time as mentioned on the Street Vending Certificate;

(vii) Street Vending Certificate will lapse after the expiry mentioned in the Certificate. It will be the sole responsibility of the Street Vendor to renew certificate before the expiry;

(viii) If a Street Vendor to whom this Street Vending Certificate is issued dies or suffers from any permanent disability or is ill, one of his family member either spouse or depended child who is enlisted in the Certificate can do business on his/her behalf;

(ix) Vendor can do the business according to its category mentioned in the Street Vending Certificate;

(x) If a Street Vendor occupies the space on a time sharing basis, he shall remove his goods and wares every day at the end of time-sharing period allowed to him/her.

(xi) Every Street Vendor shall maintain cleanliness and public hygiene in the vending zone and the adjoining areas. Every Street Vendor shall maintain civic amenities and public property in the vending zone in good condition and not damage or destroy or cause any damage or destruction to the same;

(xii) Every Street Vendor shall pay such periodic maintenance charges for the civic amenities and facilities provided in the vending zones as prescribed by the Urban Local Authority from time to time;

(xiii) This Street Vending Certificate do not confer any temporary, permanent or perpetual right of carrying out vending activities in the vending zones allotted;

(xiv) If a Street Vendor has a grievance or dispute may make an application in writing to the committee constituted by the Urban Local Authority to solve grievance or disputes;

(xv) Every Street Vendor has to follow traffic rules and should not cause disruption to traffic. The vendor in any way shall not obstruct the free movement of pedestrians and traffic;

(xvi) On demand by the Urban Local Authority officials the vendor will have to show the Street Vending Certificate;

(xvii) Every Street Vendor shall properly dressed and not be involved in any illegal or immoral activity;

(xviii) Every Street Vendor should not vend like drugs or alcohol or explosive;

(xix) Every Street Vendor has to follow any direction, instructions issued by the Urban Local Authority or State Government from time to time.

Photograph of vendor along with family members*, to be signed and seal of issuing officer

Form-3

[See clause 4 (1)(e)]

Application for Street Vending Certificate

Table-A

1.	Name of Applicant	
2.	Father/Husband name	
3.	Date of birth	
4.	Education	
5.	Address (residence)	
6.	Address of vending place (Name of Zone, Lane No. etc)	
7.	Type of vendor	
8.	Time of Vending	
9.	Date from which involved in vending	
10.	Ward name & number	
11.	Contact no.	
12.	Aadhar no.	
13.	Issued Date	
14.	Valid up to (Mention Date)	

***Photograph of the vendor and of the spouse and/or dependent children, provided that they are engaged in vending.**

Table-B

S.No.	Name of Family Members	Age	Relation with vendor	Whether involved in vending (Yes/No)
1.				
2.				
3.				
4.				
5.				

Enclosed:-Undertaking on stamp paper of Rs. 50/- regarding 4(1)(d)

Name and Signature/Thumb impression of Street Vendor

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Form-4

[See clause 4(3)]

Identity Card

Photograph of vendor along with family members*, to be signed and seal of issuing officer

Unique ID of vendor

1.	Name of vendor	
2.	Father/Husband name	
3.	Date of birth	
4.	Education	
5.	Address (residence)	
6.	Address of vending place (Name of Zone, Lane No. etc)	
7.	Type of vendor	
8.	Time of Vending	
9.	Ward name & number	
10.	Contact no.	
11.	Aadhar no.	
12.	Issued Date	
13.	Valid up to (Mention Date)	

***Photograph of the vendor and of the spouse and/or dependent children, provided that they are engaged in vending.**

Name and Signature/Thumb impression of Street Vendor

Commissioner/Chief Municipal Officer

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S.No.	Name of Family Members	Age	Relation with vendor	Whether involved in vending (Yes/No)
1.				
2.				
3.				
4.				
5.				

Important Instruction-

(a) This card is not transferable and shall be used by the vendor and their family members only.

(b) At the time of vending it is mandatory to have vending card.

(c) On demand by the urban local Authority officials the vendor will have to show the card.

(d) In the event of loss/damage of card, the information shall be given to the concern Urban Local Authority.

(e) The ID card shall be valid for opening bank account.

(f) The ID card shall not be used for any illegal or immoral business.

(g) The ID card shall not be used for any type of business involving explosives.

Form - 5

[See clause 4 (4) (b)]

Application for Renewal of Street Vending Certificate

Name of applicant (Vendor name) ……

Father/Husband Name …….

Unique Registration Number ……
(Attach copy of old street vending certificate)

Residence address ……

Postal address ……..

I wish to apply for the renewal of my street vending certificate as follows:

(1) Areas to be covered -

…….

(2) Trading in the following classed of goods -

…….

(3) The necessary renewal fee has been deposited the receipt of the same is attached
herewith -

Date : …….

Signature of applicant (Vendor name)

FOR OFFICIAL USE ONLY

Date on which application was received …….

Date of approval/rejection of application …….

Signature of officer with seal.

Form-6
[See clause 10(4)]
List of Seized Goods

S.No.	Name of the Goods	Quantity	Condition
1.			
2.			
3.			
4.			
5.			
6.			
7.			
8.			
9.			
10.			

Date of Seizure:
Place of Seizure:
Signatures and Seal of the Officer.

Name and Signature/ Thumb impression of
Street Vendor with vending Certificate No.

By order and in the Name of the Governor of Madhya Pradesh,
AMITABH AWASTHI , Dy. Secy.

NOTES OF CASES SECTION

Short Note
****(17)***
Before Mr. Justice G.S. Ahluwalia
W.P. No. 19912/2019 (Gwalior) decided on 13 December, 2019

EKKISVI SADI GRAH NIRMAN SEHKARI SAMITI …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

***A. Nagar Tatha Gram Nivesh Adhiniyam, M.P. (23 of 1973), Section 50(7) & 56 – Acquisition of Land* – Held – As per Section 56, G.D.A. after 3 years from date of publication of Scheme could not have acquired the land by entering into agreement with owners – After 3 years of publication of notification u/S 50(7), land can only be acquired by State Govt. under provisions of Land Acquisition Act – Officers of G.D.A acted contrary to provisions of Section 56.**

क. नगर तथा ग्राम निवेश अधिनियम, म.प्र. (1973 का 23), धारा 50(7) व 56 – भूमि का अर्जन – अभिनिर्धारित – धारा 56 के अनुसार, जी.डी.ए., स्कीम के प्रकाशन की तिथि से तीन वर्ष पश्चात्, स्वामियों के साथ करार करके भूमि अर्जित नहीं कर सकता था – धारा 50(7) के अंतर्गत अधिसूचना प्रकाशित होने के तीन वर्ष पश्चात्, भूमि को केवल राज्य सरकार द्वारा भूमि अर्जन अधिनियम के उपबंधों के अंतर्गत अर्जित किया जा सकता है – जी.डी.ए. के अधिकारियों ने धारा 56 के उपबंधों के विपरीत कार्यवाही की है।

***B. Nagar Tatha Gram Nivesh Adhiniyam, M.P. (23 of 1973), Section 56* – Held – In connivance with officers of G.D.A., poor persons who were original owners of land were cheated and undue advantage has been given to the petitioner society – Lokayukt directed to register FIR and investigate the matter – Petition disposed of.**

ख. नगर तथा ग्राम निवेश अधिनियम, म.प्र. (1973 का 23), धारा 56 – अभिनिर्धारित – जी.डी.ए. के अधिकारियों के साथ मौनानुकूलता से, गरीब व्यक्तियों, जो भूमि के मूल स्वामी थे, के साथ छल किया गया था और याची सोसाईटी को अनुचित लाभ दिया गया है – लोकायुक्त को मामले का प्रथम सूचना प्रतिवेदन पंजीबद्ध करने और अन्वेषण करने के लिए निदेशित किया गया – याचिका निराकृत।

***C. Constitution – Article 226 – Scope & Jurisdiction – Disputed Question of Facts* – Held – Disputed question of facts cannot be decided by this Court while exercising the power under Article 226 of Constitution.**

ग. संविधान – अनुच्छेद 226 – व्याप्ति व अधिकारिता – विवादित तथ्यों का प्रश्न – अभिनिर्धारित – इस न्यायालय द्वारा संविधान के अनुच्छेद 226 के अंतर्गत शक्ति का प्रयोग करते समय, विवादित तथ्यों के प्रश्न विनिश्चित नहीं किये जा सकते।

Cases referred :

(2009) 2 SCC 694, (2008) 14 SCC 32, (2003) 9 SCC 401, (2010) 8 SCC 660, (2010) 11 SCC 557, (2011) 7 SCC 69, 2013 (2) MPLJ 707.

Vivek Jain with *Sarvesh Sharma*, for the petitioner.
PS Raghuvanshi, G.A. for the respondent No. 1/State
Raghvendra Dixit, for the respondent Nos. 2 & 3.
N.K. Gupta with *Sanjay Sharma*, for the respondent Nos. 4 & 5.

Short Note
****(18)***
Before Mr. Justice G.S. Ahluwalia
M.P. No. 3914/2019 (Gwalior) decided on 2 December, 2019

MOHAR SINGH …Petitioner

Vs.

GAJENDRA SINGH …Respondent

***A. Civil Procedure Code (5 of 1908), Section 89(2)(d) and Legal Services Authorities Act (39 of 1987), Section 2(d) – Order of Mediator – Execution* – Held – Mediator cannot be said to be at par with Lok-Adalat – Mediator is appointed u/S 89 CPC – Order of Mediator is not executable, hence execution proceedings not maintainable – Petition dismissed.**

क. सिविल प्रक्रिया संहिता (1908 का 5), धारा 89(2)(d) एवं विधिक सेवा प्राधिकरण अधिनियम (1987 का 39), धारा 2(d) – मध्यस्थ का आदेश – निष्पादन – अभिनिर्धारित – मध्यस्थ को लोक–अदालत के सम–मूल्य नहीं कहा जा सकता – सि.प्र.सं. की धारा 89 के अंतर्गत मध्यस्थ नियुक्त किया जाता है – मध्यस्थ का आदेश निष्पादन योग्य नहीं है, अतः निष्पादन कार्यवाहियाँ पोषणीय नहीं है – याचिका खारिज।

***B. Constitution – Article 227 – Scope & Jurisdiction – Compromise Decree* – Held – While exercising power under Article 227, a compromise decree cannot be passed in favour of parties.**

ख. संविधान – अनुच्छेद 227 – विस्तार एवं अधिकारिता – समझौता डिक्री – अभिनिर्धारित – अनुच्छेद 227 के अंतर्गत शक्ति का प्रयोग करते समय, पक्षकारों के पक्ष में समझौता डिक्री पारित नहीं की जा सकती।

K.S. Tomar with *J.S. Kaurava*, for the petitioner.
Prabhakar Kushwaha, for the respondent.

I.L.R. [2020] M.P. 1789 (SC)
SUPREME COURT OF INDIA

Before Mr. Justice Ashok Bhushan & Mr. Justice Navin Sinha

C.A. No. 9778/2010 decided on 17 March, 2020

BHARAT PETROLEUM CORP. LTD. & ors. …Appellants

Vs.

ANIL PADEGAONKAR …Respondent

(Alongwith C.A. No. 9779/2010)

A. Bharat Petroleum Limited Conduct, Discipline and Appeal Rules for Management Staff 1976, Clause 6 & 10, Part III, Schedule I, Part III-A, Part III-F-(1) & (23)–B(2)(e) & (f) – Dismissal & Discharge – Disciplinary Authority & Competent Authority **– Held – Term Competent Authority will include a disciplinary authority – Under Part III-F(1), disciplinary authority has been described to include an authority as specified in Schedule I which includes both Functional Manager and Functional Director – Functional General Manager was disciplinary authority for punishment lesser than dismissal and Functional Director was disciplinary authority for punishment of dismissal – DGM was fully competent to issue charge-sheet – Order of discharge calls no interference – Direction by High Court to issue fresh charge-sheet is set aside – Appeal allowed.**

(Paras 11 to 15)

क. भारत पेट्रोलियम लिमिटेड प्रबंधन स्टाफ हेतु आचरण, अनुशासन एवं अपील नियम, 1976, खण्ड 6 व 10, भाग III, अनुसूची I, भाग III-A, भाग III-F-(1) व (23)– B(2)(e) व (f) – पदच्युति व सेवोन्मुक्त करना – अनुशासनिक प्राधिकारी व सक्षम प्राधिकारी – अभिनिर्धारित – शब्द 'सक्षम प्राधिकारी' में अनुशासनिक प्राधिकारी समाविष्ट होगा – भाग III–F(1) के अंतर्गत, अनुशासनिक प्राधिकारी में अनुसूची I में यथा विनिर्दिष्ट प्राधिकारी शामिल होना वर्णित है, जिसमें कार्यशील प्रबंधक एवं कार्यशील निदेशक दोनों शामिल हैं – कार्यशील महाप्रबंधक, पदच्युति से कमतर दण्ड हेतु अनुशासनिक प्राधिकारी था तथा कार्यशील निदेशक, पदच्युति के दण्ड हेतु अनुशासनिक प्राधिकारी था – उपमहाप्रबंधक, आरोप पत्र जारी करने के लिए पूर्ण रूप से सक्षम था – आरोपमुक्ति के आदेश में किसी हस्तक्षेप की आवश्यकता नहीं – उच्च न्यायालय द्वारा नया आरोप पत्र जारी करने के लिए दिया गया निदेश अपास्त किया गया – अपील मंजूर।

B. Bharat Petroleum Limited Conduct, Discipline and Appeal Rules for Management Staff 1976, Clause 6 & 10, Part III, Schedule I, Part III-B(2)(e) & (f) – Discharge & Dismissal **– Held – Punishment of "discharge" from service imposed under Part III-B(2)(e) – No order of "dismissal" imposed under Part III-B(2)(f) – High Court erred in opining that employee has been "dismissed" from service and came to conclude that charge-sheet was issued by incompetent authority. (Para 9)**

ख. भारत पेट्रोलियम लिमिटेड प्रबंधन स्टाफ हेतु आचरण, अनुशासन एवं अपील नियम, 1976, खण्ड 6 व 10, भाग III, अनुसूची I, भाग III-B(2)(e) व (f) – सेवोन्मुक्त करना व पदच्युति – अभिनिर्धारित – सेवा से ''उन्मुक्ति'' का दण्ड, भाग **III–B(2)(e)** के अंतर्गत अधिरोपित किया गया – भाग **III–B(2)(f)** के अंतर्गत, ''पदच्युति'' का कोई आदेश अधिरोपित नहीं किया गया – उच्च न्यायालय ने यह मत देने में भूल की कि कर्मचारी को सेवा से ''पदच्युत'' किया गया है और यह निष्कर्ष दिया कि आरोप पत्र अक्षम प्राधिकारी द्वारा जारी किया गया था।

Cases referred:

(2008) 7 SCC 639, (2013) 6 SCC 602, (2014) 1 SCC 351, (2011) 5 SCC 142, (2003) 8 SCC 9.

J U D G M E N T

The Judgment of the Court was delivered by :

NAVIN SINHA, J. :- The two appeals have been preferred by the appellant-Corporation and the respondent-employee respectively, to the extent that they are aggrieved by the common order in a writ appeal preferred by the Corporation. They have thus been heard together and are being disposed by a common order.

2. The Corporation is aggrieved to the extent the impugned order sets aside the order of punishment on the ground that the charge-sheet had not been issued by the disciplinary authority. The employee is aggrieved by the grant of liberty to the Corporation for issuance of fresh charge-sheet, and denial of back wages while granting reinstatement. In the interregnum, the employee has attained the age of superannuation in February 2018.

3. A charge-sheet was issued to the employee on 31.12.1993 by the Deputy General Manager (Aviation) (hereinafter referred to as "the DGM") while he was working on the post of Aviation Officer at the General Aviation Service Station, Gwalior, in the management cadre in Job Group "A". It was alleged that fresh sand particles had been found in the all 10 fuel tanks after his duty hours in the 'C' shift ended while the earlier inspection during the 'B' shift had found it to be free of dirt and water except for minor traces of water in tank nos. 3 and 9. While the departmental proceedings were pending, a fresh charge-sheet was issued to the employee on 27.09.1994 with regard to absence from duty on 13.08.1994. The employee was therefore charged with having acted in a manner prejudicial to the interests of the Corporation and negligence in the performance of duty including malingering or slowing down of work under Clause 6 & 10 of Part III-A of the Bharat Petroleum Limited Conduct, Discipline and Appeal Rules for Management Staff, 1976 (hereinafter referred to as 'the Rules'). Pursuant to a domestic inquiry, the inquiry officer returned a finding of guilt on 06.01.1995. The employee was furnished a copy of the report and after consideration of his

reply, the Director (Marketing) under Part III-B (2)(f) of the Rules by a common order dated 21.05.1997 'discharged' the employee from service. The departmental appeal under the Rules was rejected by a reasoned order by the Chairman on 05.10.1998.

4. The employee assailed the orders in a writ petition. The learned Single Judge, with regard to the first charge-sheet, held that the punishment of 'dismissal' stood vitiated because the Functional Director alone was competent to issue the charge-sheet. The second charge-sheet though issued by the disciplinary authority, required reconsideration as the punishment was held disproportionate to the charge, necessitating an order of remand. The Corporation was granted liberty in appeal to issue a fresh charge-sheet with regard to the first charge and to pass a lesser order of punishment with regard to the second charge. Though reinstatement was ordered, the question of back wages was left for consideration subject to the outcome of such fresh proceedings.

5. Shri. J.P. Cama, learned senior counsel appearing on behalf of the Corporation, submitted that the employee was not 'dismissed' but 'discharged' from service. The DGM being the functional General Manager and Head of the Department, the highest officer on the spot, was fully competent under the manual for delegation of authority dated 15.12.1987 to issue charge-sheet for a punishment lesser than dismissal under serial 1(a) of Schedule I under Part III of the Rules. The manual for delegation of authority had never been withdrawn or superseded even after amendment of Rule 3(g) on 22.08.1991 with regard to the definition of Disciplinary Authority in the Rule. The misconduct on the part of employee, considering his place of posting at an air force station was serious in nature. There was no infirmity in the conduct of the departmental proceedings. The employee had since reached the age of superannuation in February, 2018. Continuance of the proceedings under the Rules was an impossibility in absence of any provisions for the same.

6. The employee did not take any objection in his reply to the charge-sheet or in the memo of appeal that the DGM was not competent to issue the same. Relying on *H.V. Nirmala vs.Karnataka State Financial Corporation,* (2008) 7 SCC 639, it was submitted that the objection with regard to the lack of jurisdiction ought to have been raised at the very first instance. The employee took this objection for the first time before the High Court in the writ petition. In any event the employee has failed to demonstrate any prejudice to him thereby, assuming though not admitting any lapse. Reliance was also placed on *S.R. Tewari vs. Union of India and Another,* (2013) 6 SCC 602, that there could be no standardised yardstick with regard to proportionality of punishment which would depend on the facts of each case.

7. Shri Puneet Jain, learned counsel for the employee, submitted that dismissal was a major punishment under Part III-B (2)(f) of the Rules. The Corporation themselves opined that the charges were very serious. The procedure followed was that for a major penalty. The mere use of the word 'discharge' in the order of punishment therefore could not be determinative. The High Court has committed no error in holding that the employee had been dismissed from service pursuant to a charge-sheet issued without jurisdiction. The view taken by the High Court that after amendment of the term disciplinary authority in Rule 3(g) by the Board of Directors on 22.08.1991, the manual for delegation of authorities dated 15.12.1987 had lost its relevance, does not call for any interference. The Functional Director alone was competent to issue charge-sheet for dismissal under Sr. 1(b) of Schedule I under Part III of the Rules. The charge-sheet issued by the DGM has rightly been held to be without authority, thus vitiating the punishment. The Rules make a distinction between the disciplinary authority in Rule 3(g) and competent authority in Rule 3(h). Competent authority cannot be equated with disciplinary authority. Reliance was placed on *Union of India vs. B.V. Gopinath,* (2014) 1 SCC 351, to submit that a charge-sheet not issued according to law rendered the entire proceedings *non-est.* The High Court, in the facts of the case ought not to have given liberty to issue fresh charge-sheet or deny back wages while directing reinstatement.

8. The entire proceedings having been vitiated back wages ought to have been granted while directing reinstatement relying on *Chairmen-cum-Managing Director, Coal India Limited and Others vs. Ananta Saha and Others,* (2011) 5 SCC 142. With regard to the second charge-sheet, it was submitted that the punishment of dismissal for absence from place of duty one hour before duty hours got over was grossly disproportionate relying on *Dev Singh vs. Punjab Tourism Development Corporation Limited and Another,* (2003) 8 SCC 9.

9. We have considered the submissions on behalf of the parties. The employee was posted at the Air Force Station Gwalior. There can be no two opinions that the nature of his duties had an inherent seriousness. Two charge-sheets were issued to him and departmental proceedings were conducted. The employee was given full opportunity of defence. A finding of guilt was arrived at by the enquiry officer with regard to both the charges. The employee in his departmental appeal raised no issues of procedural irregularity with consequent prejudice. A common order of punishment of 'discharge' from service dated 21.05.1997 followed under Part III B (2)(e) of the Rules. No order of 'dismissal' was passed under Part III-B (2)(f) of the Rules. If the Corporation was of the opinion that 'dismissal' was the appropriate punishment in the facts of the case nothing prevented it from stating so. The High Court fell in a serious error by opining that the employee had been 'dismissed' from service and on that premise arrived at the conclusion that the charge-sheet was incompetent in absence of it

having been issued by the Functional Director who was the disciplinary authority under Sr. 1 (b) of Schedule I under Part III of the Rules for dismissal.

10. Part-III B (2) of the Rules provides for major penalties which includes *inter alia* removal from service which shall not be a disqualification for future employment and dismissal from service which shall ordinarily be a disqualification from future employment. The Rules therefore themselves recognise them as different punishments with varying severity. Though the word 'discharge' does not find reference under the Rules, nonetheless in service jurisprudence, removal and/or discharge are synonymous leading to a termination or end of service but without the punitive consequences of dismissal entailing loss of past services, affecting future employment and debarring retiral benefits. There is no dispute that consequent to the impugned order of 'discharge', the employee has been paid his dues.

11. The employee either in his reply to the charges or in the departmental appeal rightly raised no issues with regard to lack of competence in the DGM to issue the charge-sheet. Sr. 1 (a) of Schedule I, to be read with Part III of the Rules, provides that with regard to Job Group 'A' the Functional General Manager was the disciplinary authority for all other penalties except that of dismissal. The Functional Director was the disciplinary authority for punishment of dismissal only. The employee for the first time raised the issue in the writ petition that the charge-sheet had been issued by other than the disciplinary authority. If the employee had raised the issue either in his reply to the memo of charges or in appeal perhaps the Corporation could have addressed the issue better. Nonetheless, since a fundamental issue of jurisdiction has been raised, we shall proceed to examine the issue.

12. Rule 3(e) defines a Functional Manager as the Manager in-charge of a function. Rule 3(g) defines Disciplinary Authority as specified in Schedule I competent to impose penalties under the Rules. Competent Authority has been defined in Rule 3(h) to mean any authority empowered by the Board of Directors or the Chairman by any general or special rule or order to discharge the function or use the powers specified in the rule or order. Under Schedule I, the Functional General Manager was the disciplinary authority for punishment lesser than dismissal and the Functional director was the disciplinary authority for punishment of dismissal. We are of the considered opinion that the term Competent Authority will include a disciplinary authority so authorised in the manner prescribed in 3(h) under the delegation of authority manual dated 15.12.1987. Under Part III-F(1) of the Rules dealing with procedure for imposing major penalties, the disciplinary authority has been described to include an authority as specified in Schedule I. It includes both a Functional manager and Functional Director. Part-III-F(23) provides as follows:

> "(23) If the Disciplinary Authority or the Competent Authority having regard to its findings on all or any of the charges is of the opinion that any of the penalties specified in Rule "B" should be imposed on the Management Staff it shall, notwithstanding anything contained in Rule "G", make an order imposing such penalty"

13. The fact that the words 'Disciplinary Authority or Competent Authority' have been used interchangeably in Part III-F leaves no doubt in our mind that the delegation of authority manual had never been recalled or superseded. It is the specific case of the Corporation that the manual for delegation of authority issued on 15.12.1987 had never been withdrawn and the Corporation had all along in all other cases also acted on basis of the same and that no charge-sheet for a punishment lesser than dismissal had ever been issued by the Functional Director. The DGM was therefore fully competent under the manual also to both suspend and issue charge-sheet. The High Court itself reasoned that had the penalty been other than dismissal, the Functional Manager would have been competent to issue the charge-sheet. The High Court having posed unto itself the wrong question of dismissal from service, naturally arrived at an erroneous conclusion.

14. In view of our conclusion that the first charge-sheet had been issued by an authority competent to do so, the order of discharge calls for no interference. The direction for issuance of fresh charge-sheet is therefore held to be unsustainable and is set aside. The direction for reinstatement and grant of back wages including any proportionality of punishment under the second charge therefore becomes academic and needs no consideration.

15. The appeal preferred by the appellant-Corporation is allowed and that preferred by the respondent-employee is dismissed. There shall be no order as to costs.

Appeal allowed

I.L.R. [2020] M.P. 1795 (SC)
SUPREME COURT OF INDIA

Before Mr. Justice L. Nageswara Rao & Mr. Justice Deepak Gupta

C.A. No. 6875/2008 decided on 3 April, 2020

BHAGWAT SHARAN (DEAD THR. LRS.) …Appellant

Vs.

PURUSHOTTAM & ors. …Respondents

(Alongwith C.A. Nos. 6876/2008 & 6877/2008)

***A. Hindu Undivided Family – Burden of Proof & Presumption* – Held – To establish existence of HUF, burden heavily lies on plaintiff to not only show jointness of property but also jointness of family and jointness of living together – No material to show that properties belonged to HUF – Merely because business is joint would not raise presumption about Joint Hindu Family – Contents of documents and written statement only goes to show that the property was treated to be a joint property – No clear cut admission regarding existence of HUF – Plaintiff failed to establish fact of HUF – Appeals dismissed. (Paras 11, 16, 19, 26, 28 & 29)**

क. हिंदू अविभक्त कुटुंब – सबूत का भार एवं उपधारणा – अभिनिर्धारित – हिंदू अविभक्त कुटुंब का अस्तित्व स्थापित करने के लिए, वादी पर, न केवल संपत्ति की संयुक्तता बल्कि कुटुंब की संयुक्तता एवं एक साथ रहने की संयुक्तता भी दर्शाने के लिए अधिक भार होता है – यह दर्शाने के लिए कोई सामग्री नहीं कि संपत्तियां, हिंदू अविभक्त कुटुंब की हैं – मात्र इसलिए कि कारबार संयुक्त है, संयुक्त हिंदू कुटुंब के बारे में उपधारणा नहीं होगी – दस्तावेजों एवं लिखित कथन की अंतर्वस्तु केवल यह दर्शाती है कि संपत्ति को संयुक्त संपत्ति माना गया था – हिंदू अविभक्त कुटुंब के अस्तित्व के संबंध में कोई स्पष्ट स्वीकृति नहीं – वादी, हिंदू अविभक्त कुटुंब के तथ्य को स्थापित करने में असफल – अपीलें खारिज।

***B. Will – Doctrine of Election & Doctrine of Estoppel* – Held – Any party which takes advantage of any instrument must accept all that is mentioned in it – Party, if knowingly accepts benefits of a contract or conveyance or an order, it is estopped to deny validity or binding effect on him of such contract, conveyance or order – A person who takes benefit of a portion of the "Will" cannot challenge the remaining portion of the "Will" – Party cannot be permitted to approbate and reprobate at the same time. (Para 24 & 25)**

ख. वसीयत – चुनाव का सिद्धांत व विबंध का सिद्धांत – अभिनिर्धारित – कोई पक्षकार जो किसी लिखत का लाभ लेता है उसे उसमें उल्लिखित सभी को स्वीकार करना होगा – पक्षकार यदि ज्ञानपूर्वक एक संविदा या हस्तांतरण–पत्र या एक आदेश के लाभों को

स्वीकार करता है, वह ऐसी संविदा, हस्तांतरण पत्र या आदेश की विधिमान्यता या स्वयं पर बाध्यकारी प्रभाव से इंकार करने के लिए विबंधित है – एक व्यक्ति जो ''वसीयत'' के एक भाग का लाभ लेता है, ''वसीयत'' के शेष भाग को चुनौती नहीं दे सकता – पक्षकार को एक ही समय अनुमोदित तथा अस्वीकृत करने की अनुमति नहीं दी जा सकती।

Cases referred:

AIR 1962 SC 287, (1951) 2 SCR 603, I.L.R. 1948 Mad. 440, (1955) 1 SCR 1, (2003) 10 SCC 310, (1960) 2 SCR 253, (2007) 1 SCC 521, (1956) 1 SCR 451,(2011) 15 SCC 273, AIR 2013 SC 1241, (2010) 4 SCC 753.

J U D G M E N T

The Judgment of the Court was delivered by :

DEEPAK GUPTA, J. :- One Mangat Ram was a resident of Village Narnaul in Rajasthan. He had four sons viz., Madhav Prashad, Lal Chand, Ram Chand and Umrao Lal. Ram Chand was adopted by one Shri Gauri Mal of Gwalior. Lal Chand had four sons viz., Sri Ram, Hari Ram, Govind and Laxmi Narayan. Madhav Prashad had no issues. Therefore, he adopted Hari Ram, the son of Lal Chand. Ram Chand also had no issues and he adopted Shriram, son of Lal Chand. It is the admitted case of the parties that both Ram Chand and Lal Chand severed connections with the family and had no connection with the property of the family. This left two branches in the family of Mangat Ram, one being Madhav Prashad and his descendants through his son Hari Ram, the other branch consisted of Umrao Lal and his three sons viz., Brij Mohan, Rameshwar and Radha Krishan. The plaintiff Bhagwat Sharan, who filed the suit is the son of Radha Krishan and grandson of Umrao Lal.

2. The above facts are not disputed. The parties are also *ad idem* that Madhav Prashad shifted from his native village and came to Ashok Nagar, about 70 years prior to the filing of the suit. The suit was filed in 1988. Thus, Madhav Prashad must have shifted in or around 1918. It is also not disputed that Madhav Prashad started working as *munshi* of the then *zamindar* of the area and was thereafter known as *munshi* Madhav Prashad. The dispute basically starts hereinafter. The plaintiff claims that his grandfather Umrao Lal also came to Ashok Nagar at about the same time and started doing grain business. Thereafter, Madhav Prashad left the work of *munshi* and both the brothers started grain business in the name of "Munshi Madhav Prashad", by setting up a shop. The case of the plaintiff is that both Madhav Prashad and Umrao Lal lived together and carried on the business jointly and purchased various properties described in para 9 of the plaint. Six properties comprise of six different houses. The properties at para 9(2) comprised of various agricultural lands in different villages. The case of the plaintiff is that all these houses have been constructed jointly by Madhav Prashad and Umrao Lal, and Madhav Prashad being the elder brother was the *karta* and was running

the joint family in this capacity. It was further alleged in the plaint that Madhav Prashad being the *karta* managed to get some of the joint family property recorded in his own name. It was also alleged that after the death of Madhav Prashad and Umrao Lal, Hari Ram, adopted son of Madhav Prashad (who had died by the time the suit was filed in 1988) was the *karta* of the joint Hindu family and in this capacity some of the properties of the Joint Hindu Family were recorded in his name.

3. It is not disputed that Madhav Prashad died some time in the year 1935, Umrao Singh died some time in 1941-42 and Hari Ram died in the year 1978.

4. In respect of agricultural lands it was pleaded that all these agricultural lands were under the joint cultivation of the family and the full accounts of the cultivation was kept by late Madhav Prashad and Umrao Lal, and after their death by Hari Ram. After the death of Hari Ram, his widow Rajjo Devi (Def.no.6), used to look after cultivation on behalf of the family. It was further alleged in the plaint that Hari Ram had transferred some of the agricultural lands in the name of his brother-in-law, son, son-in-law and other relatives as *benami* transactions, which was obvious from the fact that the General Power of Attorney was executed by the beneficiaries of these transactions in favour of Hari Ram. However, this fact was not revealed to the branch of the family who were descendants of Umrao Lal. Basically, the allegation was that all the properties mentioned in para 9 of the plaint were properties of the Hindu Undivided Family (for short HUF) and, therefore, the plaintiff sought partition of the same by metes and bounds as per his share.

5. For the sake of convenience it would be appropriate to extract para 18 of the plaint which reads as follows:-

> "(18) That the business of the plaintiff and defendant Nos. 1 to 18 was almost joint till the year 1954. Thereafter, on account of the loss in the business and the business coming to a closure position almost all the people started carrying on their separate business and the immovable properties of the joint family remained undivided so far. Late Hari Ram sold the house properties mentioned in para No.9(1) (c) (d) (e) (f) of the plaint during his life time, which are liable to be reduced from there share"

This suit was contested by some of the defendants who were either in the line of descendants of Hari Ram or his beneficiaries. Transfer documents were executed in their favour. It would be pertinent to mention that none of the other heirs from the lineage of Umrao Lal filed a written statement. In the written statement filed by the contesting respondents the main objection taken was that the properties

mentioned in para 9 of the plaint were not properties of the HUF and it was denied that there ever was any such HUF.

6. The defendants denied the fact that the business being run under the name of "Munshi Madhav Prashad" was a joint family business. It was denied that Umrao Lal was a member of this business or the said shop was a joint shop. With regard to all the properties mentioned in para 9 of the plaint, it was stated that all the houses had been purchased/constructed by Madhav Prashad alone and that the agricultural lands were purchased by Hari Ram from his own income.

7. In the written statement the defendants also placed reliance on the Will of late Hari Ram and made reference to a suit filed by the plaintiff and defendant nos.1-3 in which they had stated that a portion of the house had been bequeathed to them by Hari Ram by his Will. It was therefore urged that the plaintiff having elected to accept the bequest under the Will cannot now turn around and say that the description of the properties given by Hari Ram in the Will showing them to be his personal properties was not correct. It was also alleged that as admitted in the plaint itself 3 out of 6 houses were sold by Hari Ram in his lifetime.

8. On the basis of the pleadings of the parties various issues were framed but according to us only the following issues are relevant which are extracted below :-

> 1. Whether the properties mentioned in para No.9 of the plaint are the properties of the joint family both the sides or whether the same are the self acquired properties as per the averments made by the defendants?
>
> 2. Whether the plaintiff in Civil Suit No.94-A/86 filed in the Court of Civil Judge Class-II, Ashok Nagar, has mentioned the Will dated 6.2.1987 executed by Hari Ram as the basis of the suit?
>
> 3. If yes, Whether the plaintiff is stopped from alleging the said Will as null and void?
>
> 4. Whether the Will dated 6.2.1987 executed by Hari Ram in connection with the disputed property is Null and void?

The trial court decided all these issues in favour of the plaintiff and decreed the suit holding that all the properties were joint family properties and that plaintiff had 2.38% share in the same. The contesting defendants filed an appeal in the High Court of Madhya Pradesh, and the decree of partition by the trial court was set aside. The plaintiff approached the High Court for review. The High Court dismissed the application for condonation of delay, the application for review and the application under Order XLI Rule 27 of the Code of Civil Procedure, 1908. Hence this appeal before us.

9. We have heard Shri Sushil Kumar Jain, learned senior counsel for the appellant, Shri Harin P. Raval, learned senior counsel for those respondents who support the appellant and Shri Guru Krishna Kumar, Shri Vikas Singh, and Shri Anupam Lal Das, learned senior counsel, for the contesting respondents.

10. At the outset we may note that a lot of arguments were addressed and judgments were cited on the attributes of HUF and the manner in which it can be constituted. In view of the facts narrated above, in our view, a large number of these arguments and citations need not be considered. The law is well settled that the burden is on the person who alleges that the property is a joint property of an HUF to prove the same. Reference in this behalf may be made to the judgments of this Court in *Bhagwan Dayal vs. Reoti Devi*[1]. Both the parties have placed reliance on the this judgment. In this case this Court held that the general principle is that a Hindu family is presumed to be joint unless the contraryis proved. It was further held that where one of the coparceners separated himself from other members of the joint family there was no presumption that the rest of coparceners continued to constitute a joint family. However, it was also held that at the same time there is no presumption that because one member of the family has separated, the rest of the family is no longer a joint family. However, it is important to note that this Court in *Bhagwati Prasad Sah and Ors. vs. Dulhin Rameshwari Kuer and Ors.*[2], it held as follows:-

> ".... Except in the case of reunion, the mere fact that separated coparceners chose to live together or act jointly for purposes of business or trade or in their dealings with properties, would not give them the status of coparceners under the Mitakshara law."

The Privy Council in *Appalaswami v. Suryanarayanamurti*[3] held as follows:

> "The Hindu law upon this aspect of the case is well settled.
>
> Proof of the existence of a joint family does not lead to the presumption that property held by any member of the family is joint, and the burden rests upon anyone asserting that any item of property was joint to establish the fact. But where it is established that the family possessed some joint property which from its nature and relative value may have formed the nucleus from which the property in question may have been acquired, the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family property"

[1] AIR 1962 SC 287
[2] (1951) 2 SCR 603
[3] I.L.R. 1948 Mad. 440

The aforesaid view was accepted by this Court in *Shrinivas Krishnarao Kango v. Narayan Devji Kango and Ors.*[4] In *D.S. Lakshmaiah and Ors. v. L. Balasubramanyam and Ors.*[5] this Court held as follows:

> "The legal principle, therefore, is that there is no presumption of a property being joint family property only on account of existence of a joint Hindu family. The one who asserts has to prove that the property is a joint family property. If, however, the person so asserting proves that there was nucleus with which the joint family property could be acquired, there would be presumption of the property being joint and the onus would shift on the person who claims it to be self-acquired property to prove that he purchased the property with his own funds and not out of joint family nucleus that was available."

Similar view was taken in *Mst Rukhmabai v. Lala Laxminarayan and Others.*[6] and *Appasaheb Peerappa Chamdgade v. Devendra Peerappa Chamdgade.*[7] The law is thus well settled that the burden lies upon the person who alleges the existence of the Hindu Undivided Family to prove the same.

11. Normally, an HUF can only comprise of all the family members with the head of the family being *karta*. Some property has to be the nucleus for this joint family. There is cleavage of opinion as to whether two brothers of a larger group can form a joint family. But assuming that such a joint family could have been formed by Madhav Prashad and Umrao Lal the burden lies heavily on the plaintiff to prove that the two of them joined together to form an HUF. To prove this, they will have to not only show jointness of the property but also jointness of family and jointness of living together.

12. From the facts stated above it is apparent that there is no pleading that Mangat Ram and Sons constituted a HUF. There is no allegation that this family had some property as its nucleus. Since there is no allegation that Mangat Ram and his four sons constituted a HUF, the fact that Lal Chand left the family to live by himself, would not in any manner mean that there was a disruption of the joint family status. A disruption would arise only if there was an allegation that earlier there was a HUF.

13. It is also an admitted case of the parties that Madhav Prashad and Umrao Lal came separately to Ashok Nagar. Madhav Prashad initially worked as a *munshi* with a *zamindar*. Thereafter, as per the defendants, Madhav Prashad started a business which was his own but later his brother Umrao Lal joined in the business. It is, however, contended that this business was not a business of a HUF.

[4] (1955) 1 SCR 1
[5] (2003) 10 SCC 310
[6] (1960) 2 SCR 253
[7] (2007) 1 SCC 521

14. On the other hand, the case of the plaintiff is that it was Umrao Lal who started the business and Madhav Prashad joined him later on but since Madhav Prashad was the elder brother, the business was started in the name of Madhav Prashad. There is no evidence to support the claim either way. The witnesses who have appeared were all born much later and they have not given any evidence with regard to the joint business. The plaintiff Bhagwat Sharan was born in the year 1951. The contesting defendants 4 and 8 are younger to him by 5 and 11 years. Therefore, the oral testimony of these witnesses is not of any use as rightly held by the trial court.

15. The plaintiff places great reliance on the mortgage deed by which 5 houses were mortgaged in favour of Seth Budhmal on 01.12.1944 and 26.11.1946. It is not disputed that there were 6 houses, some single storeyed and some double storeyed in Ashok Nagar which have been described in the plaint. Out of these houses, one was used as *dharamshala* and the remaining 5 were mortgaged on 01.12.1944 vide mortgage deed (Exh.P.28). This mortgage deed was executed by Hari Ram, S/o Madhav Prashad, and Brij Mohan, Rameshwar Das and Radha Krishan, S/o Umrao Lal and Pop Chand and Babu Lal @ Deep Chand, minor sons of Brij Mohan through their father and Nathu Lal minor S/o Hari Ram, through his father and they are shown as proprietors of firm M/s Madhav Prashad Agarwal. In the mortgage deed after description of the 5 houses it is mentioned that these properties are "owned and possessed by us". Further it is mentioned that the properties are free from all encumbrances and there are no other sharers, and the mortgagees have full right to alienate the same. The 5 houses were accordingly mortgaged with Seth Budhmal. This was done with a view to pay off the loan of Krishna Ram Baldeo Bank, with which the properties were already mortgaged. The amount which they obtained by mortgaging the property was transferred to the Bank and fresh mortgage was created in favour of Seth Budhmal. In para 5 of the mortgage deed it was mentioned that the mortgaged property is free from all encumbrances and, "we are the absolute owners of the same and there is no co-parcener and co-sharer". This mortgage deed was signed by Hari Ram, Brij Mohan, Rameshwar Lal, Radha Krishan as mortgagors. This would indicate that these properties were owned by them.

16. However, there is no material on record to show that the properties belonged to an HUF. They may have been joint properties but merely on the basis of the recitals in the mortgage deed they cannot be said to be a joint family property. It appears that by another mortgage deed dated 26.11.1946, the value of the mortgaged properties was enhanced to Rs. 45,000/-, and in addition to the 5 houses, one oil mill at Pachhar was also mortgaged. Seth Budhmal filed a suit (Exh.P.4) against Hari Ram, Brij Mohan, Rameshwar Lal, Radha Krishan, Nathu

Lal etc., for realisation of the mortgage money under the said mortgage deed. In para 6 and 8 of the plaint it was averred as follows :-

> "6. That, the defendants at the time of execution of aforesaid documents constituted a Trading Joint Hindu Family and of which all major members personally and minor members through their head of the branch were represented in the execution of mortgage deeds.
>
> 8. That, minors mentioned in the documents have now attained majority. Therefore, they have been impleaded in person as defendants. Their liability is limited to the extent of property of Joint Hindu Family and personal dealing. Defendant No.1 to 3 are personally and in the capacity of head of their branch are made in as defendants."

17. A written statement was filed on 09.10.1955 (Ex.P-5) on behalf of the aforesaid Hari Ram, Brij Mohan, Rameshwar Lal, Radha Krishan and Nathu Lal, and reply to paras 6 and 8 of the mortgage deed, read as follows:-

> "6. That as regards paragraph 6 of the plaint there is no objection.
>
> 8. That, as regards paragraph 8 of the plaint the reply is that the defendant No.6 is still minor. He has not attained majority. It is not admitted that defendant No.1 to 3 are Head (KARTA) being wrong, nor they are the Head, nor the mortgage transaction was made in such a capacity and the plaintiff has no right to sue in such a manner."

On the basis of the aforesaid pleadings in the earlier suit it is submitted that Hari Ram had admitted that there was a joint family business when this written statement was filed and, therefore, there is proof that the business was a joint family business and there is no material to show that this joint family status was ever disrupted.

18. It is submitted on behalf of the contesting respondent that since the family members of Hari Ram were residing in the mortgaged house, by way of abundant precaution they may have been made to sign the mortgage deed. In our view, that may not be true because the mortgage deed clearly reflects that all the family members including the minors were shown to be owners of the properties by mortgaging the same. Therefore, this property which was mortgaged in the year 1944 and then re-mortgaged in 1946 would *prima facie* appear to be joint property though at this stage we are not deciding whether the property is a joint property or the property of HUF.

19. An admission made by a party is only a piece of evidence and not conclusive proof of what is stated therein. It is in this light that we have to examine

the admission made by Hari Ram and his brothers while filing the written statement to the suit filed by Seth Budhmal. In paragraph 6 the averment was that the defendants constituted trading Joint Hindu Family. It is obvious that the admission was with regard to a trading family and not HUF. In view of the law cited above, it is clear that not only jointness of the family has to be proved but burden lies upon the person alleging existence of a joint family to prove that the property belongs to the joint Hindu family unless there is material on record to show that the property is the nucleus of the joint Hindu family or that it was purchased through funds coming out of this nucleus. In our opinion, this has not been proved in the present case. Merely because the business is joint would not raise the presumption that there is a Joint Hindu Family. As far as paragraph 8 is concerned in our view there is no clear-cut admission. The allegation made was that the minors were represented by defendant nos. 1-3, who were head of their respective branches. In reply to this it was stated that defendant nos.1-3 were neither the head or the *karta*, nor the mortgage transaction was made in that capacity. This admission cannot be said to be an unequivocal admission of there being a joint family.

20. In *Nagubai Ammal and Ors. vs. B. Shama Rao and Ors*.[8] which is the *locus classicus* on the subject it was held as follows:-

> "An admission is not conclusive as to the truth of the matters stated therein. It is only a piece of evidence, the weight to be attached to which must depend on the circumstances under which it is made. It can be shown to be erroneous or untrue, so long as the person to whom it was made has not acted upon it to his detriment, when it might become conclusive by way of estoppel."[9]

It would be pertinent to mention that in *Himani Alloys Ltd. vs. Tata Steel Ltd.*[10], it was also held that the admission should be categorical, should be conscious and deliberate act of the party making it. As far as the present case is concerned we do not find any clear-cut admission with regard to the existence of an HUF. At best, from the recitals in the mortgage deed and averments in the written statement, all that can be said is that at the relevant period of time the property was treated to be a joint property.

21. On the other hand, there are many other documents relied upon by the defendants. Out of the 6 houses, 5 were mortgaged and one is admittedly a *dharamshala*. Out of these 5 houses, 3 were sold by Hari Ram during his life time

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[8] (1956) 1 SCR 451

[9] This view has been consistently followed by this Court in a large number of cases including Bharat Singh and Anr. vs. Bhagirathi 1966 SCR (1) 606; Uttam Singh Dugal and Co. vs. Union of India and Ors. (2000) 7 SCC 120; Himani Alloys Ltd. vs. Tata Steel Ltd. (2011) 15 SCC 273.

[10] (2011) 15 SCC 273

and during the life time of the predecessors of the plaintiff, nobody objected to the sales of the properties and in the sale deeds Hari Ram is described as the sole owner of the property. One such sale deed is Exh.D-4 wherein it is mentioned that the double storey house is the property of the trading firm Madhav Prashad Agarwal and that Hari Ram is the owner of the firm and in order to repay the loan, sold the house to two persons. This sale deed was witnessed by Seth Budhmal. Though it is not stated so in the sale deed it appears that the amount of consideration must have been paid to Seth Budhmal. This document was executed on 12.09.1967, and this read with the other two sale deeds clearly indicate that Hari Ram claimed that he was the sole proprietor of the business of the trading firm Madhav Prashad Agarwal.

22. These sale deeds and the recitals were never challenged by the plaintiff or his predecessors. This would indicate that the jointness of the property if any had ceased because of some family arrangement or partition which may have happened much earlier. We have to read the sale deeds in conjunction with the averments made in the plaint quoted hereinabove wherein the plaintiff has stated that the business came to a closure and then almost all the people started carrying on their separate business. Though it is averred that the immovable properties remained the properties of the joint family the fact that separate branches started doing separate business is indicative of the fact that some separation, if not, a formal partition had taken place between the parties.

23. The other important document is the Will of Hari Ram (Exh. P-3). In this Will, Hari Ram gives details of the remaining 3 houses and mentions that these were owned by his father Madhav Prashad and that he (Hari Ram) has been doing business in the name of his father Munshi Madhav Prashad Agarwal. Out of the 6 houses, 3 had already been sold by Hari Ram and he has bequeathed the remaining 3 houses to various persons. It would be relevant to refer to the portion of the Will where Hari Ram states that he had 3 cousins Brij Mohan, Rameshwar Lal and Radha Krishan. Out of these, Radha Krishan died and was survived by his widow and 3 sons and they were living in the 2nd and 3rd floor in building No.2. Hari Ram bequeathed certain portions of the immovable property to the widow and children of Radha Krishan. It would be pertinent to mention that the plaintiff Bhagwat Sharan is the son of Radha Krishan. He also bequeathed certain properties in favour of his cousins Brij Mohan and Rameshwar Lal.

24. It is also not disputed that the plaintiff and defendant nos. 1-3 herein filed suit for eviction of an occupant in which he claimed that the property had been bequeathed to him by Hari Ram. According to the defendants the plaintiff having accepted the Will of Hariram and having taken benefit of the same, cannot turn around and urge that the Will is not valid and that the entire property is a joint family property. The plaintiff and defendant nos. 1-3 by accepting the bequest

under the Will elected to accept the will. It is trite law that a party cannot be permitted to approbate and reprobate at the same time. This principle is based on the principle of doctrine of election. In respect of Wills, this doctrine has been held to mean that a person who takes benefit of a portion of the Will cannot challenge the remaining portion of the Will. In *The Rajasthan State Industrial Development and Investment Corporation and Anr. vs . Diamond and Gem Development Corporation Ltd. and Anr*[11], this Court made an observation that a party cannot be permitted to "blow hot and cold", "fast and loose"or "approbate and reprobate". Where one party knowingly accepts the benefits of a contract or conveyance or an order, it is estopped to deny the validity or binding effect on him of such contract or conveyance or order.

25. The doctrine of election is a facet of law of estoppel. A party cannot blow hot and blow cold at the same time. Any party which takes advantage of any instrument must accept all that is mentioned in the said document. It would be apposite to refer to the treatise 'Equity-A course of lectures' by F.W. Maitland, Cambridge University, 1947, wherein the learned author succinctly described principle of election in the following terms:-

> "The doctrine of Election may be thus stated: That he who accepts a benefit under a deed or will or other instrument must adopt the whole contents of that instrument, must conform to all its provisions and renounce all rights that are inconsistent with it...."

This view has been accepted to be the correct view in *Karam Kapahi and Ors. vs. Lal Chand Public Charitable Trust and Ors.*[12]. The plaintiff having elected to accept the Will of Hari Ram, by filing a suit for eviction of the tenant by claiming that the property had been bequeathed to him by Hari Ram, cannot now turn around and say that the averments made by Hari Ram that the property was his personal property, is incorrect.

26. As far as the agricultural lands are concerned the trial court decreed the suit in respect of the agricultural lands on the basis that Madhav Prashad and his brother Umrao Lal and their successors constituted an HUF. The said lands having been bought out of the funds of the HUF would be treated to be the property of the HUF, even though they may have been entered in the name of any other person. In view of the above discussion, and the fact that we have held that the plaintiff has failed to prove that there is an HUF, we are not inclined to agree with the finding of the trial court.

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[11] AIR 2013 SC 1241
[12] (2010) 4 SCC 753

27. We now deal with each of the agricultural property separately. The properties described in paragraph 9(2)(a) of the plaint were earlier recorded in the name of Hari Ram and later in the names of his sons Purushottam and Vinod. The property at paragraph 9(2)(b) was also recorded in the name of Hari Ram and he had given cultivation rights to Sri Ram who is stated to have become the owner thereof. Similarly, the land described in paragraph 9(2)(c) also was shown in the name of Hari Ram and this was given to Kahiya Lal on tenancy. The land described in paragraph 9(2)(d) was also recorded in the name of Hari Ram and was transferred to Shiv Charan, and now stands in the name of his legal heirs. The land described in paragraph 9(2)(e) which stood in the name of Hari Ram was also transferred by him in the name of his wife Rajjo Devi in 1969.

28. As far as the lands described in 9(2)(f) and 9(2)(g) are concerned these lands were taken on lease by Nathu Lal, S/o Hari Ram from the *zamindar* of Ashok Nagar. According to the plaintiffs these lands were also lands of the joint family but that version cannot be believed in view of the *patta* granted in favour of Nathu Lal. It may be true that consideration for grant of *patta* may have been paid but there is no material on record to show that this payment was made out of the funds of HUF. It may be pertinent to mention here that the plaintiffs have alleged that in 1951 Nathu Lal was a minor and the amount was paid by Hari Ram. However, no proof has been led in this regard. In fact, from the material on record it appears that Nathu Lal was about 21 years old at that time. He was definitely more than 18 years old and thus not a minor. These lands were never shown to be owned by Madhav Prashad or Umrao Lal. It is also pertinent to mention that various parts of the land were transferred to various other persons and these transfers were never challenged by the plaintiff at the relevant time. It would also be pertinent to mention that both the courts below have come to the conclusion that the plaintiffs have failed to prove that they were getting any proceeds from the income of the agricultural land. This also indicates that the said land was not joint.

29. In view of the above discussion we find no merit in the appeals filed by the appellant(s) and the same are dismissed with no order as to costs. Pending application(s) if any, shall accordingly stand disposed of.

Appeal dismissed

I.L.R. [2020] M.P. 1807 (SC)
SUPREME COURT OF INDIA

Before Mr. Justice N.V. Ramana, Mr. Justice Sanjiv Khanna & Mr. Justice Krishna Murari

C.A. No. 1305/2010 decided on 13 May, 2020

RAMNATH AGRAWAL & ors. …Appellants

Vs.

FOOD CORPORATION OF INDIA & ors. …Respondents

***Transfer of Property Act (4 of 1882), Section 105 – Lease & Agreement for Lease – Difference* – Held – For an agreement to be considered as lease and not as an agreement to lease it is important that there must be an actual demise of property on date of agreement – In instant case, agreement was not a lease but simply an agreement giving rise to contractual obligations – Clauses of agreement goes to show that it was not a lease agreement but an agreement to enter into lease – Appeal dismissed. (Paras 19, 24 & 25)**

सम्पत्ति अन्तरण अधिनियम (1882 का 4), धारा 105 – पट्टा एवं पट्टे के लिए करार – अंतर – अभिनिर्धारित – एक करार को पट्टे के रूप में और न कि पट्टे के लिए एक करार के रूप में विचार में लिए जाने हेतु यह महत्वपूर्ण है कि करार की तिथि पर संपत्ति का वास्तविक पट्टांतरण होना चाहिए – वर्तमान प्रकरण में, करार एक पट्टा नहीं था बल्कि साधारण रूप से एक करार था जो संविदात्मक बाध्यताओं को उत्पन्न करता था – करार के खंड दर्शाते हैं कि वह एक पट्टा करार नहीं था बल्कि पट्टा करने हेतु एक करार है – अपील खारिज।

Cases referred:

AIR 1919 PC 79, 1959 Supp 2 SCR 107 : AIR 1959 SC 620, (1994) 2 SCC 497.

J U D G M E N T

The Judgment of the Court was delivered by :

KRISHNA MURARI, J.:- The present appeal arises out of the judgment and final order dated 02.07.2008 passed by the High Court of Madhya Pradesh, Bench at Indore in first appeal bearing F.A. No. 64/90. The High Court vide impugned order dated 02.07.2008 allowed the first appeal preferred by the respondents - Food Corporation of India thereby dismissing the Civil Suit No. 3-B/81 and setting aside the judgment and decree dated 29.04.1990 passed by the VI-Additional District Judge, Indore in favour of the appellant - plaintiffs.

2. The facts giving rise to the dispute in brief can be summarized as under :-

In 1976, Food Corporation of India (hereinafter referred to as 'FCI') invited offers for construction of godowns on the lands of interested parties and subsequently taking over possession of the godowns on lease. The offers so made also included a stipulation to provide assistance for securing loan for the purpose of construction from State owned banks. The loan was to be repaid in the form of FCI depositing the rent with the banks.

3. The offer made by the appellants herein was accepted by the FCI and accordingly an agreement dated 16.12.1976 was entered between the parties. As per the terms and conditions of the agreement the appellants had to construct six godowns, which would be subsequently taken over by FCI on rent. On 16.12.1976 itself, loan was sanctioned to the appellant by State Bank of Indore on the recommendation of FCI.

4. FCI vide letters dated 06.02.1977, 27.07.1977, 06.11.1977 and 02.12.1977 notified the progress of the construction of the godowns to the bank on the basis whereof the funds were disbursed to the appellants by the bank. The appellants asserts that the letter dated 02.12.1977 of the FCI certified cent percent completion of the godowns.

5. However, FCI vide a subsequent letter dated 17.12.1977 called upon the appellants to complete the construction of godowns and handover the possession of the same latest by 31.12.1977. The appellants vide letter dated 25.12.1977, informed FCI that the construction of the godowns was complete and the possession of the same be taken over.

6. On 05.01.1978, inspection of the godowns was conducted by the officials of the FCI and on the basis of the inspection report submitted by one Shri K. N. Rao, the competent officer of FCI vide letter dated 14.02.1978, recommended taking over the possession of only four out of six godowns by the FCI and pointed out certain defects in respect of remaining two godowns. The case set up by the appellants is that possession of the four godowns was already taken over on 08.02.1978.

7. The appellant issued a legal notice dated 14.05.1978 calling upon FCI to pay rent with interest @ 11% in respect of all six godowns for the period of January to April, 1978 along with charges towards electricity and wages for the security guard.

8. FCI vide its reply dated 09.06.1978, informed that rent is payable from actual date of possession i.e., 08.02.1978 and not from 01.01.1978. It was also stated that in respect of the four godowns, the appellants have not issued the necessary bills for payment of the rent and as far as the two disputed godowns are concerned, no rent is payable as the possession of the same was not taken over by

FCI and the rent in respect thereof would become payable only after the said two godowns are handed over after rectification of the defects pointed out.

9. The possession of the remaining two godowns was subsequently taken over by FCI on 14.05.1979 which fact was duly acknowledged by FCI vide letter dated 15.05.1979. The appellants vide letter dated 11.08.1979, sought damages from FCI on account of non-realization of rent towards the remaining two godowns.

10. As the demands of the appellants were not complied with, the appellants filed Civil Suit No.3-B/81 for damages amounting to Rs.5,90,000/- before the Trial Court at Indore, averring the above-mentioned facts. The claim of the appellants consisted of arrears of rent for the periods when the possession of the godowns was not taken over by FCI, non-payment of rent at enhanced rates, along with wages for security guard, electricity charges and interest.

11. FCI filed its written statement before the Trial Court denying the assertions of the appellants on the following grounds:-

i. The letter dated 02.11.77 was not a certificate of final completion as no inspection was carried out by the competent officials of the FCI by the said date.

ii. After carrying out the inspection on 05.01.1978, the Deputy Manager had recommended taking over the possession of only four godowns and had pointed out the defects in respect of the other two godowns.

iii. Rent was payable to the plaintiffs as per measurements from the date of actual possession i.e., 08.02.1978. In respect of the remaining two godowns no rent was payable as the possession of the said godowns were not handed over to FCI, after rectification of the defects pointed out in letter dated 05.01.1978.

iv. The alleged possession on 14.05.1979 was taken by officials of FCI who were not competent to do so and the said officials were punished in departmental enquiry.

12. During the pendency of the suit before the Trial Court, the appellants and the FCI entered into a lease agreement dated 06.02.1986 in respect of all six godowns.

13. The Trial Court vide judgment and decree dated 29.04.1990 decreed the suit in favour of the appellants and directed the respondents to pay a sum of Rs.5,77,274.59/- along with interest @ 11% per annum and also an enhanced rent of Rs.20,68,950/- along with interest @ 11 % per annum. According to the Trial

Court, the plaintiff had proved the completion of all the six godowns on the basis of the evidence of PW-1,2 & 5 who had issued certificates in respect of completion and fitness of the godowns. While returning the finding, the Trial Court also placed reliance upon the letter dated 15.05.1979 issued by FCI, whereby it had acknowledged the handing over the possession of the two godowns.

14. FCI preferred the first appeal bearing F.A. No.64/90 before the High Court challenging the judgment and decree of the Trial Court dated 29.04.1990. Cross objections were also preferred by the appellants herein in respect of certain claims which was rejected by the Trial Court.

15. The High Court vide impugned judgment dated 02.07.2008 allowed the appeal primarily on the ground that agreement dated 16.12.1976 was not a lease agreement and merely a contract simplicitor and the rights and liabilities of the parties were governed strictly as per the covenants prescribed by the agreement. Therefore, the claim for arrears of the rent was not made out.

16. The evidence of PW-1,2 & 5 which was relied upon by the Trial Court was discarded by the High Court on the grounds that the inspection carried out by them was in the absence of the officials of FCI and not in accordance with the specification laid down by FCI and as agreed between the parties.

17. The sole question which arises for consideration before us is whether the agreement dated 16.12.1976 was a lease agreement under Section 105 of the Transfer of Property Act, 1882 or an agreement for lease giving rise to only obligations arising out of the said contract.

18. It may be relevant to reproduce Clauses 6 and 7 of the agreement dated 16.12.1976, which read as under :-

> *"6. Upon completion of the godowns and the services referred to above in all respect, and after obtaining a completion certificate from party no. 2 or any of its officers nominated by Party no. 2 in this behalf, party no. 1 would hand over the godown/godowns to party no. 2 under a lease agreement to be executed between parties in the standard form obtaining in the FCI.*
>
> *7. It shall be understood that in the event of any delay in completion of the building or services or if there is a faulty workmanship or the structure is defective on the basis of the findings of the FCI officers, which will be final, party no. 2 would not be bound to take the structure on lease."*

19. A perusal of the aforesaid, the two Clauses of the agreement go to show that it was not a lease agreement but rather an agreement to enter into lease.

20. One of the earliest precedent, wherein the question whether an agreement can be termed as lease arose in the case of *Rani Hemanta Kumari Debi Vs. Midnapur Zamindari Company Ltd,* AIR 1919 PC 79, wherein it was held as under :-

> *"Their Lordships are of opinion that it cannot be so regarded. An "agreement to lease", which a lease is by the statute declared to include, must in their Lordships' opinion be a document which effects an actual demise and operates as a lease. They think that Jenkins C.J.., in the case of Panchanam Bose v. Chandra Charan Misra, correctly stated the interpretation of s. 17 in this respect. The present agreement is an agreement that upon the happening of a contingent event at a date which was indeterminate and having regard to the slow progress of Indian litigation, might be far distant, a lease would be granted. Until the happening of that event it was impossible to determine whether there would be any lease or not. Such an agreement does not in their Lordships' opinion, satisfy the meaning of the phrase "agreement to lease," which, in the context where it occurs and in the statute in which it is found must in their opinion relate to some document that creates a present and immediate interest in the land."*

21. The decision of the Privy Council in *Rani Hemanta Kumari Debi* (supra) was referred to by this Court in *Tiruvenibai v. Lilabai* [1959 Supp 2 SCR 107: AIR 1959 SC 620) wherein at page 111, it was held as under:-

> *"Before dealing with these points, we must first consider what the expression an agreement to lease' means under Section 2(7) of the Indian Registration Act, hereinafter referred to as the Act. Section 2(7), provides that a lease includes a counterpart, Kabuliyat, an undertaking to cultivate and occupy and an agreement to lease. In Hemanta Kumari Debi v. Midnapur Zamindari Co. Ltd. (LR (1919) 46 IA 240 : AIR 1919 PC 79) the Privy Council has held that 'an agreement to lease, which a lease is by the statute declared to include, must be a document which effects an actual demise and operates as a lease'. In other words, an agreement between two parties which entities one of them merely to claim the execution of a lease from the other without creating a present and immediate demise in his favour is not included under Section 2, sub-section (7). In Hemanta Kumari Debi case (LR (1919) 46 IA 240 : AIR 1919 PC 79) a petition setting out the terms of an agreement in compromise of a suit stated as one of the terms that the plaintiff agreed that if she succeeded in another suit*

which she had brought to recover certain land, other than that to which the compromised suit related she would grant to the defendant a lease of that land upon specified terms. The petition was recited in full in the decree made in the compromised suit under Section 375 of the Code of Civil Procedure, 1882. A subsequent suit was brought for specific performance of the said agreement and it was resisted on the ground that the agreement in question was an agreement to lease under Section 2(7) and since it was not registered it was inadmissible in evidence. This plea was rejected by the Privy Council on the ground that the document did not effect an actual demise and was outside the provisions of Section 2(7). In coming to the conclusion that the agreement to lease under the said section must be a document which effects an actual demise the Privy Council has expressly approved the observations made by Jenkins, C.J., in the case of Panchanan Bose v. Chandra Charan Misra (ILR (1910) 37 Cal 808 : 14 CWN 874) in regard to the construction of Section 17 of the Act. The document with which the Privy Council was concerned was construed by it as "an agreement that, upon the happening of a contingent event at a date which was indeterminate and, having regard to the slow progress of Indian litigation, might be far distant, a lease would be granted" and it was held that 'until the happening of that event, it was impossible to determine whether there would be any lease or not'. This decision makes it clear that the meaning of the expression 'an agreement to lease' 'which, in the context where it occurs and in the statute in which it is found, must relate to some document that creates a present and immediate interest in the land'. Ever since this decision was pronounced by the Privy Council the expression 'agreement to lease' has been consistently construed by all the Indian High Courts as an agreement which creates an immediate and a present demise in the property covered by it."

22. This court in *State of Maharashtra & Ors. v. Atur India Pvt. Ltd.* (1994) 2 SCC 497, quoting Hill & Redman distinguished between an agreement to lease and a lease. The relevant paragraph of *Atur India Pvt. Ltd.* (supra) are reproduced as under:-

"25. Hill & Redman in Law of Landlord and Tenant, 17th Edn., Vol. 1 at page 100 dealing with this aspect of the matter states as under:-

22. "DISTINCTION BETWEEN LEASE AND AGREEMENT FOR LEASE

40. (1) A lease is a transaction which as of itself creates a tenancy in favour of the tenant.

(2) An agreement for a lease is a transaction whereby the parties bind themselves, one to grant and the other to accept a lease.

(3) If the agreement for a lease is one of which specific performance will be granted the parties are, for most but not all purposes, in the same legal position as regards each other and as regards third parties as if the lease had been granted.

(4) Whether an instrument operates as a lease or as an agreement for a lease depends on the intention of the parties, which intention must be ascertained from all the relevant circumstances.

50. An instrument in proper form (a); by which the conditions of a contract of letting are finally ascertained, and which is intended to vest the right of exclusive possession in the lessee - either at once, if the term is to commence immediately, or at a future date, if the term is to commence subsequently - is a lease which takes effect from the date fixed for the commencement of the term without the necessity of actual entry by the lessee (b). An instrument which only binds the parties, the one to create and the other to accept a lease thereafter, is an executory agreement for a lease, and although the intending lessee enters the legal relation of landlord and tenant is not created."

23. This Court in *Atur India Pvt. Ltd.* (supra) also relied upon Mulla on The Transfer of Property Act to enumerate the distinction between a lease and an executory agreement to lease in the Indian Context, which is as under :-

27. We will now turn to Indian law. Mulla in The Transfer of Property Act (7th Edn.) at page 647 dealing with agreement to lease states as under:

> *"An agreement to lease may effect an actual demise in which case it is a lease. On the other hand, the agreement to lease may be a merely executory instrument binding the parties, the one, to grant, and the other, to accept a lease in the future. As to such an executory agreement the law in England differs from that in India. An agreement to lease not creating a present demise is not a lease and requires neither writing nor registration.*
>
> *As to an executory agreement to lease, it was at one time supposed that an intending lessee who had taken possession under an agreement to lease capable of specific performance, was in the same position as if the lease had been executed and registered. These cases have, however, been rendered obsolete by the decisions of the Privy Council that the equity in Walsh v. Lonsdale does not apply in India."*

24. From the aforesaid it is evident that for an agreement to be considered as a lease and not as an agreement to lease it is important that there must be an actual demise of property on the date of the agreement.

25. A perusal of the terms and conditions quoted herein above and the legal position discussed clearly demonstrates that the agreement dated 16.12.1976 was not a lease but simply an agreement giving rise to contractual obligations. The terms and conditions clearly demonstrate that the execution of the lease deed was contingent upon the construction of godowns being completed and the same being approved by issuance of completion certificate by the Competent Authority of FCI.

26. The suit preferred by the appellants is a suit for damages arising out of breach of agreement dated 16.12.1976. It is well settled law that the rights and obligations of the parties have to be decided in accordance with the terms and conditions of the contract.

27. Clause 6 of the agreement dated 16.12.1976 made it imperative for the appellants to obtain a completion certificate from the competent officers of FCI, prior to execution of lease agreement and handing over the possession of the godowns. In case of defects and faulty workmanships, the findings of the officials of FCI were final. The appellants have contended that letter dated 02.12.1977 issued by FCI was the completion certificate and no subsequent certificate was to be issued. However, it is noteworthy to point out that inspection was carried out on 05.01.1978, whereafter FCI vide letter dated 14.02.1978 had recommended taking over the possession of only four out of six godowns. There arises no question of waiver, acquiescence or estoppel, as all along FCI has contended that

two godowns were defective and the possession of the same can not be taken over till the rectification of the defects. The reliance placed by the appellants on the letter dated 15.05.1978, wherein FCI is said to have acknowledged taking over possession is totally misplaced. No reliance can be placed on the said letter which was manufactured in connivance with the delinquent officers of the FCI who were charge-sheeted and subsequently punished in a departmental enquiry for the same.

28. The appellants have not disputed the facts that the officers of FCI refused to take over the possession of the two godowns in view of the defects pointed out by the officers of FCI and the said defects were never rectified. As per Clause 6 of the agreement dated 16.12.1976, in case of defects, the findings of the officers of FCI were to be final and there was no obligation to take such structure on lease. The High Court has rightly discarded the evidence of PW-1,2 & 5 as neither the inspection was carried out by an independent agency in presence of the representatives of the appellants and respondents nor the same was in accordance with the specifications laid down by FCI in the agreement dated 16.12.1976. Therefore, no rent was payable in respect of the two disputed godowns as they were not completed as per the specifications of FCI and the possession of the disputed godowns were not taken over by FCI at the time of filing of the suit by the appellants.

29. Insofar as claim for rent prior to 08.02.1978 is concerned, the appellants were not entitled for any such claim as rent was payable only after taking over of possession as per Clause 8 of the agreement dated 16.12.1976.

30. The other question which remains to be considered is whether the appellants were entitled to claim enhanced rent in respect of the godowns. We fail to find any such covenant in the agreement dated 16.12.1976, which admittedly is not a lease, stipulating enhancement of the rent after particular period once possession of the godowns has been taken over by FCI, which may entitle the appellants for payment of an enhanced rent.

31. In view of the above facts and discussions, we find no reason to take a view different from the one taken by the High Court while allowing the first appeal of the respondents and dismissing the Civil Suit of the appellants herein. Accordingly, the appeal stands dismissed.

32. In the circumstances, we do not make any order as to costs.

Appeal dismissed

I.L.R. [2020] M.P. 1816 (SC)
SUPREME COURT OF INDIA

Before Mr. Justice Sanjay Kishan Kaul & Mr. Justice K.M. Joseph

Cr.A. No. 57/2013 decided on 29 May, 2020

SONU @ SUNIL …Appellant

Vs.

STATE OF M.P. …Respondent

A. Penal Code (45 of 1860), Sections 302, 394, 460 & 34 and Dakaiti Aur Vyapharan Prabhavit Kshetra Adhiniyam, M.P. (36 of 1981), Section 11 & 13 – Chain of Circumstances – Common Intention – **Held – Conviction of appellant based on recovery of mobile phone of deceased, where there is discrepancy about the sim number also – Recovery from appellant suffers from suspicion and doubt – Death caused by injuries inflicted with knife which was recovered from co-accused – PW-5 to whom Court below relied to hold completion of chain of circumstances, has not taken name of appellant – Not safe to convict appellant only on basis of such recovery, he is entitled for benefit of doubt – Conviction of appellant set aside – Appeal allowed.**

(Paras 30, 34 & 35)

क. दण्ड संहिता (1860 का 45), धाराएँ 302, 394, 460 व 34 एवं डकैती और व्यपहरण प्रभावित क्षेत्र अधिनियम, म.प्र. (1981 का 36), धारा 11 व 13 – परिस्थितियों की श्रृंखला – सामान्य आशय – अभिनिर्धारित – अपीलार्थी की दोषसिद्धि मृतक के मोबाईल फोन की बरामदगी पर आधारित की गई थी जहां सिम नंबर के बारे में भी विसंगति है – अपीलार्थी से बरामदगी, संदेह एवं शंका से ग्रसित – मृत्यु, चाकू से पहुंचाई गई चोटों द्वारा कारित, जिसे सह–अभियुक्त से बरामद किया गया था – अ.सा.–5, जिस पर निचले न्यायालय ने परिस्थितियों की श्रृंखला पूर्ण ठहराने के लिए विश्वास किया था, ने अपीलार्थी का नाम नहीं लिया है – अपीलार्थी को केवल उक्त बरामदगी के आधार पर दोषसिद्ध करना सुरक्षित नहीं, वह संदेह के लाभ का हकदार है – अपीलार्थी की दोषसिद्धि अपास्त – अपील मंजूर।

B. Penal Code (45 of 1860), Sections 302, 394, 460 & 34 and Dakaiti Aur Vyapharan Prabhavit Kshetra Adhiniyam, M.P. (36 of 1981), Section 11 & 13 – Theft & Murder – Appreciation of Evidence – **Held – Theft and murder forms part of one transaction – Circumstances may indicate that theft and murder committed at same time but it is not safe to draw inference that the person in possession of stolen property is the murderer. (Para 28)**

ख. दण्ड संहिता (1860 का 45), धाराएँ 302, 394, 460 व 34 एवं डकैती और व्यपहरण प्रभावित क्षेत्र अधिनियम, म.प्र. (1981 का 36), धारा 11 व 13 – चोरी व हत्या – साक्ष्य का मूल्यांकन – अभिनिर्धारित – चोरी व हत्या एक ही संव्यवहार का भाग निर्मित करते हैं – परिस्थितियां इंगित कर सकती हैं कि चोरी एवं हत्या एक ही समय पर कारित

की गई थी किंतु यह निष्कर्ष निकालना सुरक्षित नहीं कि वह व्यक्ति जिसके कब्जे में चुराई गई संपत्ति है, वही हत्यारा है।

***C. Criminal Practice – Recovery of Article – Inference against Accused* – Held – In case of recovery of article, if person accused of committing offence other than theft (such as murder), there are tests to establish the offence – Tests enumerated. (Para 28)**

***ग. दाण्डिक पद्धति – वस्तु की बरामदगी – अभियुक्त के विरूद्ध निष्कर्ष* – अभिनिर्धारित – वस्तु की बरामदगी के प्रकरण में, यदि व्यक्ति को चोरी के अलावा अन्य अपराध (जैसे कि हत्या) कारित करने का अभियुक्त बनाया गया है, अपराध स्थापित करने के लिए परीक्षण दिये गये है – परीक्षण प्रगणित किये गये।**

Cases referred:

(2019) 3 SCC 770, AIR 1954 SC 28, AIR 1956 SC 54, AIR 1978 SC 522, AIR 2001 SC 2342, AIR 1975 SC 179, 2008 (15) SCC 501, 1978 (4) SCC 440, 1998 (5) SCC 699, 2004 (3) SCC 793.

J U D G M E N T

The Judgment of the Court was delivered by : **K.M. JOSEPH, J. :-** . The appellant was tried with 4 others and was convicted under Sections 394, 460 and 302 read with Section 34 of the Indian Penal Code, 1860 (hereinafter referred to as, 'the IPC', for short). He was also found guilty of offences under Sections 11 and 13 of the 'Madhya Pradesh Dakaiti Avam Vyapharan Adhiniyam, 1981 (hereinafter referred to as, 'Madhya Pradesh Adhiniyam'). The appellant was, in fact, sentenced to death for the offence under Section 302 read with Section 34 of the IPC along with two other accused apart from a fine of Rs. 5000/-. He was sentenced to 10 years Rigorous Imprisonment in regard to the offence under Section 460 of the IPC. He was also handed down a sentence of 10 years for the offence under Section 394 read with Section 34 of the IPC. Still further, he was also sentenced to 7 years for the offence under Sections 11 and 13 of the Madhya Pradesh Adhiniyam. By the impugned judgment, the High Court answered the death reference by holding that in the circumstances, the death penalty was not warranted. In place of death penalty, the High Court sentenced the appellant and two other accused to life imprisonment and enhanced the fine to Rs. 25,000/-. The appeal filed by the appellant was dismissed otherwise. The prosecution case, in brief, appears to be as follows:

> On 08.09.2008, in the night, Bharosilal (hereinafter referred to as, 'the deceased', for short) was at his village Bilaua. He was residing alone. One Abhay Sharma-PW9, who is the son of the deceased, was informed by one Neeraj Bhargav that his father has not opened the door on that day. On receiving such information, PW9, who also turned out to be

the complainant, finally went to his father's residence and it was found that his father was dead and the First Information Report (FIR) was lodged on 10.09.2008. On the basis of the investigation conducted, Kalli, Hariom, Veeru, Virendra and the appellant came to be charged with the offences as noticed. In fact, the appellant was charged under Section 397 of the IPC also.

2. PW1 to PW15 were examined as prosecution witnesses. Material objects were also produced. The following are the questions, which were framed by the Trial Court:

"(i) Whether accused Kalli @ Gopal Sharma, Sonu @ Sunil and Hariom on the date of incident after sunset and before sunrise after committing house tress pass in the residential house of deceased Bharosilal, committed the murder of Bharosilal?

(ii) Whether accused Kalli @ Gopal Sharma, Sonu @ Sunil and Hariom formed common intention to commit murder of Bharosilal?

(iii) Whether accused Kalli @ Gopal Sharma, Hariom and Sonu @ Sunil in fulfilment of their common intention committed murder of Bharosilal by strangulation and cutting by a chhuri (knife)?

(iv) Whether accused Kalli @ Gopal Sharma, Hariom and Sonu @ Sunil by using deadly weapon in committing robbery, committed the murder of Bharosilal and looted gold and silver jewellery and two mobile phones of Nokia made from the possession of Bharosilal?

(v) Whether accused Veeru and Virendera along with accused Kalli @ Gopal Sharma, Hariom and Sonu @ Sunil, at the house of accused Virendra Singh, Kushmah hatched conspiracy of committing robbery in the house of Bharosilal?

(vi) Whether the accused persons committed the offence defined and specified under Section 2(b) of MPDVPK Act and committed the offence u/s 11/13 of the above said Act?"

3. The Trial Court found that it was a case entirely based on circumstantial evidence. It noticed that the deceased had suffered the following injuries:

"Injury No.1	Incised of 6x1.5x1 c.m. on the right side of the chin.
Injury No. 2	Incised wound of 4 x 1 ½ cm below 1 cm from the injury no. 1.
Injury No. 3	Incised wound of 6 x 3 x 2cm left fore arm anteriority middle.
Injury No. 4	Incised wound of 6 x 1 x 1cm, just 2cm below injury no. 3.
Injury No. 5	Incised wound of 6 x 1 x 1cm, just 2cm below injury no. 4.
Injury No. 6	Incised wound on abdomen 3" below measuring 3 x 2 x deep upto peritoneum, part of intestine coming out from the wound."

4. The cause of death was found to be shock and hemorrhage due to excessive bleeding caused by multiple wounds. The death was caused within 36 hours of the postmortem report. The postmortem was conducted on 10.09.2008. It cannot be disputed that the death was homicidal and it was caused with the intent to commit murder. The Trial Court further proceeded to find that the certain articles were found missing from the almirah in the house where the deceased stayed. PW8 is wife of the deceased. PW9, as already noticed, is one of the sons of the deceased. PW13 held identification of the gold and silver jewellery and the mobile phones, which according to them, belonged to the deceased. The identified articles were belonging to the deceased. One *hasli* (necklace) made of silver, one pair of earrings and two mobile phones were identified. The contention of the accused that PW13, who held the identification proceedings, deposed that at that time a Police Officer was present, was rejected by finding that from the Identification Memo-Exhibit P21, it was clear that no Police Officer was present at the time of the identification of the proceedings. The Court also relied upon the evidence of PW8 and PW9, who were found to have not stated about the presence of Police Officers at the time of the identification proceedings. The evidence of PW9 and the evidence of PW8, were also referred to, to find that the Police came to open the door. It was opened and it was seen that the almirah was opened and goods/gold articles were scattered, and out of the said goods, one *hasli* (necklace) made of silver, one pair of gold earrings and two mobile phones, were missing. The evidence of PW3-another son, was relied upon to find that PW5 had overheard the conversation between all the accused which was to the effect that the deceased was living alone and they were making a plan for committing a loot

in his house. No doubt, the Court also noticed that PW1, who was cited by the prosecution, to prove the said conversation, turned hostile. PW3 had also deposed that he was told by PW5 about having overheard the conversation between the accused. The evidence of PW3 was relied upon to find that both Virendra and Veeru used to come to massage the body of his father and his father used to say that they would be got employed. PW3 deposed about his familiarity with accused Virendra, Veeru and Kalli present in the Court. PW6- another son of the deceased, has deposed that Kalli used to come to his village to sell *ghee* and used to sit and talk with the deceased and used to massage the body of his father. The Trial court finds that Veeru, Virendra and Kalli used to come and they were also acquainted with the deceased and his family members. Thereafter, the Trial Court also referred to the recoveries of the articles. From Hariom, one mobile phone was recovered. From Kalli, the *Chhuri*(knife), used for committing the offence, was recovered. From the appellant, another mobile phone of Nokia Company, Model 5110, of black colour, upon which the Number 97321820 was written in red ink, was also seized. The evidence of PW9 was relied upon wherein he has deposed, that a Nokia Mobile on which B.L. in English was written with red marker, and on the battery of the same, Number 97321820 in red ink, had been written, was stolen. From accused Virendra, the recovery of *hasli*(necklace) was effected. From Veeru, one pair of gold earrings was seized. On the basis of the same, it was found that the stolen property and weapon have been seized on the statement of the accused, and that these circumstances, completed the chain of circumstantial evidence. Reliance was placed on the deposition by PW5, who had overheard the conversation between the accused about the criminal conspiracy. PW7, a witness to the recovery statement of the appellant-Exhibit P13 and also evidence of PW12- the Police Inspector, who arrested the appellant, has been relied upon to prove the statement leading to the recovery of the mobile from the appellant. The following findings may be noted:

> "In the above said analysis it is proved that there is criminal conspiracy amongst the accused persons to commit theft or loot in the house of deceased, on the basis of memorandum statement of accused Hariom, the looted mobile is recovered/ seized from the possession of accused Hariom on the basis of memorandum of accused Kalli @ Gopal Sharma and on producing by him one blood stained sharp edged chhuri (knife) used in the offence has been seized from the possession of accused Kalli @ Gopal Sharma. On the basis of memorandum statement of accused Sonu @ Sunil and on producing by him the looted mobile Nokia is seized from accused Sonu @ Sunil. In the same manner on the basis of Accused Virendra one old and used hasli (necklace) made of silver is seized from the possession of accused Virendra. On the basis of accused Veeru

and on producing by him the looted property i.e. one pair of earrings are seized by the police from the possession of accused Veeru. All the four looted properties i.e. two mobile phones, one hasli (necklace) and one pair of gold earrings have been identified by Rukmani (PW-8) and Abhay Kumar Sharma (PW-9) in identification proceedings and they admitted that the same belong to them. All these circumstances complete the chain of circumstances against the accused persons. The accused persons have not produced any evidence in rebuttal of the same. The defence did not explain the fact that the looted property and weapon of offence have been recovered from their possession in this situation it is clear that. The accused persons hatched criminal conspiracy of committing loot in the house of the deceased, accused Kalli @ Gopal Sharma, Hariom and Sonu @ Sunil has committed murder of deceased before sun rises and after sun set by entering in the house of the deceased.

From the criminal conspiracy and in fulfillment of the same and from the seizure of weapon of offence and looted property from the accused Kalli @ Gopal Sharma, Hariom, Sonu @ Sunil and no explanation of the same on behalf of defence it would be presumed that accused Kalli @ Gopal, Sonu @ Sunil and Hariom by entering in the house of deceased before sun rise and after sun set has committed loot and in committing of the said loot has committed the murder of deceased Bharosilal Sharma by inflicting injuries with knife. Because at the time of committing loot all the three accused persons Kalli @ Gopal, Hariom and Sonu @ Sunil were present at the place of occurrence, all the three have also committed loot and in committing of the said loot the murder of deceased Bharosilal has been committed, from this it is clearly concluded that there were common intention amongst the accused persons Kalli @ Gopal, Hariom and Sonu @ Sunil to commit the murder of deceased Bharosilal. Therefore, the offence u/s460/302/34 against accused Kalli @ Gopal, Hariom and Sonu @ Sunil are proved beyond reasonable doubt.

So far as the question of offence u/s 397/34 IPC against accused Kalli @ Gopal, Hariom and Sonu @ Sunil is concerned the weapon used in the offence knife is only seized from accused Kalli @ Gopal Sharma, it is clear from the same that at the time of incident a chhuri, used in the incident which is deadly and sharp edged was in possession of accused Kalli @ Gopal Sharma."

(Emphasis supplied)

5. The appellant was found along with Hariom, guilty of the offence under Section 394 read with Section 34 of the IPC, whereas, Section 397 of the IPC was found proved against Kalli. The Trial Court found Kalli guilty under Section 397 read with Section 34 of the IPC. Appellant was also convicted under Section 302 read with Section 34 of the IPC. Thereafter, it was also found that the appellant and others were guilty of the offences under Sections 11 and 13 of the Madhya Pradesh Adhiniyam, based on the offences proved otherwise.

6. The High Court, in appeal, proceeded to find that eleven circumstances emerged before the Trial Court:

i. The incident in connection with the loot took place on 08.09.2008 after locking the doors from inside in the house of the deceased who was residing alone.

ii. That the postmortem confirms the prosecution case. It is found that it is natural that on 09.09.2008 when the deceased did not appear to be seen and was not responding on knocking the door, Neeraj Bhargava informed PW9 that he was not responding. PW9 and PW8 departed to the place to know about the welfare of the deceased.

iii. Upon request of PW9, his neighbor- Phoolchand climbed through the stairs and he found the deceased with blood on his hand and was lying dead. He went to the Police Station Bilaua for lodging the report which was recorded at about 11:30 P.M in night. The dead body was referred for postmortem on the same day and the FIR was lodged in the evening of 10.09.2008.

iv. On 10.09.2008, Ashok Kumar(PW3), in his Case Diary Statement, disclosed that the Cell Phone Number 9406586386, generally used by his father, was also found missing. Another Cell Phone Number 9928120429, which was made available by son of deceased, was also found missing.

v. Investigation was conducted by PW15 and initially names of the assailants were not dictated by that time.

vi. The successor of PW15-(PW14) conducted subsequent investigation. Statements of witnesses were recorded, call details of stolen mobile sets from Cyber Cell was received. On 18.10.2008, he came to know the names of assailants from Cyber Cell. Within two days, arrests were made of

the accused, viz., Kalli, Hariom, Parihar, Virendra Kachhi and Veeru. The *Churri*(knife) was seized from accused Kalli, one necklace from Virendra, one pair of gold earrings from Veeru.

vii. The accused cannot get benefit for the inaction/ latches of the investigation.

viii. On 02.11.2008, D.P. Sharma-PW12, arrested appellant and recovered from him one mobile phone bearing SIM No. 97321820.

ix. As per medical evidence, it is clear that the deceased was put to death by the accused or any one of them. Looking to the nature of the incised wounds seen on the body of the deceased, the death appears to be homicidal.

x. Identification of properties, which were seized/ recovered in between 18.10.2008 to 02.11.2008, was conducted on 10.12.2008, which cannot be said delayed because the persons who have identified the articles, were the residents of Gwalior.

xi. The motive of the incident is apparently clear. It was committed for committing loot/theft, and during the incident of theft, the deceased was killed by the accused.

7. We have heard learned Senior Counsel for the appellant and also learned counsel for the state. Learned Senior Counsel would complain that there is no evidence against the appellant for convicting him for the offences, he has been found guilty of. He complained that the Court's below have erred in placing reliance upon PW-5 who allegedly overheard the conversation between the five accused persons by standing outside the house of one of them. He points out that the witness could not be believed. It is pointed out that PW-1 who was cited by the prosecution to prove the said conversation has not adhered to the version which was sought to be attributed to him. It is highly improbable that PW-5 could have overheard any such conversation. He pointed out that a clear discrepancy in regard to the recovery of the mobile phone from the appellant. In the memorandum relating the alleged recovery of the mobile phone, what is stated is that the appellant took one mobile phone make of Nokia of the deceased and he has hidden the same on the roof of his house. The seizure memo reveals the following as what was recovered:

"

S.No.	Property	Signatures obtained on packets or property
1.	One mobile phone of Nokia company of black colour old and used, model No. 5110 made in Finland CE 0188X no. 490541/30/26305416 is written. Code No. 0502182 is written. B.L. is written on the mobile in red ink and on its battery a no. 97321820 is written with red ink. (some portion not illegible).	

"

8. He would then point out that the High Court, in the recital of circumstances, has found that a Cell Phone Number 9928120429 was found missing, and then he points out the eighth circumstance, which is noted by the Court, is that one mobile phone, bearing SIM Number 97321820, was recovered from the appellant. Therefore, the phone that was seized from the appellant was not the phone number which was mentioned by the son of the deceased, PW-3, as was being used by his father. He further pointed out about the mysterious maxi found at the premises. In this regard, we may notice the following findings by the Trial Court:

> "It is argued on behalf of defence that one blood stained and sleeveless maxi of white colour having lines of brown colour, the lower portion of the same is blood stained and the same is used is seized by the police wide Ex P-6 from the place of occurrence, while there was no woman present at the place of occurrence. In such a situation, on account of seizure of maxi from the place of occurrence, the presence of any woman at the time of the incident is proved, but who was that woman, the prosecution did not produce any evidence in this regard hence, the prosecution case is doubtful. Only recovery/ seizure of blood stained maxi from the place of occurrence does not make doubtful to the prosecution case. Human blood was detected on the shirt of deceased and on the said maxi, there is no evidence that there was blood of any other person on the maxi. Because the wife of the deceased Rukmani Sharma is alive and Rukmani Sharma (Pw-8) has admitted in her cross examination that she used to go occasionally to the house/ place of occurrence at Bilaua. In this sitation where there are visits of the wife of deceased in the house then this probability could not be denied that the said maxi would be of the wife of the

> deceased. In this situation from the seizure of maxi from place occurrence the incident could not be doubtful."

9. He would point out that the Investigating Officer admitted that he did not carry out any investigation regarding the maxi. He would further contend that there is no evidence, as far as the appellant is concerned, to convict him of the offences. The evidence, even according to the prosecution witnesses, show that the other accused, viz., Veeru, Virendra and Kalli, were known to the prosecution witnesses as persons who would frequent the house of the deceased. As far as the appellant is concerned, there is no such evidence. In short, the contention is that the case is one where the appellant is convicted without any evidence and the injustice may be set right.

10. *Per contra,* learned Counsel for the State supported the judgment.

11. As already noticed the appellant stands convicted under Section 460, 302 read with Section 34 of the IPC and Section 394 read with Section 34 of the IPC. This is besides convicting the appellant under Sections 13 and 14 of the Madhya Pradesh Adhiniyam. The case hinges entirely on circumstantial evidence. Though eleven circumstances have been enlisted by the High Court, the circumstances Nos. 2 and 3 relate to the prosecution version as to the discovery of the death of the deceased by his son and his wife. They relate to going to the place of his residence, finding out the dead body and the lodging of the FIR. Circumstance No. 5 also does not amount to a circumstance. Equally, we are not convinced that the circumstance No. 7, viz., that the accused cannot get benefit for the inaction/latches of the investigation, can amount to a piece of circumstantial evidence for the prosecution to discharge its burden to prove the case against the accused.

12. The circumstances, which can be culled out, can be put as follows:

> The deceased died in his house where he was living alone, as a result of shock and hemorrhage from 6 incised wounds as noticed and proved by medical evidence. The death is homicidal too. There were valuable articles, namely, a silver necklace, gold earring and two mobile phones which were found missing too. These articles have been recovered from the accused as already mentioned. A knife stood recovered from Kalli, one of the accused. The other valuable articles identified by the closed relative, namely, his wife and his son stood recovered. From the articles so recovered, one mobile phone was recovered from the appellant.

13. There is evidence of prosecution witnesses that out of the five accused, viz., Kalli, Veeru and Virendra used to frequent the house of the deceased. The over hearing of the conversation by PW-5 amongst the accused prior to the death

of the deceased about their plans to commit loot/theft from the house of the deceased is another circumstance relied upon.

WHETHER A MOBILE PHONE WAS RECOVERED BASED ON STATEMENT BY APPELLANT

14. PW12 has deposed that on 01.11.2008, after arresting the appellant and on enquiry in custody, he (appellant) made Statement-P13 to the effect that the looted mobile seized was hidden on the loft of his room and he would recover the same. He further deposed that appellant took the looted mobile from the loft and he prepared the Seizure Memo. In the cross-examination, he states that the seized mobile was of the deceased. He further stated that no documents were produced. He denied that he had planted the mobile from anywhere and false proceedings have been done. PW7 has been examined to prove, *inter alia,* that he was called to the Police Station, and after 15 to 20 days of the proceedings relating to the recovery of the knife from Kalli, enquiry was made from the person, who he has told was Sonu-appellant. On making enquiry, he gave an information in respect of the mobile. He deposed that he has signed on the Statement-P13 [the Statement purportedly to be under Section 27 of the Indian Evidence Act, 1872 (hereinafter referred to as, 'the Evidence Act', for short)] . He also admits that he had signed on the Seizure Memo prepared based on the Statement-P14. Thus, PW7 and PW12 prove that a statement was given by the appellant while in custody. Based on the statement, a mobile phone was recovered from the appellant. The recovery was from his house. It was not from an open space.

WHETHER RECOVERED PHONE PROVED AS BELONGING TO THE DECEASED. EVIDENCE RELATED TO THE MOBILE PHONE, RECOVERED FROM THE APPELLANT

15. PW3-son of the deceased has this to say:

> On 10.09.2008, his brother told him that some persons had committed murder of his father causing injuries with sharp-edged weapon and took away goods/articles from the almirah. Along with this, they also took away two mobile phones of his father. The mobile phone of his father is 940655863866 which is of BSNL. The sim of the same has been issued either from Dabra or Bilaua (We are not concerned with this phone as this phone has been recovered from another accused).
>
> What is stated next is as follows:
>
> The other phone bearing number 9920121429 make of M-Nokia was fitted with square LKD Red LED which had a light while charging the mobile. The mobile was bought by him at

> Bombay prior to three months ago when his father came to Bombay so that information about him could be communicated.

He, however, also says in his cross-examination that he had stated in his statement to the Police that when his father came to Bombay, then, he had given him another phone of make Nokia which had LED and showing light while charging the mobile. The mobile number of the other phone was mentioned in Exhibit D1. He is unable to explain as to why if such statement is not found in the statement given by him to the Police. He said that again he is unable to give the reason as to why it is not mentioned in the statement to the Police that he had stated that the father had two sims out of which one was of Vodafone which was purchased from Bombay. Lastly, he states in further cross as follows:-

> "Cross-examination by Sh. A.K. Shrotiya, Advocate for Sunu@Sunil.
>
> I could not tell the date on which I had given mobile phone to my father the above said mobile I had purchased from Mahesh Gahera, Mahesh Gahera is residing Bombay he lived at Bandra the same was given in gift the EMI of the same. I could not tell today I can not produce a receipt of the same as I was given the above said mobile as gift to me by Mahesh Gahera, he deals in mobile phone he as several sets of the same. My father had another mobile phone made of Nokia EMI no of the same I would not tell I neither have receipt of the same nor I could produce the same."

16. PW9 is another son of the deceased, who has identified the mobile phones. This is what he has to say in regard to the mobile phones:

> The mobiles were of black colour and having old antenna. On the battery of one mobile A-9406586386 is written in red ink and on the other mobile on the back side it is written capital 'BL' , in English and number 97321820 was written with red marker. He says that after 8 to 10 days, when they checked the goods, they came to know that some articles had been stolen. He further states that they had informed the Police by that day about the theft of the mobiles. He and his mother went to identify the goods. His mother was called first and he went later.

It is to be remembered that PW3 says he had given the mobile in question prior to 3 months ago when deceased came to Bombay. The deceased was staying alone. It is PW9 now who has identified by the number written in the battery.

17. PW8 is the mother. She says first, on the next day, Police Officer came and they opened the room and they saw that almirah was opened and articles were scattered. Out of the articles, one *hensli* (necklace made of silver), gold earrings

and two mobile phones of Nokia Company, were stolen. Except this, no article was stolen. She says that identification of the articles was got done by her. In cross-examination on behalf of Kali *alias* Gopal, she says that on 11th or 12th, she came to know about the articles which were stolen. She says that in her statement to the Police, she has stated that on the next day of incident, the almirah was opened and the articles were scattered and, then, she came to know that her goods had been stolen. She had not made any complaint anywhere in respect of her stolen goods. She denies allegation that they have concocted a false story of goods being stolen after 8 to 10 days of the incident for creating evidence. In this regard, it may be noticed that in the evidence of PW9-son, he has stated that after going to the lower room on the next day, he saw the almirah on that day. Articles were lying outside. Therefore, they guessed that something had been stolen. At that time, it could not be known what had been stolen. After 8 to 10 days, when they checked the goods, they came to know that some articles had been stolen.

18. In the Recovery Memo of the phone from the appellant, it is stated as follows:

> One mobile phone of Nokia company of black colour mode no. 5110, made in Finland, followed by a certain number, code number is shown as 0502182 was written, BL is written on the mobile in red ink and, on its battery, the number 97321820 is written with red ink.

19. According to the deposition of PW3, the recovery of phone which is attributed from the appellant, was bearing number 9920121429. The High Court has, in the impugned judgment, found that another Cell Phone Number 9928120429, which was made available by his son-PW3, was found missing. Thereafter, the finding by the High Court is that D.P. Sharma, ASI arrested the accused and on 02.11.2008 recovered from him one mobile phone bearing sim number 97321820. It is clear that the finding by the High Court that recovery was made from the appellant of one mobile phone sim number 97321820, is clearly contrary to the version of PW3 who purchased or was gifted the phone which he allegedly gave to his father. Even, according to the Recovery Memo, the Number 97321820 is shown as the number on the battery of the mobile phone. The number, which is allegedly provided by PW3, is the Number 9920121429.

20. In *Ashish Jain v. Makrand Singh and others*[1], it is held as follows:

> "28. We find substance in the argument of the learned Amicus Curiae that this identification was not done in accordance with due procedure. It is evidence from the testimony of several of the examined pledgors, such as PWs 15, 16 and 28, that the identification procedure was conducted

[1] (2019) 3 SCC 770

> without mixing the recovered jewellery with similar or identical ornaments...."

21. In this case also in regard to the mobile phone only the two mobiles were kept for identification and it was purportedly identified as noticed by PW9 besides PW8. In the identification conducted by PW13, it is come out that two mobile phones were not mixed with any other mobile phones

22. What is the effect of recovery of the mobile proceeding on the basis that it belonged to the deceased? Section 114 of the Evidence Act with illustration (a) reads as follows:

> "114. Court may presume existence of certain facts. —The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.
>
> Illustrations
>
> The Court may presume—
>
> (a) That a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession;"

23. The scope of this provision has been considered by this Court on various occasions. In *Sunder Lal alias Sundera v. State of Madhya Pradesh*[2], both the accused and deceased were seen together. After the alleged murder, the accused went with the article belonging to the deceased for pledging/selling it. In the circumstances, the Court took the view that the ornaments were established to be the ornaments worn by the deceased. No explanation was forthcoming how the accused came to be in possession on the very same day on which the alleged murder was committed. On this, the Court took the view that the conviction under Section 302 of the IPC, based on the circumstances, was correct.

24. On the other hand, in *Sanwant Khan and another v. State of Rajasthan*[3], one Mahant Ganesh Das, who was a wealthy person, used to live in a temple of Shri Gopalji along with another person. Both of them were found dead. The house had been ransacked and boxes and almirah opened. It was not known at the time who committed the offence. Investigation resulted in arrest of the appellant, and on the same day, he produced a gold *khanti* from his *bara,* where it was found buried in the ground. Another accused produced a silver plate. The Court found

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[2] AIR 1954 SC 28
[3] AIR 1956 SC 54

that there was no direct evidence. There were certain circumstances which were rejected by the Sessions Judge and the solitary circumstance was the recovery of the two articles. In these circumstances, the Court held, inter alia, as follows:

> "Be that as it may, in the absence of any direct or circumstantial evidence whatsoever, from the solitary circumstance of the unexplained recovery of the two articles from the houses of the two appellants the only inference that can be raised in view of illustration A to S. 114 of the Evidence Act is that they are either receivers of stolen property or were the persons who committed the theft, but it does not necessarily indicate that the theft and the murders took place at one and the same time.
>
> xxx xxx xxx
>
> Here, there is no evidence, direct or circumstantial, that the robbery and murder formed parts of one transaction. It is not even known at what time of the night these events took place. It was only late next morning that it was discovered that the Mahant and Ganpatia had been murdered and looted. In our Judgment, Beaumonth, C.J., and Sen J. in - Bhikha Gobar v. Emperor, AIR 1943 Bom 458 (B) rightly held that the mere fact that an accused produced shortly after the murder ornaments which were on the murdered person is not enough to justify the inference that the accused must have committed the murder.
>
> xxx xxx xxx
>
> In our judgment no hard and fast rule can be laid down as to what inference should be drawn from a certain circumstance. Where, however, the only evidence against an accused person is the recovery of stolen property and although the circumstances may indicate that the theft and the murder must have been committed at the same time, it is not safe to draw the inference that the person in possession of the stolen property was the murdered. Suspicion cannot take the place of proof.
>
> (Emphasis supplied)

25. In *Baiju v. State of Madhya Pradesh*[4], the Court held:

> "14. The question whether a presumption should be drawn under illustration (a) of S. 114 of the Evidence Act is a matter which depends on the evidence and the circumstances of each case. Thus the nature of the stolen article, the manner of its acquisition by the owner, the nature of the evidence about its

[4] AIR 1978 SC 522

> identification, the manner in which it was dealt with by the appellant, the place and the circumstances of its recovery, the length of the intervening period, the ability or otherwise of the appellant to explain his possession, are factors which have to be taken into consideration in arriving at a decision."

That was a case where the Court found that prosecution had proved the case.

26. This Court, in *Shri Bhagwan v. State of Rajasthan*[5], held:

> "11. The possession of the fruits of the crime, recently after it has been committed, affords a strong and reasonable ground for the presumption that the party in whose possession they are found is the real offender, unless he can account for such possession in some way consistent with his innocence. It is founded on the obvious principle that if such possession had been lawfully acquired, that party would be able to give an account of the manner in which it was obtained. His unwillingness or inability to afford any reasonable explanation is regarded as amounting to strong, self-inculpatory evidence. If the party gives a reasonable explanation as to how he obtained it, the courts will be justified in not drawing the presumption of guilt. The force of this rule of presumption depends upon the recency of the possession as related to the crime and that if the interval of time be considerable, the presumption is weakened and more especially if the goods are of such kind as in the ordinary course of such things frequently change hands. It is not possible to fix any precise period. This Court has drawn similar presumption of murder and robbery in a series of decisions especially when the accused was found in possession of these incriminating articles and was not in a position to give any reasonable explanation. *Earabhadrappa* v. *State of Karnataka* [(1983) 2 SCC 330 : 1983 SCC (Cri) 447] was a case where the deceased Bachamma was throttled to death and the appellant was taken into custody and gold ornaments and other articles were recovered at his instance. This Court observed: (Para 13)
>
> "This is a case where murder and robbery are proved to have been integral parts of one and the same transaction and therefore the presumption arising under Illustration (a) to Section 114 of the Evidence Act is that not only the appellant committed the murder of the deceased but also committed robbery of her gold ornaments which form part of the same transaction."

[5] AIR 2001 SC 2342

PW5, WHO OVERHEARD THE CONSPIRATORIAL CONVERSATION

27. In this case both the courts have apparently drawn strength from the testimony of PW5. PW5 is a person whose evidence is virtually the sole testimony relied on to prove the conspiracy to commit theft/robbery. It is worthwhile to consider what he has deposed in Court. He and Mohan Sharma, (who is PW1 and has turned hostile) at the house of Virendra Kushwah (Virendra is one of the accused in this case) found Virendra, Veeru Dheemar and three other persons sitting and talking. When they (PW1, PW5) passed in front of the gate, he saw that they stopped talking. Then they went little forward. He told that these goondas/miscreants *(Badmaash)* seem to be outsiders. Let us listen to their conversation. They heard, Virendra Kushwah and Veeru were saying to the three persons that Bharosilal is an old man and he has a lot of money and is living alone. He and Veeru would remain here. Kalli-the appellant and Hariom would go to the house of the deceased to commit the theft. Then they left from there. Next day it was known that someone had killed Bharosilal. In the evening of the next day he refrained from telling anyone because they were goondas. Later on, he told the son of Bharosilal, whose name is Abhay, that these five accused have committed murder. He identified them. In cross, he says his house is far from where the *goondas* were making conversation. On the 16th day, when the Police came for inquiry, he told all the above things to the Police. He himself did not tell by going to the Police Station. He says that he has seen all the three persons (which apparently includes the appellant) at the Police Station. On 16.10.2008, when he was called at the Police Station, at that time, all the three persons were sitting. [The arrest of the appellant, it may be noted, is made by PW-12 only on 01.11.2008]. He deposed that he did not also see the accused persons at the Police Station. The Police made inquiry in the office and these three accused persons were detained in the Police Station. The police officials also not shown him the three accused persons at there. He further says that when the accused persons were sent to jail, then S.I. had shown to him the accused persons in the vehicle. The names of all the three were told and all the three were got identified. He further says that he had got knowledge of the names of all the three persons when Police recorded his statement, i.e., after 8 to 10 days from 16.10.2008. Then, he came to the name of the remaining three persons. In earlier cross-examination on behalf of another accused, he has stated in his statement that till the Police recorded his statement. He did not know about the residence of the three persons whose names he has told except Virendra and Veeru but they seemed to be outsiders. He further says that he has no knowledge of the fact that the persons who were sitting in the house of Virendra, if they were uttering by taking wrong names of each other. He, no doubt, says that there was light in the house of Virendra. The light of the same was scattered.

28. In the case of recovery of an article from an accused person when he stands accused of committing offences other than theft also, (in this instance murder), what are the tests:

i. The first thing to be established is that the theft and murder forms part of one transaction. The circumstances may indicate that the theft and murder must have been committed at the same time. But it is not safe to draw the inference that the person in possession of the stolen property was the murderer [See *Sanwant Khan* (supra)];

ii. The nature of the stolen article;

iii. The manner of its acquisition by the owner;

iv. The nature of evidence about its identification;

v. The manner in which it was dealt with by the accused;

vi. The place and the circumstances of its recovery;

vii. The length of the intervening period;

viii. Ability or otherwise of the accused to explain its possession [See *Baiju* (supra)].

29. In this case, applying the tests as above, we find as follows:

I. The appellant has not given any explanation as to how he came by possession of the mobile. He has no explanation in his questioning under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the CrPC' , for short);

II. As far as length of the intervening period is concerned, recovery was effected on 02.11.2008 whereas the date of the incident is 08.09.2008. That means, a gap of less than two months. The arrest of the appellant was effected on 01.11.2008, i.e., a day before the recovery;

III. As far as nature of the article is concerned, it was a mobile phone which was capable of being transferred by mere delivery. No doubt, it would contain a sim which may connect the phone with the previous owner or person in possession. It is also common knowledge, however, that it may be open to the person, who possesses the mobile, to equip it with a new sim;

IV. As far as identification is concerned, we have already seen the nature of the evidence;

V. It is not in dispute that the two mobile phones were kept and they were not mixed with any other similar looking mobile phones.

30. The appellant, along with the others, were charged under the offences with the aid of Section 34 of the IPC. The finding by the Trial Court in this case is that there was a criminal conspiracy hatched to commit robbery. As far as Section 34 is concerned, it proclaims the principle of vicarious criminal liability. The soul of the Section, and the principle which underlies criminal liability for the acts of another therein, is the shared intention or the common intention to commit an offence. The common intention must be for the very offence which the accused is charged with. In this case, it is to be noted that though there is a charge of causing death by strangulation, the finding is that the death was caused as a result of the injuries inflicted with the knife. The knife was, apparently, carried and wielded by the co-accused-Kalli. From him, in fact, the recovery of the knife was also effected which becomes all the more reason for us to conclude that it will be totally unsafe to convict the appellant of the charges of which he is found guilty including Section 302 of the IPC based only on the recovery of the mobile phone where the recovery itself suffers from suspicion and doubt. We may, in this regard, notice the view expressed by this Court in *Hardev Singh and others v. State of Punjab*[6]: -

> " 9. The view of the High Court that even the person not committing the particular crime could be held guilty of that crime with the aid of Section 34 of the Penal Code if the commission of the act was such as could be shown to be in furtherance of the common intention not necessarily intended by every one of the participants, is not correct. The common intention must be to commit the particular crime, although the actual crime may be committed by any one sharing the common intention. Then only others can be held to be guilty..... ."
>
> (Emphasis supplied)

31. In *Arun v. State by Inspector of Police, Tamil Nadu*[7], this Court, dealing with the case where Section 34 of the IPC was sought to be invoked against the appellant in the matter of committing the offence of murder. No doubt, it was a case where there was no charge or evidence that he committed the murder. This Court referred to the tests laid down in the decision in *Dharam Pal v. State of Haryana*[8] and we would refer to paragraphs 14 and 15 of the said judgment. The same reads as under:

> "14. It may be that when some persons start with a pre-arranged plan to commit a minor offence, they may in the course of their committing the minor offence come to an understanding to commit the major offence as well. Such an

[6] AIR 1975 SC 179
[7] 2008 (15) SCC 501
[8] 1978 (4) SCC 440

understanding may appear from the conduct of the persons sought to be made vicariously liable for the act of the principal culprit or from some other incriminatory evidence but the conduct or other evidence must be such as not to leave any room for doubt in that behalf.

15. A criminal court fastening vicarious liability must satisfy itself as to the prior meeting of the minds of the principal culprit and his companions who are sought to be constructively made liable in respect of every act committed by the former. *There is no law to our knowledge which lays down that a person accompanying the principal culprit shares his intention in respect of every act which the latter might eventually commit.* The existence or otherwise of the common intention depends upon the facts and circumstances of each case. The intention of the principal offender and his companions to deal with any person who might intervene to stop the quarrel must be apparent from the conduct of the persons accompanying the principal culprit or some other clear and cogent incriminating piece of evidence. In the absence of such material, the companion or companions cannot justifiably be held guilty for every offence committed by the principal offender."

(Emphasis Supplied)

32. As far as the presumption being drawn of common intention, we notice the judgment of this Court in *Brijlal Pd. Sinha v. State of Bihar*[9]:

"11..... . The liability of one person for an offence committed by another in the course of a criminal act perpetrated by several persons will arise under Section 34 of the Penal Code, 1860 only where such criminal act is done in furtherance of a common intention of the persons who join in committing the crime. Direct proof of common intention will, of course, be difficult to get and such intention can only be inferred from the circumstances. But the existence of a common intention must be a necessary inference from the circumstances established in a given case. A common intention can only be inferred from the acts of the parties. Unless a common intention is established as a matter of necessary inference from the proved circumstances the accused persons will be liable for their individual act and not for the act done by any other person. For an inference of common intention to be drawn for the purposes of Section 34, the evidence and the circumstances of the case should establish, without any room for doubt, that a meeting of minds and a

[9] 1998 (5) SCC 699

> fusion of ideas had taken place amongst the different accused and in prosecution of it, the overt acts of the accused persons flowed out as if in obedience to the command of a single mind. If on the evidence, there is doubt as to the involvement of a particular accused in the common intention, the benefit of doubt should be given to the said accused person. .... ."

33. In *Girija Shankar v. State of U.P.*[10], this Court made the following observations:

> "9. ..... In order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of minds of all the accused persons to commit the offence for which they are charged with the aid of Section 34, be it pre-arranged or on the spur of the moment; but it must necessarily be before the commission of the crime. ...."
>
> (Emphasis supplied)

34. Thus, in this case, as far as the appellant is concerned, the evidence against him essentially consists of the recovery of the mobile phone and there is discrepancy about the number which we have noted. PW5 has not taken the name of the appellant. Essentially evidence of PW5 and the recovery is relied on to hold that the chain of circumstances is complete. We have noticed the testimony of PW5. The appellant is not mentioned as one of the persons who used to visit the deceased's father though three of the other accused were named, viz., Veeru, Kalli and Virendra. There is complaint from the appellant that no Test Identification Parade was conducted for the accused. We have referred to what PW5 has deposed.

35. In the facts of this case, we are inclined to think that it would not be safe to uphold the conviction of the appellant. He would be entitled to the benefit of doubt. We allow the appeal. The impugned judgment in so far as it relates to the appellant will stand set aside and he will stand acquitted. The appellant's bail bond shall stand discharged. He will be set at liberty if his custody is not required in connection with any other case.

Appeal allowed

[10] 2004 (3) SCC 793

I.L.R. [2020] M.P. 1837 (SC)
SUPREME COURT OF INDIA

Before Mr. Justice Dr. Dhananjaya Y. Chandrachud, Mr. Justice Hemant Gupta & Mr. Justice Ajay Rastogi

Cr.A. Nos. 461-462/2020 decided on 19 June, 2020

JYOTI (SMT.) & anr. …Appellants

Vs.

TRILOK SINGH CHOUHAN …Respondent

***A. Criminal Procedure Code, 1973 (2 of 1974), Section 125 and Hindu Marriage Act (25 of 1955), Section 11 – Legally Wedded Wife – Caretaker – Entitlement* – Held – It is submitted that earlier husband of appellant is untraceable since 1999 and thus she married respondent in 2008 – Husband filed a case u/S 11 of Act of 1955 which was dismissed and order has attained finality – Parties have cohabited together for four years which would raise a presumption sufficient to sustain order of maintenance – Appellant entitled for maintenance – Impugned order set aside – Appeal allowed. (Para 8)**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125 एवं हिन्दू विवाह अधिनियम (1955 का 25), धारा 11 – विधिक रूप से विवाहित पत्नी – अभिरक्षक – हकदारी – अभिनिर्धारित – यह निवेदन किया गया कि अपीलार्थी का पूर्व पति 1999 से लापता है और इसलिए उसने 2008 में प्रत्यर्थी से विवाह किया – पति ने 1955 के अधिनियम की धारा 11 के अंतर्गत एक प्रकरण प्रस्तुत किया जिसे खारिज किया गया तथा आदेश ने अंतिमता प्राप्त कर ली है – पक्षकारों ने चार वर्षों तक एक साथ सहवास किया है जिससे एक उपधारणा की जायेगी जो भरणपोषण के आदेश को कायम रखने के लिए पर्याप्त है – अपीलार्थी भरणपोषण हेतु हकदार है – आक्षेपित आदेश अपास्त – अपील मंजूर।

***B. Criminal Procedure Code, 1973 (2 of 1974), Section 125 and Hindu Marriage Act (25 of 1955), Section 11 – Legally Wedded Wife – Caretaker – Appreciation of Evidence* – Held – Contention of respondent that appellant was engaged as a caretaker, is belied by his own submission that he came to know about appellant from a marriage bureau – Why would a person contacts a marriage bureau for enagaging a caretaker, he could have contacted a nursing agency – Further, if respondent is paralyzed, why would he engage a women as caretaker against normal course of human conduct – Respondent failed to establish that appellant was only a caretaker. (Para 8)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125 एवं हिन्दू विवाह अधिनियम (1955 का 25), धारा 11 – विधिक रूप से विवाहित पत्नी – अभिरक्षक – साक्ष्य का मूल्यांकन – अभिनिर्धारित – प्रत्यर्थी का तर्क कि अपीलार्थी को अभिरक्षक के रूप में

नियोजित किया गया था, उसके स्वयं के इस निवेदन से झूठा साबित होता है कि उसे एक मैरिज ब्यूरो से अपीलार्थी के बारे में पता चला था – एक अभिरक्षक नियोजित करने के लिए कोई व्यक्ति मैरिज ब्यूरो से संपर्क क्यों करेगा, वह एक नर्सिंग एजेंसी को संपर्क कर सकता था – इसके अतिरिक्त, यदि प्रत्यर्थी लकवाग्रस्त है, वह सामान्य मानवीय आचरण के विरूद्ध, एक महिला को अभिरक्षक के रूप में क्यों नियोजित करेगा – प्रत्यर्थी यह स्थापित करने में विफल रहा कि अपीलार्थी केवल एक अभिरक्षक थी।

***C. Criminal Procedure Code, 1973 (2 of 1974), Section 125 and Hindu Marriage Act (25 of 1955), Section 11 – Adverse Inference* – Held – In proceedings u/S 11 of Act of 1955, for annulment of marriage, husband has not availed opportunity to lead evidence to show that there was no valid marriage – Application u/S 11 was dismissed which was not further challenged – Adverse inference must be drawn against respondent/husband. (Para 8)**

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125 एवं हिन्दू विवाह अधिनियम (1955 का 25), धारा 11 – प्रतिकूल निष्कर्ष – अभिनिर्धारित – 1955 के अधिनियम की धारा 11 के अंतर्गत, विवाह के बातिलीकरण हेतु कार्यवाहियों में पति ने यह दर्शाने हेतु कि कोई विधिमान्य विवाह नहीं हुआ था, साक्ष्य प्रस्तुत करने के अवसर का उपयोग नहीं किया है – धारा 11 के अंतर्गत आवेदन खारिज किया गया था जिसे आगे चुनौती नहीं दी गई थी – प्रत्यर्थी/पति के विरूद्ध प्रतिकूल निष्कर्ष निकाला जाना चाहिए।

Cases referred:

(1992) 2 SCC 375, AIR 2005 SC 1809, 2011 Cri.L.J. 96 SC.

O R D E R

Delay Condoned.

2. Leave granted

3. These appeals arise from a judgment and order of a learned Single Judge of the Indore Bench of the High Court of Madhya Pradesh dated 22 July 2016. Allowing a revision under Section 19(4) of the Family Courts Act 1984, the learned Single Judge set aside an order of the Principal Judge of the Family Court at Indore dated 30 October 2014. The Family Court allowed a claim for maintenance by the Appellant under Section 125 of the Code of Criminal Procedure 1973 at Rs 3,000 per month.

4. The case of the appellant is that she was married earlier and has children. According to the appellant, on 1 December 1999, her spouse left the family and has since remained untraced. According to her, on 25 June 2008, a marriage was solemnized between her and the respondent in accordance with Hindu rites and ceremonies at Gayatri Shakti Peeth Pragya Sansthan, Ravindra Nagar, Indore. Disputes arose between the parties which led to the filing of an application of

maintenance under Section 125 of the Code of Criminal Procedure on 20 October 2012. The respondent instituted a petition under Section 11 of the Hindu Marriage Act 1955 on 1 July 2013, seeking annulment of his marriage with the appellant.

5. On 30 October 2014, the Principal Judge of the Family Court allowed the application for maintenance. The petition filed by the respondent under Section 11 was dismissed on 21 August 2015. The respondent did not lead evidence in support of his plea for annulment. The High Court set aside the grant of maintenance on the ground that the appellant was not a "legally wedded wife" of the respondent, having regard to the provisions of Explanation (b) to Section 125(1) of the Code of Criminal Procedure. In coming to this conclusion, the High Court has relied upon the judgment of this Court in *Vimla K vs Veeraswamy K*[1] and *Savitaben Somabhat Bhatiya vs State of Gujarat*[2]. The High Court has noted that in *Chanmuniya vs Virendra Kumar Singh Kushwaha*[3], a divergence of judicial opinion led to a reference to a larger Bench on whether a presumption of a valid marriage by reason of cohabitation over a period of time would entitle a woman to an order of maintenance under Section 125 and whether strict proof of marriage is essential to sustain a claim for maintenance under Section 125. The reference was not answered, as was noted in a subsequent decision in *Lalita Toppo vs State of Jharkhand*[4]. The High Court was of the view that since the appellant had a subsisting marriage and it had not been established that her marriage had lawfully come to an end, she was not entitled to maintenance since she could not be treated to be "legally wedded" to the respondent. A proceeding was initiated before the High Court under Section 482 thereafter, which was rejected by an order dated 7 December 2018.

6. Ms Christi Jain, learned counsel appearing on behalf of the appellants submits that (i) the Family Court noted the contention of the respondent that the appellant was engaged as a 'caretaker'. This was belied by the case of the respondent that he had contacted a marriage bureau through which he had got to know her. If a caretaker was being appointed under a contract of personal service, it was unnecessary to contact a marriage bureau ; (ii) the petition for annulment instituted under Section 11 was dismissed by the trial court. The petition presented an opportunity to the respondent to lead evidence in support of his submission that there was no valid marriage with the appellant. This opportunity was not availed of and an adverse inference must be drawn; (iii) The parties cohabited together for a period of four years which would raise a presumption, sufficient in the facts of the case, to sustain the order of maintenance passed by the

[1] (1992) 2 SCC 375
[2] AIR 2005 SC 1809
[3] 2011 Cri. L.J. 96 SC
[4] Criminal Appeal 1656 of 2015

Family Court; (iv) the respondent has produced no material whatsoever to establish the contention that the appellant was merely a caretaker. The respondent who claims to be paralyzed, would have no reason to engage a woman as a caretaker which would be against the normal course of human conduct.

7. On the other hand, while seeking to refute the submissions of the appellant, Mr.Sumeer Sodhi, learned counsel appearing on behalf of the respondent submitted at (i) the appellant has not been able to prove a valid marriage with the respondent; (ii) an inference that there was a valid marriage between the parties cannot be drawn merely because a petition for annulment lodged by the respondent has been rejected; (iii) in the application for maintenance, that was filed by the appellant under Section 125 in December 2012, the case which was sought to be made out was that the spouse of the appellant had left for Gujarat about ten years earlier and that the marriage between the parties took place on 25 January 2008. This pleading would indicate that on the date on which the marriage between the parties is alleged to have taken place, the period which is envisaged in Section 108 of the Evidence Act would not have elapsed, since the marriage has taken place within a period of seven years since the departure of the spouse of the appellant; (iv) in the Special Leave Petition, an attempt has been made to improve upon the case of the appellant by submitting that the spouse of the appellant was untraceable since 1999; (v) the respondent earns about Rs 37000 per month and has been paralyzed over a period of one decade and the flat in the occupation of the appellant belongs to the respondent's mother. Hence it was urged that no case for interference with the judgment of the High Court has been made out. Mr. Sodhi has also placed reliance on a three-Judge Bench decision of this Court in *Lalita Toppo vs State of Jharkhand*[5].

8. Before we deal with the judgment of the Family Court, it is necessary to note that the case of the respondent is that there was no spousal relationship between the parties and that the appellant had been appointed only as a caretaker. The Family Court did not accept this contention, going by the case of the respondent that he had contacted a marriage bureau through whom he had come to know of the appellant. If the respondent was intending to engage a caretaker or service provider, it was in the very nature of things, contrary to the ordinary course of events that he would approach a marriage bureau. A nursing agency would have been the normal course of recourse. Apart from this, an important circumstance which must weigh with the court is that the respondent instituted a petition under Section 11 of the Hindu Marriage Act 1955 for a declaration that the marriage between him and the appellant was void because the appellant had a prior subsisting marriage. Ms Christi Jain is right in submitting that the material which is sought to be adduced in the course of the submissions of the respondent to cast doubt on the validity of the marriage which the appellant claims between the

[5] 2019 (13) 796

parties ought to have been, but was not placed before the trial court in the proceedings under Section 11. The respondent did not avail of the opportunity to lead evidence and rested content with the dismissal of the petition. The dismissal of the proceeding under Section 11 has attained finality. An adverse inference must hence be drawn against the respondent. The pleadings of the appellant in the application under Section 125 have to be read holistically. The contention of the appellant is that her husband is untraceable since 1999 and that she has entered upon a valid marriage with the respondent. Parties cohabited together for four years. The respondent sought to avail of a legal remedy by seeking a declaration that his marriage with the appellant was void. He failed to substantiate his case in the remedy which he had adopted. The High Court was in error in coming to the conclusion that the appellant was not entitled to an order of maintenance under Section 125. The parties have cohabited together and the case of the respondent that the appellant was only a caretaker is belied by his own case and by the failure of the remedy which he pursued under Section 11.

9. In the above view of the matter, the submissions which have been urged on the basis of the earlier decisions of the court which had led to a divergence of opinion and a reference to a larger bench need not detain these proceedings. The appellant was entitled to maintenance. Th High Court was in error in setting aside the decision of the Family Court.

10. For the above reasons, we are of the view that the judgment of the High Court is unsustainable and that the Single Judge erred in interfering with the decision of the Family Court. The Judgment and order of the High Court dated 22 July 2016 is set aside. The order of the Family Court awarding maintenance to the appellant is restored, The appeals are allowed in the above terms.

Appeal allowed

I.L.R. [2020] M.P. 1841
WRIT PETITION

Before Mr. Justice G.S. Ahluwalia

W.P. No. 12168/2019 (Gwalior) decided on 3 December, 2019

GWALIOR ALCOBREW PVT. LTD. …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

(Alongwith W.P. Nos. 5818/2019, 8912/2019, 8610/2019, 8469/2019, 9490/2019, 9466/2019, 9417/2019, 9097/2019, 8995/2019, 5817/2019, 4594/2019, 4095/2019, 3665/2019, 3541/2019, 3503/2019, 3382/2019, 3296/2019, 2780/2019, 2468/2019, 10068/2019, 9983/2019, 9767/2019 & 9670/2019)

A. Country Spirit Rules, M.P., 1995, Rule 4(4) & 12 – Penalty – **Held – Non maintenance of atleast 25% of minimum stock in glass bottles amounts to violation of Rule 4(4) of the Rules of 1995 – Penalty rightly imposed under Rule 12 of the Rules of 1995 – Petitions dismissed.**

(Para 41 & 50)

क. देशी स्पिरिट नियम, म.प्र., 1995, नियम 4(4) व 12 – शास्ति – अभिनिर्धारित – कांच की बोतलों में कम से कम 25 प्रतिशत का न्यूनतम स्टॉक बनाए न रखना 1995 के नियमों के नियम 4(4) के उल्लंघन की कोटि में आता है – 1995 के नियमों के नियम 12 के अंतर्गत शास्ति उचित रूप से अधिरोपित की गई – याचिकाएँ खारिज।

B. Country Spirit Rules, M.P., 1995, Rule 4(4) & 11 – Tender Notice – Violation of Conditions – **Held – Any condition mentioned in tender notice shall be an integral part of contract granted under Rules of 1995 – Bidder cannot wriggle out of the contractual obligations – In view of Rule 11, violation of tender notice shall be violation of Rule 4(4) of the Rules of 1995.**

(Paras 18, 24, 31 & 32)

ख. देशी स्पिरिट नियम, म.प्र., 1995, नियम 4(4) व 11 – निविदा नोटिस – शर्तों का उल्लंघन – अभिनिर्धारित – निविदा नोटिस में उल्लिखित कोई भी शर्त, 1995 के नियमों के अंतर्गत मंजूर की गई संविदा का एक अभिन्न हिस्सा रहेगी – बोली लगाने वाला संविदात्मक बाध्यताओं से बच निकल नहीं सकता – नियम 11 को दृष्टिगत रखते हुए, निविदा नोटिस का उल्लंघन, 1995 के नियमों के नियम 4(4) का उल्लंघन होगा।

C. Tender – Liquor Trade – Rights & Duties – **Held – Trade in liquor is not a fundamental right and is merely a privilege – Petitioner must follow each and every condition of tender notice – Respondents were not under obligation to apprise the petitioner about his default/mistakes.**

(Para 17 & 48)

ग. निविदा – मदिरा व्यापार – अधिकार व दायित्व – अभिनिर्धारित – मदिरा का व्यापार करना एक मौलिक अधिकार नहीं है तथा मात्र एक विशेषाधिकार है – याची को निविदा नोटिस की प्रत्येक शर्त का पालन करना चाहिए – प्रत्यर्थीगण, याची को उसकी भूल/गलतियों के बारे में अवगत कराने के बाध्यताधीन नहीं थे।

D. Country Spirit Rules, M.P., 1995, Rule 12 – Penalty – Concept – **Held – Penalty is not imposed by way of punishment for committing any offence, but it is imposed for better enforcement of provisions of law.**

(Para 45)

घ. देशी स्पिरिट नियम, म.प्र., 1995, नियम 12 – शास्ति – संकल्पना – अभिनिर्धारित – किसी अपराध को कारित करने के लिए शास्ति दण्ड के माध्यम से अधिरोपित नहीं की जाती है बल्कि यह विधि के उपबंधों के बेहतर प्रवर्तन के लिए अधिरोपित की जाती है।

***E. Interpretation – Executive Instructions* – Held – Where the Statute or Rules are silent, then Executive Instructions can be issued to supplement the Rules and not supplant it. (Para 24)**

ङ. निर्वचन – कार्यपालिक अनुदेश – अभिनिर्धारित – जहां कानून अथवा नियम मौन हैं, तब नियमों की अनुपूर्ति करने हेतु कार्यपालिक अनुदेश जारी किये जा सकते हैं तथा न कि उन्हें हटाने हेतु।

Cases referred :

AIR 1978 SC 851, (2010) 9 SCC 496, ILR 2013 MP 837, AIR 1970 SC 253, 2012 (3) SCC 248, AIR 1973 SC 1098, AIR 1970 SC 1955, 2010 (3) MPLJ 29, (2004) 11 SCC 26, (1990) 1 SCC 109, (1995) 1 SCC 574, (2013) 6 SCC 573, (1984) 3 SCC 634, (2013) 16 SCC 147, W.P. No. 60/2016 order passed on 30.11.2018.

Vinod Bhardwaj with *Kartik Sharma* and *S.K. Shrivastava*, for the petitioner.

R.K. Soni, G.A. for the State.

G.S. AHLUWALIA, J. :- Heard Finally.

2. By this Common Order, W.P. Nos. 12168/2019 (Gwalior Alcobrew Pvt. Ltd. vs. State of M.P. & Ors.), 5818/2019 (Ms. Som Distilleries Pvt. Ltd. vs. State of M.P. & Ors.), 8912/2019 (Gwalior Alcobrew Pvt. Ltd. vs. State of M.P. & Ors.), 8610/2019 (Gwalior Alcobrew Pvt. Ltd. vs. State of M.P. & Ors.), 8469/2019 (Gwalior Alcobrew Pvt. Ltd. vs. State of M.P. & Ors.), 9490/2019 (Gwalior Alcobrew Pvt. Ltd. vs. State of M.P. & Ors.), 9466/2019 (Gwalior Alcobrew Pvt. Ltd. vs. State of M.P. & Ors.), 9417/2019 (Gwalior Alcobrew Pvt. Ltd. vs. State of M.P. & Ors.), 9097/2019 (Gwalior Alcobrew Pvt. Ltd. vs. State of M.P. & Ors.), 8995/2019 (Gwalior Alcobrew Pvt. Ltd. vs. State of M.P. & Ors.), 5817/2019 (Ms. Som Distilleries Pvt. Ltd. vs. State of M.P. & Ors.), 4594/2019 (Gwalior Alcobrew Pvt. Ltd. vs. State of M.P. & Ors.), 4095/2019 (Gwalior Alcobrew Pvt. Ltd. vs. State of M.P. & Ors.), 3665/2019 (Gwalior Alcobrew Pvt. Ltd. vs. State of M.P. & Ors.), 3541/2019 (Gwalior Alcobrew Pvt. Ltd. vs. State of M.P. & Ors.), 3503/2019 (Gwalior Alcobrew Pvt. Ltd. vs. State of M.P. & Ors.), 3382/2019 (Gwalior Alcobrew Pvt. Ltd. vs. State of M.P. & Ors.), 3296/2019 (Gwalior Alcobrew Pvt. Ltd. vs. State of M.P. & Ors.), 2780/2019 (Gwalior Alcobrew Pvt. Ltd. vs. State of M.P. & Ors.), 2468/2019 (Gwalior Alcobrew Pvt. Ltd. vs. State of M.P. & Ors.), 10068/2019 (Gwalior Alcobrew Pvt. Ltd. vs. State of M.P. & Ors.), 9983/2019 (Gwalior Alcobrew Pvt. Ltd. vs. State of M.P. & Ors.), 9767/2019 (Gwalior Alcobrew Pvt. Ltd. vs. State of M.P. & Ors.), 9670/2019 (Gwalior Alcobrew Pvt. Ltd. vs. State of M.P. & Ors.) shall be decided.

3. For the sake of convenience, the facts of W.P. No. 12168 of 2019 shall be taken into consideration.

4. The present petition has been filed against the order dated 2-12019 passed by Board of Revenue in Appeal No. 6525/2018/Gwalior/Ex.A, thereby affirming the order dated 12-11-2018 passed by Excise Commissioner, Gwalior in case No. 5(1)2018-9/7183, by which the penalty of Rs. 1,51,250/- has been imposed for not maintaining atleast 25% of minimum stock in glass bottles during the year 2017-2018.

5. According to the petitioner, it is a Private Limited Company registered under the provisions of Companies Act, 1956 and is engaged inter alia in the manufacture of rectified spirit and extra neutral alcohol. The petitioner has its distillery at Gwalior. Apart from manufacturing and bottling its own brands, the petitioner is also engaged in business of bottling brands for other alcohol manufacturers.

6. It is the case of the petitioner that it had applied for and was granted various licenses i.e., C.S.-1, D-1, F.L.9 and F.L.9A by respondent no.2 and accordingly the petitioner has been granted permission to undertake the activity of manufacturing and bottling of Indian Made Foreign Liquor (IMFL) and Country Spirit at its distillery. The petitioner has also been permitted to sell/transfer the IMFL and Country Spirit from its unit to storage warehouses and other destinations within the State of Madhya Pradesh as well as outside the State.

7. The respondent no.1 issued a Tender Notice for the supply of country spirit in sealed bottles in 51 Districts (Supply areas) of Madhya Pradesh. Sealed Tenders were invited from distillers of Madhya Pradesh for the grant of licence(s) under the provisions of the Madhya Pradesh Country Spirit Rules, 1995 (In short Rules, 1995) to supply country spirit through bonded storage warehouses to the retail sale contractors in sealed bottles for a period commencing 1st April 2017 and ending 31st March 2018.

8. The petitioner also participated and was declared successful and accordingly it was granted license and the petitioner was regularly supplying bottled country spirit. It is the claim of the petitioner, that there was no instances of non-supply of Country spirit. It is claimed that owing to the demand in the market, the supplies and consequently the stock was largely maintained in PET bottles. Since, the demand of glass bottles was nill in the market, therefore, Country spirit was filled only in PET bottles. However, a show cause notice dated 24-9-2018 was issued mentioning therein, that since for the period between April 2017 to March 2018, 25% of day's average issue in glass bottles from the warehouse was not kept in **glass bottles,** therefore, the present petitioner is liable to penalty under Condition 6(xxxi) of Tender Notice read with Rule 4(4)(a) and Rule 12 of M.P. Country Spirit Rules, 1995.

9. The petitioner submitted its reply and submitted that previously 100% supply was done in glass bottles, however, with the permission of the State Govt., the supply is also made in PET bottles. Since, the demand was of PET bottles, therefore, the minimum stock was maintained in PET bottles so that the supply may not be discontinued. No loss was ever caused to the State Govt. It is alleged that the Commissioner, Excise, did not consider the reply filed by the petitioner, in its true perspective, and by order dated 12-11-2018 (Annexure P/1) imposed a penalty of Rs. 1,51,250/-.

10. The petitioner being aggrieved by the order of the Excise Commissioner, filed an appeal which was registered as Appeal 6525/2018/Gwalior/Aa.A. The Board of Revenue, by order dated 2-01-2019 has dismissed the appeal, accordingly, the present petition has been filed.

11. Challenging the order passed by the Commissioner, Excise, as well as the Board of Revenue, it is submitted by the Counsel for the petitioner, that the penalty can be imposed for violation of the Rules. There is no allegation, that the petitioner did not maintain the minimum stock as required under Rule 4(4) of Rules, 1995. But the only allegation is that the minimum stock was not kept in **glass bottles** but was kept in **PET bottles.** The Rules, 1995 do not provide that the Country spirit cannot be kept in PET bottles. The conditions of Tender, cannot be equated with Statue but they are contract only. Further in the Tender Notice or under the Rules, 1995, the breach of Tender condition has not been made an offence. Further, the Appellate Court has not considered the grounds which were raised in the memo of appeal. Further, the respondents did not issue notice during the currency of the contract, otherwise, the petitioner could have rectified the mistake. It is further submitted that the show cause notice was issued only after the conclusion of contract and accordingly, no penalty can be imposed for breach of concluded contract. It is further submitted that the Excise Commissioner, while passing the order dated 12-11-2018 has no where stated that the penalty is being imposed for violating the terms of contract, and now the respondents cannot substitute its own findings. To buttress his contentions, the Counsel for the petitioners, relied upon the judgment passed by the Supreme Court in the case of *Mohinder Singh Gill & Anr. vs. The Chief Election Commissioner, New Delhi & Ors.* reported in AIR 1978 SC 851, *Kranti Associates Private Limited & Anr. vs. Masood Ahmed Khan & Ors.* reported in (2010) 9 SCC 496, *Central Homeopathic & Biochemic Association, Gwalior & Ors. vs. State of M.P. & Ors.* reported in ILR 2013 MP 837, *M/s. Hindustan Steel Ltd. vs. State of Orissa* reported in AIR 1970 SC 253, *Rattan Bai & Anr. vs. Ram Das & Ors.* reported in 2012(3) SCC 248, *Rattan Bai & Anr. vs. Ram Das & Ors.* reported in 2012(3) SCC 248, *Union of India vs. Rampur Distillery & Chemical Co. Ltd.* reported in AIR 1973 SC 1098, *Maula Bux vs. Union of India* reported in AIR 1970 SC 1955, *Ujjain Charitable*

Trust Hospital and Research Centre vs. State of M.P. & Anr. reported in 2010 (3) MPLJ 29.

12. *Per contra,* it is submitted by the Counsel for the respondents that the petitioner was granted C.S.-1 License for the financial year 2017-2018 where in the terms and conditions of the C.S.-1 license itself, it was mentioned as under :

1. *This license is granted under and shall be subject to the provisions of the Madhya Pradesh Excise Act, 1915 and the Rules made thereunder and shall also be subject to such subsidiary orders and instructions, as the Excise Commissioner, Madhya Pradesh, may from time to time issue in this behalf.*
2. *During the period of license shall observe all the conditions of the tender notice.*
3. *The licensee will use only such essences and food colours for the preparation of any kind of country liquor as are approved by the Excise Commissioner.*
4. *On breach of any of the conditions of this license or the provisions of the Madhya Pradesh excise Act or of the rules made thereunder, this license may be cancelled by the Excise Commissioner.*

13. It is further submitted that in exercise of powers conferred by sub-section (1) and clauses (d) and (h) of sub-section (2) of Section 62 of the Madhya Pradesh Excise Act, 1915, the State Govt. has made rules called as "Madhya Pradesh Country Spirit Rules, 1995". Rule 11 of Rules, 1995 prescribe that the licensee shall be bound by General or Special Orders which may be issued by the Excise Commissioner from time to time. It is further submitted that the Penalty as provided under Rule 12 of the Rules, 1995 is not for any loss sustained by the State Govt, but it is a deterrent measure, so that the stipulations in the rules and the terms of license, including maintaining minimum stock as prescribed by the authority is adhere to. It is further submitted that trade in liquor is not the fundamental right but it is a privilege and the petitioner must fulfill the terms and conditions of license. It is further submitted that clause 6(v) of the Tender notice dated 9-1-2017 clearly provided that the Successful tenderer will have to supply maximum 50% of the total supply of District in glass bottles as demand by the Assistant Commissioner Excise/District Excise Officer of the District.

14. Heard the learned Counsel for the parties.

15. Clause 6(xxxi) of the Tender Notice dated 19-1-2017 published in the Official Gazette (Extraordinary) reads as under:

> *6(xxxi) The Successful tendere will have to always maintain at least 25% stock of one day's average issue in glass bottles in every storage warehouse.*

16. It is the case of the respondents that the petitioner did not follow the above mentioned condition and thus is liable to pay penalty as per Rule 12 of the Rules, 1995.

17. It is well established principle of law that trade in liquor is merely a privilege and not a fundamental right. The Supreme Court in the case of *State of Punjab Vs. Devans Modern Breweries Limited,* reported in (2004) 11 SCC 26 has held as under :

> **"113.** In my opinion, Articles 301 and 304*(a)* of the Constitution are not attracted to the present case as the imposition of import fee does not, in any way, restrict trade, commerce and intercourse among the States. In my opinion, the permissive privilege to deal in liquor is not a "right" at all. The levy charged for parting with that privilege is neither a tax nor a fee. It is simply a levy for the act of granting permission or for the exercise of power to part with the privilege. In this context, we can usefully refer to *Har Shankar* v. *Dy. Excise and Taxation Commr.* and *Panna Lal* v. *State of Rajasthan.* As noticed earlier, dealing in liquor is neither a right nor is the levy a tax or a fee. Articles 301-304 will be rendered inapplicable at the threshold to the activity in question. Further, there is not even a single judgment which upholds the applicability of Articles 301-304 to the liquor trade. On the contrary, numerous judgments expressly hold these articles to be inapplicable to trade, commerce and intercourse in liquor. We can beneficially refer to the judgments in *State of Bombay* v. *R.M.D. Chamarbaugwala, Har Shankar case, Sat Pal and Co.* v. *Lt. Governor of Delhi* and *Khoday case.* The learned counsel for the respondent submitted that Articles 301-304 are violated or transgressed. In view of discussions in the paragraphs above, it is clearly demonstrated as to how and why Articles 301-304 are inapplicable to liquor trade in any form."

The Supreme Court in the case of *Synthetics and Chemicals Ltd. Vs. State of U.P.* reported in (1990) 1 SCC 109 has held as under :

> **"105.** The basis of the privilege doctrine appears to be that alcoholic drinks or intoxicating drinks are expected to be injurious to health and therefore the trade in these commodities is described as obnoxious and therefore a citizen has no fundamental right under Article 19(1*)(g)* of the Constitution and therefore the trade in alcoholic drinks which

is expected to be injurious to health and obnoxious is the privilege of the State alone and the State can part with this privilege on receipt of the consideration."

The Supreme Court in the case of *Khoday Distilleries Ltd. Vs. State of Karnataka* reported in (1995) 1 SCC 574 has held as under :

"60. We may now summarise the law on the subject as culled from the aforesaid decisions.

(a) The rights protected by Article 19(1) are not absolute but qualified. The qualifications are stated in clauses (2) to (6) of Article 19. The fundamental rights guaranteed in Article 19(1*)(a)* to *(g)* are, therefore, to be read along with the said qualifications. Even the rights guaranteed under the Constitutions of the other civilized countries are not absolute but are read subject to the implied limitations on them. Those implied limitations are made explicit by clauses (2) to (6) of Article 19 of our Constitution.

(b) The right to practise any profession or to carry on any occupation, trade or business does not extend to practising a profession or carrying on an occupation, trade or business which is inherently vicious and pernicious, and is condemned by all civilised societies. It does not entitle citizens to carry on trade or business in activities which are immoral and criminal and in articles or goods which are obnoxious and injurious to health, safety and welfare of the general public, i.e., *res extra commercium,* (outside commerce). There cannot be business in crime.

(c) Potable liquor as a beverage is an intoxicating and depressant drink which is dangerous and injurious to health and is, therefore, an article which is *res extra commercium* being inherently harmful. A citizen has, therefore, no fundamental right to do trade or business in liquor. Hence the trade or business in liquor can be completely prohibited.

(d) Article 47 of the Constitution considers intoxicating drinks and drugs as injurious to health and impeding the raising of level of nutrition and the standard of living of the people and improvement of the public health. It, therefore, ordains the State to bring about prohibition of the consumption of intoxicating drinks which obviously include liquor, except for medicinal purposes. Article 47 is one of the directive principles which is fundamental in the governance of the country. The State has, therefore, the power to completely prohibit the manufacture,

sale, possession, distribution and consumption of potable liquor as a beverage, both because it is inherently a dangerous article of consumption and also because of the directive principle contained in Article 47, except when it is used and consumed for medicinal purposes.

(e) For the same reason, the State can create a monopoly either in itself or in the agency created by it for the manufacture, possession, sale and distribution of the liquor as a beverage and also sell the licences to the citizens for the said purpose by charging fees. This can be done under Article 19(6) or even otherwise.

(f) For the same reason, again, the State can impose limitations and restrictions on the trade or business in potable liquor as a beverage which restrictions are in nature different from those imposed on the trade or business in legitimate activities and goods and articles which are *res commercium.* The restrictions and limitations on the trade or business in potable liquor can again be both under Article 19(6) or otherwise. The restrictions and limitations can extend to the State carrying on the trade or business itself to the exclusion of and elimination of others and/or to preserving to itself the right to sell licences to do trade or business in the same, to others.

(g) When the State permits trade or business in the potable liquor with or without limitation, the citizen has the right to carry on trade or business subject to the limitations, if any, and the State cannot make discrimination between the citizens who are qualified to carry on the trade or business.

(h) The State can adopt any mode of selling the licences for trade or business with a view to maximise its revenue so long as the method adopted is not discriminatory.

(i) The State can carry on trade or business in potable liquor notwithstanding that it is an intoxicating drink and Article 47 enjoins it to prohibit its consumption. When the State carries on such business, it does so to restrict and regulate production, supply and consumption of liquor which is also an aspect of reasonable restriction in the interest of general public. The State cannot on that account be said to be carrying on an illegitimate business.

(j) The mere fact that the State levies taxes or fees on the production, sale and income derived from potable liquor whether the production, sale or income is legitimate or illegitimate, does not make the State a party to the said activities.

> The power of the State to raise revenue by levying taxes and fees should not be confused with the power of the State to prohibit or regulate the trade or business in question. The State exercises its two different powers on such occasions. Hence the mere fact that the State levies taxes and fees on trade or business in liquor or income derived from it, does not make the right to carry on trade or business in liquor a fundamental right, or even a legal right when such trade or business is completely prohibited.
>
> *(k)* The State cannot prohibit trade or business in medicinal and toilet preparations containing liquor or alcohol. The State can, however, under Article 19(6) place reasonable restrictions on the right to trade or business in the same in the interests of general public.
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> *(l)* Likewise, the State cannot prohibit trade or business in industrial alcohol which is not used as a beverage but used legitimately for industrial purposes. The State, however, can place reasonable restrictions on the said trade or business in the interests of the general public under Article 19(6) of the Constitution.
>
> *(m)* The restrictions placed on the trade or business in industrial alcohol or in medicinal and toilet preparations containing liquor or alcohol may also be for the purposes of preventing their abuse or diversion for use as or in beverage."

The Supreme Court in the case of *State of Kerala Vs. Kandath Distilleries* reported in (2013) 6 SCC 573 has held as under :

> "24. Article 47 is one of the directive principles of State policy which is fundamental in the governance of the country and the State has the power to completely prohibit the manufacture, sale, possession, distribution and consumption of liquor as a beverage because it is inherently dangerous to human health. Consequently, it is the privilege of the State and it is for the State to decide whether it should part with that privilege, which depends upon the liquor policy of the State. The State has, therefore, the exclusive right or privilege in respect of potable liquor. A citizen has, therefore, no fundamental right to trade or business in liquor as a beverage and the activities, which are res extra commercium, cannot be carried on by any citizen and the State can prohibit completely trade or business in potable liquor and the State can also create a monopoly in itself for the trade or business in such liquor. This legal position is well settled. The State can also impose restrictions and limitations on the trade or business in liquor as a beverage, which restrictions are in nature different from

> those imposed on trade or business in legitimate activities and goods and articles which are res commercium. Reference may be made to the judgments of this Court in *Vithal Dattatraya Kulkarni* v. *Shamrao Tukaram Power, P.N. Kaushal* v. *Union of India, Krishan Kumar Narula* v. *State of J&K, Nashirwar* v. *State of M.P., State of A.P.* v. *McDowell & Co.* and *Khoday Distilleries Ltd.* v. *State of Karnataka."*

18. Thus, it is clear that where the petitioner is well aware of the provisions of law governing and regulating the business of liquor or was aware of the terms of auction/tender notice, then the bidder cannot wriggle out of the contractual obligations.

19. The Supreme Court in the case of *State of Haryana v. Lal Chand,* reported in (1984) 3 SCC 634, has held as under :

> **"8.** In *Har Shanker* v. *Deputy Excise and Taxation Commissioner* this Court held that the writ jurisdiction of the High Courts under Article 226 was not intended to facilitate avoidance of obligations voluntarily incurred. It was observed that one of the important purposes of selling the exclusive right to vend liquor in wholesale or retail is to raise revenue. The licence fee was a price for acquiring such privilege. One who makes a bid for the grant of such privilege with a full knowledge of the terms and conditions attaching to the auction cannot be permitted to wriggle out of the contractual obligations arising out of the acceptance of his bid. Chandrachud, J. (as he then was) interpreting the provisions of the Punjab Excise Act, 1914 and of the Punjab Liquor Licence Rules, 1956 said: (SCC pp. 745-46, para 16)
>
> "The announcement of conditions governing the auctions was in the nature of an invitation to an offer to those who were interested in the sale of country liquor. The bids given in the auctions were offers made by the prospective vendors to the Government. The Government's acceptance of those bids was the acceptance of willing offers made to it. On such acceptance, the contract between the bidders and the Government became concluded and a binding agreement came into existence between them. . . . The powers of the Financial Commissioner to grant liquor licences by auction and to collect licence fees through the medium of auctions cannot by writ petitions be questioned by those who, had their venture succeeded, would have relied upon those very powers to found a legal claim. Reciprocal rights and obligations arising out of contract do not depend for their enforceability upon whether a contracting party

> finds it prudent to abide by the terms of the contract. By such a test no contract could ever have a binding force."
>
> To the same effect are the decisions of this Court in *State of Haryana* v. *Jage Ram* and the *State of Punjab* v. *Dial Chand Gian Chand & Co.* laying down that persons who offer their bids at an auction to vend country liquor with full knowledge of the terms and conditions attaching thereto, cannot be permitted to wriggle out of the contractual obligations arising out of the acceptance of their bids by a petition under Article 226 of the Constitution."

The Supreme Court in the case of *State of Punjab Vs. Devans Modern Breweries Ltd.,* reported in (2004) 11 SCC 26 has held as under :

> **"139.** In the case of *State of Haryana* v. *Lal Chand* this Court held that after making bid for grant of exclusive privilege of liquor vend with full knowledge of terms and conditions of auction, the bidder cannot wriggle out of the contractual obligations arising out of acceptance of his bid by filing writ petition.
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> **140.** In the case of *State of Punjab* v. *Dial Chand Gian Chand and Co.* this Court held that a licensee who participates in the auction voluntarily and with full knowledge is bound by the bargain and the writ petition filed under Article 226 by such licensee in an attempt to dictate terms of the licence without paying the licence fee must fail. The highest bidder after acceptance of his bid cannot challenge the second auction on the ground of adverse effect on his business."

20. Thus, it is clear that when the petitioner had participated in an auction and had obtained license to supply country liquor, then he cannot avoid either the provisions regulating the trade in liquor or cannot avoid the terms and conditions of license or auction/tender notice, or general or special order.

21. It is contended by the Counsel for the petitioner, that the Rules, 1995 does not exclusively provide for glass bottles, therefore, any violation of terms of Tender Notice would not be covered under Rule 4(4) of Rules, 1995 and thus, no penalty can be imposed under Rule 12 of Rules, 1995.

22. Considered the submission made by the Counsel for the Petitioner.

23. Rule 11 of Rules, 1995 reads as under :

> ***11. The licensee shall be bound by general or special orders which may be issued by the Excise Commissioner from time to time.***

24. The Tender Notice dated 19-1-2017 was issued by the Excise Commissioner and every condition mentioned in the Tender Notice can be termed as general or special order issued by the Excise Commissioner. Thus, any condition mentioned in the Tender Notice shall be an integral part of contract granted under Rules, 1995 and by virtue of Rule 11 of the Rules, the Excise Commissioner, can always issue general or special orders and the same shall be binding on the licensee as if the said general or special order is an integral part of rules. It is well established principle of law that where the Statute or Rules are silent, then the Executive Instructions can be issued to supplement the Rules and not supplant it.

25. The Supreme Court in the case of *Union of India v. Ashok Kumar Aggarwal,* reported in (2013) 16 SCC 147 has held as under :

> **59.** The law laid down above has consistently been followed and it is a settled proposition of law that an authority cannot issue orders/office memorandum/ executive instructions in contravention of the statutory rules. However, instructions can be issued only to supplement the statutory rules but not to supplant it. Such instructions should be subservient to the statutory provisions. (Vide *Union of India* v. *Majji Jangamayya, P.D. Aggarwal* v. *State of U.P.* , *Paluru Ramkrishnaiah* v. *Union of India, C. Rangaswamaiah* v. *Karnataka Lokayukta* and *Joint Action Committee of Air Line Pilots' Assn. of India* v. *DG of Civil Aviatio.)*
>
> **60.** Similarly, a Constitution Bench of this Court, in *Naga People's Movement of Human Rights* v. *Union of India,* held that the executive instructions have binding force provided the same have been issued to fill up the gap between the statutory provisions and are not inconsistent with the said provisions.
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> **61.** In *Nagaraj Shivarao Karjagi* v. *Syndicate Bank* this Court has explained the scope of circulars issued by the Ministry observing that it is binding on the officers of the department, particularly the recommendations made by CVC.
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> **62.** In *State of U.P.* v. *Dharmander Prasad Singh* this Court held that the order must be passed by the authority after due application of mind uninfluenced by and without surrendering to the dictates of an extraneous body or an authority.

26. It is not the case of the Petitioner that Clause 6(xxxi) of the Tender Notice is contrary to the provisions of Rules, 1995. Whereas Rules, 1995 clearly provides

that the liquor can be bottled in Glass or PET bottles. Thus, the Tender Condition No. 6(xxxi) cannot be said to be violative of any provision of Rules, 1995. Thus, the Excise Commissioner, can impose a restriction of maintaining the 25% of the minimum stock in glass bottles.

27. The petitioner has not disputed that it had not maintained at least 25% of the minimum stock in glass bottles.

28. Thus, it is clear that the Petitioner has not followed the Tender Condition No. 6(xxxi) and therefore, violated Rule 4(4) of the Rules.

29. It is next contended by the Counsel for the petitioner, that since, there was no demand of glass bottles, therefore, the entire minimum stock of country spirit was kept in PET bottles. It is well established principle of law that trade in liquor is not a fundamental right under Article 19 of the Constitution of India, but it is a privilege, and therefore, the petitioner was under obligation to follow the license condition, tender condition, general or special order issued by Excise Commissioner from time to time as well as the provisions of Excise Act and Rules, 1995.

30. Rule 4(4) of Spirit Rules, 1995 reads as under :

> **"4 Manufacture and Bottling :** (1) .....
>
> (2).....
>
> (3).....
>
> (4) (a) The licensee shall maintain at each "bottling unit"a minimum stock of **bottled liquor** and rectified spirit equivalent to average issues of five and seven days respectively of the preceding month. In addition, he shall maintain at each "storage warehouse" a minimum stock of bottled liquor equivalent to average issue of five days of the preceding month ;
>
> Provided that in special circumstances, the Excise Commissioner may reduce the above requirement of maintenance of minimum stock of rectified spirit and/or sealed bottles in respect of any "bottling unit" or "storage warehouse".
>
> (5) .....
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> (6) .....
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> (7) .....
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> (8) .....
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> (9) .....
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> (10) .....

(11) .....

(12) .....

(13) .....

(14) .....

(15) .....

31. In Rule 4(4) of Rules, 1995, the word "bottled liquor" has been mentioned, therefore, it is silent as to whether the bottled liquor should be in PET bottles or Glass bottles. Under these circumstances, the Excise Commissioner, by general or special order can supplement the rules, and as the Tender Notice Condition No. 6(xxxi) can be imposed, therefore, the Tender Notice condition No. 6(xxxi) would supplement the Rule 4(4) of the Rules.

32. In view of Rule 11 of Rules, 1995, violation of tender notice shall be violation of Rule 4(4) of Rules.

33. It is next contended by the Counsel for the Petitioner that the Excise Commissioner cannot travel beyond his order dated 12-11-2018 (Annexure P/2) and since, he has not assigned any reason and has merely stated that non-maintaining atleast 25% of minimum stock in glass bottles would amount to violation of Rule 4(4) of the Rules, but has not held that it is violative of Tender Condition Notice therefore, the said order is bad.

34. This Court has already considered the question that whether the Tender Notice Condition No. 6(xxxi) can supplement the Rule 4(4) of the Rules 1995 or not and therefore, it is held that violation of Tender Notice Condition No. 6(xxxxi) would amount to violation of Rule 4(4) of Rules and thus, it is held that the order passed by the Excise Commissioner, is not bad in law.

35. It is next contended by the Counsel for the petitioner, that the Board of Revenue, while deciding the appeal filed by the petitioner has not considered all the grounds raised by the petitioner, therefore, the order dated 2-1-2019 passed by Board of Revenue in appeal (Annexure P/1) is bad.

36. Considered the submission.

37. This Court has already considered the question that whether violation of condition of Tender Notice would amount to violation of Rules 1995 or not, therefore, this Court is of the considered opinion, that no fault can be found in the order dated 2-1-2019 passed by Board of Revenue.

38. It is next contended by the Counsel for the Petitioner, that Condition 6(v) of Tender Notice Conditions permit use of PET bottle also therefore, the petitioner cannot be penalized for not maintaining at atleast 25% of the minimum stock in glass bottles.

39. Considered the submission.

40. Clause 6(v) of Tender Notice Condition reads as under :

> *6(v). The Country spirit shall be bottled in glass and pet bottles of 750 milliliters, 375 milliliters and 180 milliliters. The successful bidder tenderer will have to supply country spirit in glass and pet bottles as per demand of retail license which shal be determined by the Assistant Excise Commissioner/District Excise Officer of the District.....*

41. The Tender Condition 6(v) cannot be read along with Rule 4(4) of the Rules. This deals with general supply whereas Rule 4(4) of the Rules, 1995 deals with maintaining the minimum supply. Further, as per Rule 4(4) of the Rules, 1995, atleast 25% of the minimum stock is to be maintained in glass bottles. Thus, the above mentioned submission made by the Counsel for the petitioner is rejected as misconceived.

42. It is next contended by the Counsel for the petitioner, that breach of tender condition has not been made an offence, therefore, no penalty can be imposed.

43. Considered the submission.

44. This Court in the case of *M/s Som Distilleries Pvt. Ltd. vs. Excise Commissioner & Ors.* by order dated **30-11-2018** passed in **W.P. No. 60 of 2016** has held as under :

> As per the provisions of Rule 4(4) of Spirit Rules, 1995, the licensee is under obligation to maintain the minimum stock of bottled liquor equivalent to average issues of five days of the preceding month. The basic purpose of maintaining the minimum stock of spirit in the storage warehouse is to supply the spirit in case of additional demand. Thus, for maintaining the balance between the demand and supply, the licensee is required to maintain the minimum stock in the storage warehouse, so that in case of non-supply of liquor to meet the higher demand of spirit/liquor, the spurious spirit is not sold in the market. Thus, the basic purpose of maintaining the minimum stock in the storage warehouse is to deal with every/urgent situation and that is why, no fixed minimum quantity has been prescribed under the Rules, but it fluctuates in accordance with the average issues of five dates of the preceding month. My view is fortified by the judgment passed by the **Delhi High Court in the case of Union of India Vs. Central Distillary and Breweries Ltd.** reported in **(2002) 98 DLT 275** which reads as under :
>
> > "33. The purpose for which the minimum stock is required to be kept is not in dispute i.e., to avoid use of

> spurious liquor. The purpose and object to make such rules is thus in public interest."
>
> Thus, the maintenance of minimum stock in the storage warehouse equivalent to average issues of five days of the preceding month is mandatory and the petitioner cannot get away from the liability of maintaining minimum stock in the storage warehouse, on the ground that non-maintenance of minimum stock had not effected the State adversely.
>
> * * * *
>
> From the plain reading of Rule 12 of Spirit Rules, 1995, it is crystal clear that the penalty is imposable on breach or contravention of any of these rules or the provisions of M.P. Excise Act. Thus, it is clear that penalty under Rule 12 of Spirit Rules, 1995 is not imposed for the loss sustained by the State.
>
> * * * *
>
> As it is evident from Rule 12 of Spirit Rules, 1995, that the penalty is imposed for contravention or breach of any of the Rule and not by way of punishment for committing any offence, therefore, mens rea or actual loss to the other party of the contract are not necessary. Where a provision, which is in public interest, has been made, then for its better enforcement, if the penalty is provided, then it is within the legislative competence and mens rea is not necessary. Mere contravention or Breach of any of the Rule is sufficient to invite the imposition of Penalty. As already held that the petitioner himself has admitted that there was a lapse on the part of the petitioner, in maintaining the minimum stock of spirit in the storage spirit. Thus, where contravention or breach of any rule has been established, then the authorities are well within their right to impose the penalty for such contravention or breach.

45. Thus, it is clear that the penalty is not imposed by way of punishment for committing any offence, but it is imposed for better enforcement of the provisions of law.

46. It is next contended by the Counsel for the petitioner, that the respondents should have pointed out the mistake during the currency of the contract, so that the petitioner could have rectified the same, but the imposition of the penalty after the contract has concluded is bad.

47. Considered the submission.

48. As already pointed out that the trade in liquor is not a fundamental right and is merely a privilege, and the petitioner must follow each and every provision

of law. The Tender Notice condition No. 6(xxxi) was very clear and the petitioner was aware of the same from day one. It is the duty of the petitioner to follow each and every condition of tender notice, and the respondents were not under obligation to apprise the petitioner about his default. Since, the petitioner has not disputed that he had not maintained 25% of the minimum stock in glass bottles, therefore, the petitioner cannot get away from his liability of making payment of Penalty on the ground that he was not apprised of his mistakes during the currency of the contract.

49. No other argument was advanced by the counsel for the petitioner.

50. Accordingly, this Court is of the considered opinion, that the Excise Commissioner as well as the Board of Revenue did not commit any mistake by holding that non-maintenance of atleast 25% of the minimum stock in glass bottles, amount to violation of Rule 4(4) of Rules, 1995, therefore, have rightly imposed the penalty under Rule 12 of Rules, 1995. The interim orders are hereby vacated.

51. Resultantly, this petitions fail and are hereby **dismissed.**

Petition dismissed

I.L.R. [2020] M.P. 1858
WRIT PETITION

Before Mr. Justice Sanjay Dwivedi

W.P. No. 2454/2009 (Jabalpur) decided on 15 May, 2020

ANIL PRATAP SINGH …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

A. Service Law – Disciplinary Proceeding – Punishment – Consultation with Commission **– Held – When any advice is given by Commission and used against delinquent for imposing penalty, then rule of natural justice requires that copy of same be supplied to delinquent – In present case, no such advice has been taken from Commission – If disciplinary authority has not consulted with Commission, order of punishment is not vitiated or makes the decision making process defective – It does not violate principle of natural justice – Petition dismissed. (Para 13)**

क. सेवा विधि – अनुशासनिक कार्यवाही – दण्ड – आयोग से परामर्श – अभिनिर्धारित – जब आयोग द्वारा कोई सलाह दी गई है और अपचारी के विरूद्ध, शास्ति अधिरोपित करने हेतु उपयोग की गयी है तब नैसर्गिक न्याय की अपेक्षा है कि उसकी प्रति,

अपचारी को प्रदाय की जाए – वर्तमान प्रकरण में, आयोग से ऐसी कोई सलाह नहीं ली गई है – यदि अनुशासनिक प्राधिकारी ने आयोग से परामर्श नहीं किया है, दण्ड का आदेश दूषित नहीं हो जाता या विनिश्चय करने की प्रक्रिया दोषपूर्ण नहीं हो जाती – यह नैसर्गिक न्याय के सिद्धांत का उल्लंघन नहीं करता – याचिका खारिज।

***B. Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rule 15, proviso – Consultation with Commission* – Held – Requirement of consultation by disciplinary authority with Public Service Commission is only directory in nature – Non-complaince of same do not vitiate the order of disciplinary authority. (Para 13)**

ख. सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 15, परंतुक – आयोग से परामर्श – अभिनिर्धारित – अनुशासनिक प्राधिकारी द्वारा लोक सेवा आयोग के साथ परामर्श की अपेक्षा केवल निदेशात्मक स्वरूप की है – उक्त का अननुपालन, अनुशासनिक प्राधिकारी के आदेश को दूषित नहीं करता।

***C. Constitution – Article 226 – Disciplinary Proceeding – Punishment – Principle of Natural Justice* – Held – Petitioner has cross examined the witnesses – It is not a case of no evidence – Petitioner failed to file reply of charge-sheet – No violation of principle of natural justice – Regarding scope of interference in matter of punishment inflicted by disciplinary authority, Apex Court concluded that it is not proper for High Court to re-appreciate the evidence adduced by parties – Petition dismissed. (Paras 9 to 12)**

ग. संविधान – अनुच्छेद 226 – अनुशासनिक कार्यवाही – दण्ड – नैसर्गिक न्याय का सिद्धांत – अभिनिर्धारित – याची ने साक्षियों का प्रतिपरीक्षण किया है – यह कोई साक्ष्य नहीं का प्रकरण नहीं है – याची, आरोप पत्र का जवाब प्रस्तुत करने में असफल रहा – नैसर्गिक न्याय के सिद्धांत का कोई उल्लंघन नहीं – अनुशासनिक प्राधिकारी द्वारा दिये गये दण्ड के मामले में हस्तक्षेप की व्याप्ति के संबंध में सर्वोच्च न्यायालय ने निष्कर्षित किया कि पक्षकारों द्वारा दिये गये साक्ष्य का पुनः मूल्यांकन करना उच्च न्यायालय के लिए उचित नहीं है – याचिका खारिज।

Cases referred :

(2003) 2 SCC 533, (2009) 7 SCC 69, (2011) 5 SCC 435, (2013) 6 SCC 530, (2010) 11 SCC 557, (2010) 5 SCC 349, 2008 AIR SCW 1365, (1995) 6 SCC 749, (1999) (5) SCC 762, W.P. No. 17870/2014 decided on 25.09.2017.

K.C. Ghildiyal, for the petitioner.
Deepak Kumar Singh, Dy. G.A. for the respondents.

O R D E R

SANJAY DWIVEDI, J.:- This petition under Article 226 of the Constitution of India has been filed by the petitioner seeking quashment of the order dated 22.06.2006 (Annexure P/7) whereby a major penalty of removal from service has been imposed on him and the order dated June, 2008 (Annexure P/10) whereby the appeal filed by him challenging the order of major penalty has been rejected.

2. The facts of the case in brief are that the petitioner was appointed as Sub Engineer in Rural Engineering Department in the State Government on 22.02.1981. After completing 12 years of services, he was given senior scale of pay and was designated as Class-II Gazetted Officer. In the year 1988, petitioner was posted as Sub Engineer with Janpad Panchayat, Rewa. On 03.06.1998, Jila Panchayat Rewa sanctioned the work of construction of 01 Km. WBM road from Silpari Nala to Silpari School situated within the area of Janpad Pancyayat, Rewa. The estimated value of the said construction was Rs. 2,95,000/-. On 17.06.1998, the first installment towards the said construction was released in favour of the Sarpanch of Gram Panchayat Kothi. Thereafter, petitioner recommended the second installment to be released to Gram Panchayat. When the work was half way through, the measurement of the work was carried out by the petitioner and necessary entries were made in the measurement book, which was duly completed by the petitioner and, as per the petitioner, the same was handed over in the office of Janpad Panchayat, Rewa for which a receipt was issued by the office of Janpad Panchayat.

3. On 31.12.1998, an inspection was carried out by the Sub Divisional Officer, RES, Sub Division, Rewa and a report to that effect was submitted by him. In the said report, some irregularities were found in the work of constructions undertaken by the petitioner. On the basis of the said report, a charge sheet was issued to the petitioner on 29.11.2000 levelling several charges on him alleging that he had carried out fraudulent evaluation of the work of WBM road, which was to be constructed from Silpari Nala to Silpari School. It is alleged that the petitioner fraudulently recommended for release of Rs. 1,19,941/- in favour of Gram Panchayat. It is also alleged against the petitioner that he did not submit the Measurement Book No. 6 and despite instructions issued by the officers, he did not obey their instructions and as such, violated the service rules by ignoring the command of the superior authority.

4. As per the petitioner, he submitted reply to the charge sheet (Annexure P/4), but the disciplinary authority passed the order ignoring the facts mentioned in the reply to the charge sheet and directed to hold the departmental enquiry against him vide order dated 15.01.2001 (Annexure P/5).

5. The enquiry officer conducted the enquiry and also submitted his report.

The disciplinary authority relying upon the finding given by the enquiry officer and agreeing with the enquiry report, passed the order of dismissal from service against the petitioner on 22.06.2006 (Annexure P/6). The appeal preferred by the petitioner against the order passed by the disciplinary authority was also rejected vide order dated June, 2008 (Annexure P/10).

6. The petitioner in the present petition has challenged the orders impugned mainly on the ground that principle of natural justice has not been followed by the respondents during the course of decision making process. The disciplinary authority has committed wrong in not considering the reply to the charge sheet submitted by the petitioner and directing to hold the disciplinary enquiry. It is further alleged by the petitioner that the statement of witnesses were recorded behind his back and he was also not allowed to cross-examine the witnesses. It is also stated that no inspection was carried out in presence of the petitioner by any of the officers and the charges were framed against him based only on assumption. It is also alleged by the petitioner that the report on the basis of which charges were framed was never supplied to him. It is also contended by the petitioner that it is a case of no evidence and, therefore, no penalty could have been imposed on him. The petitioner has also contended that the respondent No. 2 was not competent to impose a major penalty and no concurrence from Madhya Pradesh Public Service Commission was taken by the authority. The petitioner has also placed reliance on the decisions reported in (2003) 2 SCC 533 - *Indian Charge Chrome Ltd. And another vs. Union of India and others,* (2009) 7 SCC 69 -*Commissioner of Income Tax, Shimla vs. Greenworld Corporation Parwanoo,* (2011) 5 SCC 435 - *Joint Action Committee of Air Line Pilots' Association of India (ALPAI) and others vs. Director General of Civil Aviation and others,* (2013) 6 SCC 530 - *Chairman, Life Insurance Corporation of India and others vs. A. Masilamani,* (2010) 11 SCC 557 - *Manohar Lal (Dead) by LRs. vs. Ugrasen (dead) by LRs. and others,* (2010) 5 SCC 349 - *Union of India and others vs. Alok Kumar* and 2008 AIR SCW 1365 - *Divnl. Forest Officer, Kothagudem and others v. Madhusudhan Rao.*

7. The respondents have filed their return stating therein that the petitioner was entrusted with the work of construction of 01 Km. WBM road from Silpari Nala to Silpari School for which administrative sanction of Rs.2,95,000/- was accorded. On the basis of the first and second stage of the said work, an amount of 2,36,000/- was released to the agency, which was undertaking the construction work of the said road. It is contended by the respondents that on the basis of the assessment carried out by the petitioner of the work performed by the agency, the first installment of the said amount i.e. Rs. 1,18,000/- was released on 17.06.1998 and thereafter relying upon the said valuation made by the petitioner, the second installment of equal amount was released on 28.08.1998. However, complaints were received in respect of the work performed by the agency and the valuation made by the petitioner. Thereafter, an inspection was done by the respondent No.

5 alongwith one Shri R.P. Soni, Sub Engineer and Shri Sangram Singh, Sub Engineer on 31.12.1998. As per the inspection report, it was found that the petitioner submitted the false valuation in respect of the work performed by the agency whereas only a small quantity of material worth Rs.16,068/- was found dumped on the site. No construction work, as valued by the petitioner, was found on the site. As per the statement of local residents, no construction of road was done since the last 4-5 years. Thus, it is clear that the petitioner has misused the government money, caused a loss to the government and accordingly the allegations made in the complaints were found true.

8. Thereafter, the petitioner was asked to submit the measurement book in relation to the work done. The petitioner instead of producing the measurement book, informed that the same had been submitted by him in the office of Janpad Panchayat Rewa, but, he failed to give any detail as to when and to whom the measurement book was handed over by him. Consequently, a charge sheet was issued to him and the matter was enquired in regard to the charges levelled against the petitioner. It is very specifically denied by the respondents that petitioner had submitted any reply to the charge sheet. As per the respondents, the petitioner did not submit any reply to the charge sheet. It is also stated by the respondents that petitioner was afforded full opportunity to establish his defence by adducing oral and documentary evidence, but, he failed to do so. It is submitted by the respondents that initially an enquiry report was submitted on 22.04.2003, which was supplied to the petitioner vide memo dated 22.05.2003 to which the petitioner submitted his reply. The disciplinary authority after considering the entire material decided to inflict punishment of removal from service on the petitioner and accordingly passed the order dated 22.06.2006. This order was later on amended vide order dated 06.02.2007. An appeal was preferred by the petitioner against the order of punishment, but, the same was rejected vide order dated June, 2008 (Annexure P/10). As per the respondents, the authority has followed the principle of natural justice, but the petitioner failed to show as to what prejudice was caused to him and in what manner the principle of natural justice was violated.

9. As per the respondents, despite repeated opportunities, the petitioner did not submit the measurement book to establish his stand that his recommendation for release of the fund was correct. As per the respondents, since the petitioner did not produce the measurement book, though he was repeatedly asked for the same and further failed to give any detail as to when and to whom the said measurement book was handed over by him in the office of Janpad Panchayat, Rewa, an adverse inference was drawn against him. As per the respondents, in a matter of departmental enquiry if the order of punishment is based upon the evidence adduced during the course of enquiry, the same cannot be re-appreciated in a petition under Article 226 of the Constitution of India. It is stated by the

respondents that in view of the limited scope of judicial review in the matter of punishment inflicted during disciplinary proceedings, the present case is not a case of no evidence and there is no violation of principle of natural justice in a decision making process, therefore, the order impugned does not call for any interference and it is prayed by the respondents that the petition is without any substance and deserves to be dismissed.

10. Considering the rival contention made by the parties, it is clear that the basic attack of the petitioner is that the principle of natural justice has been violated by the respondents in the decision making process. As per the learned counsel for the petitioner, the decision for holding the departmental enquiry itself was not sustainable as respondents have stated that charge sheet issued to the petitioner was not replied to and, therefore, in absence of the reply, they had no option, but to hold the departmental enquiry. However, learned counsel for the petitioner has submitted that reply to the charge sheet was very much submitted by the petitioner, which is available as Annexure P/4, but unfortunately the same was overlooked and not considered by the disciplinary authority. On the other hand, in reply, the respondents have contended that no reply to the charge sheet was filed by the petitioner. He only submitted a reply to the enquiry report, which was communicated to him vide memo dated 22.05.2003. I have perused the document Annexure P/4, which is said to be a reply to the charge sheet and perusal of the same indicates that the said document is nothing but a response to the memo dated 22.05.2003. From the subject contained in Annexure P/4, it can easily be said that the said document was submitted by the petitioner in response to the memo dated 22.05.2003. Therefore, I find substance in the contention made by the respondents that on 22.05.2003 enquiry report was supplied to the petitioner through a memo. Not only this, from perusal of Annexure P/4 it clearly indicates that the same is not the reply to the charge sheet, but it was a reply to the enquiry report because in the said reply the petitioner has disclosed the conduct of the presenting officer and also of the enquiry officer. Thus, in my opinion, on the basis of material available on record, the stand taken by the respondents that the reply to the charge sheet was never submitted by the petitioner, is correct. The stand taken by the petitioner alleging violation of principle of natural justice, as the reply to the charge sheet was not considered, in my opinion, is equivocal. The enquiry report dated 22.04.2003 (Annexure P/6) is also available on record. From perusal of the said enquiry report, it is clear that the enquiry officer has recorded the statements of Shri J.S. Rajput, the then Sub Divisional Officer, RES, Sub Division, Rewa, Shri R.P. Soni, Sub Engineer and Shri Sangram Singh. The petitioner also cross-examined the said witnesses, but, never raised any objection as is being raised in the present petition that the said witnesses were examined behind his back. Since those witnesses have been cross-examined and the petitioner has failed to show as to what prejudice has been caused to him even though the statement of those witnesses were recorded behind his back, I am of the opinion that the stand taken

by the petitioner that he was granted an opportunity of hearing to cross-examine the witnesses is unfounded. Although it is not clear from the record whether the statements of those witnesses were recorded in absence of the petitioner, but, the petitioner has failed to show any prejudice to him. The same cannot be considered to be a violation of principle of natural justice.

11. The enquiry officer in his report has very categorically evaluated the statements of the witnesses and then arrived at a finding that the charges levelled against the petitioner have been found proved. It is also rightly observed by the enquiry officer that the material document i.e. Measurement Book No. 6, in which it is shown that evaluation and measurement of the work done was recorded by the petitioner, was not produced before the enquiry officer. The petitioner despite several opportunities has also not given any detail as to when and to whom the said measurement book was handed over by him and in absence of those details, adverse inference was drawn against the petitioner and initially it was determined that there was no fault in the inspection report submitted by Sub Divisional Officer and Sub Engineer made on 31.12.1998 in which it was found that there was no construction of the road was done as per the report submitted by the petitioner, but, only construction material worth Rs. 16,068/- was dumped on the site.

12. The Supreme Court, while dealing with the issue of scope of interference in the matter of disciplinary proceedings in the case of *B.C. Chaturvedi vs. Union of India & others* - (1995) 6 SCC 749, has observed as under:-

> **"12.** Judicial review is not an appeal from a decision but a review of the manner in which the decision is made. Power of judicial review is meant to ensure that the individual receives fair treatment and not to ensure that the conclusion which the authority reaches is necessarily correct in the eye of the court. When an inquiry is conducted on charges of misconduct by a public servant, the Court/Tribunal is concerned to determine whether the inquiry was held by a competent officer or whether the inquiry was held by a competent officer or whether rules of natural justice are complied with. Whether the findings or conclusions are based on some evidence, the authority entrusted with the power to hold inquiry has jurisdiction, power and authority to reach a finding of fact or conclusion. But that finding must be based on some evidence. Neither the technical rules of Evidence Act nor of proof of fact or evidence as defined therein, apply to disciplinary proceeding. When the authority accepts that evidence and conclusion receives support therefrom, the disciplinary authority is entitled to hold that the delinquent officer is guilty of the charge. The Court/Tribunal in its power of judicial review does not act as appellate authority to re-appreciate the evidence and to arrive at its own independent findings

> on the evidence. The Court/Tribunal may interfere where the authority held the proceedings against the delinquent officer in a manner inconsistent with the rules of natural justice or in violation of statutory rules prescribing the mode of inquiry or where the conclusion or finding reached by the disciplinary authority is based on no evidence. If the conclusion or finding be such as no reasonable person would have ever reached, the Court/Tribunal may interfere with the conclusion or the finding, and mould the relief so as to make it appropriate to the facts of each case."

Further in the case of *Bank of India and another Vs. Degala Suryanarayana* - (1999) (5) SCC 762, the Supreme Court has observed as under:-

> **"11.** Strict rules of evidence are not applicable to departmental enquiry proceedings. The only requirement of law is that the allegation against the delinquent officer must be established by such evidence acting upon which a reasonable person acting reasonably and with objectivity may arrive at a finding upholding the gravamen of the charge against the delinquent officer. Mere conjecture or surmises cannot sustain the finding of guilt even in departmental enquiry proceedings. The Court exercising the jurisdiction of judicial review would not interfere with the findings of fact arrived at in the departmental enquiry proceedings excepting in a case of malafides or perversity i.e., where there is no evidence to support a finding or where a finding is such that no man acting reasonably and with objectivity could have arrived at that findings. The Court cannot embark upon reappreciating the evidence or weighing the same like an appellate authority. So long as there is some evidence to support the conclusion arrived at by the departmental authority, the same has to be sustained. In *Union of India v. H.C. Goel AIR 1964 SC 364,* the Constitution Bench has held :-
>
> > "[T]he High Court can and must enquire whether there is any evidence at all in support of the impugned conclusion. In other words, if the whole of the evidence led in the enquiry is accepted as true, does the conclusion follow that the charge in question is proved against the respondent? This approach will avoid weighing the evidence. It will take the evidence as it stands and only examine whether on that evidence legally the impugned conclusion follows or not."

Considering the aforesaid enunciation of law in regard to the scope of interference in the matter of punishment inflicted by the disciplinary authority, no case of interference is made out, as the available evidence has been discussed hereinabove. It is not a case of violation of principle of natural justice. It is also not a case of no evidence. As already made clear by the Supreme Court that it is not proper for the High Court to re-appreciate the evidence adduced by the parties,

since the punishment in the present case is based on the evidence adduced by the prosecution and the same is foundation of conclusion drawn by disciplinary authority.

13. The petitioner has also raised a ground of competence stating that the respondent No. 2 is not the competent authority to inflict the major punishment. The respondents in para-14 of their reply has answered this objection saying that since the Commissioner, Revenue Division had a limited scope to the extent of initiating enquiry, therefore, the matter was forwarded to the State Government and ultimately the order of punishment was issued by the competent authority i.e. the State Government vide order dated 22.06.2006 (Annexure P/7). However, the order dated 06.02.2007 has no applicability for the reason that the same has referred the power to respondent No.2 in respect of inflicting a minor penalty. Therefore, the order dated 06.02.2007 has no substance because the same cannot have an effect to modify the order passed by the higher authority i.e. the State Government. The petitioner has also contended that the respondents have not consulted with the Madhya Pradesh Public Service Commission before imposing major punishment and as such the order of punishment is not sustainable. However, in the reply submitted by the respondents, they have denied the said allegation and submitted that the order of punishment does not suffer from any jurisdictional error. Our High Court, in the case of *Harish Tiwari vs. State of Madhya Pradesh* - WP No. 17870/2014 decided on 25th September, 2017 has dealt with the issue and observed as under:-

> "14. Rule 15 of the Rules of 1966 provides for action on the enquiry report which reads as under :
>
> > **"15. Action on the inquiry report.-** (1) the disciplinary authority if it is not itself the inquiring authority may, for reasons to be recorded by it in writing, remit the case to the inquiring authority for further inquiry and report and the inquiring authority shall thereupon proceed to hold the further inquiry according to the provisions of Rule 14 as far as may be.
> >
> > (2) The disciplinary authority shall, if it disagrees with the findings of the inquiring authority on any article of charge, record its reasons for such disagreement and record its own finding on such charge, if the evidence on record is sufficient for the purpose.
> >
> > (3) If the disciplinary authority having regard to its finding on all or any of the articles of charge is of the opinion that any of the penalties specified in Rule 10 should be imposed on the Government servants, it shall, not withstanding anything contained in Rule 16, make an order imposing such penalty [but in doing so it shall record reasons in writing] :

> Provided that in every case where it is necessary to consult the Commission, the record of the inquiry shall be forwarded by the disciplinary authority to Commission for its advice and such advice shall be taken into consideration before making any order imposing any penalty on the Government servant.
>
> As per the said rule, after getting report from the enquiry officer, the disciplinary authority, on the basis of findings on all charges, can imposed punishment as given under Rule 10 of the Rules. The proviso to sub-rule (3) of Rule 15 of the Rules of 1966, provides that in every case where it is necessary to consult the Commission, the record of the enquiry shall be forwarded by the disciplinary authority to the Commission for its advice and such advice shall be taken into consideration before making any order imposing any penalty on the Government servant. In the present case, although the advice of the Commission was taken by the respondents, however, the report of the Commission was not supplied to the petitioner before imposing the punishment. If any advice given by the PSC is being used against the petitioner for imposing penalty, then the rule of natural justice requires that the copy of same be supplied to the petitioner. "

In view of above enunciation of law, it is clear that when any advice is given by the Commission and used against the delinquent for imposing penalty then the rule of natural justice requires that the copy of the same be supplied to the delinquent. However, in the present case, from the order passed by the disciplinary authority it does not reveal that the advice of the Commission has been taken note of and punishment is based upon the same. Therefore, in my opinion, the order impugned does not suffer from any material irregularity and violation of principle of natural justice, which makes the decision making process defective and the same can be interfered with only on the count that the Commission was not consulted.

Hon'ble Justice Shri G.P. Singh in his book 'Principles of Statutory Interpretation (14th Edition)" has also considered the requirement of consultation with the Commission and has also interpreted the effect of its non-compliance in the following manner:

> The provision of Article 230(3)(c) of the Constitution on all disciplinary matters affecting a Civil Servant. The said provision has been interpreted as directory and its non-compliance was held not vitiating the disciplinary action taken (***State of U.P. v. Manbodhan Lal Shrivastava, AIR 1957 SC 912***).

Thus, in my opinion, as has been observed hereinabove, if at all the disciplinary authority has not consulted with the Commission, the order of

punishment cannot be held to be vitiated and the same also does not violate principle of natural justice.

14. Accordingly, as per the discussion made hereinabove, I find no reason to interfere in the impugned orders. The petition is, therefore, dismissed. However, there shall be no order as to cost.

Petition dismissed

I.L.R. [2020] M.P. 1868 (DB)
WRIT PETITION

Before Mr. Justice Sanjay Yadav & Mr. Justice Atul Sreedharan

W.P. No. 25097/2019 (Jabalpur) decided on 27 July, 2020

IN REFERENCE …Petitioner

Vs.

UNION OF INDIA …Respondent

***A. Public Interest Litigation – Suo Motu – Railway Reservations – Lower Berth – Re-Prioritisation* – Held – For allotment of lower berth in trains, Indian Railways directed to seriously reconsider the priority schedule – Pregnant women, passengers suffering from terminal illness or life threatening ailments like cancer, physically and mentally challenged persons be considered as priority No. 1, senior citizens as priority No. 2 and VVIPs as priority No. 3 – Petition disposed. (Para 9)**

क. लोक हित वाद – स्वप्रेरणा से – रेल आरक्षण – निचली बर्थ – पुनः प्राथमिकीकरण – अभिनिर्धारित – रेलगाड़ियों में निचली बर्थ के आबंटन हेतु भारतीय रेल को प्राथमिकता अनुसूची का गंभीरता से पुनर्विचार करने के लिए निदेशित किया गया – गर्भवती महिलाएं, प्राणहर व्याधि या कर्करोग जैसी जानलेवा बीमारी से ग्रसित यात्रियों तथा शारीरिक रूप से एवं मानसिक रूप से विकलांग व्यक्तियों का विचार नं. 1 प्राथमिकता पर किया जाये, वरिष्ठ नागरिकों को नं. 2 प्राथमिकता तथा वी वी आई पी को नं. 3 प्राथमिकता – याचिका निराकृत।

***B. Public Interest Litigation – Suo Motu – Railway Journey – Suggestions/Measures* – Light signal/sound be fixed on each bogie to alert passengers before departure of train; position of seats/berths be displayed on site/app while making reservations and size/number of doors be increased – Held – Suggestions are aspects relating to policy decisions of respondents entailing huge expenditure – Court cannot pass judicial order on such aspects. (Para 2 & 8)**

ख. लोक हित वाद – स्वप्रेरणा से – रेल यात्रा – सुझाव/उपाय – रेलगाड़ी के प्रस्थान से पूर्व यात्रियों को सतर्क किये जाने हेतु प्रत्येक बोगी पर लाईट सिग्नल/ध्वनि लगायी जाए, आरक्षण करते समय सीटों/बर्थों की स्थिति को साईट/ऍप पर प्रदर्शित

किया जाए तथा दरवाजों की संख्या/आकार बढ़ाया जाए – अभिनिर्धारित – सुझाव, प्रत्यर्थीगण के नीति निर्णयों से संबंधित पहलू हैं जिससे भारी खर्च होगा – उक्त पहलू पर न्यायालय न्यायिक आदेश पारित नहीं कर सकता।

Samdarshi Tiwari, amicus curiae for the court.
N.S. Ruprah, for the respondent.

O R D E R

The Order of the Court was passed by :
ATUL SREEDHARAN, J. :- This Public Interest Litigation (PIL) has been registered *suo-motu* by this Court to consider certain measures regarding railway journeys in the interest of the public at large. The PIL owes its genesis to a train journey undertaken by a Judge of this Court while was travelling from Gwalior to Jabalpur on an official visit. When the train reached the Katni-Murwara station, the Judge got off the train for a cup of tea and suddenly, the train started pulling out from the platform without blowing its horn. The Judge was put to great inconvenience and the accompanying hazard of boarding the running train. The incident made the brother Judge put forth three suggestions to the Indian Railways which if implemented would go a long way to ensure passenger comfort during the journey.

2. The Indian Railways is the largest State-owned railways in the world. It is the single largest employer and has more than 1.4 million (fourteen lakh) employees working for it (larger than the Indian Army which has 1.2 million personnel). It plies 7421 freight trains daily, moving three million tons of freight. It also runs 12617 passenger trains transporting about 23 million people every day[1] over a 66000 Kms rail network.

The three-suggestions put forth by the Judge of this Court are as follows.

(1) "It would be in the interest of the public at large that some light signal/sound be fixed on each bogie enabling the passengers outside the train to be alert prior to departure of train with a view to avoid mishappening/accident.

(2) If the website / app is updated by displaying the position of the seats/berths to be allotted at the time of making reservation, that would be more convenient and suitable for the public in general.

(3) The size/number of doors of the bogies should be increased or in the alternative, duration of stoppage of the trains should be increased from two minute to at least five

[1]**Source:** http://www.business-standard.com/article/beyond-business/18-interesting-facts-about-india-railways-business-standard-news-115021600404_1.html

minute, to make the people smooth and easy while boarding of getting off the train."

3. The reply filed by the Respondent Indian Railways is most apologetic and regretful for the inconvenience caused to the Judge. As regards the first suggestion the Respondent has replied that the train does not move without at least two whistles and without a display of the green / amber signal on the platform in front of each train. It is further stated that perhaps the Judge may not have heard the whistle/horn of the engine on account of the loud ambient sound on the platform. The Respondent says that further instructions have been issued to the staff concerned that greater caution and care should be taken to ensure that the horn of the engine is loud and audible and that the same is accompanied by repeated announcements on the platform through the public address system and also the video displays regarding the departure of the train.

4. As regards the suggestion that light signals or hooters being fixed on the coaches is concerned, the Respondent in the reply has stated that modification of the coach requires a policy decision and design approval affecting thousands of trains all over the country and that it would not be possible to switch over to a new system of signalling overnight or even over months. Respondent further says that the system has been developed by a highly specialised body of experts. However, the Respondents undertake to ensure greater display of the green/yellow signals and efficient, loud and repeated blowing of the horn before the train departs from a station.

5. As regards the second suggestion put forth by the Judge with regard to information relating to vacant position of seats/berths, similar to what is shown on the websites and mobile applications of the airline services operating in the country, the Respondent state that though berths which are vacant for allotment are not displayed on the official website of the railways, a comparison with the airlines would not be an accurate assessment of the problem. The Respondent has stated that there can be no effective comparison between the airlines and the Indian Railways as the number of passenger trains running on an average day in India are over 12,000. It is further submitted by the Respondent that lakhs of passengers travel each day and so it is not physically possible to demonstrate which seats are vacant with the present IT infrastructure. The IT experts associated with the railways have stated that providing information relating to vacant berths and their position in the coach is presently not possible. Under the circumstances, the Respondent states that updating the website and the mobile application for displaying the position of seats/berths to be allotted at the time of drawing reservation is again a policy decision and involves major changes and hence has huge financial implications and therefore unviable.

6. The Respondent while answering the issue of granting lower berths to senior citizens has stated that in the priority list of the railways, the VVIPs like ministers, Supreme Court/High Court judges etc., fall very high and they have to be first allotted the lower berths. After the VVIPs are accommodated, priorities are given to pregnant women and senior citizens. The Respondent has expressed their inability to manage to the extent that each and every person should be given the lower berth. However, they state that the best efforts are being made to ensure that senior citizens do get the lower berth. The Respondent also states that design of the railway coaches are being made in such a manner that in future it shall be convenient for every person to climb up to the upper berth also however, some inconvenience while travelling is inevitable and therefore regretted.

7. As regards the third suggestion relating to widening the doors or increasing the stoppage time of the trains at the stations, the Respondent states that it will not be possible to widen the size of the doors because it will decrease the passenger carrying capacity of the coach and will also compromise the safety of the passengers. It further says that any modification in the passenger coaches contains lot of public expenditure, trials and experiments. As regards the stoppage of a train at a particular station, the Respondent submits that the stop of the train at each station is widely published through railway timetables, announcements, noticeboard and display board etc. Increasing the stoppage of a train, according to the Respondent, would further delay the train in reaching its destination and that the fixing of the halting time at the stations is based upon an assessment by the Respondent with regard to the number of passengers alighting and boarding a particular train at the station. In other words, an indiscriminate extension of time would be counter-productive to the running of trains as it would cause delays and disrupt the time schedule of the trains in reaching their destinations.

8. Having heard the submissions of the learned Amicus Curiae and the learned counsel for the Respondent, we are satisfied with the reply given by the Respondent. The suggestions that were put forth to the Respondent have been considered by the Respondent and they have expressed their inability for the reasons stated hereinabove. This Court cannot force the Respondent to incur expenses which the Respondent does not consider as economically viable and also on account of the large number of trains on which the said measures would have to be implemented which makes the proposals difficult, almost impossible to implement. The suggestions put forth are aspects relating to policy decisions of the Respondent entailing huge expenditure. This court cannot pass a judicial order in matters which would interfere with aspects of policy relating to the Respondent Indian Railways for which this court lacks the technical expertise to appreciate the difficulties that would be faced by the railways in giving effect to the suggestions.

9. However, as regards the prioritisation of berth allotment is concerned, the Respondent Indian Railways is requested to consider re-prioritising the berth allotment by giving the highest priority to pregnant women, then to senior citizens and thereafter to the VVIPs. As far as VVIP's/Officials being given a priority in reservation of seat/berth is concerned, the rationale of officials being given a priority is understandable as they are required to travel at short notice for their official duties. However, as regards the priority of allocation of the lower berth is concerned, the same as it exists on date is unpragmatic. Pregnant women are most vulnerable on account of their medical condition and it would cause them great inconvenience in occupying the middle or upper berth. Thus, the dictates of reason and the fulfilment of a welfare state demands that they be given the highest priority along with passengers suffering from terminal illness or life threatening ailments like cancer and those who are physically or mentally challenged, be considered as priority No.1 for allotment of the lower berth. The senior citizens who on account of their advanced age and attendant medical issues should be considered at priority No.2 and lastly, the VVIP's who are usually serving state functionaries are invariably those blessed with better health and so be considered at priority No.3. With the above direction to seriously re-consider the prioritisation of allotment of the lower berth in trains, the petition is finally disposed of.

Order accordingly

I.L.R. [2020] M.P. 1872
WRIT PETITION
Before Mr. Justice Sujoy Paul

W.P. No. 8931/2020 (Jabalpur) decided on 6 August, 2020

AJIT SINGH (DR.) …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

***A. Service Law – Transfer – Contractual Employees* – Held – Impugned order itself says that a contractual employee cannot be transferred to a place other than the place where he was appointed – His extension of contractual period as a consequence thereof has to be at the same place where he was working – Policy decision regarding extension of contractual employment of existing employees already taken – Impugned order set aside – Petition allowed. (Paras 9, 10 & 13)**

क. सेवा विधि – स्थानांतरण – संविदात्मक कर्मचारीगण – अभिनिर्धारित – आक्षेपित आदेश स्वयं कहता है कि एक संविदात्मक कर्मचारी को, जिस स्थान पर वह

नियुक्त था, उसके अलावा एक अन्य स्थान पर स्थानांतरित नहीं किया जा सकता – इसके परिणामस्वरूप उसकी संविदात्मक अवधि का बढ़ाया जाना उसी स्थान पर होना चाहिए जहां वह कार्यरत था – वर्तमान कर्मचारियों के संविदात्मक नियोजन को बढ़ाये जाने के संबंध में नीति निर्णय पहले ही लिया जा चुका है – आक्षेपित आदेश अपास्त – याचिका मंजूर।

B. ***Service Law – Transfer – Casual Employees*** **– Held – Full Bench of this Court concluded that in absence of an enabling provision/service condition, casual employee cannot be transferred – Transfer is not a condition of service for a casual employee. (Para 11)**

ख. *सेवा विधि – स्थानांतरण – आकस्मिक कर्मचारीगण* – अभिनिर्धारित – इस न्यायालय की पूर्ण न्यायपीठ ने निष्कर्षित किया कि एक सामर्थ्यकारी उपबंध/सेवा शर्त की अनुपस्थिति में, आकस्मिक कर्मचारी को स्थानांतरित नहीं किया जा सकता है – एक आकस्मिक कर्मचारी हेतु, स्थानांतरण, सेवा की एक शर्त नहीं है।

C. ***Interpretation of Statutes*** **– Held – If something cannot be permitted to be done directly, it cannot be permitted by indirect method. (Para 10)**

ग. *कानूनों का निर्वचन* – अभिनिर्धारित – यदि प्रत्यक्ष रूप से कुछ करने की अनुमति नहीं दी जा सकती, उसे अप्रत्यक्ष ढंग से करने की अनुमति नहीं दी जा सकती।

Case referred :

(2010) MPLJ 662 (FB).

Ajay Mishra with *Satyendra Jyotishi*, for the petitioner.
A.P. Singh, Dy. A.G. for the respondent/State.

(Supplied: Paragraph numbers)

O R D E R

(Heard through Video Conferencing)

SUJOY PAUL, J.:- With the consent of the parties, the matter is heard finally.

This petition filed under Article 226 of the Constitution assails the order dated 22.6.2020 whereby the petitioner is directed to work at District Umariya against the vacant post of Programme Officer. It was directed that new contract of petitioner be executed at District-Umariya.

2. Criticizing this order, learned counsel for the petitioner submits that impugned order dated 22.6.2020 itself makes it clear that as per the condition of contract, the work of contractual employees is to be extracted/taken at the same place where he was appointed.

3. By placing reliance on the document dated 21.5.2020 Annexure RJ-1, it is argued that the apex body i.e. the Directorate of Panchayat and Rural Development Department in video conferencing decided to extend the contract for a period for one year. As per this policy decision taken at the apex level, the subordinate authorities including the Jila Panchayat, Katni is now required to undertake the consequential ministerial exercise and enter into the consequential contract relating to the extension of service. Accordingly, by order dated 22.5.2020 Annexure RJ-2, the applicant's ACRs were produced before the learned CEO with the request to issue necessary order for extension of the contract.

4. After having taken a policy decision on apex level, it is no more open to the respondents to direct the petitioner to work on a different place other than the place where he was working pursuant to his appointment.

5. Prayer is opposed by the learned Dy. Advocate General on the strength of the policy dated 1.12.2015 wherein in Clause 11 it was mentioned that after issuance of contractual order of appointment, the employee needs to join at the place of posting otherwise his order will be cancelled automatically. If the applicant is interested to continue, he has to enter into new contract at District, Umariya.

6. Learned Dy. Advocate General also placed reliance on the order passed by this Court in W.P.No.8150/2011 (*Rajendra Prasad Bakoriya Vs. Secretary, the State of M.P.*) Annexure R-6 to bolster his submission that either for enforcement of contract or for challenging the termination of contractual appointment, the remedy is elsewhere and not before this Court.

7. No other point is pressed by counsel for the parties.

8. I have heard counsel for the parties at length and perused the record.

The relevant portion of the impugned order dated 22.6.2020 reads as under:

"//आदेश//

भोपाल, दिनांक 02

क/8/0/एनआरईजीएस–म.प्र./स्था./एनआर–2/2020, महात्मा गांधी नरेगा अंतर्गत संविदा अधिकारियों/कर्मचारियों के साथ अनुबंध निष्पादित कर उनकी सेवा लेने के लिये जिला कलेक्टर (जिला कार्यक्रम समन्वयक) को अधिकार प्रत्यायोजित किये गये है। **संविदा अधिकारियों/कर्मचारियों की नियुक्ति "कार्य विशेष एवं स्थान विशेष" के लिये होने के कारण स्थानांतरण नहीं किया जा सकता है।**

इस परिप्रेक्ष्य में श्री अजीत सिंह, संविदा अतिरिक्त कार्यक्रम अधिकारी, जनपद पंचायत बहोरीबंद जिला कटनी को आगामी आदेश तक जिला उमरिया में रिक्त अतिरिक्त कार्यक्रम अधिकारी के पद पर कार्य करने हेतु आदेशित किया जाता है।

अतः श्री अजीत सिंह, संविदा अतिरिक्त कार्यक्रम अधिकारी का **नवीन अनुबंध जिला उमरिया में निष्पादित किया जावें।**

आयुक्त द्वारा अनुमोदित

(प्रभात उइके)

संयुक्त आयुक्त (प्रशा.)

मध्यप्रदेश राज्य रोजगार गारंटी परिषद''

(Emphasis Supplied)

9. A careful reading of this order leaves no room for any doubt that respondents are conscious of the fact that contractual employee cannot be transferred by posting him to a different place than the place on which he was appointed. Indisputably, the policy decision is already taken to continue the contractual employment of the existing employee.Pertinently, in the order dated 21.5.2020, it is mentioned as under:

''संदर्भित पत्र 03 के माध्यम से अपर मुख्य सचिव, म0प्र0 शासन पंचायत एवं ग्रामीण विकास विभाग की वीडियो कॉन्फ्रेसिंग दिनांक 16.04.2020 को मनरेगा योजना में संविदा में **पदस्थ लोक सेवकों हेतु संविदा वृद्धि हेतु** निम्नानुसार निर्देश दिये गये है :–

1. जिला/जनपद पंचायत में संविदा में पदस्थ समस्त अमले की संविदा अवधि पूर्वानुसार निर्धारित ACR (वार्षिक कार्य प्रणाली) पत्रक में प्रविष्टि करते हुये **अनुबंध कर आगामी 01 वर्ष हेतु संविदा अवधि बढाई जावे।**

2. ग्राम पंचायत में पदस्थ ग्राम रोजगार सहायक की सेवा अवधि पूर्वानुसार निर्धारित प्रकिया के तहत कार्यवाही कर आगामी 01 वर्ष हेतु **संविदा अवधि बढ़ाई जावे।**''

(Emphasis Supplied)

10. The above highlighted portion shows that the contractual period is to be extended for the employees who are working at the relevant place. A conjoint reading of order dated 22.6.2020 Annexure P-1 and 21.5.2020 Annexure RJ-1 shows that a contractual employees needs to be kept at the same place where he was appointed. His extension of contractual period, as a consequence thereof has to be at the same place where he was working . For this reason, by Annexure RJ-2, the record of the petitioner was produced before the concerned CEO, Jila Panchayat, Katni so that appropriate decision may be taken for extension of contract period. The respondents by issuing the impugned order dated 22.6.2020 have tried to do something indirectly which was impermissible, if done directly. A contractual employee cannot be transferred to a place other than the place where he was appointed. Thus, a different *modus operandi* adopted by directing the petitioner to sign a contract at *Umariya* so that the petitioner is left with no option

but to go to *Umariya.* This is trite that if something cannot be permitted to be done directly, it cannot be so permitted by adopting indirect method.

11. A full bench of this court in the case of *Ashok Tiwari Vs. M.P. Text Book Corporation and another*, (2010) MPLJ 662 (FB) opined that in absence of an enabling provision/service condition, a casual employee cannot be transferred. In other words, the transfer is not a condition of service for a casual employee. The said principle will squarely apply in a case of contractual employee unless it is shown that there exists the provision enabling the employer to transfer such employee, the transfer order cannot sustain judicial scrutiny. The relevant portion reads as under:

> *"23. .....That being so, one of the preconditions necessary for transfer of an employee is that he should be holder of a post, his appointment should be substantive in nature to a regular post in the establishment after following the due process contemplated for appointment to the post and even though transfer is an incident of service, but transfer is permissible only if the conditions of service and the contract of service contemplates a provision for transfer from one place to another."*

12. Clause 11 of the policy has no significance in this matter because it is applicable only when the contractual order of appointment is already passed. This exercise relating to the petitioner is in the pipe line in the teeth of Annexure RJ-2. In other words, the CEO, Jila Panchayat, Katni needs to take a decision and pass an appropriate order for extension of contract. The judgment of *Rajendra Prasad Bakoriya* (supra) cannot be pressed into service because the petitioner has neither challenged the termination nor seeking any specific performance of contract. Indeed, he is seeking enforcement of certain portion of administrative order dated 22.6.2020 Annexure P-1 wherein respondents themselves realised and recorded that a contractual employee cannot be transferred. In addition, he is seeking enforcement of policy decision mentioned in Annexure RJ-1 whereby the contractual period is to be extended for a period of one year. Thus, both the arguments of learned Dy. A.G. will not cut any ice.

13. In view of the foregoing analysis, the impugned order dated 22.6.2020 cannot sustain judicial scrutiny. The said order is set aside. It will be open to the CEO, Jila Panchayat, Katni to take a decision as per law regarding the extension of contract period as per Annexure RJ-1 and RJ-2.

The petition is allowed.

Petition allowed

I.L.R. [2020] M.P. 1877
WRIT PETITION
Before Mr. Justice Sujoy Paul
W.P. No. 21426/2012 (Jabalpur) decided on 7 August, 2020

DURYODHAN BHAVTEKAR …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

***A. Service Law – Departmental Enquiry – Second Enquiry – Dismissal from Service* – Held – Once the previous order of punishment was set aside by this Court in previous round of litigation, it was not open to Disciplinary Authority to give it validity and upheld it – Further, in second enquiry, no evidence could be produced against petitioner – It is a case of no legal evidence against petitioner – Punishment order and Appellate Order cannot sustain judicial scrutiny – Petitioner entitled for all consequential benefits as if he was never subjected to any departmental enquiry – Petition allowed. (Paras 14 to 18)**

क. सेवा विधि – विभागीय जांच – द्वितीय जांच – सेवा से पदच्युति – अभिनिर्धारित – जब एक बार इस न्यायालय द्वारा, मुकदमेबाजी के पूर्वतर दौर में, शास्ति का पूर्वतर आदेश अपास्त किया गया था, अनुशासनिक प्राधिकारी उसे विधिमान्यता देने और कायम रखने के लिए मुक्त नहीं था – इसके अतिरिक्त, द्वितीय जांच में, याची के विरूद्ध कोई साक्ष्य प्रस्तुत नहीं किया जा सका – याची के विरूद्ध कोई विधिक साक्ष्य न होने का यह एक प्रकरण है – शास्ति आदेश एवं अपीली आदेश, न्यायिक संविक्षा में कायम नहीं रह सकता – याची सभी परिणामिक लाभों हेतु हकदार, जैसा कि वह कभी किसी विभागीय जांच के अधीन नहीं था – याचिका मंजूर।

***B. Civil Services (Pension) Rules, M.P., 1976, Rule 9(2)(a)* – Held – It is prerogative for employer to continue with same enquiry, if the charge sheet was issued when government servant was in employment – However, punishment of dismissal cannot be imposed once the employee attains the age of superannuation. (Para 12 & 14)**

ख. सिविल सेवा (पेंशन) नियम, म.प्र., 1976, नियम 9(2)(a) – अभिनिर्धारित – नियोक्ता के लिए उसी जांच को जारी रखना, यह परमाधिकार है, यदि आरोप पत्र तब जारी किया गया था जब शासकीय सेवक नियोजन में था – किंतु, पदच्युति की शास्ति एक बार कर्मचारी के अधिवार्षिकी आयु प्राप्त कर लेने पर अधिरोपित नहीं की जा सकती।

Cases referred :

2007 (11) SCC 517, (2007) 2 SCC 433.

Sanjay K. Agrawal, for the petitioner.
A.P. Singh, Dy. A.G. for the respondents-State.

O R D E R

SUJOY PAUL, J.:-This petition under Article 226 of the constitution of India assails the order dated 16.09.2011 whereby Collector/Disciplinary Authority opined that previous order of punishment of dismissal from service dated 07.08.1997 was in accordance with law and therefore, restored. Petitioner is also aggrieved by appellate order dated 31.07.2012 (Annexure P/11) whereby appeal of the petitioner was dismissed by Commissioner, Jabalpur Division.

2. This is second visit of the petitioner to this Court based on the departmental enquiry which was initiated by issuing the charge-sheet dated 23.11.1993. After completing the said enquiry, punishment order dated 07.08.1997 was passed whereby the petitioner was dismissed from service. Aggrieved, petitioner filed Original Application No. 2738 of 1997 before M.P. State Administrative Tribunal, which was on its abolition, transferred to this Court and was renumbered as W.P.No.11747/2003. This matter was decided on 24.02.2009. The petition was allowed against which the State filed writ appeal no.49/2010, which was dismissed by the Division Bench of this Court.

3. Shri Sanjay K. Agrawal, Learned counsel for the petitioner by taking this Court to the previous order dated 24.02.2009 urged that this Court set-aside the punishment order dated 07.08.1997 (Annexure P/2 therein) and directed reinstatement of petitioner by reserving liberty to proceed with the enquiry from the stage of submission of enquiry report. The action of enquiry officer in relying on the statement of Shri A.K. Namdeo (which was collected behind the back of the petitioner) was disapproved and it was categorically directed to conduct enquiry from a particular stage.

4. The department by order dated 01.12.2010 appointed an Enquiry Officer and Presenting Officer. No witness entered the witness box in this round of enquiry. Shri Agrawal urged that enquiry report dated 26.05.2011 (Annexure P/7) shows that the Presenting Officer prepared a written note regarding charge no.2 and opined that delinquent employee/petitioner has illegally drawn Rs.45,000/- from Group Insurance Scheme of deceased employee Nanuram (Peon), but did not pay it to his widow Jaivanta Bai. It is urged that neither Jaivanta Bai nor any person who was in the helm of affairs at the relevant time entered the witness box. The Presenting Officer had no knowledge about the incident. On the basis of his note, the Enquiry Officer illegally held the petitioner as guilty.

5. Learned counsel for the petitioner further urged that petitioner attained the age of superannuation on 30.06.1999. Impugned order dated 16.09.2011 was passed by approving the previous punishment order dated 07.08.1997. This could not have been done because the said order stood quashed by the order of this Court in W.P.No.11747/2003. After retirement of petitioner, no punishment order could

have been passed by the Disciplinary Authority under the CCA Rules. The petitioner is suffering since 1993 for no fault on his part. Thus, while setting aside the impugned order of punishment, respondents be directed to provide all consequential benefits to the petitioner. Reliance is placed on 2007 (11) SCC 517, *Kanailala Bera Vs. Union of India and others.*

6. Shri A.P. Singh, learned Deputy Advocate General opposed the said contention. He submits that in para no.9 of W.P.No.11747/2003 makes it clear that the liberty was given to Disciplinary Authority to take into account the further evidence by proceeding in the matter as per M.P.C.S. (CCA Rules) of 1966. In the light of this and liberty given by this Court, no fault can be found in the order dated 01.12.2010 whereby an Enquiry Officer and Presenting Officer was appointed. Reliance is placed on Rule 9 (2) (a) of M.P.C.S. (Pension) Rules, 1976 which provides that if an enquiry is instituted when government service employee was in service, same enquiry will continue even after his retirement.

7. Learned Deputy Advocate General further urged that charge no.2 alleged against the petitioner is very serious and the Enquiry Officer has rightly held the petitioner as guilty. The Disciplinary Authority has not committed any error of law in imposing the punishment. The Appellate Authority has rightly rejected his appeal. No other point is pressed by the learned counsel for the parties.

8. I have heard the learned counsel for the parties at length and perused the record.

9. Before dealing with rival contentions, it is apposite to reproduce the relevant paragraph of the order passed in W.P.No.11747/2003 decided on 24.02.2009 which reads as under:-

> *"7. Considering the aforesaid grounds and reasons it is a fit case where the order of dismissal from service based on such a enquiry be quashed and the matter remanded back to the disciplinary authority to proceed from the stage of submission of enquiry report.*
>
> *8. Accordingly, this petition is allowed. Order impugned Annexure P/2 dated 7.8.99 is quashed. It is directed that petitioner shall be reinstated and respondents are granted liberty to proceed with the enquiry from the stage of submission of enquiry report. That apart the finding of the enquiry officer so far as it is based on the material collected by him from District Nazir, Shri A.K. Namdeo, shall not be taken into consideration at all for proceeding against the petitioner and the enquiry from the stage of submission of enquiry report shall be based on the material collected by the enquiry officer in the enquiry conducted on 4.3.94, 2.4.94, 6.5.94 and 29.9.94 respectively and not on any other material after giving an opportunity to the petitioner to give his say on the report (except the evidence collected through Shri A.K. Namdeo). Respondents*

shall proceed to pass final orders in the departmental enquiry. The aforesaid exercise shall be completed within a period of three months from the date of receipt of certified copy of this order. The question of regularizing the intervening period and payment of salary for the said period shall be decided while passing the final order in the matter after concluding the proceedings as directed herein above. Petitioner shall be deemed to have been reinstated in service, and in case he has attained the age of superannuation enquiry shall continue as if it is being held against the retired employee and penalty as is permissible to be imposed on a retired employee shall only be imposed against the petitioner.

9. However, while reconsidering the matter with effect from the state of submission of report by the enquiry officer in case the disciplinary authority feels that further evidence is required to be taken, the disciplinary authority is free to proceed in the matter in accordance to the statutory provisions contained in this regard in the Rules of 1966.

10. Petition stands allowed and disposed of with the aforesaid without any order so as to costs. "

10. A plain reading of this order makes it clear that this Court has given two options to the department; (i) to proceed against the petitioner by supplying him copy of enquiry report and take a decision thereupon without considering the statement of Shri A.K. Namdeo, which was collected behind the back of the petitioner; and (ii) if the Disciplinary Authority feels that further evidence is required to be taken, he is free to proceed as per CCA Rules, 1966.

11. Since the Disciplinary Authority appointed new Enquiry Officer and Presenting Officer by order dated 01.12.2010 (Annexure P-5/A), it is clear like noonday that they have given up the first option to proceed on the basis of previous enquiry report. Thus, previous report, in my opinion, pales into insignificance.

12. In the teeth of Rule 9(2)(a) of Pension Rules, which as per learned Dy. A.G. was considered in WP. No.3719/06 *(Saroj Kumar Shrivastava vs. State of M.P.),* there is no doubt that it is the prerogative of the employer to continue with the same enquiry, if the charge sheet was issued when government servant was in employment. In this view of the matter, no fault can be found in the order dated 01.12.2010 (Annexure P-5/A).

13. The new Enquiry Officer conducted the enquiry in which neither the complainant Jaiwanta Bai entered the witness box nor any other witness entered the witness box. The Presenting Officer prepared a written note and submitted before the Enquiry Officer. The 'conclusion' drawn by Enquiry Officer is solely founded upon the note so prepared by the Presenting Officer. The Presenting Officer was not a listed witness. He had no personal knowledge about the

incident. He did not enter the witness box and offered himself for cross examination. He did not prove any document. In this backdrop, this enquiry report solely founded upon the note of Presenting Officer cannot be countenanced.

14. Interestingly, the Collector Balaghat passed the order dated 16.09.2011. I find substance in the argument of Shri Agrawal that once the previous order of punishment dated 07.08.1997 was set aside by this Court in the previous round of litigation, it was no more open to the Disciplinary Authority to give it validity and upheld it. He also could not have passed a fresh punishment order because as per Pension Rules, this could have been done only by the Governor/Competent Authority under the Pension Rules. In other words, the Disciplinary Authority has no power to dismiss the employee after his retirement. The punishment of dismissal can be imposed when an employee is on the rolls of the department.

15. In view of foregoing analysis, it is clear like a cloudless sky that in the second enquiry pursuant to order dated 01.12.2010 (Annexure P-5/A), no further evidence could be produced before the Disciplinary Authority. This Court in Para 9 of the judgment of WP. No.11747/03 granted liberty to deal with further evidence.

16. As noticed, previous enquiry has lost its complete shine and in the further enquiry, no evidence could be produced. The question is whether in a case of this nature, the matter should be remanded back to the department to conduct a further enquiry. In the fact situation of this case, it will be travesty of justice, if the petitioner is again relegated to face the departmental enquiry. More so, when in further enquiry no further evidence could be produced. Thus, it is a case of no evidence against the petitioner and, therefore, it cannot be said that enquiry stood vitiated only because of violation of principles of natural justice or it suffered with technical error only. On merits also the department could not produce any legal evidence to substantiate the charges. For these cumulative reasons, I am not inclined to remit the matter after about 27 years from the date of issuance of charge sheet.

17. The judgment of Apex Court in *Kanailal Bera* (supra) is relied upon for the purpose of grant of consequential benefits. In the said judgment, the Apex Court made it clear that it should not be treated as a precedent. Hence, the said judgment is of no assistance to the petitioner.

As analyzed above, the punishment order dated 16.09.2011 and appellate order dated 31.07.2012 cannot sustain judicial scrutiny. At the cost of repetition, it is held that it is a case of no legal evidence against the petitioner. In this backdrop, the petitioner is entitled to get all consequential benefits. Reference may be made to the judgment of Supreme Court reported in (2007) 2 SCC 433 *(J.K. Synthetics Ltd. vs. K.P. Agrawal & Anr.)* wherein the Apex Court opined that grant of

backwages/consequential benefits does not flow as a natural or necessary consequence of interference in the punishment order. However, there are two exceptions. First is where the Court sets aside the termination as a consequence of employee being exonerated or being found not guilty of the misconduct. Second is where the Court reaches a conclusion that the enquiry was held in respect of a frivolous issue or petty misconduct, as a camouflage to get rid of the employee or victimize him.

Present case is covered by the first exception aforesaid. This Court for the reasons stated hereinabove held that there was no legal evidence against the appellant held in guilty. Hence, all consequential benefits are directed.

18. Resultantly, the respondents shall provide all consequential benefits to the petitioner as if he was never subjected to any departmental enquiry. The said benefits shall be provided to the petitioner within 90 days from the date of production of copy of this order.

19. The petition is allowed.

Petition allowed

I.L.R. [2020] M.P. 1882
WRIT PETITION
Before Mr. Justice Sujoy Paul
W.P. No. 7565/2020 (Jabalpur) decided on 14 August, 2020

CHANDRAGUPT SAXENA …Petitioner

Vs.

BANK OF BARODA & ors. …Respondents

***A. Service Law – Transfer – Frequent Transfers* – Held – Petitioner, being a Manager, is senior officer of Bank and Apex Court opined that for superior or responsible posts, continued posting at one station is not conducive of good administration – Further, petitioner is neither a Class III nor Class IV employee, thus he do not deserves a protection from frequent transfer which may be given to them in a given fact situation. (Para 10)**

क. सेवा विधि – स्थानांतरण – बारंबार स्थानांतरण – अभिनिर्धारित – याची एक प्रबंधक होने के नाते, बैंक का वरिष्ठ अधिकारी है और सर्वोच्च न्यायालय की राय है कि वरिष्ठ या जिम्मेदार पदों हेतु, लगातार एक ही स्थान पर पदस्थापना, अच्छे प्रशासन के लिए सहायक नहीं है – इसके अतिरिक्त, याची न तो एक वर्ग–III न ही वर्ग–IV कर्मचारी है अतः, वह बारंबार स्थानांतरण से संरक्षण का हकदार नहीं है, जो कि दिये गये तथ्य की स्थिति में उन्हें दिया जा सकता है।

***B. Service Law – Transfer – Frequent Transfers* – Held – Employer is the best judge to decide transfer of employee – There was a scuffle between petitioner and other employee – Transfer of petitioner to maintain discipline and normal functioning of department – No fault with transfer orders – Petition dismissed. (Para 11(v) & 12)**

ख. सेवा विधि – स्थानांतरण – बारंबार स्थानांतरण – अभिनिर्धारित – कर्मचारी के स्थानांतरण का विनिश्चय करने हेतु, नियोक्ता सर्वोत्तम निर्णायक है – याची और अन्य कर्मचारी के बीच हाथापाई हुई थी – अनुशासन बनाये रखने के लिए और विभाग का कामकाज सामान्य रखने के लिए याची का स्थानांतरण – स्थानांतरण आदेशों में कोई दोष नहीं – याचिका खारिज।

***C. Service Law – Transfer – Personal Inconvenience – Scope of Interference* – Held – Transfer order can be interfered with if it violates any statutory provision (not policy guidelines), issued by incompetent authority, proved to be malafide or changes the service condition of employee to his detriment – Relevant circular regarding transfer of physically handicapped employees is directory in nature – Personal inconvenience etc. cannot be a ground to interfere with transfer order. (Paras 11(i) to (iii))**

ग. सेवा विधि – स्थानांतरण – व्यक्तिगत असुविधा – हस्तक्षेप की व्याप्ति – अभिनिर्धारित – स्थानांतरण आदेश में हस्तक्षेप किया जा सकता है यदि वह किसी कानूनी उपबंध (नीति दिशा–निदेश नहीं) का उल्लंघन करता हो, अक्षम प्राधिकारी द्वारा जारी किया गया हो, असद्भावपूर्वक होना साबित हुआ हो अथवा कर्मचारी की सेवा शर्त को उसके अहितकर बदलता हो – शारीरिक रूप से दिव्यांग कर्मचारियों के स्थानांतरण संबंधी सुसंगत परिपत्र निदेशात्मक स्वरूप के है – व्यक्तिगत असुविधा इत्यादि, स्थानांतरण आदेश में हस्तक्षेप के लिए आधार नहीं हो सकता।

Cases referred :

W.P. No. 148/2017 decided on 27.04.2018, 2004 (4) SCC 245, 1986 (4) SCC 131, 1995 (3) SCC 270.

Maninder S. Bhatti, for the petitioner.
Ashish Shroti, for the respondent Nos. 1 & 2.

O R D E R

SUJOY PAUL, J.:- This petition filed under Article 226 of the Constitution assails the transfer order dated 14.02.2020 (Annexure-P/14) whereby the petitioner is transferred from Satna to Chhindwara.

2. The case of the petitioner is that since 2016, he was subjected to frequent transfers. To buttress this contention, reliance is placed on Annexure-P/23 dated

17.02.2017 with the rejoinder and Annexure-P/4 with the petition. The impugned transfer is the 4th transfer order within a short span of time. It is urged that in July, 2019, the petitioner met with a serious accident and was badly injured. He suffered 42% disability which is evident from the certificate Annexure-P/7 dated 24.02.2020. By placing heavy reliance on the Ministry of Finance Circular dated 15.02.1988 (Annexure-P/21), it is urged that the transfer of petitioner, a disabled officer, was wholly impermissible. The ground of personal inconvenience is also canvassed by Shri M.S. Bhatti, learned counsel for the petitioner. By contending that the petitioner's wife is presently pregnant, his daughter is studying in Class IV and aged mother is unwell, the frequent transfer will uproot his family.

3. Lastly, it is submitted that on 31.01.2020, there was a strike called by the employees association in the Bank. The petitioner did not participate in the said strike. One officer Shri Sinha participated in the strike and during the strike, he came inside the Bank and manhandled the petitioner. The petitioner sustained injuries which is evident from the document (Page 28). He lodged a police report. The Bank did not take any action against Shri Sinha, indeed, transferred the petitioner who had performed his duties on the date of strike. For these cumulative reasons, transfer order needs be interfered with. In support of the said argument, reliance is placed on the judgment of Indore Bench passed in Writ Petition No.148/2017 *(Sudhanshu Tripathi Vs. Bank of India)* decided on 27.04.2018.

4. *Per contra,* Shri Ashish Shroti, learned counsel for the Bank supported the impugned order. He urged that the petitioner is a senior officer and history of transfer does not show that the petitioner is subjected to frequent transfer. The petitioner cannot claim immunity on the basis of personal inconvenience. The Circular dated 15.02.1988 (Annexure-P/21) has no application in the present case. Shri Shroti urged that the Bank recorded the statements of the employees about the incident dated 31.01.2020. The employees stated that the petitioner assaulted Shri Sinha by using his walking stick. There was a quarrel between the petitioner and Shri Sinha. The petitioner preferred a complaint before the Investigating Officer (Page 15 with the return) but did not mention that he suffered any injury because of alleged assault by Shri Sinha. In order to maintain discipline in the Branch, the petitioner was transferred and after some time, Shri Sinha was also transferred. This is prerogative of the employer to maintain discipline and transfer the employees from one Branch to another Branch. In the case of this nature, the Circular dated 15.02.1988 (Annexure-P/21) is of no assistance to the petitioner. Reliance is also placed on 2004 (4) SCC 245 *(Union of India Vs. Janardhan Debanalth)*. Lastly, it is submitted that the handicap certificate was obtained by the petitioner after issuance of the transfer order.

5. In rejoinder submission, Shri Bhatti, learned counsel for the petitioner urged that although Shri Sinha has been transferred from Satna but order in this regard is passed after five months from the date of transfer of the petitioner.

6. Faced with this, Shri Shroti, learned counsel for the Bank apprised the Court that Shri Sinha initially went on leave and thereafter in the interest of administration, he was also transferred.

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

8. I have heard learned counsel for the parties at length and perused the record.

9. In the light of aforesaid statements, following points need determination:

(1) Whether the impugned transfer order can be interfered with on the ground of frequent transfer ?

(2) Whether in the light of Circular dated 15.02.1988 and judgment of Indore Bench in Writ Petition No.148/2017, interference on transfer is warranted ?

(3) Whether on the ground of personal inconvenience of the petitioner, interference can be made ?

10. **Point No.1:**

The petitioner being a Manager is a Senior Officer of the Bank. The Apex Court in 1986 (4) SCC 131 *(B. Varadha Rao Vs. State of Karnataka and others)* opined that frequent, unsheduled and unreasonable transfers can uproot a family. However, the Apex Court observed that it cannot be forgotten that so far as superior or more responsible posts are concerned, continued posting at one station is not conducive to good administration. It was observed that the position of Class III and Class IV employees stand on different footing. The petitioner neither a Class III nor a Class IV employee. Thus, it cannot be said that he deserves a protection from frequent transfer which may be given to a Class III/IV employee in a given fact situation. Even otherwise, the petitioner, in my opinion, is not subjected to frequent transfer.

11. **Point Nos.2 & 3:**

(i) The relevant portion of the Circular dated 15.02.1988 reads as under:

"F.No.302/33/2/87-SCT(B)
Government of India
Ministry of Finance
Department of Economic Affairs
(Banking Division)
New Delhi, Dated 15.02.1988
AII CES of Public Sector Banks
And Financial Institutions
RBI/NABARD

SUB: **Posting/Transfer of Physically Handicapped employed in public sector banks/financial institutions.**

Sir, Representations have been received that in view of their physical disability bank employees who are physically handicapped may be exempted from routine periodical transfers from places of their original postings/appointment. Earlier the Government had issued instructions vide letter **No. 302/33/2/87-SCT(B) dated 31st August, 1987** that BSRBs should endeavour as far as possible to allot the selected physically handicapped candidates to banks having branches located in or near their home town or village.

The question of their posting/transfer has also been considered in the same context and it has been decided that **subject to the administrative exigencies,** the physically handicapped persons employed in public sector banks in all cadres should **normally** but exempted from the routine periodical transfers. It has been decided that such persons should not **normally** be transferred even on promotion if a vacancy exists in the same branch/office, town/city. When the transfer of a physically handicapped employee becomes inevitable on promotion to a place other than his original place of appointment due to non-availability of vacancy, it should be ensured that such employees are kept nearest to their original place of posting and in any case are not transferred to far off/remote places. This concession would not be available to such of the physically handicapped employees of the banks who are transferred on grounds of disciplinary action or are involved in fraudulent transactions, etc.

The receipt of this letter may be acknowledged.
Yours faithfully,
Sd/-
(Y.P. Sethi)
Deputy Secretary to the Govt. of India"

[Emphasis Supplied]

(ii) A careful reading of this circular makes it clear that it is directory in nature. It was decided that *"subject to the administrative exigency"* the

physically handicapped employees should normally be exempted from routine periodical transfer. On more than one occasion, the word "normally" is used in the circular which makes it directory in nature.

(iii) I am unable to read this circular in the manner suggested by Shri Bhatti, learned counsel for the petitioner. Apart from this, the transfer order can be interfered with if it violates any statutory provision (not policy guidelines), issued by an incompetent authority, proved to be mala fide, changes the service condition of an employee to his detriment. Personal inconvenience etc. cannot be a ground to interfere with the transfer order [See: *State of M.P. and another Vs. S.S. Kourav and others,* 1995 (3) SCC 270].

(iv) So far the order of Indore Bench in *Sudhanshu Tripathi* (supra) is concerned, a careful reading of this order shows that the Bank in the said case made a bald statement that transfer is the routine transfer done on account of administrative exigency. The Court expressed its displeasure in the manner certain personal allegations against the family members of the petitioner therein were made by the employer. Since, no justifiable reasons were shown by the Bank in the said case to deviate from various policies, interference was made.

(v) In the instant case, as noticed, the Bank recorded statements of various employees who were present on the date of incident/strike i.e. on 31.01.2020 and the employees reported that there was a scuffle between the petitioner and Shri Sinha. The petitioner assaulted Shri Sinha by using his walking stick. In this backdrop, the employer stated that in order to maintain discipline in the Satna Branch, the petitioner and Shri Sinha both were transferred.

(vi) The ancillary question is : whether for this reason, transfer is permissible ? In *Janardhan Debanath* (supra), the Apex Court opined as under:

> "..... For the purposes of effecting a transfer, the question of holding an enquiry to find out whether there was misbehaviour or conduct unbecoming of an employee is unnecessary and what is needed is the prima facie satisfaction of the authority concerned on the contemporary reports about the occurrence complained of and **if the requirement, as submitted by the respondents, of holding an elaborate enquiry is to be insisted upon the very purpose of transferring an employee in public interest or exigencies of administration to enforce decorum and ensure probity would get frustrated."**
>
> [Emphasis Supplied]

12. In view of this judgment, no fault can be found in the action of the respondents in transferring the petitioner to maintain discipline in the Branch. The employer is the best judge to take a decision regarding transfer of an employee.

13. In view of foregoing analysis, no case is made out for interfere under Article 226 of the Constitution. Petition fails and is hereby dismissed.

Petition dismissed

I.L.R. [2020] M.P. 1888
ELECTION PETITION

Before Mr. Justice B.K. Shrivastava

E.P. No. 7/2019 (Jabalpur) order passed on 13 July, 2020

RAM KISHAN PATEL …Petitioner

Vs.

DEVENDRA SINGH & anr. …Respondents

***A. Representation of the People Act (43 of 1951), Section 83(1)(a) & 86 and Civil Procedure Code (5 of 1908), Order 7 Rule 11 – "Concise Statement of Material Facts" & "Cause of Action"* – Returning Candidate/ Respondent filed application under Order 7 Rule 11 CPC – Held – Petitioner mentioned entire details of his knowledge and defects in affidavit of respondent – Petition having a concise statement of material facts and discloses a triable issue or cause of action – Grounds taken by respondent in application under Order 7 Rule 11 CPC not sufficient for dismissal of petition – Application dismissed. (Paras 35, 36 & 46)**

क. लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 83(1)(a) व 86 एवं सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 11 – ''तात्विक तथ्यों का संक्षिप्त कथन'' व ''वाद हेतुक'' – निर्वाचित प्रत्याशी/प्रत्यर्थी ने आदेश 7 नियम 11 सि.प्र.सं. के अंतर्गत आवेदन प्रस्तुत किया – अभिनिर्धारित – याची ने प्रत्यर्थी के शपथपत्र में उसके ज्ञान एवं त्रुटियों के संपूर्ण विवरण उल्लिखित किये – याचिका में तात्विक तथ्यों का संक्षिप्त कथन है और एक विचारणीय विवाद्यक या वाद कारण प्रकट होता है – प्रत्यर्थी द्वारा आदेश 7 नियम 11 सि.प्र.सं. के अंतर्गत आवेदन में लिये गये आधार, याचिका की खारिजी हेतु पर्याप्त नहीं – आवेदन खारिज।

***B. Representation of the People Act (43 of 1951), Sections 33A, 36 & 83(1)(a) and Conduct of Election Rules, 1961, Rules 4 & 4A – Affidavit with Nomination Papers* – Held – In case of absence of affidavit or false affidavit or affidavit with blank space is not an affidavit in the eyes of law – In this respect, contention of petitioner may be examined during trial of this case and sufficient opportunity has to be given to respondent to explain his position. (Para 46)**

ख. लोक प्रतिनिधित्व अधिनियम (1951 का 43), धाराएँ 33A, 36 व 83(1)(a) एवं निर्वाचन का संचालन नियम, 1961, नियम 4 व 4A – नामांकन पत्रों के साथ शपथपत्र – अभिनिर्धारित – शपथपत्र की अनुपस्थिति की दशा में या मिथ्या शपथपत्र अथवा रिक्त स्थान के साथ शपथपत्र, विधि की दृष्टि में एक शपथपत्र नहीं है – इस संबंध में, इस प्रकरण के विचारण के दौरान याची के तर्क का परीक्षण किया जा सकता है और प्रत्यर्थी को उसकी स्थिति स्पष्ट करने का पर्याप्त अवसर दिया जाना चाहिए।

***C. Representation of the People Act (43 of 1951), Section 83(2) – Copy of Petition & Documents submitted for giving to Respondents – Attestation of* – Held – Section 83(2) says only about manner of filing schedule or annexure, which provides that "any schedule or annexure to petition shall also be signed by petitioner and verified in same manner as the petition" – This requirement is not applicable to the copies of documents/annexure submitted for giving to respondents. (Paras 48 to 52)**

ग. लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 83(2) – प्रत्यर्थीगण को देने के लिए याचिका एवं दस्तावेजों की प्रति प्रस्तुत की गई – का अनुप्रमाणन – अभिनिर्धारित – धारा 83(2) केवल अनुसूची या अनुलग्नक प्रस्तुतीकरण की रीति के बारे में कहती है जो उपबंधित करती है कि ''याचिका की किसी अनुसूची या अनुलग्नक को भी याची द्वारा हस्ताक्षरित किया जाना चाहिए और उसी रीति से सत्यापित किया जाना चाहिए जैसे कि याचिका'' – यह अपेक्षा, दस्तावेजों/अनुलग्नक की उन प्रतियों पर लागू नहीं होती जिन्हें प्रत्यर्थी को दिये जाने के लिए प्रस्तुत किया गया है।

***D. Representation of the People Act (43 of 1951), Section 81(3) & 83(2) – Verification of Documents* – Held – Section 81(3) says only about the copy of petition, not about schedule or annexure – All documents filed with petition are certified copies issued by Returning Officers under his seal and signature – These are certified copies of public documents issued by public authority during discharging his official duties – Section 83(2) is not applicable. (Paras 48 to 52)**

घ. लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 81(3) व 83(2) – दस्तावेजों का सत्यापन – अभिनिर्धारित – धारा 81(3) केवल याचिका की प्रति के बारे में कहती है न कि अनुसूची या अनुलग्नक के बारे में – याचिका के साथ प्रस्तुत सभी दस्तावेज, निर्वाचन अधिकारियों द्वारा उसकी मुद्रा एवं हस्ताक्षर द्वारा जारी की गई प्रमाणित प्रतियां हैं – वे, लोक प्राधिकारी द्वारा उसके पदीय कर्तव्यों के निर्वहन के दौरान जारी किये गये सार्वजनिक दस्तावेजों की प्रमाणित प्रतियां हैं – धारा 83(2) प्रयोज्य नहीं।

***E. Representation of the People Act (43 of 1951), Section 83(1)(a) & 86 and Civil Procedure Code (5 of 1908), Order 7 Rule 11 – Rejection of Plaint* – Grounds where principles of Order 7 Rule 11 CPC are applicable under given circumstances and stages – Discussed & enumerated. (Para 19)**

ङ. लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 83(1)(a) व 86 एवं सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 11 – वादपत्र का नामंजूर किया जाना – आधार जहां दी गई परिस्थितियों एवं प्रक्रमों के अंतर्गत आदेश 7 नियम 11 सि.प्र.सं. के सिद्धांत लागू होते हैं – विवेचित एवं प्रगणित किये गये।

Cases referred :

AIR 1986 SUPREME COURT 1253 = 1986 Supp SCC 315, AIR 1977 S.C. 2421 [14.10.1977] = (1977) 4 SCC 467, (1998) 2 SCC 70, (2003) 1 SCC 557, (2004) 3 SCC 137, (2004) 9 SCC 512, 2007 AIR SCW 3456 = (2007) 5 SCC 614, I.L.R. 2009 M.P. 3167, AIR 2012 S.C. 3912 [30.07.2012] = (2012) 8 SCC 706, AIR 2017 S.C. 2653 = (2017) 13 SCC 174, AIR 2007 S.C. 581 = (2007) 3 SCC 617, AIR 2001 S.C. 3689 = (2001) 8 SCC 233, AIR 2006 S.C. 713 = (2005) 13 SCC 511, AIR 2002 S.C. 2112 = 2002 AIR-SCW 2186 = (2002) 5 SCC 294, AIR 2003 S.C. 2363, AIR 2014 S.C. 344 = 2002 AIR SCW 2186 = (2014) 14 SCC 189, AIR 2003 S.C. 2128.

Mrigendra Singh with *Navtej Singh Ruprah* and *Nidhi Padam*, for the petitioner.

Sanjay K. Agrawal, for the respondent No. 1.

O R D E R

B.K. SHRIVASTAVA, J.:- This order shall govern the disposal of I.A. No. 8210 of 2019 filed by Respondent No.1 Devendra Singh on 5.7.2019 under Order 7 Rule 11 of CPC read with section 86 of **"Representation of the People Act, 1951"** (referred to as **"Act 1951")** for dismissal of the election petition No.07 of 2019 as not maintainable under section 86 of the Act, 1951 read with Order 7 Rule 11 of CPC.

2. Notification U/s 30 of R.P. Act,1951 was issued by Election Commission on 02.11.2018 for Legislative Assembly election. Voting was held on 28.11.2018 and the result was declared on 11.12.2018. Respondent No.1 Devendra Singh, Sponsored by the Indian National Congress Party, is the returned candidate (by margin of 8001 votes) for Constituency No.140, Udaipura, District Raisen. Petitioner Ram Kishan Patel, sponsored by Bhartiya Janta Party, who was the looser in that election, filed main election petition under section 80 / 80-A of the Act, 1951 on 24.01.2019 mainly on the ground as contained in Section 100 (1) (d) (i) & (iv) of the Act, 1951.

3. As per the petitioner the election of respondent No.1 is vitiated under section 100 (1) (d) (i) & (iv) of the Act, 1951 because the nomination submitted by the respondent no.1 was not in accordance with the prescribed format as stipulated by the law as neither the affidavit which was submitted by the respondent no.1 along with the nomination paper was signed by the respondent nor respondent

no.1 was properly identified upon the affidavit. The affidavit did not contain signature of the notary on the seal contained at all pages. Therefore, it would be deemed that no affidavit was filed along-with nomination papers by Respondent. Non-compliance of the mandatory provision of law entailed only rejection of the nomination form at threshold at the time of scrutiny of nomination as provided under section 36(2) of the Act, 1951. As per petitioner despite of categorical objection raised by the petitioner before the returning officer, the nomination of the respondent no.1 was accepted. The petitioner also filed the copy of nomination [Ex.P.1], objection raised by the petitioner dated 12.11.2018 [Ex.P.2], reply dated 12.11.2018 filed by the respondent [Ex.P.3] and the order dated 13.11.2018 passed by the Returning Officer rejecting objection [Ex.P.4].

4. As per the petitioner, Section 33 (1) read with section 33(A) of the Act, 1951 and Rule 4-A of the **"Conduct of Election Rules, 1961"** make it clear that nomination paper which include the affidavit in Form 26 is to be completed in all respect. The law is very rigid in relation to the affidavit (Form 26) because the same touches the root of fundamental rights of voter i.e. right to know about the credentials of the candidate. The **blank** / **unsigned** / **unverified** affidavit would leave the voter confused and the very object of disclosure stand defeated. Therefore, the affidavit filed by the respondent no.1 ought to have been rejected because the defect of unsigned affidavit is definitely a defect of **substantial character** which cannot be marginalized. The reference of sections 8(1)(e) and 8(2) of Notaries Act, and Rule 8 & 11 of Chapter IV of **"High Court of Madhya Pradesh, Rules, 2008"** also given by the petitioner.

5. The respondent no.1 served, then he filed the Interim Application No. 8210 of 2019 under Order 7 Rule 11 of CPC read with section 86 of Act, 1951, on 05.07.2019. It is submitted by the respondent no.1, that petition filed by the petitioner is not maintainable under section 86 of the Representation of People Act read with Order 7 Rule 11 of CPC.

6. The Respondent No.1 seeks dismissal of Election petition upon the following grounds:-

> **"A.** *The election petition does not contain a concise statement of material fact on which the petitioner relies and therefore does dot disclose a triable cause of action. The petition thus suffers from non-compliance of the provisions contained U/s 83(1)(b) of the Act, 1951.*
>
> **B.** *The election petition has not been verified in the manner laid down in the Code of Civil Procedure, 1908 inasmuch as the petitioner has not disclosed the source of information on the basis whereof allegations have been leveled in the petition.*
>
> **C.** *Copy of the election petition as served upon the answering respondent has not been attested by the petitioner under his own signature*

to be a true copy of the petitioner. The memo of petition bears such attestation but the documents filed along with the election petition do not bear any such attestation. There is thus non-compliance of the provisions contained U/s 81(3) of the Act, 1951.

D. *The averments made in the election petition are completely vague and lacking in material particulars. No trial or enquiry is permissible on the basis of such vague indefinite imprecise averments. The petition therefore, does not disclose a triable issue or cause of action and therefore merits dismissal'"*

7. The petitioner filed the reply of the aforesaid application on 17.10.2019 and opposed the contention raised by the respondent no.1. It is submitted that the allegations made by the petitioner may ultimately be proved to be only devoid of truth but the question is whether the petitioner should be refused an opportunity to prove his allegations. The charge in question is yet to be proved, it may or may not be too. In Para 7 of the reply, the petitioner said :-

"7. *That, it is well settle cannon of election law that purity of election is the very essence of real democracy. The charge in question is yet to be prove, it may or may not be too. The allegations made by the petitioner may ultimately be proved to be only devoid of truth, but the question is whether the petitioner should be refused an opportunity to prove his allegation. The answer of all these questions would be definitely be negative. Nevertheless in the case at hand due care has been taken by the petitioner in leveling the allegations, in full facts and particulars thereof has been supplied, so as to enable the petition into trial, thus the instant application so filed by the respondent for dismissal of the petition at threshold U/o VII Rule 11 of C.P.C. read with section 86 and 87 of the Act of 1951 deserves to be dismissed."*

8. No doubt, the powers of Order 7 Rule 11 can be used in the election petition filed under Act,1951. In *Azhar Hussain v. Rajiv Gandhi***,** AIR 1986 SUPREME COURT 1253 = 1986 Supp SCC 315 , the Apex Court said in para 8 and 9 that Since CPC is applicable, the court trying the election petition can act in exercise of the powers of the Code including Order 6 Rule 16 and Order 7 Rule 11(a). The Court said in Para 8 :-

"8. The argument is that inasmuch as Section 83(1) is not adverted to in Section 86 in the context of the provisions, noncompliance with which entails dismissal of the election. petition, it follows that noncompliance with the requirements of Section 83 (1), even though mandatory, do not have lethal consequence of dismissal. Now it is not disputed that the Code of Civil Procedure (CPC) applies to the trial of an election petition by virtue of section 87 of the Act. Since CPC is applicable, the court trying the election petition can act in exercise of the powers of the Code including Order 6 Rule 16 and Order 7 Rule 11(a)."

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.

Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-paper shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevent by any cause of exceptional nature for correction the valuation or supplying the requisite stamp-paper, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff."

9. In T. *Arivandandam Petitioner v. T. V. Satyapal and another Respondents*, AIR 1977 S.C. 2421 [14.10.1977] = (1977) 4 SCC 467, while considering the provision of Order 7 Rule 11 and the duty of the trial court the Apex Court has reminded the trial Judges with the following observation:

"The learned Munsif must remember that if on a meaningful, not formal , reading of the plaint it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, he should exercise his power under O. VII R. 11, C. P. C. taking care to see that the ground mentioned therein is fulfilled. And, if clear drafting has created the illusion of a cause of action, nip it in the bud at the first hearing by examining the party searchingly under O. X. C.P.C. An activist Judge is the answer to irresponsible law suits. The trial Courts would insist imperatively on examining the party at the first hearing so that bogus litigation can be shot down at the earliest stage. The Penal Code is also resourceful enough to meet such men, (Ch. XI) and must be triggered against them. In this case, the learned Judge to his cost realised what George Bernard Shaw remarked on the assassination of Mahatma Gandhi." "It is dangerous to be too good."

10. In *I.T.C. Ltd. v. Debts Recovery Appellate Tribunal* [(1998) 2 SCC 70] it was held that the basic question to be decided while dealing with an application filed under Order 7 Rule 11 of the Code is whether a real cause of action has been set out in the plaint or something purely illusory has been stated with a view to get out of Order 7 Rule 11 of the Code.

11. In *Saleem Bhai v. State of Maharashtra* [(2003)1 SCC 557] it was held with reference to Order 7 Rule 11 of the Code that -

> " 9. ... the relevant facts which need to be looked into for deciding an application thereunder are the averments in the plaint. The trial court can exercise the power at any stage of the suit before registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial. For the purposes of deciding an application under Clauses (a) and (d) of Rule 11 of Order 7 CPC, the averments in the plaint are germane; the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage,..." (SCC p. 560, para 9).

12. In *Sopan Sukhdeo Sable v. Asstt. Charity Commr.* [(2004) 3 SCC 137] this Court held thus: (SCC pp. 14647, para 15)

> " 15. There cannot be any compartmentalization, dissection, segregation and inversions of the language of various paragraphs in the plaint. If such a course is adopted it would run counter to the cardinal canon of interpretation according to which a pleading has to be read as a whole to ascertain its true import. It is not permissible to cull out a sentence or a passage and to read it out of the context in isolation. Although it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without addition or subtraction or words or change of its apparent grammatical sense. The intention of the party concerned is to be gathered primarily from the tenor and terms of his pleadings taken as a whole. At the same time it should be borne in mind that no pedantic approach should be adopted to defeat justice on hair splitting technicalities."

13. In *Liverpool & London S.P. & I Assn. Ltd.vs. M.V.Sea Success I & Anr.,* (2004) 9 SCC 512, The Court said:-

> "139. Whether a plaint discloses a cause of action or not is essentially a question of fact. But whether it does or does not must be found out from reading the plaint itself. For the said purpose, the averments made in the plaint in their entirety must be held to be correct. The test is as to whether if the averments made in the plaint are taken to be correct in their entirety, a decree would be passed."

14. In *Hardesh Ores Pvt. Ltd v. M/s. Hede and Co.WITH Sociedade de Fomento Industrial Pvt. Ltd v. M/s. Hede and Co. 2007* AIR SCW 3456 =(2007)5 SCC 614, the Apex Court said that whether a plaint discloses a cause of action is

essentially a question of fact, but whether it does or does not must be found out from reading the plaint itself. For the said purpose the averments made in the plaint in their entirety must be held to be correct. The test is whether the averments made in the plaint if taken to be correct in their entirety a decree would be passed. The averments made in the plaint as a whole have to be seen to find out whether Cl. (d) of R. 11 of O. 7 is applicable. It is not permissible to cull out a sentence or a passage and to read it out of the context in isolation. Although it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without addition or subtraction of words or change of its apparent grammatical sense.

15. 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.

16. Apex Court in *The Church of Christ Charitable Trust and Educational Charitable Society, rep. by its Chairman v. M/s. Ponniamman Educational Trust rep. by its Chairperson / Managing Trustee,* AIR 2012 S.C. 3912 [30.7.2012] = (2012) 8 SCC 706, observed in para 6 as follows: -

> "6 .....It is clear from the above that where the plaint does not disclose a cause of action, the relief claimed is undervalued and not corrected within the time allowed by the Court, insufficiently stamped and not rectified within the time fixed by the Court, barred by any law, failed to enclose the required copies and the plaintiff fail to comply with the provisions of Rule 9, the Court has no other option except to reject the same. A reading of the above provision also makes it clear that power under Order VII, Rule 11 of the Code can be exercised at any stage of the suit either before registering the plaint or after the issuance of summons to the defendants or at any time before the conclusion of the trial. This position was explained by this Court in Saleem Bhai and Ors. v. State of Maharashtra and others, (2003) 1 SCC 557 : (AIR 2003 SC 759 : 2003 AIR SCW 174).

17. In paragraph 8 (of AIR) of the *Madanuri Sri Rama Chandra Murthy v. Syed Jalal*, AIR 2017 S.C. 2653 = (2017) 13 SCC 174, the Apex Court has succinctly restated the legal position as follows: -

> "8. The plaint can be rejected under Order VII, Rule 11 if conditions enumerated in the said provision are fulfilled. It is needless to observe that the power under Order VII, Rule 11, CPC can be exercised by the Court at any stage of the suit. The relevant facts which need to be looked into for deciding the application are the averments of the plaint only. If on an entire and meaningful reading of the plaint, it is found that the suit is manifestly vexatious and merit -less in the sense of not disclosing any right to sue, the court should exercise power under Order VII, Rule 11, CPC. Since the power conferred on the Court to terminate civil action at the threshold is drastic, the conditions enumerated under Order VII, Rule 11 of CPC to the exercise of power of rejection of plaint have to be strictly adhered to. The averments of the plaint have to be read as a whole to find out whether the averments disclose a cause of action or whether the suit is barred by any law. It is needless to observe that the question as to whether the suit is barred by any law, would always depend upon the facts and circumstances of each case. The averments in the written statement as well as the contentions of the defendant are wholly immaterial while considering the prayer of the defendant for rejection of the plaint. Even when, the allegations made in the plaint are taken to be correct as a whole on their face value, if they show that the suit is barred by any law, or do not disclose cause of action, the application for rejection of plaint can be entertained and the power under Order VII, Rule 11 of CPC can be exercised. If clever drafting of the plaint has created the illusion of a cause of action, the court will nip it in the bud at the earliest so that bogus litigation will end at the earlier stage."

18. It may be useful to refer para 12 of *Azhar Hussain v. Rajiv Gandhi*, AIR 1986 SUPREME COURT 1253 = 1986 Supp SCC 315 in which the Apex Court held that the whole purpose of conferment of powers under this provision is to ensure that a litigation which is meaningless, and bound to prove abortive, should not be permitted to waste judicial time of the court, in the following words :

> **"12**. .....The whole purpose of conferment of such powers is to ensure that a litigation which is meaningless and bound to prove abortive should not be permitted to occupy the time of the court and exercise the mind of the respondent. The sword of Damocles need not be kept hanging over his head unnecessarily without point or purpose. Even in an ordinary Civil litigation the Court readily exercises the power to reject a plaint if it does not disclose any cause of action. "

19. Therefore, upon perusal of the provision of Order 7 Rule 11 of CPC and aforesaid pronouncements, it can be said that :-

> **[i]** The provision of Order VII Rule 11 is mandatory in nature. It states that the plaint "shall" be rejected if any of the grounds specified in clause (a) to (e) are made out.

[ii] If the Court finds that the plaint does not disclose a cause of action, or that the suit is barred by any law, the Court has no option, but to reject the plaint.

[iii] The remedy under Order VII Rule 11 is an independent and special remedy, wherein the Court is empowered to summarily dismiss a suit at the threshold, without proceeding to record evidence, and conducting a trial, on the basis of the evidence adduced, if it is satisfied that the action should be terminated on any of the grounds contained in this provision.

[iv] The underlying object of Order VII Rule 11 (a) is that if in a suit, no cause of action is disclosed, or the suit is barred by limitation under Rule 11 (d), the Court would not permit the plaintiff to unnecessarily protract the proceedings in the suit. In such a case, it would be necessary to put an end to the sham litigation, so that further judicial time is not wasted.

[v] At this stage, the pleas taken by the defendant in the written statement and application for rejection of the plaint on the merits, would be irrelevant, and can not be adverted to, or taken into consideration.

[vi] The test for exercising the power under Order VII Rule 11 is that if the averments made in the plaint are taken in entirety, in conjunction with the documents relied upon, would the same result in a decree being passed.

[vii] The averments made in the plaint in their entirety must be held to be correct.

[viii] The averments made in the plaint as a whole have to be seen to find out whether Cl. (d) of R. 11 of O. 7 is applicable. It is not permissible to cull out a sentence or a passage and to read it out of the context in isolation.

[ix] If on a meaningful reading of the plaint, it is found that the suit is manifestly vexatious and without any merit, and does not disclose a right to sue, the court would be justified in exercising the power under Order VII Rule 11 CPC.

[x] The power under Order VII Rule 11 CPC may be exercised by the Court at any stage of the suit, either before registering the plaint, or after issuing summons to the defendant,or before conclusion of the trial.

20. It will also be useful to refer some important provisions of "The Representation of People Act, 1951" :-

"33. Presentation of nomination paper and requirements for a valid nomination. -

(1) On or before the date appointed under clause (a) of Section 30 each candidate shall, either in person or by his proposer, between the hours of eleven O'clock in the forenoon and three O'clock in the afternoon deliver to the Returning Officer at the place specified in this behalf in the notice issued under Section 31 a nomination paper completed in the prescribed form and signed by the candidate and by an elector of the constituency as proposer :

[Provided .....

Provided further .....

Provided .....]

(1A). .....

(2) .....

(3) .....

(4) .....

(5) .....

(6) .....

(7) .....

33A. Right to information.-

(1) A candidate shall, apart from any information which he is required to furnish, under this Act or the rules made thereunder, in his nomination paper delivered under sub- section (1) of section 33, also furnish the information as to whether -

(i) he is accused of any offence punishable with imprisonment for two years or more in a pending case in which a charge has been framed by the court of competent jurisdiction;

(ii) he has been convicted of an offence [other than any offence referred to in sub- section (1) or sub-section (2), or covered in sub-section (3), of section 8] and sentenced to imprisonment for one year or more.

(2) The candidate or his proposer, as the case may be, shall, at the time of delivering to the returning officer the nomination paper under sub-section (1) of section 33, also deliver to him an affidavit sworn by the

candidate in a prescribed form verifying the information specified in sub-section (1).

(3) The returning officer shall, as soon as may be after the furnishing of information to him under sub-section (1), display the aforesaid information by affixing a copy of the affidavit, delivered under sub-section (2), at a conspicuous place at his office for the information of the electors relating to a constituency for which the nomination paper is delivered."

"33B. Candidate to furnish information only under the Act and the rules .—

Notwithstanding anything contained in any judgment, decree or order of any court or any direction, order or any other instruction issued by the Election Commission, no candidate shall be liable to disclose or furnish any such information, in respect of his election which is not required to be disclosed or furnished under this Act or the rules made thereunder."

"35. Notice of nominations and the time and place for their Scrutiny.—

The returning officer shall, on receiving the nomination paper under sub-section (1) or, as the case may be, sub-section (1A) of section 33], inform the person or persons delivering the same of the date, time and place fixed for the scrutiny of nominations and shall enter on the nomination paper its serial number, and shall sign thereon a certificate stating the date on which and the hour at which the nomination paper has been delivered to him; and shall, as soon as may be thereafter, cause to be affixed in some conspicuous place in his office a notice of the nomination containing descriptions similar to those contained in the nomination paper, both of the candidate and of the proposer."

"36. Scrutiny of nominations.-

(1) On the date fixed for the scrutiny of nominations under Section 30, the candidates, their election agents, one proposer of each candidate, and one other person duly authorised in writing by each candidate but no other person, may attend at such time and place as the Returning Officer may appoint; and the Returning Officer shall give them all reasonable facilities for examining the nomination papers of all candidates which have been delivered within the time and in the manner laid down in Section 33.

(2) The Returning Officer shall then examine the nomination papers and shall decide all objections which may be made to any nomination and may, either on such objection or on his own motion, after such summary inquiry, if any, as he thinks necessary, [reject] any nomination on any of the following grounds :-

(a) that on the date fixed for the scrutiny of nominations the candidate either is not qualified or is disqualified for being chosen to fill the seat under any of the following provisions that may be applicable, namely :-Articles 84, 102, 173 and 191,Part II of this Act and Sections 4 and 14 of the Government of Union Territories Act, 1963 (2 of 1963); or,

(**b**) that there has been a failure to comply with any of the provisions of Section 33 or Section 34; or

(**c**) that the signature of the candidate or the proposer on the nomination paper is not genuine.

(3) Nothing contained in [clause (b) or clause (c) of sub-section (2)] shall be deemed to authorise the [rejection] of the nomination of any candidate on the ground of any irregularity in respect of a nomination paper, if the candidate has been duly nominated by means of another nomination paper in respect of which no irregularities has been committed.

(4) The Returning Officer shall not reject any nomination paper on the ground of any defect which is not of a substantial character.

(5).....

(6).....

(7).....

(8)....."

"125A. Penalty for filing false affidavit, etc.-

A candidate who himself or through his proposer, with intent to be elected in an election,-

(i) fails to furnish information relating to sub-section (1) of section 33A; or

(ii) gives false information which he knows or has reason to believe to be false; or

(iii) conceals any information, in his nomination paper delivered under sub-section (1) of section 33 or in his affidavit which is required to be delivered under sub-section (2) of section 33A, as the case may be, shall, notwithstanding anything contained in any other law for the time being in force, be punishable with imprisonment for a term which may extend to six months, or with fine, or with both."

21. In continuation Rule 4 and 4A of **"The Conduct of Election Rules, 1961"** are also relevant :-

> **"4. Nomination paper.**—Every nomination paper presented under sub-section (1) of section 33 shall be completed in such one of the Forms 2A to 2E as may be appropriate:
>
> **Provided** that a failure to complete or defect in completing, the declaration as to symbols in a nomination paper in Form 2A or Form 2B shall not be deemed to be a defect of a substantial character within the meaning of sub-section (4) of section 36.
>
> **4A. Form of affidavit to be filed at the time of delivering nomination paper.**—The candidate or his proposer, as the case may be, shall, at the time of delivering to the returning officer the nomination paper under sub-section (1) of section 33 of the Act, also deliver to him an affidavit sworn by the candidate before a Magistrate of the first class or a Notary in Form 26."

22. Therefore, it appears that S. 33(1) of the Act requires that a nomination paper completed in the prescribed form and signed by the candidates and by an elector of the constituency as proposer shall be filed along with the affidavit as required in rule 4A, on or before the date appointed for the nomination. Section 33(4) lays down that on the presentation of a nomination paper, the returning officer shall satisfy himself that the names and electoral roll numbers of the candidate and his proposer as entered in the nomination paper are the same as those entered in the electoral rolls; provided that **the returning officer shall permit any clerical or technical error in the nomination paper in regard to the said names or numbers to be corrected** in order to bring them into conformity with the corresponding entries in the electoral rolls; and where necessary, direct that any clerical or printing error in the said entries shall be overlooked. Section 36 then prescribes for the scrutiny of nomination papers and sub-sec. (2) (b) thereof lays down that the **nomination paper shall be rejected if there has been a failure to comply with any of the provisions of S. 33.** But sub-sec. (4) lays down that the returning officer **shall not reject any nomination paper on the ground of any defect which is not of a substantial character**. The result of these provisions is that the proposer and the candidate are expected to file the nomination papers complete in all respects in accordance with the prescribed form; but even if there is some defect in the nomination paper in regard to either the names or the electoral roll numbers, it is the duty of the returning officer to satisfy himself at the time of the presentation of the nomination paper about them and **if necessary to allow them to be corrected,** in order to bring them into conformity with the corresponding entries in the electoral roll. Thereafter, **on scrutiny the returning officer has the power to reject the nomination paper on the ground of failure to comply with any of the provisions of S. 33 subject however to this that no nomination paper shall be rejected on the ground of any defect which is not of a substantial character.**

23. Now we considering the grounds raised by respondent in his application. The **first** and **fourth** grounds are as under :-

> **"[A].** The election petition does not contain a concise statement of material fact on which the petitioner relies and therefore does dot disclose a triable cause of action. The petition thus suffers from non-compliance of the provisions contained U/s 83(1)(b) of the Act, 1951.
>
> **[D].** The averments made in the election petition are completely vague and lacking in material particulars. No trial or enquiry is permissible on the basis of such vague indefinite imprecise averments. The petition therefore, does not disclose a triable issue or cause of action and therefore merits dismissal."

24. It is appropriate to mention hear that in the aforesaid two questions, the respondent mainly used three points i.e. **"absence of concise statement" "lacking in material particulars"** and **"not discloser of a triable issue or cause of action".** The aforesaid objections are related to election petition, which has been filed by Petitioner before the High Court. Section 81 to 86 of Act, 1951 says :-

> **"81. Presentation of petitions.—**
>
> **(1)** An election petition calling in question any election may be presented on one or more of the grounds specified in sub-section (1) of section 100 and section 101 to the High Court by any candidate at such election or any elector within forty-five days from, but not earlier than the date of election of the returned candidate, or if there are more than one returned candidate at the election and the dates of their election are different, the later of those two dates.
>
> **Explanation.**—In this sub-section, "elector" means a person who was entitled to vote at the election to which the election petition relates, whether he has voted at such election or not.
>
> **(2)**....[Omitted]
>
> **(3)** Every election petition shall be accompanied by as many copies thereof as there are respondents mentioned in the petition, and every such copy shall be attested by the petitioner under his own signature to be a true copy of the petition."
>
> **"82. Parties to the petition.—A petitioner shall join as respondents to his petition** :-
>
> (a) where the petitioner, in addition to claiming a declaration that the election of all or any of the returned candidates is void, claims a further declaration that he himself or any other candidate has been duly elected, all the contesting candidates other than the petitioner, and where no such further declaration is claimed, all the returned candidates; and,

(b) any other candidate against whom allegations of any corrupt practice are made in the petition."

"83. Contents of petition.- **(1) An Election petition -**

(a) shall contain a concise statement of the material facts on which the petitioner relies;

(b) shall set forth full particulars of any corrupt practice that the petitioner alleges including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice; and,

(c) shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (5 of 1908) for the verification of pleadings:

Provided that where the petitioner alleges any corrupt practice, the petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof.

(2) Any schedule or annexe (sic : annexure) to the petition shall also be signed by the petitioner and verified in the same manner as the petition."

"84. Relief that may be claimed by the petitioner.—

A petitioner may, in addition to claiming a declaration that the election of all or any of the returned candidates is void, claim a further declaration that he himself or any other candidate has been duly elected."

"86. Trial of election petitions.—

(1) The High Court shall dismiss an election petition which does not comply with the provisions of section 81 or section 82 or section 117.

Explanation.—An order of the High Court dismissing an election petition under this sub-section shall be deemed to be an order made under clause (a) of section-98.

(2) As soon as may be after an election petition has been presented to the High Court, it shall be referred to the Judge or one of the Judges who has or have been assigned by the Chief Justice for the trial of election petitions under sub-section (2) of section 80A.

(3) Where more election petitions than one are presented to the High Court in respect of the same election, all of them shall be referred for trial to the same Judge who may, in his discretion, try them separately or in one or more groups.

(4) Any candidate not already a respondent shall, upon application made by him to the High Court within fourteen days from the date of commencement of

the trial and subject to any order as to security for costs which may be made by the High Court, be entitled to be joined as a respondent.

Explanation.—For the purposes of this sub-section and of section 97, the trial of a petition shall be deemed to commence on the date fixed for the respondents to appear before the High Court and answer the claim or claims made in the petition.

(5) The High Court may, upon such terms as to costs and otherwise as it may deem fit, allow the particulars of any corrupt practice alleged in the petition to be amended or amplified in such manner as may in its opinion be necessary for ensuring a fair and effective trial of the petition, but shall not allow any amendment of the petition which will have the effect of introducing particulars of a corrupt practice not previously alleged in the petition.

(6) The trial of an election petition shall, so far as is practicable consistently with the interests of justice in respect of the trial, be continued from day to day until its conclusion, unless the High Court finds the adjournment of the trial beyond the following day to be necessary for reasons to be recorded.

(7) Every election petition shall be tried as expeditiously as possible and endeavour shall be made to conclude the trial within six months from the date on which the election petition is presented to the High Court for trial."

117. Security for costs.—

(1) At the time of presenting an election petition, the petitioner shall deposit in the High Court in accordance with the rules of the High Court a sum of two thousand rupees as security for the costs of the petition.

(2) During the course of the trial of an election petition, the High Court may, at any time, call upon the petitioner to give such further security for costs as it may direct."

25. It is submitted by the respondent that Section 83 of the Act deals with contents of petition. Clause (a) of Sub Section 1 of Section 83 provides that an election petition shall contain a concise statement of material facts on which the petitioner relies. Clause (b) of Sub Section 1 of Section 83 further, provides that such an election petition shall set forth full particulars of any corrupt practices that the petitioner alleges, including as full statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice. Clause (c) of Sub Section 1 of the Section 83 provides that the election petition shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (v of 1908) for the verification of pleadings. The proviso of Sub Section 1 further mandates that where the petitioner alleges any corrupt practice, the petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of

such corrupt practice and the particulars thereof. Sub Section 2 of Section 83 provides that any schedule or annexure to the petition shall also be signed by the petitioner and verified in the same manner as the petition. It is further submitted that Section 86 of the Act deals with trial of election petition. Sub Section 1 of Section 86 specifically provides that the High Court shall dismiss an election petition which does not comply with the provision of Section 81 or Section 82 or Section 117.

26. It is further submitted by respondent that in the light of the aforesaid provisions of the Act if the petition filed by the petitioner is examined, the same would disclose complete non-compliance of the aforesaid mandatory provisions of the Act. The petitioner has not made a concise statement of material facts with full particulars on which the petitioner relies. It is also submitted that even though the non-compliance of the provisions contained under Section 83 of the Act are not covered under Section 86(1) of the Act, it has been settled by a series of judgments by the Hon'ble Apex Court that the petition which does not meet the requirement of Section 83 can also be dismissed under Section 86 of the Act with the aid of Order 7 Rule 11 CPC.

27. In reply the Petitioner submit that he has filed the instant petition with due care and as per the mandatory provisions of the Act of 1951. The law mandates that the election petition must contain concise statement which discloses cause of action. Herein the present case the petitioner has pleaded each and every illegal act of Respondent No. 1 and others very consciously with all particulars. Hence, the allegations of the Respondent No. 1 that the election petitioner has filed the instant petition casually is imaginary and deserves to be rejected.

28. Learned Counsel for Respondent placed reliance upon *Virender Nath Gautam v. Satpal Singh and Ors.,* AIR 2007 S.C.581 = (2007)3 SCC 617 in which the Apex Court defines the expression **'material facts'** and said :-

> **"29.** All material facts, therefore, in accordance with the provisions of the Act, have to be set out in the election petition. If the material facts are not stated in a petition, it is liable to be dismissed on that ground as the case would be covered by clause (a) of sub-section (1) of Section 83 of the Act read with clause (a) of Rule 11 of Order VII of the Code.
>
> **30.** The expression 'material facts' has neither been defined in the Act nor in the Code. According to the dictionary meaning, 'material' means 'fundamental', 'vital', 'basic', 'cardinal', 'central', 'crucial', 'decisive', 'essential', 'pivotal', indispensable', 'elementary' or 'primary'. [Burton's Legal Thesaurus, (Third edn.); p.349]. The phrase 'material facts', therefore, may be said to be those facts upon which a party relies for his claim or defence. In other words, 'material facts' are facts upon which the plaintiff's cause of action or the defendant's defence depends. What particulars could be said to be 'material facts' would depend upon the

facts of each case and no rule of universal application can be laid down. It is, however, absolutely essential that all basic and primary facts which must be proved at the trial by the party to establish the existence of a cause of action or defence are material facts and must be stated in the pleading by the party.

33. A distinction between 'material facts' and 'particulars', however, must not be overlooked. 'Material facts' are primary or basic facts which must be pleaded by the plaintiff or by the defendant in support of the case set up by him either to prove his cause of action or defence. 'Particulars', on the other hand, are details in support of material facts pleaded by the party. They amplify, refine and embellish material facts by giving distinctive touch to the basic contours of a picture already drawn so as to make it full, more clear and more informative. 'Particulars' thus ensure conduct of fair trial and would not take the opposite party by surprise.

34. All 'material facts' must be pleaded by the party in support of the case set up by him. Since the object and purpose is to enable the opposite party to know the case he has to meet with, in the absence of pleading, a party cannot be allowed to lead evidence. Failure to state even a single material fact, hence, will entail dismissal of the suit or petition. Particulars, on the other hand, are the details of the case which is in the nature of evidence a party would be leading at the time of trial."

29. Learned Counsel for Respondent also placed reliance upon *Hari Shanker Jain Appellant v. Sonia Gandhi,* AIR 2001 S.C. 3689 = (2001) 8 SCC 233 . The Apex Court said the material facts required to be stated are those facts which can be considered as materials supporting the allegations made. In other words, they must be such facts as would afford a basis for the allegations made in the petition and would constitute the cause of action as understood in the Code of Civil Procedure, 1908. The Court said as under :-

"22. Section 83(1)(a) of RPA, 1951 mandates that an election petition shall contain a concise statement of the material facts on which the petitioner relies. By a series of decisions of this Court, it is well-settled that the material facts required to be stated are those facts which can be considered as materials supporting the allegations made. In other words, they must be such facts as would afford a basis for the allegations made in the petition and would constitute the cause of action as understood in the Code of Civil Procedure, 1908. The expression 'cause of action' has been compendiously defined to mean every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. Omission of a single material fact leads to an incomplete cause of action and the statement of claim becomes bad. The function of the party is to present as full a picture of the cause of action with such further information in detail as to make the opposite party understand the case he will have to meet. See ***Samant N.***

Balakrishna, etc. v. George Fernandez, (1969) 3 SCR 603; ***Jitender Bahadur Singh v. Krishna Behari,*** *(1969) 2 SCC 433.* Merely quoting the words of the Section like chanting of a mantra does not amount to stating material facts. Material facts would include positive statement of facts as also positive averment of a negative fact, if necessary. In ***V. S. Achuthanandan v. P J. Francis,*** (1999) 3 SCC 737, this Court has held, on a conspectus of a series of decisions of this Court, that material facts are such preliminary facts which must be proved at the trial by a party to establish existence of a cause of action. Failure to plead "material facts" is fatal to the election petition and no amendment of the pleadings is permissible to introduce such material facts after the time-limit prescribed for filing the election petition.

23. It is the duty of the Court to examine the petition irrespective of any written statement or denial and reject the petition if it does not disclose a cause of action. To enable a Court to reject a plaint on the ground that it does not disclose a cause of action, it should look at the plaint and nothing else. Courts have always frowned upon vague pleadings which leave a wide scope to adduce any evidence. No amount of evidence can cure basic defect in the pleadings.

24. There are two features common to both the election petitions. Firstly, both the petitions are verified as 'true to personal knowledge' of the two petitioners respectively which is apparently incorrect as the very tenor of pleadings discloses that any of the petitioners could not have had personal knowledge of various facts relating to the respondent personally and during the course of hearing we had put this across to the two petitioners and they responded by submitting only this much that the verification if incorrect was capable of being cured. The second common feature in the two petitions is that there are bald assertions made about the Italian law without stating what is the source of such law as has been pleaded by the election-petitioners or what is the basis for raising such pleadings. These averments also have been verified as 'true to my knowledge' of each of the election-petitioners a position, wholly unacceptable."

30. Reliance also placed upon para 11 of *Azhar Hussain v. Rajiv Gandhi,* AIR 1986 S.C. 1253 = 1986 Supp SCC 315 in which it has been said that all the primary facts which must be proved by a party to establish a cause of action or his defence are material facts, therefore an election petition can be summarily dismissed if it does not furnish cause of action. :-

"11. In view of this pronouncement there is no escape from the conclusion that an election petition can be summarily dismissed if it does not furnish cause of action in exercise of the powers under the Code of Civil Procedure. So also it emerges from the aforesaid decision that appropriate orders in exercise of powers under the Code of Civil

> Procedure can be passed if the mandatory requirements enjoined by Section 83 of the Act to incorporate the material facts in the election petition are not complied with. This Court in **Samant's case** (1969) 3 SCC 238 : (AIR 1969 SC 1201) has expressed itself in no unclear terms that the omission of a single material fact would lead to an incomplete cause of action and that an election petition without the material facts relating to a corrupt practice is not an election petition at all. So also in **Udhav Singh's case** (1977) 1 SCC 311 : (AIR 1977 SC 744) the law has been enunciated that all the primary facts which must be proved by a party to establish a cause of action or his defence are material facts. In the context of a charge of corrupt practice it would mean that the basic facts which constitute the ingredients of the particular corrupt practice alleged by the petitioner must be specified in order to succeed on the charge. Whether in an election petition a particular fact is material or not and as such required to be pleaded is dependent on the nature of the charge leveled and the circumstances of the case. All the facts which are essential to clothe the petition with complete cause of action must be pleaded and failure to plead even a single material fact would amount to disobedience of the mandate of, Section 83(1) (a). An election petition therefore can be and must be dismissed if it suffers from any such vice. The first ground of challenge must therefore fail."

31. In *Harkirat Singh v. Amarinder Singh*, AIR 2006 S.C. 713 = (2005) 13SCC 511 the petition was dismissed by the High court by saying that it did not state material facts and thus did not disclose a cause of action. But the Supreme Court set aside the order and said that High Court, was wholly unjustified in entering into the correctness or otherwise of facts stated and allegations made in the election petition and in rejecting the petition holding that it did not state material facts and thus did not disclose a cause of action. The Court also said that High Court, stepped into prohibited area of appreciating the evidence and by entering into merits of the case which would be permissible only at the stage of trial of the election petition and not at the stage of consideration whether the election petition was maintainable. In para 81 & 82, the Apex court observed as under :-

> **"81.** As we have already observed earlier, in the present case, 'material facts' of corrupt practice said to have been adopted by the respondent had been set out in the petition with full particulars. It has been expressly stated as to how Mr. Chahal who was a Gazetted Officer of Class I in the Government of Punjab assisted the respondent by doing several acts, as to complaints made against him by authorities and taking of disciplinary action. It has also been stated as to how a Police Officer, Mr. Mehra, who was holding the post of Superintendent of Police helped the respondent by organizing a meeting and by distributing posters. It was also alleged that correct and proper accounts of election expenses have not been maintained by the respondent. Though at the time of

hearing of the appeal, the allegation as to projecting himself as 'Maharaja of Patiala' by the respondent had not been pressed by the learned counsel for the appellant, full particulars had been set out in the election petition in respect of other allegations. The High Court, in our opinion, was wholly unjustified in entering into the correctness or otherwise of facts stated and allegations made in the election petition and in rejecting the petition holding that it did not state material facts and thus did not disclose a cause of action. The High Court, in our considered view, stepped into prohibited area of appreciating the evidence and by entering into merits of the case which would be permissible only at the stage of trial of the election petition and not at the stage of consideration whether the election petition was maintainable.

82. We, therefore, hold that the High Court was wrong in dismissing the election petition on the ground that material facts had not been set out in the election petition and the election petition did not disclose a cause of action. The order passed by the High Court, therefore, deserves to be quashed and set aside."

32. As per respondent the petition suffers from non-compliance of the provisions contained U/s 83(1)(b) of the Act, 1951, because does not contain a concise statement of material fact on which the petitioner relies. Sub section (b) says about the "full particulars of **corrupt practice".** It is appears from the reading of entire petition that this petition is not based upon **"corrupt practice".** Even the respondent himself raised the objection about **"absence of concise statement of material fact",** which come under sub section 83(1)(a) not under 83(1)(b). Sub Section (b) of S.83(1) require **"full particulars"** in the case of **Corrupt practice** , while sub section (a) require only **"concise statement"** of the **material facts**.

33. In the light of the aforesaid law, if we examined the petition, than it appears that the petition has been filed mainly upon the grounds that nomination submitted by the respondent no.1 was not in accordance with the prescribed format as stipulated by the law as ;

(i) Neither the affidavit which was submitted by the respondent no.1 along with the nomination paper was signed by the respondent nor respondent no.1 was properly identified upon the affidavit.

(ii) The affidavit did not contain signature of the notary on the seal contained at all pages, therefore, it would be deemed that no affidavit was filed along-with nomination papers by Respondent.

34. The ground taken by petitioner is mainly related to the affidavit filed along with nomination paper. As per the petitioner the election of respondent No.1 is vitiated under section 100 (1) (d) (i) & (iv) of the Act, 1951 because the

nomination submitted by the respondent no.1 was not in accordance with the prescribed format as stipulated by the law as neither the affidavit which was submitted by the respondent no.1 along with the nomination paper was signed by the respondent nor respondent no.1 was properly identified upon the affidavit. The affidavit did not contain signature of the notary on the seal contained at all pages. Therefore, it would be deemed that no affidavit was filed along-with nomination papers by Respondent.

35. As for (sic : far) as **"concise statement of material facts"** is concerned, it appears that in para 6 (A) to 6 (M) of petition, sufficient details are mentioned by the petitioner related to the affidavit. Not only details of defects are mentioned, the relevant provisions of concerned law and rules are also mentioned. Reference of Sections 30, 31, 33, 33A, 36(2), 100(1)(d)(i) & (v) of the **"Representation of the People Act 1951",** Rule 4-A & Form 26 contained in the **"Conduct of election Rules, 1961",** Section 8 (1)(e), 8(2) of **"Notaries Act,1952"** has been given. Entire language of any section of law is not required to be pleaded.

36. It is appeared from **Para 6 (A) to 6 (M)** of petition that the petitioner mentioned the entire details of his knowledge and the defects in affidavit. In Para 6 (C) it is stated that as per provisions of section 33-A(3) of the Act, 1951, the respondent no.2 affixed the information / nomination submitted by respondent no.1 on the notice board. Accordingly, the petitioner also got the opportunity to peruse the same and gathered the fact that the nomination form so submitted by respondent no.1 was not in accordance with the prescribed form, as stipulated by the law as neither the affidavit annexed thereto was signed by respondent no.1 nor the same was identified. The affidavit did not contain the signature of the notary on the seal contained at all pages, hence, non-compliance of mandatory provision of law entailed only rejection of nomination form at the threshold at the time of scrutiny of nomination as provided under section 36(2) of the Act, 1951.

37. In other paras it is stated that as per **Rule 4-A** of the **Conduct of Election Rules,** the filing of affidavit is necessary along with the nomination paper filed under section 33(1) of the Act, 1951. The affidavit should be sworn before a Magistrate of the First Class or a Notary in Form 26. The affidavit submitted by the respondent no.1 was not signed by the notary on each page. Respondent no.1 was not properly identified, therefore, it would be deemed that no affidavit was filed along with the nomination paper. The defect of non-verification and identification of the affidavit is a defect of substantial character and, therefore, the nomination form so submitted by the respondent no.1 ought to have been rejected during scrutiny as per section 36(2) of Act,1951. It is also stated that the filing of affidavit is mandatory, as per the direction given by the Apex Court in the case of **People's Union For Civil Liberties Vs. Union of India and another**. As per instructions given by the Supreme Court in that case, the legislature has

introduced " **Section 33-A"** in the Act and **Rule 4-A** of the Conduct of Rules, according to which it is mandatory on the part of candidate to furnish an affidavit as per prescribed format i.e. Form 26 stating therein the assets and liabilities, educational qualification and past and present criminal cases so that the voters of the constituency could know full particulars of a candidate. The affidavit filed by respondent no.1 having no any signature / verification as per rule, therefore, the affidavit is not an affidavit in the eyes of law. It is the settled preposition of law that without proper signature / verification and identification, an affidavit is nullity because verification of affidavit testifies the genuineness / authenticity of the candidates. It is also stated that a candidate who has filed an affidavit with false information as well as a candidate who has filed an affidavit with particulars left blank, should be treated as per the same shall tantamount to breach of Fundamental Rights of voter, guaranteed under Article 19(1)(a) of the Constitution (Right to Know) of the citizen, which is inclusive of freedom of speech and expression, as interpreted by Hon'ble the Supreme Court in the case of **Association of Democratic Reform.** In this case, the defect of unsigned affidavit is definitely a defect of substantial character, which cannot be marginalized. The nomination paper was wrongly accepted.

38. Whether in the absence of affidavit, defect in the affidavit, or in case of false affidavit, the nomination should be rejected or not? As per petitioner, looking to the defect in the affidavit filed by respondent no.1, the nomination should be rejected. In this behalf, the petitioner placed reliance upon the following decisions :-

[1] *Resurgence India v. Election Commission of India and Anr.,* AIR 2014 S.C. 344 = 2002 AIR SCW 2186 = (2014) 14 SCC 189 [Three Judges] [13.09.2013]

[2] *Peoples Union for Civil Liberties (PUCL) and another Vs.. Union of India and another = Lok Satta and others Vs. Union of India ,* AIR 2003 S. C. 2363 [13.03.2003] [Three Judges]

[3] *Union of India Vs. Association for Democratic Reforms and another, =Peoples Union for Civil Liberties and another Vs. Union of India and another,* AIR 2002 S. C. 2112 = 2002 AIR-SCW 2186 = (2002) 5 SCC 294 [02.05.2002] [Three Judges]

39. In the case of *Union of India Vs. Association for Democratic Reforms and another = Peoples Union for Civil Liberties and another Vs. Union of India and another* , AIR 2002 S. C. 2112 = 2002 AIR-SCW 2186 = (2002) 5 SCC 294 [Three Judges] , The Supreme Court, directed the Election Commission of India to issue necessary orders, in exercise of its power under Article 324 of the Constitution, to call for information on affidavit from each candidate seeking election to the

Parliament or a State Legislature as a necessary part of his nomination paper furnishing therein information relating to his conviction / acquittal / discharge in any criminal offence in the past, any case pending against him of any offence punishable with imprisonment for 2 years or more, information regarding assets (movable, immovable, bank balance etc.) of the candidate as well as of his / her spouse and that of Dependants, liability, if any, and the educational qualification of the candidate. The Apex Court sum up the legal and constitutional position as under ;-

> **"1.** The jurisdiction of the Election Commission is wide enough to include all powers necessary for smooth conduct of elections and the word 'elections' is used in a wide sense to include the entire process of election which consists of several stages and embraces many steps.
>
> **2.** The limitation on plenary character of power is when the Parliament or State Legislature has made a valid law relating to or in connection with elections, the Commission is required to act in conformity with the said provisions. In case where law is silent, Article 324 is a reservoir of power to act for the avowed purpose of having free and fair election. Constitution has taken care of leaving scope for exercise of residuary power by the Commission in its own right as a creature of the Constitution in the infinite of situations that may emerge from time to time in a large democracy, as every contingency could not be foreseen or anticipated by the enacted laws or the rules. By issuing necessary direction, Commission can fill the vacuum till there is legislation on the subject. In Kanhiya Lal Omar's case, the Court construed the expressions "superintendence, direction and control" in Article 324(1) and held that a direction may mean an order issued to a particular individual or a precept which may have to follow and it may be a specific or a general order and such phrase should be construed liberally empowering the election commission to issue such orders.
>
> **3.** The word "elections" includes the entire process of election which consists of several stages and it embraces many steps, some of which may have an important bearing on the process of choosing a candidate. Fair election contemplates disclosure by the candidate of his past including the assets held by him so as to give a proper choice to the candidate according to his thinking and opinion. As stated earlier, in Common Cause case (supra) the Court dealt with a contention that elections in the country are fought with the help of money power which is gathered from black sources and once elected to power, it becomes easy to collect tons of black money, which is used for retaining power and for re-election. If on affidavit a candidate is required to disclose the assets held by him at the time of election, voter can decide whether he could be re-elected even in case where he has collected tons of money.

Presuming, as contended by the learned senior counsel Mr. Ashwini Kumar, that this condition may not be much effective for breaking a vicious circle which has polluted the basic democracy in country as the amount would be unaccounted. May be true, still this would have its own effect as a step-in-aid and voters may not elect law-breakers as law-makers and some flowers of democracy may blossom.

4. To maintain the purity of elections and in particular to bring transparency in the process of election, the Commission can ask the candidates about the expenditure incurred by the political parties and this transparency in the process of election would include transparency of a candidate who seeks election or re-election. In a democracy, the electoral process has a strategic role. The little man of this country would have basic elementary right to know full particulars of a candidate who is to represent him in Parliament where laws to bind his liberty and property may be enacted.

5. The right to get information in democracy is recognised all throughout and it is natural right flowing from the concept of democracy. At this stage, we would refer to Article 19(1) and (2) of the International Covenant of Civil and Political Rights which is as under: -

> **"(1)** Everyone shall have the right to hold opinions without interference.
>
> **(2)** Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

6. Cumulative reading of plethora of decisions of this Court as referred to, it is clear that if the field meant for legislature and executive is left unoccupied detrimental to the public interest, this Court would have ample jurisdiction under Article 32 read with Articles 141 and 142 of the Constitution to issue necessary directions to the Executive to subserve public interest.

7. Under our Constitution, Article 19(1)(a) provides for freedom of speech and expression. Voter's speech or expression in case of election would include casting of votes, that is to say, voter speaks out or expresses by casting vote. For this purpose, information about the candidate to be selected is must. Voter's (little man-citizen's) right to know antecedents including criminal past of his candidate contesting election for MP or MLA is much more fundamental and basic for survival of democracy. The little man may think over before making his choice of electing law breakers as law makers.

40. In the aforesaid case the Court found that the directions issued by the High Court are not unjustified or beyond its jurisdiction. However, considering the submissions made by the learned counsel for the parties at the time of hearing of the matter, the Apex Court **modified the said directions in para 58 as stated below:-**

> **"58. The Election Commission is directed** to call for information on affidavit by issuing necessary order in exercise of its power under Article 324 of the Constitution of India from each candidate seeking election to Parliament or a State Legislature as a necessary part of his nomination paper furnishing therein, information on the following aspects in relation to his/her candidature:-
>
> (1) Whether the candidate is convicted / acquitted / discharged of any criminal offence in the past if any, whether he is punished with imprisonment or fine?
>
> (2) Prior to six months of filing of nomination, whether the candidate is accused in any pending case, of any offence punishable with imprisonment for two years or more, and in which charge is framed or cognizance is taken by the Court of law. If so, the details thereof.
>
> (3) The assets (immovable, movable, bank balances etc.) of a candidate and of his/her spouse and that of Dependants.
>
> (4) Liabilities, if any, particularly whether there are any over dues of any public financial institution or Government dues.
>
> (5) The educational qualifications of the candidate.

41. Pursuant to the above directions, the Election Commission, vide order dated 28.06.2002, issued certain directions to the candidates to furnish full and complete information in the form of an affidavit, duly sworn before a Magistrate of the First Class, with regard to the matters specified in Association for Democratic Reforms (supra). It was also directed that non-furnishing of the affidavit by any candidate or furnishing of any wrong or incomplete information or suppression of any material information will result in the rejection of the nomination paper, apart from inviting penal consequences under the Indian Penal Code, 1860. It was further clarified that only such information shall be considered to be wrong or incomplete or suppression of material information which is found to be a defect of substantial character by the Returning Officer in the summary inquiry conducted by him at the time of scrutiny of nomination papers.

42. In *Peoples Union for Civil Liberties (PUCL) and another Vs.. Union of India and another , = Lok Satta and others Vs. Union of India* , AIR 2003 S. C.

2363 [Three Judges] though the Supreme Court reaffirmed the aforementioned decision but also held that the direction to reject the nomination papers for furnishing wrong information or concealing material information and verification of assets and liabilities by means of a summary inquiry at the time of scrutiny of the nominations cannot be justified. Therefore, Court directed to the Commission to revise the instructions. The court observed -

> "While no exception can be taken to the insistence of affidavit with regard to the matters specified in the judgment in Association for Democratic Reforms case, the direction to reject the nomination paper for furnishing wrong information or concealing material information and providing for a summary enquiry at the time of scrutiny of the nominations, cannot be justified. In the case of assets and liabilities, it would be very difficult for the returning officer to consider the truth or otherwise of the details furnished with reference to the 'documentary proof.' Very often, in such matters the documentary proof may not be clinching and the candidate concerned may be handicapped to rebut the allegation then and there. If sufficient time is provided, he may be able to produce proof to contradict the objectors' version. It is true that the aforesaid directions issued by the Election Commission is not under challenge but at the same time prima facie it appears that the Election Commission is required to revise its instructions in the light of directions issued in Association for Democratic Reforms case (supra) and as provided under the Representation of the People Act and its 3rd Amendment."

43. Pursuant to the above, the Election Commission, vide order dated 27.03.2003, held its earlier order dated 28.06.2002 non-enforceable with regard to verification of assets and liabilities by means of summary inquiry and rejection of nomination papers on the ground of furnishing wrong information or suppression of material information. Again, the Election Commission of India, vide letter dated 02.06.2004 directed the Chief Electoral Officers of all the States and Union Territories that where any complaint regarding furnishing of false information by any candidate is submitted by anyone, supported by some documentary evidence, the Returning Officer concerned should initiate action to prosecute the candidate concerned by filing formal complaint before the appropriate authority.

44. Thereafter, in *Resurgence India v. Election Commission of India and Anr*., AIR 2014 S.C. 344 = 2002 AIR SCW 2186 = (2014) 14 SCC 189 [Three Judges] the Petitioner-organization pleaded for issuance of appropriate writ / direction including the writ of mandamus directing the respondents to make it compulsory for the Returning Officers to ensure that the affidavits filed by the candidates are complete in all respects and to reject those nomination papers, which are

accompanied by blank affidavits. In that case the nomination paper was filed with affidavit in which space prescribed for particulars was left blank. The court said that its defeats the "right to know" of elector therefore such nomination paper is liable to be rejected. The court said that filing of affidavit stating that the information given in the affidavit is correct but leaving the contents blank does not fulfill the objective behind filing the same. The ultimate purpose of filing of affidavit along with the nomination paper is to effectuate the fundamental right of the citizen under Article 19(1) (a) of the Constitution of India. The citizens are required to have the necessary information at the time of filing of the nomination paper in order to make a choice of their voting. When a candidate files an affidavit with blank particulars, it renders the affidavit itself nugatory. It is the duty of the Returning Officer to check whatever the information required is fully furnishing at the time of filing of affidavit with the nomination paper since such information is very vital for giving effect to the 'right to know' of the citizens. If a candidate fails to fill the blanks even after the reminder by the Returning Officer, the nomination paper is fit to be rejected. Court further observed that the candidate who has filed an affidavit with false information as well as the candidate who has filed an affidavit with particulars left blank cannot be treated at par. If so done it will result in breach of fundamental right guaranteed under Article 19(1)(a) of the Constitution, viz., 'right to know', which is inclusive of freedom of speech and expression. If the Election Commission accepts the nomination papers in spite of blank particulars in the affidavits, it will directly violate the fundamental right of the citizen to know the criminal antecedents, assets and liabilities and educational qualification of the candidate. Further, the subsequent act of prosecuting the candidate under Section 125A(i) will bear no significance as far as the breach of fundamental right of the citizen. It is therefore necessary for the candidate to explicitly remark as 'NIL' or 'Not Applicable' or 'Not known' in the columns and not to leave the particulars blank. The court summarized the directions in para 27 as under :-

> **"27.** What emerges from the above discussion can be summarized in the form of following directions:
>
> **(i)** The voter has the elementary right to know full particulars of a candidate who is to represent him in the Parliament / Assemblies and such right to get information is universally recognized. Thus, it is held that right to know about the candidate is a natural right flowing from the concept of democracy and is an integral part of Article 19(1) (a) of the Constitution.
>
> **(ii)** The ultimate purpose of filing of affidavit along with the nomination paper is to effectuate the fundamental right of the citizens under Article 19(1)(a) of the Constitution of India. The citizens are supposed to have the necessary information at the time of filing of

nomination paper and for that purpose, the Returning Officer can very well compel a candidate to furnish the relevant information.

(iii) Filing of affidavit with blank particulars will render the affidavit nugatory.

(iv) It is the duty of the Returning Officer to check whether the information required is fully furnished at the time of filing of affidavit with the nomination paper since such information is very vital for giving effect to the 'right to know' of the citizens. If a candidate fails to fill the blanks even after the reminder by the Returning Officer, the nomination paper is fit to be rejected. We do comprehend that the power of Returning Officer to reject the nomination paper must be exercised very sparingly but the bar should not be laid so high that the justice itself is prejudiced.

(v) We clarify to the extent that Para 73 of People's Union for Civil Liberties case (supra) will not come in the way of the Returning Officer to reject the nomination paper when affidavit is filed with blank particulars.

(vi) The candidate must take the minimum effort to explicitly remark as 'NIL' or 'Not Applicable' or 'Not known' in the columns and not to leave the particulars blank.

(vii) Filing of affidavit with blanks will be directly hit by Section 125A(i) of the RP Act. However, as the nomination paper itself is rejected by the Returning Officer, we find no reason why the candidate must be again penalized for the same act by prosecuting him/her."

45. In the above case the Court also referred *Shaligram Shrivastava Vs. Naresh Singh Patel*, AIR 2003 S. C. 2128 [Three Judges] in which Apex court said that rejection of nomination is proper upon the ground of failure to fill proforma prescribed by Election Commission eliciting necessary information for deciding whether person is qualified or disqualified. In that case it was found that the candidate did not properly filled such proforma and also remain absent at time of scrutiny of nomination. The Court observed that the failure to fill the proforma prescribed by the election commission eliciting necessary and relevant information in the light of S. 8 to inquire as to whether the person is qualified and not disqualified and also failing to be present personally or through his representative at the time of scrutiny renders the statutory duty / power of Returning Officer for holding proper scrutiny of nomination paper nugatory. No scrutiny of the nomination paper could be made under S. 36(2) of the Act in the light of S. 8 of the Act. It certainly rendered the nomination paper suffering from defect of substantial character and the Returning Officer was within his rights in rejecting the same. Court further said that at the time of scrutiny the Returning Officer is entitled to satisfy himself that a candidate is qualified and not disqualified. Sub-section (2) of S. 36 authorises him to hold an enquiry on his own

motions, though summary in nature. The Returning Officer furnished a proforma to the candidates to be filled on affidavit and filed on or before the date and time fixed for scrutiny of the nomination paper. Therefore, providing a proforma, eliciting necessary and relevant information in the light of S. 8 of the Act to enquire as to whether the person is qualified and not disqualified, is an act or function fully covered under sub-section (2) of S. 36 of the Act. The Returning Officer is authorized to seek such information to be furnished at the time or before scrutiny. If the candidate fails to furnish such information and also absents himself at the time of the scrutiny of the nomination papers, is obviously avoiding a statutory enquiry being conducted by the Returning Officer under sub-section (2) of S. 36 of the Act relating to his being not qualified or disqualified in the light of S. 8 of the Act. It is bound to result in defect of a substantial character in the nomination. The court further observed that the information furnished in the form 2-B prescribed under R. 4 contains the declaration of the candidate that he is qualified and not disqualified to be a candidate for being chosen from the constituency. Such bald declaration that the candidate is qualified and not disqualified is not at all sufficient to scrutinise the nomination paper from the angle of S. 8 of the Act. For the purpose of scrutiny further information is necessary. The scrutiny may call for even suo-motu inquiry by the Returning Officer though summary in nature. It is one of the statutory duties of the Returning Officer to scrutinise the nomination paper in the light of S. 8 of the Act and he is statutorily authorised to hold a summary inquiry about the qualification and disqualification of the candidates. Such a power which vests in the Returning Officer is not dependent instructions issued by the Election Commission, therefore, it is not necessary to enter into the controversy whether the instructions issued by the Election Commission are in exercise or its power under Art. 324 or not.

46. Therefore, it is clear position of law that in case of absence of affidavit or the false affidavit or affidavit with blank space is not an affidavit in the eyes of law. The contention of the petitioner that the "affidavit filed by respondent is not an affidavit in the eye of law" may be examined during the trial of this case. Sufficient opportunity is required to be given to the respondent no.1 to explain his position. As far as objections of respondent no.1 are concerned, it appears that the petition having a concise statement of material fact and the petition discloses a trivial issue or cause of action. Therefore, the grounds 3(A) and 3(D) raised by respondent no.1 in his application are not acceptable and are not sufficient for dismissal of the petition.

47. **Ground No. B -**

> **"(B).** The election petition has not been verified in the manner laid down in the Code of Civil Procedure, 1908 inasmuch as the petitioner has not

disclosed the source of information on the basis whereof allegations have been leveled in the petition."

As per respondent no.1, the election petition has not been verified in the manner laid down in the Code of Civil Procedure, 1908 and the petitioner has not disclosed the source of information on the basis whereof allegations have been leveled in the petition. It appears from the petition that all objections are related to the affidavit filed by respondent no.1. The source of information has been clearly mentioned in Para 6(C) in which it is stated that the respondent no.2 affixed the nomination and affidavit, on the notice board, therefore, upon perusal of the notice board, the petitioner got the knowledge of the fact. The objection regarding the verification of petition also having no any force. The petitioner Ram Kishan Patel signed every page of petition. Notary also affixed his seal with his signature on each and every page of the petition. The verification also found at Page No.9 and the aforesaid petition is also supported by an affidavit of petitioner Ram Kishan Patel sworn before the Notary. This affidavit also having the seal and signature of Notary and the signature of petitioner. Before the Notary petitioner Ram Kishan was identified by another person Vinod Kumar Sahu. Therefore, the objection raised, having no any force and not acceptable.

48. **Ground No. C -**

"[C]. Copy of the election petition as served upon the answering respondent has not been attested by the petitioner under his own signature to be a true copy of the petitioner (sic : petition). The memo of petition bears such attestation but the documents filed along with the election petition do not bear any such attestation. There is thus non-compliance of the provisions contained U/s 81(3) of the Act, 1951."

49. In this objection it is stated by respondent no.1 that the copy which has been served upon him has not been attested by the petitioner under his own signature being a true copy. The memo of petition bears such attestation but the documents filed along with the election petition do not bear any such attestation. Therefore, non-compliance of provisions contained under section 81 (3) of the Act, 1951 is made out. It is mentioned in the application that section 81 of the Act deals with presentation of the petitions. Sub Section 3 of the Section 81 specifically provides that *"every election petition shall be accompanied by as many copies thereof as there are respondent mentioned in the petition and every such copy shall be attested by the petitioner under his own signature to be a true copy of the petition"*. Section 86 of the Act deals with trial of election petition. Sub Section 1 of Section 86 specifically provides that the High Court shall dismiss an election petition which does not comply with the provision of Section 81 or Section 82 or Section 117.

50. In reply, the petitioner submitted (in his written reply) that said allegation made in the application is nothing but ipse-dixi of Respondent No. 1. From perusal it is clear that each and every page of the election petition is attested by the petitioner under his own signature. Hence, the allegation deserves to be rejected at threshold. In fact, the petitioner has filed the election petition as per the provision of the Act of 1951 and it is duly signed and verified by him as provided under clause (c) of sub section 1 of section 83 of the Act of 1951 and as per provision of Code of Civil Procedure.

51. Sub section (3) of Section 81 of Act,1951 says every election petition shall be accompanied by as many copies thereof as there are respondents mentioned in the petition, and every such copy shall be attested by the petitioner under his own signature to be a true copy of the petition. Upon perusal of the photo copy of petition, filed along with application under consideration, it is clear that each and every page of the election petition has been attested by the petitioner under his own signature with the word 'T.C.', which is the short form of "True Copy". The respondent himself admitted in his application that memo of petition bears such attestation but he said that the documents filed along with the election petition do not bear any such attestation.

52. The respondent said that the documents filed along with the election petition do not bear any such attestation. Sub section (2) of Section 83 of Act, 1951, says any schedule or annexe (sic : annexure) to the petition shall also be signed by the petitioner and verified in the same manner as the petition. This argument is not convincing because section 81(3) says only about the copy of petition, not about schedule or annexe (sic : annexure). Section 83(2) says only about the manner of filing the schedule or annexe. It is provided that "any schedule or annexe (sic : annexure) to the petition shall also be signed by the petitioner and verified in the same manner as the petition". This requirement is not applicable to the copies of documents / annexe (sic : annexure) submitted for giving to respondent. In this petition, the documents filed by petitioner shows that all are the certified copies of documents issued by Returning officer under his seal and signature. Because the documents are the certified copies of public documents, issued by public authority during discharging his official duties, therefore section 83(2) is not applicable. Hence point No. "C" also not acceptable.

53. Therefore, I.A. 8210 of 2019 is dismissed.

Order accordingly

I.LR. [2020] M.P. 1921 (DB)
APPELLATE CRIMINAL

Before Mr. Justice S.C. Sharma & Mr. Justice Shailendra Shukla

Cr.A. No. 953/2011 (Indore) decided on 10 July, 2020

ARUN …Appellant

Vs.

STATE OF M.P. …Respondent

(Alongwith Cr.A. Nos. 994/2011, 1070/2011, 1071/2011, 1081/2011, 1123/2011 & 1205/2011)

***A. Penal Code (45 of 1860), Sections 396, 398 & 412, Arms Act (54 of 1959), Section 25(1)(a) & (b) and Evidence Act (1 of 1872), Section 7 – Dacoity – Circumstantial Evidence* – Bank cash looted while it was being transported to other branch – Accused failed to explain the possession of such huge cash, where currency notes were wrapped by bank slip carrying seal of bank – Seizure of cash box, firearm and vehicle used in crime, from accused, duly proved – Presumption u/S 412 IPC not rebutted by accused – As per call records, accused persons were in touch with each other during the concerned period of crime and even thereafter – Offence proved beyond reasonable doubt – Conviction affirmed – Appeals dismissed.**

(Paras 32 to 36, 43, 48, 59, 63 & 92)

क. दण्ड संहिता (1860 का 45), धाराएँ 396, 398 व 412, आयुध अधिनियम (1959 का 54), धारा 25(1)(a) व (b) एवं साक्ष्य अधिनियम (1872 का 1), धारा 7 – डकैती – परिस्थितिजन्य साक्ष्य – बैंक के रोकड़ को लूटा गया जब उसका अन्य शाखा में परिवहन किया जा रहा था – अभियुक्त, उक्त भारी मात्रा में रोकड़ का कब्जा स्पष्ट करने में असफल रहा जहां करेंसी नोटों को, बैंक की मुद्रा वाली बैंक पर्ची में लपेटा गया था – अभियुक्त से रोकड़ के बक्से, अग्न्यायुध एवं अपराध में प्रयुक्त वाहन की जब्ती सम्यक् रूप से साबित की गई – अभियुक्त द्वारा भा.दं.सं. की धारा 412 के अंतर्गत उपधारणा का खंडन नहीं किया गया – कॉल रिकार्ड्स के अनुसार अभियुक्तगण, संबंधित अपराध की अवधि के दौरान और यहां तक कि उसके पश्चात् भी एक दूसरे के संपर्क में थे – अपराध, युक्तियुक्त संदेह से परे साबित – दोषसिद्धि अभिपुष्ट – अपीलें खारिज।

***B. Penal Code (45 of 1860), Section 396 & 398 and Arms Act (54 of 1959), Section 25(1)(a) & (b) – Seized Weapon* – FSL report shows that seized knife contained human blood – No explanation by accused – Apex Court held that as recovery was made pursuant to disclosure statement by accused and in serological report human blood was found, the non-determination of blood group had lost its significance.** **(Paras 48, 67 & 68)**

ख. दण्ड संहिता (1860 का 45), धारा 396 व 398 एवं आयुध अधिनियम (1959 का 54), धारा 25(1)(a) व (b) – जब्तशुदा शस्त्र – एफ.एस.एल. प्रतिवेदन दर्शाता है कि जब्तशुदा चाकू पर मानव रक्त लगा था – अभियुक्त द्वारा कोई स्पष्टीकरण नहीं – सर्वोच्च न्यायालय ने अभिनिर्धारित किया है कि चूंकि बरामदगी, अभियुक्त द्वारा प्रकटन कथन के अनुसार की गई थी और सीरम प्रतिवेदन में मानव रक्त पाया गया था, रक्त समूह का अवधारण न करने का महत्व खो जाता है।

C. Penal Code (45 of 1860), Sections 396, 398 & 412 and Arms Act (54 of 1959), Section 25(1)(a) & (b) – Seizure Memo – Delay **– Seizure memo prepared after 3 weeks from registration of offence – Held – Case involved number of accused persons, where dozens of piece of evidence were required to be collected – No unusual delay. (Para 71)**

ग. दण्ड संहिता (1860 का 45), धाराएँ 396, 398 व 412 एवं आयुध अधिनियम (1959 का 54), धारा 25(1)(a) व (b) – जब्ती मेमो – विलंब – जब्ती मेमो को अपराध के पंजीयन से 3 सप्ताह पश्चात् तैयार किया गया – अभिनिर्धारित – प्रकरण में कई अभियुक्तगण शामिल हैं जहां दर्जनों साक्ष्य के टुकड़े एकत्रित करना अपेक्षित था – कोई असामान्य विलंब नहीं।

D. Penal Code (45 of 1860), Sections 396, 398 & 412 – Test Identification Parade **– Held – Although manner of identification not described in identification memo, this is not a major lacuna as to render whole identification proceedings unreliable. (Para 66)**

घ. दण्ड संहिता (1860 का 45), धाराएँ 396, 398 व 412 – पहचान परेड – अभिनिर्धारित – यद्यपि पहचान ज्ञापन में पहचान की रीति वर्णित नहीं, यह एक बड़ी कमी नहीं है जिससे कि संपूर्ण पहचान कार्यवाहियां अविश्वसनीय हो जाएं।

E. Penal Code (45 of 1860), Section 396 & 398 and Arms Act (54 of 1959), Section 25(1)(a) & (b) – Independent witnesses turning hostile – Effect **– Held – Apex Court concluded that mere fact that a witness is police officer, does not by itself gives rise to any doubt about his creditworthiness – In present case, evidence of IO is reliable as there is nothing in cross examination of IO to discredit his evidence. (Para 36 & 38)**

ङ. दण्ड संहिता (1860 का 45), धारा 396 व 398 एवं आयुध अधिनियम (1959 का 54), धारा 25(1)(a) व (b) – स्वतंत्र साक्षीगण पक्षविरोधी हो गये – प्रभाव – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया कि मात्र यह तथ्य कि एक साक्षी पुलिस अधिकारी है, अपने आप में उसकी विश्वसनीयता के बारे में कोई संदेह उत्पन्न नहीं करता, वर्तमान प्रकरण में, अन्वेषण अधिकारी का साक्ष्य विश्वसनीय है क्योंकि अन्वेषण अधिकारी के प्रतिपरीक्षण में साक्ष्य को अविश्वसनीय बनाने के लिए कुछ नहीं है।

***F. Penal Code (45 of 1860), Section 411 & 412 and Evidence Act (1 of 1872), Section 114-A – Presumption* – Held – Recovery made barely after 4 days of incident – Provisions of Section 114-A of Evidence Act gets attracted, where Court may presume that a person in possession of stolen goods soon after theft, is either thief or has received goods knowing them to be stolen, unless he can account for his possession. (Para 91)**

च. दण्ड संहिता (1860 का 45), धारा 411 व 412 एवं साक्ष्य अधिनियम (1872 का 1), धारा 114–A – उपधारणा – अभिनिर्धारित – बरामदगी, घटना के मुश्किल से 4 दिन पश्चात् की गई – साक्ष्य अधिनियम की धारा 114–A के उपबंध आकर्षित होते हैं जहां न्यायालय यह उपधारणा कर सकता है कि चोरी के तुरंत पश्चात् चुराया गया माल जिस व्यक्ति के कब्जे में है वह या तो चोर है या उसने माल को चोरी का माल होने का ज्ञान होते हुए प्राप्त किया है, जब तक कि वह उसके कब्जे का कारण नहीं दे सकता।

***G. Penal Code (45 of 1860), Section 411 & 412 – Ingredients – Appreciation of Evidence* – Held – Regarding possession of cash in respect of 4 accused persons, there is no evidence to show that they knew that the cash is looted property as a result of dacoity – Memorandum statements also not recorded – At the same time, it can safely be presumed that they knew that it was a stolen property – These accused persons liable to be convicted u/S 411 and not u/S 412 IPC – Sentence reduced from 7 years to 3 years – Appeals partly allowed. (Paras 89 to 94)**

छ. दण्ड संहिता (1860 का 45), धारा 411 व 412 – घटक – साक्ष्य का मूल्यांकन – अभिनिर्धारित – रोकड़ के कब्जे के संबंध में, चार अभियुक्तों के बारे में यह दर्शाने के लिए कोई साक्ष्य नहीं कि उन्हें ज्ञात था कि रोकड़, डकैती के परिणामस्वरूप लूटी गई संपत्ति है – कथनों के ज्ञापन भी अभिलिखित नहीं किये गये – तत्समय, यह सुरक्षित रूप से उपधारणा की जा सकती है कि उन्हें ज्ञात था कि वह एक चुराई गई संपत्ति थी – ये अभियुक्तगण धारा 411 के अंतर्गत दोषसिद्ध किये जाने योग्य हैं और न कि धारा 412 भा. दं.सं. के अंतर्गत – दण्डादेश को 7 वर्ष से घटाकर 3 वर्ष किया गया – अपीलें अंशतः मंजूर।

Cases referred:

AIR 2003 S.C. 1311, AIR 2001 SC 2420, (1992) 3 SCC 300, 2012 (11) SCC 768, 2018 (2) ANJ (SC) (Suppl.) 107, 2016 10 SCC 220, (2015) SCC 3314, (2011) Gauhati Law Reports 539, (2010) 2 SCC 748, 1997 3 SCC 525, 2010 Vol.-1 CRIMES 256 (Orissa).

Vivek Singh, for the appellant in Cr.A. Nos. 953/2011 & 994/2011.

Girish Desai, for the appellants in Cr.A. No. 1070/2011.

Sudha Shrivastava, for the appellants in Cr.A. Nos. 1071/2011, 1081/2011 & 1123/2011.

P.K. Shukla, for the appellant in Cr.A. No. 1205/2011.
L.S. Chandiramani, P.P. for the respondent/State.

J U D G M E N T

The Judgment of the Court was delivered by: **SHAILENDRA SHUKLA, J.:-** These appeals have been preferred under the provision of Section 374 of Cr.P.C by the appellants against the convictions and sentences pronounced against them by ASJ Indore in S.T.No.460/18 vide judgment dt. 31.3.2011. The convictions and sentences are noted as under in Tabular form :-

S r. N o	CRA.No	Name of accused	Conviction under the provisions of IPC.	Jail sentence	Fine	Addl. Sentence in default of payment of fine
1	953/2011	Arun	U/s. 412 of IPC	7 years RI	1000	1 month
2	994/2011	Mahesh	U/s. 412 of IPC	7 years RI	1000	1 month
3	1070/2011	**1**.Ankur @ Banti	U/s. 396 & 398 of IPC.	L.I. & 7 years RI	2000 1000	2 and 1 months. on each count
		2. Ashok	U/s. 396, 398 & 25(1-b) (a) of Arms Act.	L.I., 7 years RI & 2 years RI	2000 1000 1000	2, 1 & 1 months on each count
		3. Ravi @ Babi	U/s. 396, 398 & 25(1-b) (b) of Arms Act.	L.I., 7 years RI & 1 year RI	2000 1000 500	2, 1 months and 15 days on each count
		4.Hemraj @ Sonu	U/s. 396, 398 & 25(1-b) (b) of Arms Act.	L.I., 7 years RI & 1 year RI	2000 1000 500	2, 1 months and 15 days on each count
4	1071/2011	Rajendra @ Manju	U/s. 412 of IPC	7 years RI	1000	1 month
		2.Ghanshyam	U/s. 412 of IPC	7 years RI	1000	1 month
5	1081/2011	Rahul @ Vijendar	U/s. 396 of IPC	L.I.	2000	2 months
6	1123/2011	Shivraj Singh	U/s.412 of IPC	7 years RI	1000	1 month
7	1205/2011	Pradeep	U/s. 396 of IPC	L.I.	2000	2 months

2. The prosecution story in short is that cash amounts from Rajwada Branch of Union Bank of India at Indore used to be transported to chest of Union Bank of India at Sindhi Colony. On 11.4.2008, the head cashier of Rajwada Branch namely Mr. Brij Mohan Gupta set out to deposit Rs.19.50 lacs in an auto rickshaw hired for Sindhi Colony Branch where chest is available for storing cash and he was accompanied by Rekha Dubey (PW5), a bank employee and another person called Vikas Shinde (PW32). Brij Mohan Gupta sat in a middle of seat along with the box containing money which was already fastened with two locks. As the auto rickshaw reached Manik Bagh Bridge, six persons in two motor cycles, one silver colored and the other red colored came from behind and blocked the path of auto rickshaw. Some of the riders jumped from their motorcycles and immediately dealt knife blows on Vikas Shinde (PW32) who got seriously injured and fell out of the auto rickshaw. These assailants thereafter dragged out Rekha Dubey (PW5)

and thereafter they snatched the box from the hands of Brij Mohan Gupta and in the process gave knife injuries to him as well. When Brij Mohan Gupta, despite being hurt, ran after the accused persons, one of the accused fired from his fire arm resulting in serious injury to Brij Mohan Gupta. The auto rickshaw driver thereafter immediately took injured Vikas Shinde (PW32) to Police Station Juni and thereafter to M.Y. Hospital at Indore whereas Rekha Dubey (PW5) took Mr. Brij Mohan Gupta, who was critically injured to Anand Hospital. Before leaving for another hospital Rekha Dubey (PW5) called up her Branch Manager. The police of police station Juni had also got information in the meanwhile and the investigating officer reached Anand Hospital where the deceased was declared as brought dead. Rekha Dubey (PW5) thereafter narrated the story to Investigating Officer Mohan Singh (PW47) which was taken down in writing which is Ex.P/13 and thereafter on the basis of this Dehati Nalishi report, FIR Ex.P/60 was lodged and investigation was initiated. Two days later, *ie.,* on 13.4.2008, a secret information was received in the police station that accused Rahul is about to leave the city and he is present on his house along with some other accused persons and is possessing looted cash of the bank. On the basis of such information, the place where Rahul was staying with two other co-accused persons was raided, and Rahul and two of his accomplices Ankur and Pradeep were nabbed and thereafter on interrogation Rahul spilled the beans and divulged about the roles of others also. Part of looted money was recovered from Rahul and on his memorandum from other accused persons as well, looted cash was recovered. Out of Rs.19.50 lacs Rs.17.24 lacs were recovered from various accused. This apart, sharp edged knives which were used in inflicting injuries on Vikas Shinde (PW32) and Brij Mohan Gupta were also recovered from these accused persons on the basis of their memorandum. The fire arm which was used in the incident was also recovered from the accused Ashok. These items along with the blood stained articles were sent to FSL for serological examination. The serological laboratory gave its findings and the fire arm was also sent to arms Moharrir which was found to be in a fit condition to fire. After completion of investigation charge sheet was filed against the appellant and other co-accused persons including an accused namely Ejaz.

3. Charges were framed against all the accused under provisions of Section 396, 398 and 412 of IPC. Additional charges under Section 25(1-b) (b) of Arms Act were framed against accused Hemraj and Ravi whereas charge under Section 25(1-b) (a) of Arms Act was framed against accused Ashok. The accused abjured their guilt and claimed innocence. They proposed to give defence evidence. However, no defence evidence was led by them.

4. The trial court after examining as many as 47 witnesses pronounced its verdict and has convicted appellants as depicted in the table. However, accused Ejaz was acquitted of all charges.

5. In their appeals, the appellants have claimed innocence.

6. **Appellant Arun** in Cri.Appeal No.953/2011 has stated that the prosecution could not prove the intention which is essential ingredients under Section 412 of IPC and the material omissions and contradictions have been omitted by the trial court.

7. **Appellant Mahesh** in Cri.Appeal No.994/2011 has submitted that the allegation against him was that he received Rs.60,000/- from co-accused Ashok. It is submitted in the aforesaid appeal that Panch witnesses Sachin (PW8) and Ghanshyam (PW12) have turned hostile and conviction is based only on the testimony of Investigating Officer Mohan Singh Yadav (PW47), which suffers from infirmities. The citation of *Karanjit Singh v/s. State of Delhi,* AIR 2003 S.C. 1311 which has been relied upon by the trial court does not apply to the facts and situation of the present case. It is further stated that for proving the offence under Section 412 of IPC, the prosecution has to prove that the seized property was looted property and secondly that the accused knew or had reason to believe that the property which is found in his possession was received by him from the members of the gang of the decoits (sic : dacoits). These essential ingredients of Section 412 of IPC have not been fulfilled by the prosecution.

8. In **CRA.No.1070/2011**, the appellants are ***Ankur @ Banti, Ashok, Ravi and Hemraj*** who have all been convicted under Sections 396 and 398 of IPC and 3 of them namely Ashok, Ravi and Hemraj have been additionally convicted and sentenced respectively under Sections 25(1-b)(a), Section 25(1-b) (b) and Section 25(1-b) (b) of Arms Act. The grounds have been taken by these appellants are that the identification of appellants have not been established, Rekha Dubey (PW5) witness of identification memo is not reliable, that all the independent witnesses of memorandum and seizure have turned hostile, that Vikas Shinde (PW32) was an important eye-witness, but he was not made to undergo identification parade, that the cash amount was recovered was also not subjected to any identification. On these grounds appellants have claimed acquittal.

9. **Cri. Appeal No.1071/2011** is preferred by appellants ***Rajendra and Ghanshyam*** both of them have been convicted under Section 412 of IPC. The grounds which have been taken are that the cash amount allegedly recovered from the appellants was not identified to be the same cash which was looted and that no identification of appellants was also conducted and ingredients of Section 412 of IPC have not been proved and on these grounds acquittal has been sought.

10. **CRA.No.1081/2011** has been filed by appellant ***Rahul @ Vijender***. It is submitted that the identification of the accused has not been done appropriately and the material omissions and contradictions in the statements of the witnesses have been overlooked and all the independent witnesses have turned hostile and on these grounds acquittal has been sought.

11. **Cri. Appeal No.1123/2011** has been filed by appellant ***Shivraj Singh***. In this appeal also it is submitted that ingredients of Section 412 of IPC have not been satisfied and the witnesses who have deposed against him should not have been relied upon and the appellant deserved to have been given the benefit of Probation of Offenders Act.

12. **Cri.Appeal No.1025/2011** has been filed by appellant ***Pradeep*** who has been convicted under Section 396 of IPC. In his appeal he has submitted that none of the eye-witnesses have identified the appellant, that the proof against the appellant is based upon circumstantial evidence but the various links of the circumstances do not join together in such a manner so as to prove the charge under Section 396 of IPC beyond reasonable doubt. The appellant is innocent and he has been falsely implicated.

13. Learned counsel for the appellants has also submitted written final arguments to bolster the cases of the appellants. The question before this court is whether in view of such submissions the conviction and sentences imposed upon the appellants deserve to be set aside and the appellants be acquitted ?.

14. This court and the trial court were faced with determination of the following questions :-

(1) Whether on 11.4.2008 Mr. Brij Mohan Gupta who was a head cashier of Union Bank of India Rajwada Branch, Indore, accompanied by bank employee Rekha Dubey (PW5) and Vikas Shinde (PW32) was carrying Rs.19.50 lacs in a locked box for depositing the same in Union Bank of India chest at Branch situated near Sapna Sangeeta Road, Indore and the aforesaid amount was being carried by them in auto rickshaw driven by Rameshchand (PW2) ?

(2) Whether the box containing cash amount of Rs.19.50 lacs was looted by more than 5 persons resulting in commission of decoity (sic : dacoity) ?

(3) Whether Shri Gupta was murdered by one of the decoits by firing from fire arm and whether Vikas Shinde was seriously injured by this gang of decoits (sic : dacoits) ?

(4) Whether decoity (sic : dacoity) was committed by appellants Ankur, Ashok, Ravi @ Babi, Hemraj @ Sonu, Pradeep and Rahul ?

(5) Whether Brij Mohan Gupta was murdered by appellant Ashok by firing from his fire arm ?

(6) Whether at the time of commission of decoity (sic : dacoity) accused Ankur, Ashok, Ravi and Hemraj were armed with deadly weapons ?

(7) Whether accused Arun, Mahesh, Rajendra, Ghanshyam and Shivraj Singh dishonestly received cash amounts from the members of the gang of decoits (sic : dacoits) and were they liable under Section 412 of IPC ?

15. It would be appropriate to revisit Sections 396, 398 and 412 of IPC.

> **Section 396 of IPC** reads as under :- 396. Dacoity with murder.—If any one of five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity, every one of those persons shall be punished with death, or imprisonment for life, or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.
>
> **Section 398 of IPC** reads as under :- Attempt to commit robbery or dacoity when armed with deadly weapon. — If, at the time of attempting to commit robbery or dacoity, the offender is armed with any deadly weapon, the imprisonment with which such offender shall be punished shall not be less than seven years.
>
> **Section 412 of IPC** reads as under :- 412. Dishonestly receiving property stolen in the commission of a dacoity. —Whoever dishonestly receives or retains any stolen property, the possession whereof he knows or has reason to believe to have been transferred by the commission of dacoity, or dishonestly receives from a person, whom he knows or has reason to believe to belong or to have belonged to a gang of dacoits, property which he knows or has reason to believe to have been stolen, shall be punished with imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

16. **Regarding question No.1 -** Narendra Mohan Pant (PW4) states that on 11.4.2008 while he was posted as Branch Manager in Union Bank of India, M.G. Road, Rajwada, cash amount of Rs.19.50 lacs was to be transported from his branch to the branch near Sapna Sangeeta Road, which has a chest for keeping large amounts of cash. On that day Mr. Brij Mohan Gupta, head cashier was deputed to transport the cash along with bank employee Rekha Dubey (PW5) and Vikas Shinde (PW32) and they set out on auto rickshaw.

17. Rekha Dubey (PW6) states that she was posted as cash peon in Rajwada Union Bank Branch and on 11.4.2008, the head cashier was Mr. Brij Mohan Gupta. The witness states that she, Vikas Shinde (PW32) and Shri Gupta set out on an auto rickshaw for depositing Rs.19.50 lacs in Sindhi Colony currency Section at 4.10 PM. Her statements have been corroborated by Vikas Shinde (PW32). Auto rickshaw driver Rameshchand (PW2) has stated that he was hired by Rekha Dubey (PW5) for going to bank situated at Sindhi Colony near Sapna Sangeeta Talkies.

18. Regarding the fact that Mr. Brij Mohan Gupta was indeed carrying Rs.19.50 lacs with him, the evidence of Amirchand (PW1) is important. He states that he was Assistant Manager of M.G. Road Union Bank of India and had told Mr. Brij Mohan Gupta to count the money which was to be transported to the chest branch and Mr. Brij Mohan Gupta counted Rs.19.50 lacs before this witness. This amount was kept in bundles of different denominations as per the witness. This witness has not been challenged in cross-examination. The Investigating Officer Shri Mohan Singh (PW47) has seized two voucher slips No.226 and 227 respectively of Rs.11.50 lacs and Rs.8.00 lacs which he has seized from the Branch Manager Narendra Mohan Pant (PW4). The seizure memo is Ex.P/5. Narendra Mohan Pant (PW4) has stated that these voucher slips were seized from him by the Investigating Officer. Other witnesses of the seizure memo Ex.P/5 are Anil Yadav (PW23) and Akhilesh Mishra (PW37). Both of whom have supported the prosecution story regarding seizure of these vouchers. None of these witnesses have been challenged regarding counting of money and preparation of voucher slips. Thus, no doubt remains that the amount which was being transported was in fact was Rs.19.50 lacs and the said amount was kept inside the box in different bundles of various denominations as described in Exhibits P/6 and P/7 respectively.

19. The statements of Rekha Dubey (PW5), Narendra Mohan Pant (PW4), Vikas Shinde (PW32) and Rameshchand (PW2) have not been challenged appropriately in cross-examination to the extent that Mr. Brij Mohan Gupta, Rekha Dubey (PW5) and Vikas Shinde (PW32) had started of in an auto rickshaw from Rajwada Branch with box of cash for carrying the same to the chest situated at Branch near Sapna Sangeeta Road. Further the evidence of Amirchand (PW1) is also reliable and it is thus proved that the bank employees had been carrying Rs.19.50 lacs in cash in a box with them. Thus question No.1 is found rightly proved by the trial court.

20. **Regarding question No.2 and 3** - Rekha Dubey (PW5) states that as the auto rickshaw moved towards Moti Tabela, some miscreants on Hero Honda motorcycle over took the auto rickshaw in which the witness was travelling. This was followed by another motorcycle. There were two such motor cycles on which six persons were sitting. As the auto rickshaw started climbing Manik Bagh Bridge, the miscreants blocked the auto rickshaw and Vikas Shinde (PW32) was inflicted knife wounds and he was dragged down the auto rickshaw and thereafter miscreants started snatching the box containing cash. Mr. Brij Mohan Gupta when tried to resist, he was inflicted knife injury and then he was shot at by one of the accused with a fire arm.

21. Similarly Vikas Shinde (PW32) has supported the prosecution story stating that on 11.4.2008, he was working as a peon in Union Bank Branch at

Rajwada. On that day he along with Mr. Brij Mohan Gupta and Rekha Dubey (PW5) set out for depositing Rs.19.5 lacs in the main branch situated at Sapna Sangeeta talkies. As per the witness six persons in two different motor cycles blocked their path near Manik Bagh Bridge and started abusing the auto rickshaw driver and thereafter immediately those miscreants inflicted injury on the witness and dragged him down. Thereafter, they snatched away the cash box from Mr. Brij Mohan Gupta and when Mr. Gupta tried to stopped the miscreant he was shot at.

22. This witness has been further supported by Rameshchand (PW2), the auto rickshaw driver. He states that he was hired by Rekha Dubey (PW5) for going to bank situated at Sindhi Colony near Sapna Sangeeta Talkies. There were 3 passengers in auto rickshaw and on the way near Millat Nagar, miscreants came on motorcycles and started abusing him alleging that he does not know how to ride this auto. Later on, they stopped the auto rickshaw and immediately after getting out, those persons started assaulting Vikas Shinde (PW32) and gave him knife injuries and when the witnesses started picking up Vikas Shinde (PW32), the assailants snatched away the cash box and they were chased down by Mr. Brij Mohan Gupta, but Brij Mohan Gupta was shot at by fire arm and Mr. Brij Mohan Gupta fell down at that place only. The statements of these three witnesses have not been challenged in the cross examination.

23. The witness Narendra Mohan Pant (PW4) received a call at 4.30 PM from Rekha Dubey (PW5) that some miscreants have stopped their vehicle and snatched away the cash box and they have also injured Mr. Brij Mohan Gupta. This statement of witness has also not been challenged. Thus, it is found proved that on 11.4.2008, Mr. Brij Mohan Gupta the head cashier had set out on an auto rickshaw for depositing Rs.19.50 lacs in the Branch situated near Sapna Sangeeta talkies at Indore where there is chest. However on the way the loot occurred and motor cycle borne persons snatched away the cash box and they also injured Mr. Brij Mohan Gupta and Vikas Shinde (PW32). These witnesses have not been challenged appropriately in their cross-examinations. Thus, it is found proved that the box containing Rs.19.50 lacs was looted by six decoits (sic : dacoits) while the money was being transported in auto rickshaw.

24. Now the question is whether Brij Mohan Gupta died as a result of injuries suffered by him due to shooting by fire arm by one of the assailants ?. As already seen earlier Rekha Dubey (PW5) has stated that Brij Mohan Gupta was shot at by one of the assailants and she took Brij Mohan Gupta in auto rickshaw to hospital called Anand Hospital but Shri Brij Mohan Gupta was declared to be brought dead. Mohan Singh (PW47) as Investigating Officer in para 3 states that on 11.4.2008 on receiving the information about incident he arrived at Anand Hospital but came to know that Brij Mohan Gupta had died on 12.4.2008. The body of Mr. Brij Mohan Gupta was shifted from Choitram Hospital to District

Hospital at Dhar and a Safina form was prepared which is Ex.P/2 and thereafter the body panchnama document was also prepared which is Ex.P/3 which carries signatures of the witnesses. Rajesh Gupta (PW3) is also witness of Safina form Ex.P/2 and of body panchnama Ex.P/3. Dr. Bharat Prakash (PW18) states that on 12.4.2008, he was posted in District Hospital at Indore on the post of medical officer and he carried out postmortem examination of Brij Mohan Gupta whose body was brought by constable Sher Singh. On examination he found that there were six injuries on the body of Brij Mohan Gupta, five of which were contusions and abrasions at various place such as left eye-brow, on the forehead, on left knee etc and the sixth wound was found in the form of a bullet injury, due to which second and third rib had been pierced and left lung was pierced through and bullet had injured the right ventricle of the heart and diaphragm and had also scrapped right side of liver and a yellow colored metal piece was located in posterior abdominal valve and the direction of the firing of bullet was from left to right and from upper to lower region. There was 1 litre blood in thoracic cavity of left side of the chest and 2 ½ litres of blood was found in abdomen. This was gun shot injury and the time of death was 12 hours earlier. The postmortem report is Ex.P/45 and the cause of death was excessive bleeding due to this injury. There was no blackening around injury wound which showed that bulled (sic : bullet) was not fired from extremely close range. There is no reason to dispute the statement of this witness and it is found proved beyond doubt that the death of Brij Mohan Gupta occurred due to gun shot injury. Thus, the death of Brij Mohan Gupta would come in the category of culpable homicide.

25. As far as Vikas Shinde (PW32) is concerned, he also suffered knife injuries and the witness was taken to M.Y. Hospital by Rameshchand (PW2) who is auto rickshaw driver. Dr. Jitendra Verma (PW31) states that on 11.4.2008, he was posted in M.Y. Hospital on the post of CMO and on that day Vikas Shinde (PW32) was brought for treatment. On examining him, it was found that there were two injuries caused to him and both were incised wound. First was on the left thigh on the exterior which was 2cm x ½ cm and the second injury was also incised wound on the posterior side of left thigh which was 3.5 cm x 3 cm x 2 cm. Both these injuries were caused due to hard and sharp object and was caused within 24 hours. The report is Ex.P/65. Dr. Sunita Gupta (PW42) Assistant Professor in M.Y. Hospital states that on 11.4.2008 Vikas Shinde (PW32) was brought in injured state. It was found that a major vessel on his left thigh had been severed which was repaired by this witness and on 20.4.2008 Vikas Shinde (PW32) left the hospital on his own. Dr. Ravikant (PW41) also submits that on 11.4.2008, while he was posted in M.Y. Hospital on the post of RSO he had examined Vikas Shinde (PW32) who was bleeding profusely from his left thigh and he was immediately taken inside operation theater and the Ex.P/4 is his admission ticket and Ex.P/17 is the set of his treatment papers running into 23 pages. He also

submits that on 20.4.2008 Vikas Shinde (PW32) left the hospital on his own accord. This witness has not been challenged in cross examination and thus, it is found that Vikas Shinde (PW32) was inflicted knife injuries on his left thigh resulting in heavy and profuse bleeding and his life could be saved because of timely surgical intervention.

26. So far it has been found proved that Rs.19.50 lacs which were being transported by Brij Mohan Gupta, Rekha Dubey and Vikas Shinde (PW32) were looted by six persons when this amount was being transported from Rajwada Branch to Union Bank of India to chest of bank situated near Sapna Sangeeta road at Indore. It has also been found proved that Vikas Shinde (PW32) was seriously injured with knife by the dacoits and further it is found proved that dacoits injured Brij Mohan Gupta with knife and later on one of the dacoits fired at Brij Mohan Gupta from fire arm resulting in his death. In view of the doctor conducting postmortem, it is found proved that the injury was such which could have caused death in the ordinary course of nature and the culpable homicide of Brij Mohan Gupta amounted to murder.

27. Thus questions No.2 and 3 are answered in affirmative.

Now we shall deal with question Nos.4, 5 and 6 which are as under:

Question No.4: Whether the dacoity was committed by appellants namely; Ankur, Pradeep, Ravi, Hemraj, Rahul and Ashok.

Question No.5: Whether at the time of commission of dacoity, the accused/appellants namely; Ankur, Ashok, Ravi and Hemraj were armed with deadly weapons. The role of each of the appellant shall be discussed separately.

Question No.6: Whether at the time of commission of decoity accused Ankur, Ashok, Ravi and Hemraj were armed with deadly weapons ?

28. As per prosecution story, the Investigating Officer (IO) through Mukhbir Punchnama received the first lead about the appellant- Rahul. The evidence relating to Rahul and Pradeep have a commonality, therefore the evidence regarding both the accused persons shall be dealt with together.

Regarding Rahul and Pradeep:

29. There are three eye-witnesses in this case. These are Rekha Dubey (PW5), Vikas Shinde (PW32) and Auto-Driver Ramesh Chandra (PW2).

30. Rameshchand (PW2) at the outset fails to identify the accused persons during evidence. He also states that he could not identify any of the accused persons during test identification parade. Thus, this witness does not give any lead as to the identification of the accused persons. As far as Vikas Shinde (PW32) is concerned, he in his court deposition identifies 4 accused persons namely Sonu,

Hemraj, Rajendra, Ravi and Ashok. However, in his police statement which is Ex.D/4, this witness has stated that he could not see the physical traits of the assailants and he also could not see the motor cycle registration number. It is quite clear that no identification parade was carried out in front of this witness which he admits as well. Thus, witness has identified the accused persons for the first time during dock identification which has taken place on 11.10.2010, which is about 2½ years from the date of the incident. In such scenario, the court statements of the witnesses regarding identification of the accused persons becomes suspicious.

31. The third eye witness is Rekha Dubey (PW5) who in para 4 states that out of six dacoits the faces of three dacoits were covered and that of 3 others were uncovered. This witness in the same paragraph identifies accused Ravi as the person who was driving the motorcycle at that point of time. This witness has been declared hostile because she does not state anything regarding identification parade. However, after being declared hostile, she admits that identification parade was carried out and she had identified accused Hemraj @ Sonu. She admits to have signed the identification memo Ex.P/1.

32. We have seen that none of the eye witnesses namely, Rekha (PW-5), Ramesh Kumar (PW-2) and Vikas Shinde (PW-32) have identified Rahul as one of the assailants. However, there is circumstantial evidence available against him which shall now be appreciated. Witness Mohan Singh (PW-47), in para-4 states that on 13.04.2008 he received a mukhbir information that accused Rahul @ Brajesh is presently at his house along with some of his accomplices and is preparing to flee from his house and that he has cash with him belonging to the bank and that he is the person who along with accomplices had committed loot. On receiving this information, the witness recorded the information in Rojnamcha (Ex.P/74) and went to the house of Rahul along with accompanying force. He found Rahul along with Ankur and Pradeep in his house. They were all brought to the police station and again Rojnamcha (Ex.P/75) was recorded. Rahul was arrested vide Ex.P/33 and then his memorandum statements were recorded. Rahul in his memorandum stated that he has hidden Rs.2.40,000/- in a metal box and proposed to recover the same. The memo is Ex.P/34 on which the signatures of the witness appears from D to D part. After preparation of memo, the cash amount of Rs.2,40,000/- was seized from his house from a box vide seizure memo Ex.P/38. The amounts were in bundles of Rs.100/-denomination as also bundles of Rs.500/- denomination. The panchnama of the denominations and bundles were prepared which is Ex.P/39. As per the information given by Rahul, one Hero Honda Passion Plus silver colour bearing registration No.MP09 MD 2747 was also seized vide Ex.P/37 which carries his signatures from C to C part. The independent witnesses of Ex.P/37 that is the seizure of Hero Honda Passion Plus are Satish (PW16) and Mahadev (PW15) however, both these witnesses have turned hostile. In his cross-examination, this witness has been given suggestion

that Rahul did not give any such memorandum, which suggestion has been denied by him. There is nothing to discredit the statements made by this witness in his examination-in-chief. The witness Mohan Singh (PW47) in para-5 also states that he had recorded yet another memorandum of Rahul which is Ex.P/52 in which he had stated that the planning of loot was made by using a Motorola mobile bearing mobile No.9826631273 and on the basis of this memorandum, the aforesaid mobile was recovered from the possession of Rahul vide seizure memo (Ex.P/54). The witness Mahesh Othwani (PW43) has exhibited the call details which is Ex.P/72 which carries the calls which were exchanged between accused Ashok Akodiya with other accused persons. This witness is the Assistant Manager in the Reliance Smart Mobile Company, Indore and he was asked by CSP, Juni region at Indore to provide the call details of the mobile of co-accused Ashok which bears mobile No.9827385808. On perusal of Ex.P/72, which is the call details show that Ashok and Rahul had exchanged telephone calls on 11.04.2008 at 6.55 PM and 7.10 PM and also at 9.00 PM and again on the next day i.e. on 12.04.2008, the telephone calls were exchanged at 7.32 PM. This evidence is relevant under Section 7 of Evidence Act. Thus, it is quite clear that Rahul was in constant touch with the other co-accused Ashok on the day of the incident and even day after.

33. There is one more evidence against Rahul which is regarding his motorcycle seen at the spot when the incident occurred. In Ex.P/13, Dehati Nalishi, which has been made by Rekha, it has been mentioned that miscreants had come in a silver coloured motorcycle Hero Honda on which the number 74 in large numerals had been written. The motorcycle which has been seized from Rahul is silver colour Hero Honda Passion Plus and its registration number is MP09 MD 2747. The numerals 74 are the middle numbers. The question is how the witness Rekha could only see the two numbers i.e., 74. The answer to this would be understood from the memorandum statement of co-accused Pradeep who in Ex.P/36 has stated that the number plate of motorcycle of Rahul was taken out which has been hidden by Pradeep below his almirah. Pradeep proposed to recover the number plate of the motorcycle. Subsequently, vide Ex.P/41, a number plate of motorcycle was recovered and only two numbers i.e. 74 was prominent and the numeral 2 which preceded the numeral 7 as also numeral 7 which succeeded numeral 4 were scrapped off. Thus, the number was 2747 however, the numeral 2 in the beginning and 7 in the end were scrapped off and only 74 was visible. It thus becomes clear that at the time of the incident, this number plate had been used in the motorcycle in which only two numerals i.e. 74 were visible. However, after the incident, this number plate was taken out and replaced with another number plate carrying registration No.MP09 MD 2747. However, even this number plate was not the correct registration number because Narendra Kumar Diswaiya (PW44) who works as Assistant Grade-2 at RTO, Indore, has appeared as a witness and from his record, he has stated that the registration No.MP09 MD 2747 motorcycle is

registered in the name of another person namely, Kailash Ore. Thus, it is quite clear that Rahul was in possession of a motorcycle whose registered owner was some other person namely, Kailash. It may be that this motorcycle was also a looted vehicle. The crux of the matter is that Rahul had taken care that the vehicle which he was using was not registered in his name. However, from the discussion undergone herein before, it is proved that the Hero Honda Passion Plus motorcycle was the same motorcycle which was in possession of Rahul. The only difference was that its number plate was not the same which was found when the vehicle was seized and at the time of incident, a different number plate was used, which had only two numerals i.e. 74 and this number plate was recovered from the possession of co-accused Pradeep. This shows not only the involvement of Rahul but also of Pradeep. The onus was upon Rahul to show as to how he came in possession of currency notes of a huge sum of Rs.2.40,000/-. No explanation has been given by Rahul.

34. Section 114(a) of Evidence Act provides that the court may presume that a man who is in possession of stolen woods (sic : goods) soon after theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession.

35. In the present case, looking to the evidence available the first presumption would be applicable that Rahul in possession of stolen money was in fact the thief and the circumstances proved that he was one of the robbers. This presumption has not been rebutted satisfactorily by him.

36. In the written submission on behalf of Rahul, stress has been laid on the fact that independent witnesses namely; Mahadev (PW15), Satish (PW16) and Pappu (PW24) who are witnesses of memorandum and seizure of Hero Honda Bike, mobile and cash memo have turned hostile and it is not safe to rely upon the sole witness-Mohan Singh (PW47). The impact of the independent witnesses having turned hostile has already been considered. However, it has been found that the evidence of Investigating Officer-Mohan Singh (PW47) is reliable and there is nothing in his cross-examination so as to discredit him. In the case of *P.P. Beeran v/s. State of Kerala,* AIR 2001 SC 2420 and in number of many other judgments, it has been held by Hon'ble Apex Court that mere fact that a witness is police officer, does not by itself gives rise to any doubt about his creditworthiness. The involvement of accused-Rahul in the dacoity has been fortified by the evidence of Mahesh Otwani (PW43) as well. There is nothing to indicate that Rahul has been falsely implicated by the Investigating Agency. The fact that the motorcycle used by dacoits was recovered from Rahul itself shows his active involvement and presence at the time of commission of dacoity. It has also been mentioned in the written final arguments that no deadly weapon has been recovered from the accused-Rahul (appellant). Regarding this submission, it is

made clear that Rahul has not been convicted under Section 398 IPC which is applicable only when member of a dacoit is armed with deadly weapon. Thus, it is proved beyond reasonable doubt that Rahul was involved in the dacoity, that he was in conversation with members of the gang and took active part in the dacoity by being present at the time of incident and an amount of Rs.2,40,000/- which was the looted money was also recovered from him.

37. In the case of *State of U.P. V/s. Dr. Ravindra Prakash Mittal,* (1992) 3 SCC 300, it was held that circumstances from which conclusion is drawn should be fully proved; circumstances should be conclusive; all established facts should be consistent with the hypothesis of guilt and inconsistent with innocence of the accused and circumstances should exclude possibility of guilt of any person other than the accused. As regards the case of Rahul, the conditions mentioned in the above citation are fully satisfied.

38. We have seen the involvement of accused Pradeep who had hidden the number plate of Hero Honda Passion Plus belonging to or in possession of Rahul. This apart, as per Mohan Singh (PW-47), on the basis of memorandum of Pradeep, a sum of Rs.2,40,000/- which was his share was also recovered from his possession as per Ex.P/41 and not only this, Pradeep was also having in his possession the share of co-accused Javed which was again Rs.2,40,000/-. Thus, a total sum of Rs.4,80,000/- was seized from the house of Pradeep as per his own memorandum. It has already been seen that independent witnesses Satish (PW16) and Mahadev (PW15) of the seizure memo Ex.P/41 have turned hostile but because of the fact that independent witnesses have turned hostile, it cannot be stated that the evidence gathered by Mohan Singh (PW47) has no value. The evidence of Mohan Singh (PW47) in itself is trustworthy. There are no such statements in his cross-examination which make his statements in examination-in-chief to be doubtful. The onus was upon Pradeep to show as to how he came in possession of number plate of a motorcycle with the only two same numbers i.e. 74 which are mentioned in Dehati Nalishi (Ex.P/13). It has already been found that when investigating officer Mohan Singh (PW47) raided the house of Rahul, he found Pradeep also along with him. This also is a relevant evidence proved against him that he was included in the planning of loot along with the co-accused Rahul. It has already been found that there were six persons in two motorcycles who committed dacoity. Appellant Pradeep was found to be staying with Rahul and other evidence against him also shows he being actively involved. Onus was upon him to prove otherwise which has not been discharged by him. No explanation has been submitted by or on behalf of Pradeep and therefore, involvement of Pradeep in dacoity is also proved beyond reasonable doubt.

39. The next case whose case would be discussed is Ankur @ Bunty. This accused as per IO-Mohan Singh (PW47) was found to be accompanying accused-Rahul and Pradeep when the house of Rahul was raided.

40. In view of the above discussion, the convictions of Rahul and Pradeep under provisions of Section 396 of IPC are affirmed.

Regarding Ankur @ Bunty:

41. As far as the involvement of accused-Ankur @ Bunty is concerned, we have already seen that none of the eye-witnesses i.e. Ramesh Kumar (PW2), Rekha (PW5) and Vikas Shinde (PW32) have deposed against accused-Ankur and identification of Ankur on the basis of identification parade has also failed. But there is circumstantial evidence against Ankur which shall now be appreciated.

42. Investigating Officer (IO) Mohan Singh (PW47) has stated in para-4 that on 13.04.2008, he received an information through a Mukhbir (informant) that co-accused Rahul has committed bank loot and presently he is present in his home along with two of his partners who were involved in the crime and are about to flee. The said information was recorded in Rojnamchasana which is Ex.P/74. After writing Rojnamchasana (Ex.P74), the Investigating Officer started off towards the house of accused-Rahul along with police force and after determining the exact location of Rahul, the police raided the residence and found Rahul along-with the present appellant-Ankur and one another accused-Pradeep. They were taken to the police station and Rojnamchasana (Ex.75) was recorded. Thereafter Ankur was arrested vide arrest memo Ex.P/32. The memorandum statement of accused-Ankur was then recorded in which he had stated that his share was Rs.2,40,000/-. He further informed that the knife and the box which earlier contained the cash money are hidden in a place called 'ढ़ोर वाला बाड़ा' and in that 'बाड़ा' beneath the grass, the aforesaid items had been hidden. Memorandum statements are Ex.P/35 and on the basis of these statements, the aforesaid items were seized from the place indicated by Ankur. The seizure memo is Ex.P/40. It was seen that the box which was retrieved had its both locks in its place, however the hooks where the locks were affixed were broken which means that locks could not be opened, however the box was opened up by breaking open the hooks where the locks were fastened.

43. It has already been seen that the independent witnesses of the memorandum statement Ex.P/35 and seizure memo Ex.P/39 were Satish (PW16) and Mahadev (PW15) and they have turned hostile. Hence the factum of memorandum and seizure hinges only on the evidence of Investigating Officer Mohan Singh (PW47) and it is to be seen as to whether this evidence is reliable or not. One discrepancy occurs in the evidence of Investigating Officer Mohan Singh (PW47) and the discrepancy is that as per the witness, a sum of Rs.2,40,000/-were recovered from the same box which was looted as per the witness whereas in the memorandum statements, Ankur has stated in Ex.P/35 that

Rs.2,40,000/- have been kept by him in a box in his house. Barring this discrepancy, there is no other discrepancy in the statements of Mohan (PW47). The question is whether this discrepancy strikes at the root of the evidence of Investigating Officer ? The answer is no. There is no contradiction as far as the recovery of money from the box is concerned. The only discrepancy is the money was recovered from the box other than the box which was looted. However, there is nothing to discredit the evidence of Investigating Officer Mohan Singh (PW4) that a sum of Rs.2,40,000/- was recovered in bundles of cash of Rs.100/- and Rs.500/- and the onus now lied upon Ankur to show as to how he came into possession of such huge amount of money. This onus has not been discharged by him. Further, evidence has been collected to prove that the box recovered from the possession of Ankur was the same box which was looted. After seizure of box, the same box was subjected to identification and Narendra Mohan Pant (PW/4) who was the Branch Manager in the Union Bank of India, Rajwada Branch, has stated in para-6 that in the identification proceedings, 3-4 similar boxes were kept in a room which was near the police station and the witness identified the box as per identification memo which is Ex.P/8 carrying the signatures of witnesses from 'A to A' part. Not only the box was subjected to identification, but the keys of locks were also seized by the police from the witness as per his own deposition. This seizure memo is Ex.P/9. A milan punchnama of keys was drawn up by the police as per Ex.P/10. Regarding identification of the box, the witness Narendra Mohan Pant (PW4) has been cross-examined. In para-8, he states that he could identify the looted box because it was fastened with two locks. He was asked as to whether other boxes were also locked or not, the witness claims ignorance regarding this question. He is also not able to state whether the latches fastened on the other boxes were in broken state or not. In para-9, he also states that he cannot state as to whether the boxes which were mixed along with the looted box were of other colours or not. He states that none of the boxes including the looted box carried any Company's name.

44. Avadhesh Kumar Choudhari (PW28) is the Tehsildar who corroborates the factum of identification of the box by Narendra Mohan Pant (PW/4) and he states that in Ex.P/8 which is the identification memo of his signatures are from 'B to B' part. In cross-examination, he admits that such boxes are available in the market.

45. Learned counsel for the appellant submits that from the evidence of Narendra Mohan Pant (PW4), it appears that boxes which were placed along with looted box did not have locks fastened on them and that their latches were also not broken and therefore it was easy to identify the concerned box.

46. This submission was considered.

47. Although there may be discrepancy in exactly carrying out the identification parade by not observing minutely that each of the boxes were in the same state however, Narendra Mohan Pant (PW/4) was the Branch Manager in the Union Bank of India, MG Road Branch and he submits that cash used to be sent in the same box to the Branch where the chest existed. In para-16, he states that the same box was being used time and again and therefore he was in a position to identify the aforesaid box. Thus, it is quite clear that Narendra Mohan Pant (PW4) was very well conversant with the features of the box which was always used in transporting the cash and, therefore even if no identification parade was carried out, the identification of box could never have been doubted because the same box was being used every time for transporting the cash as per Narendra Mohan Pant (PW4) who was the Branch Manager at the relevant point of time. Thus, the question of identification of box does not remain unsolved question. Moreover, the aforesaid box had two locks fastened on it and the keys of the box was with Mr. Narendra Mohan Pant (PW4). Investigating Officer Mohan Singh (PW7) in para-10 has stated that Narendra Mohan Pant had given him two keys of the locks which were seized as per Ex.P/9 and then Milan Panchnama of the keys and locks was drawn which is Ex.P/10 meaning thereby that these were the keys of the locks fastened on the box and that locks could be opened up by these keys only. Thus, it is found proved that the box which was recovered from the possession of Ankur was the same box which was used for transporting the cash. It is also found proved that both the locks of boxes could not open and the latches in which the locks were fastened were broken and the cash had been taken out. As already stated, the onus was upon Ankur to clarify as to how from the box cash was taken out and this onus has not been discharged by him.

48. Further, there is yet another piece of evidence collected against Ankur. Ankur's another memorandum was also recorded which is Ex.P/51 in which he proposed to recover the mobile phone of Nokia Company which had been used at the time of incident. The aforesaid mobile phone was sought to be recovered from a bag hidden in the house of Ankur. On the basis of this memorandum, a mobile of Nokia Company was seized from the house of Ankur vide Ex.P/53. The SIM Number in the Mobile Phone was 99260-16102 as per Ex.P/53. Witness Gagan Shastri (PW27) has stated that Ankur @ Bunty is his distant relative and that the witness had a Mobile No.9926016102. The witness states that 2 - 2½ years back Ankur had come to his house and he liked the mobile phone of the witness and this witness had handed over the SIM to Ankur @ Bunty which was never given back by Ankur to the witness. These statements have not been properly challenged in cross-examination. Witness Mahesh Utwani (PW43) whose evidence had earlier been discussed and who has exhibited the call details of Ashok Akodia as per Ex.P/72 throws light upon the conspiracy. As per Ex.P/72 there have been phone calls between co-accused Ashok Akodia from his Mobile No.9827385808 to the

mobile number of Ankur's number i.e. 9926016102 and these calls have been made on the date of incident i.e. 11.04.2008 at 4:15:27 i.e. evening 4' O' Clock 15 minutes and 27 seconds. This was the time when the incident was about to take place. Further calls have also been made at 17:01:08 and 17:05:37 on the same day and that there are many more calls between these two mobile numbers which can be seen at Ex.P/72 which makes it very clear that Ankur had been acting as per plan for committing dacoity along with other co-accused persons. This piece of evidence in (sic : is) relevant under Section 7 of the Evidence Act. He was caught with Pradeep and Rahul which also shows that they were part of a Gang who committed dacoity as narrated in the present case. Further, the knife seized as per Ex.P/40 was also seen to contain traces resembling blood. The signature of Ankur on Ex.P/40 is from 'C to C' part. The knife which was seized from him was also sent for FSL Examination the aforesaid knife is Article-'G' which was found to contain human blood as per FSL report which is Ex.P/78. In the case of *Jagroop Singh v/s. State of Punjab,* 2012 (11) SCC 768, it was held that as the recovery was made pursuant to a disclosure statement made by the accused and the serological report had found that the blood was of human origin, the non-determination of the blood group had lost its significance. This is also a very relevant piece of evidence against Ankur which also proves not only that the Ankur was present at the time of commission of dacoity but was also involved in inflicting knife injuries on Vikas Shinde and Brij Mohan Gupta who had died later on.

49. In view of the above discussion, conviction of Ankur @ Banti under Section 396 and 398 of IPC is affirmed. No charge was framed under Section 25(1-b)(b) of Arms Act against Ankur @ Banti hence, there is no question of the aforesaid section to be found proved against him.

Regarding Ravi @ Babi

50. We have already seen that Rameshchand (PW2) has not identified any of the accused persons and the statements of Vikas Shinde (PW32) is unreliable when he says that he had identified Ravi. This is because in his police statement Ex.D/4, he had stated that he could not see the physical trades of assailants. It is also clear that no identification parade was carried out for identification by Vikas Shinde (PW32) of the accused. Hence, the dock identification of Ravi by Vikas Shinde (PW32) after a gap of 2½ years is unreliable.

51. The third eye witness is Rekha Dubey (PW5) who in para 4 states that out of six dacoits the faces of three dacoits were covered and that of 3 others were uncovered. This witness in the same paragraph identifies accused Ravi as the person who was driving the motorcycle at that point of time. This witness has been declared hostile because she does not state anything regarding identification parade. However, after being declared hostile, she admits that identification

parade was carried out and she had identified accused Hemraj @ Sonu. She admits to have signed the identification memo Ex.P/1.

52. Avadesh Kumar Chaturvedi (PW28) is Tehsildar who states that on 23.5.2008, while he was posted as additional Tehsildar at Indore, identification parade was carried out and Rekha Dubey (PW5) was asked to identify the accused persons and Rekha Dubey (PW5) could not identify accused Pradeep, Ankur, Rahul and Ashok. However, on that day accused Ravi was not present and therefore, his identification could not be carried out. The identification memo is Ex.P/1 on which the witness's signatures are from 'C' to 'C' part and that of Rekha Dubey (PW5) from 'B' to 'B' part. It thus becomes clear from this witness's evidence that during identification proceeding, accused Ravi was not present and therefore, there was no opportunity for Rekha Dubey (PW5) to identify Ravi at that point of time.

53. Learned counsel for the appellants in his written submissions has submitted that Rekhabai (PW5) did not recognize Ravi during identification parade. Regarding this submission is has become clear that Ravi was absent when identification parade was being carried out. Hence, the above arguments is not acceptable.

54. Rekha Dubey (PW5) has identified Ravi for the first time during her court deposition. The court deposition of Rekha Dubey (PW5) has taken place on 23.12.2008, which is about after 8 months of the incident. The question is whether during this 8 months' period, was Rekha Dubey (PW5) liable to forgot and whether her statements regarding identification of Ravi are prone to suspicion or not ?. It can be seen that Rekha Dubey (PW5) is the person who had recorded her Dehati Nalishi report just about 2 to 3 hours after the incident and in this Dehati Nalishi report she has explained the physical characteristics of the assailants. She states that one of the accused was Sawla (darkish) and was Chikna (oily faced). The other accused has been described as 18 to 20 years old thin person. One another accused which has been described to be 18 to 20 years old. One of the accused was on the plump side and had small hair and in Ex.P/13 she categorically states that she would be able to identify the accused persons. As already stated, the deposition of Rekha Dubey (PW5) had been made after 8 months of the incident and it is also seen that in her Dehati Nalishi report she had given the particulars of the physical characteristics of many accused persons with great detail. It is also clear that the incident had occurred in the day light at about 4.30 PM and therefore, identification during the time of deposition cannot be considered to be figment of imagination on the part of Rekha Dubey (PW5). As far as accused Ravi is concerned, Rekha has been asked regarding complexion of Ravi and has been given suggestion that he is dark and not Sawla (darkish). Rekha Dubey (PW5) admits that accused Ravi is dark and not darkish and she states that she had told the

police that accused was dark colored person. She also states that while recording her Dehati Nalishi that she had told that the accused was dark colored person with smooth (Chikna) face. Rekha has in fact recorded the word Sawla (darkish) not only in her Dehati Nalishi report Ex.P/13 but also in her police statement Ex.P/3 and she has admitted that Ravi is not darkish but is a dark colored. On this basis, learned counsel has argued that Ravi is not the same whose characteristics have been described by Rekha Dubey (PW5) in her Dehati Nalishi and police statement. This submission was considered. There is a thin line between darkish and dark complexion. In India absolutely dark people are hard to find by and mostly the people who are on the dark side are generally darkish (Sanwle) and therefore, this difference may not go completely in favour of the accused. In *Hemudan Nanbha Gadhvi v/s. State of Gujarat*, 2018 (2) ANJ (SC) (Suppl.) 107, it has been held that generally speaking, dock identification is to be given primacy over identification in TIP. However, in case of failure in dock identification, if other corroborative evidence is available, identification in TIP assumes significance.

55. However due to such differences in court statements, police statement and Dehati Nalishi report, corroborative piece of evidence is needed which shall be discussed next.

56. Now the corroborative evidence which has appeared against Ravi shall be considered. Mohan Singh (PW47) in para 8 has stated that on 30.4.2008, he arrested Ravi. The arrest memo is Ex.P/54 and his memorandum is Ex.P/27A and as per these memorandum statements Ravi has stated that out of Rs.2.50 lacs which he had received as his share from looted amount, he had kept Rs.2.09 lacs under his bed in his house. Accused Ravi has further stated that the knife which was used and the blood stained shirt were also kept under his bed, which he proposed to recover. This witness further states that on the basis of memorandum statements cash amount of Rs.2.09 lacs were recovered under the bed of Ravi. This amount was in the denominations of Rs.100/- and there was 7 bundles of Rs.100/- each and two bundles of Rs.500/- were also recovered.

57. A striped shirt pink colored which was blood stained were also recovered as per Ex.P/30. However, it was not sent to FSL. Apart from these items one spring activated knife was also recovered from same place as per the seizure memo Ex.P/30. The independent witnesses of memorandum and seizure are Gopal (PW19) and Munna (PW13). However both of them have turned hostile. In the cross examination of Mohan Singh (PW47), no specific questions have been asked from witnesses regarding recovery of Rs.2.09 lacs, recovery of knife and recovery of blood stained shirt from the house of Ravi on the basis of memorandum.

58. In para 10 the witness again states that on the basis of the memorandum of Ravi, the motorcycle passion plus bearing registration No. M.P. 09 MN 7790 was recovered from Ankit. This memorandum in Ex.P/18. A perusal of this document shows that Ravi had stated that motorcycle of Rahul and Banti were used and motorcycle of Banti is hidden by Banti's brother Ankit and he proposed to recover it. Thereafter, the motorcycle, along with its registration No. was recovered from the house of Ankit, as per Ex.P/19. The seizure memo of motorcycle is Ex.P/19. These statements of the witness have also not been challenged appropriately in his cross - examination. Another witness regarding memorandum and recovery of motorcycle from Ankit on the basis of memorandum of Ravi is Kailash (PW16). This witness states that Ravi had told the police before him that the motorcycle red colored passion plus belongs to Banti (another accused) and the motorcycle has been hidden by Ankit who is the brother of Banti and Ravi proposed to get the motorcycle recovered from Ankit. The memorandum is Ex.P/18 on which signatures of Kailash is found on 'A' to 'A' part. The witness further states that on the basis of this memorandum a motorcycle passion plus was seized from the possession of Ankit along with its registration card. The seizure memo is Ex.P/19 on which the signatures of witness is from 'A' to 'A' part. In his cross examination Kailash (PW10) admits that he has cycle shop near the police station and whenever T.I. requires him for appending signatures he complies with the directions of the T.I. he becomes the witness. However even though this witness may be a pocket witness of the police but he very explicitly narrates the incident regarding memorandum given by Ravi and recovery of motorcycle and its registration card from Ankit who is the brother of Banti. The aforesaid evidence is in consonance with the evidence of Rekha (PW5) who has identified Ravi as one who was driving the motorcycle. It also shows close association of Ravi with Ankur @ Bunti. Statements regarding memorandum and recovery of motorcycle as narrated by Investigating Officer Shri Mohan Singh (PW47) have not been challenged in cross examination. This apart the witness Kailash (PW10) cannot also be termed to be unreliable. Thus, there is reliable corroborative evidence available against Ravi that he used a motorcycle belonging to co-accused Banti, from Ankit, the brother of Banti.

59. This apart, it is already been found proved beyond reasonable doubt that an amount of Rs.2.09 lacs was recovered from Ravi and this amount was in bundles of Rs.100/- and Rs.500/-, the explanation of which has not been given by Ravi. As already found, the bundles of notes seized were wrapped in a slip of Union Bank of India along with Bank's seal. Onus was now upon Ravi to explain as to how he came in possession of such huge amount which was drawn from Union Bank of India and why it was hidden by him under his Bed ?. The onus has not been discharged by Ravi. Thus following evidence is available against Ravi :-

(1) His dock identification by eye-witness Rekha (PW5) as one who was riding one of the two motorcycles.

(2) Questioned motorcycle has been recovered as per memorandum of Ravi from Ankit who is brother of accused Banti.

(3) The motorcycle was owned by Banti and its whereabouts were known to Ravi. This proves not only close association between Banti and Ravi, but also proves that it was given by him to Ankit for hiding after using the vehicle.

(4) The recovery of Rs.2,09,000/- hidden by Ravi and notes was property of Union Bank of India and its possession and purpose of hiding has not been explained by Ravi.

60. The knife which has been recovered from Ravi has not been found to carry any blood stain. This knife is Article 'I' and 'I' has not been found to carry any blood stain. Learned counsel in her written submission has stressed upon the fact that no trace of blood on a knife which was recovered from Ravi shows his non-involvement in causing injury to Vikas Shinde (PW32) and Mr. Brij Mohan Gupta.

61. This submission was considered.

62. It has clearly been found that identification of Ravi by Rekhabai (PW5) in her dock identification is reliable and it has also been found proved that it was Ravi who was driving the motorcycle. Therefore, it is only natural that being on the driver's seat, he did not get down and inflict blows on Vikas Shinde and Mr. Brij Mohan Gupta and therefore there was no blood stains on his knife. There being no blood stains on the knife thus supports the evidence of Rekhabai (PW5) that Ravi was driving the motorcycle.

63. As already stated earlier, some inconsistency was of-course present in the evidence of Rekha Dubey (PW5) while identifying Ravi. Therefore, corroborative evidence was required in this matter against Ravi which is proved as already described and therefore it is conclusively proved that Ravi was one of the dacoits who had committed dacoity by looting Brij Mohan Gupta for sum of Rs.19.50 lacs. The onus was on Ravi to explain how he came in possession of Rs.2.09 lacs in bundles of Rs.100/- and Rs.500/- denominations. Ravi has offered no explanation and therefore, the prosecution has been able to prove its case beyond reasonable doubt against Ravi.

64. It is proved that Ravi was one of the decoits (sic : dacoits) and was one of the member of the gang of decoit (sic : dacoit) who had committed loot on the date of incident. It is also found proved that Ravi was carrying a deadly weapon knife at the time of commission of decoity (sic : dacoity).

65. Thus, conviction of Ravi under Section 396 and 398 of IPC and Section 25(1-b)(b) of Arms Act by trial court is affirmed.

Regarding involvement of accused Hemraj

66. Regarding involvement and identification of accused Hemraj @ Sonu the witness Rekha Dubey (PW5) has stated that out of six accused persons, the faces of 3 were covered and 3 were uncovered. In court deposition, this witness had identified accused Ravi. However, she has been declared hostile as she states nothing about the identification parade carried out during the investigation. After being declared hostile, she recalls and states that she had been able to identify Hemraj @ Sonu in identification parade and her signatures on Ex.P/1. The identification memo has been identified by her. No question has been asked in her cross examination on behalf of Hemraj @ Sonu. Avdesh Kumar Chaturvedi (PW28) is Tehsildar who had conducted identification proceedings on 23.5.2008 at the Central Jail, Indore and this witness states that Rekha Dubey (PW5) had correctly identified Hemraj @ Sonu and the signatures of witness from 'C' to 'C' part on Ex.P/1 have been identified by the witness. In his cross examination he admits in para 4 that it has not been described in identification memo as to how, ie., in what manner the witness has identified the accused ie., by placing her hand on head or by merely indicating with hand. He states that Rekha was already present when he went inside the jail for identification proceedings. Although the manner of identification has not been described in Ex.P/1, identification memo, but this is not a major lacuna as to render the whole identification proceedings unreliable. Looking to the fact that no cross examination of Rekha (PW5) has been conducted regarding identification of Hemraj by her and further that the statements of Avdesh Kumar Chaturvedi (PW28) Tehsildar have also not been challenged appropriately, it is found proved that Rekha had correctly identified Hemraj as one of the dacoits. It may also be seen that Rekha Dubey (PW5) in her Dehatinalishi report Ex.P/13 has given the physical characteristics of the various robbers involved in the incident and Dehatinalishi report has been recorded barely 2 hours after the incident and further that the incident has occurred in day light and the statements of Rekha Dubey (PW5) that 3 of the accused persons had their face uncovered at the time of incident had also been not challenged. Thus, on the basis of evidence of Rekha Dubey (PW5), it is found proved that Hemraj was one of the robbers who had committed the robbery. This eye witness apart, there is corroborative evidence also available against Hemraj which shall be discussed in the following para.

67. Witness Mohan Singh (PW47) in para 9 states that he had arrested Hemraj son of Rajendra vide Ex.P/55 and had obtained his memorandum statement under Section 27 of Evidence Act in which he had stated that out of his share of Rs.2.50 lacs, he had kept Rs.1.55 lac with his father Rajendra and rest of the amount he had

already spent. He further proposed to recover one knife from below an Almirah. The memorandum statements are Ex.P/26, which carry the signatures of the witness from 'D' to 'D' part. The witness states that on the basis of this memorandum statements, a sharp edged knife which was spring activated carrying blood stains was seized vide Ex.P/29 which carries his signatures from 'C' to 'C' part. The witness further states that on the basis of memorandum of Hemraj Rs.1.55 lacs were recovered from father of Hemraj, ie., Rajendra and these Rs.1.55 lacs were in the form of one bundle of Rs.500/- and 10 bundles of Rs.100/-. All of those carry Union Bank of India seal and slips. The arrest memo of Rajendra is Ex.P/25, which carry the signatures of witness from 'C' to 'C' para (sic : part). In his cross examination no questions have been asked on behalf of Hemraj so as to controvert statement made in examination in chief. The two witnesses of memorandum and seizure are Gopal (PW19) and Munnalal (PW13). However both of them have turned hostile but as already seen, the statement of Mohan (PW47) has not been challenged appropriately in cross examination. The knife which was seized on the basis of memorandum of Hemraj has been sent to the FSL and this article is Article 'H' and as per the FSL report Ex.P/78 human blood stains have been found on this knife and the onus was upon Hemraj to show as to how the human blood was found present on the knife recovered on the basis of his memorandum.

68. In the written submissions, it has been stated that FSL report states that "result so obtained is inconclusive". Therefore, the opinion of Article 'H' so recovered from Hemraj cannot be relied upon.

69. The aforesaid submission was considered.

70. A perusal of Ex.P/78 very clearly shows that Article 'H' which is knife recovered from Hemraj carries human blood. The inconclusive report is regarding the blood group. Even though blood group could not be determined, however it is proved that knife carries traces of human blood and no explanation has been given by Hemraj regarding the same.

71. It has further been mentioned that seizure memo was prepared after the delay of 3 weeks after the registration of the offence and no explanation for as such delay has been mentioned. Regarding this submission, it has to be mentioned that this is a case involving number of accused persons and dozens of pieces of evidence were required to be collected and therefore, it cannot be stated that there was unusual delay. Further no question regarding the delay has been asked from Mohan Singh Pant (PW47). Hence, conviction under Sections 396 and 398 of IPC and Section 25(1-b)(b) against Hemraj is affirmed.

Regarding involvement of accused - Ashok:

72. Now the evidence pertaining to involvement of accused Ashok shall be considered. As already seen earlier, none of the eye-witnesses in the case have been able to identify the accused Ashok. In the identification parade which was held, the witness Rekha (PW5) has been able to identify only the accused Hemraj. In such scenario, the circumstantial evidence which is available shall be considered to conclude as to whether the trial court has rightly convicted Ashok or not. It has already been seen that the deceased Brij Mohan Gupta had died due to gun shot injury and the doctor had taken out the bullet which has pierced the vital organ of Brij Mohan Gupta. It is quite clear from the evidence of eye-witnesses that one of the accused persons had taken out the fire arm and fired at Brij Mohan Gupta. As per prosecution story, the person who had fired at Brij Mohan Gupta was none other than accused Ashok. The circumstantial evidence pertaining to such story shall now be considered.

73. Mohan Singh (PW47) states that when he came to know about the incident he reached the spot which was in-front of old revenue building. He found blood splattered on the road. He also found one empty cartridge fired from fire arm and at the back of the cartridge numeral 7.65 had been written. The cartridge was seized and sealed and Ex.P/15 is the seizure memo. The spot map which has been prepared is Ex.P/14. The other witness of seizure memo Ex.P/15 are Chelaram (PW6) and Mohammed Raees (PW11), both of whom have stated that at the back of the cartridge words ES 7.6 had been written. These witnesses have not been cross examined so as to challenge their statements made in examination in chief. Witness Mohan Singh (PW47) in para 6 states that on 15.4.2008 he had arrested Ashok Akodiya vide arrest memo Ex.P/19 and had prepared his memorandum given under Section 27 of the Evidence Act. In the memorandum Ashok had stated that he had got Rs.2.50 lacs as his share of the loot and out of this amount Rs.1.50 lacs he had given to Shivraj Singh, Rs.40,000/- to Arun and Rs.60,000/- to Mahesh for keeping the amount with them. Ashok further gave the statement that a pistol which he had used along with the magazine containing 3 live cartridges is kept inside Almirah and he proposed to recover the same. The memorandum Ex.P/23 on which the signature of the accused is from B to B part. The same was, ie., the pistol and 3 rounds were thereafter seized as per Ex.P/24 on which there are signatures of witnesses from C to C part. He further states that on the basis of memorandum of Ashok Rs.1.50 lac were seized from the possession of Shivraj Singh. These are 29 bundles each bundle containing Rs.100/- note and each note denomination was Rs.50/-, the seizure memo of which is Ex.P/25. The witness states that he thereafter seized Rs.60,000/- from the house of Mahesh and he recovered a bundle of Rs.500 notes and another bundle of Rs.100/-notes. Rs.60,000/- were recovered and seized vide seizure memo Ex.P/27 on which the signatures of the applicant witness is from C to C part. After this, as per the witness he went to the house of accused Arun and seized Rs.40,000/- from him which were

8 bundles of 100 notes each and each note denomination was Rs.50/-. The seizure memo was Ex.P/56 and the signature of the applicant is from C to C part. Thereafter Shivraj Singh, Arun and Mahesh were arrested vide arrest memo Ex.P/20, Ex.P/21A and Ex.P/22 respectively. The witness of memorandum and seizure from Ashok are Sachin (PW8) and Ghanshyam (PW14) both of whom have turned hostile and thus prosecution story hinges only on the basis of evidence of Investigating Officer Mohan (PW47). The aforesaid seized pistol and live cartridges and empty cartridges have been produced before the court and while pistol has been marked as Article A, the three live cartridges are shown as Article A/2 and the empty cartridges have been shown as Article A/3.

74. Irfan Ali, Head Constable (PW33) is Arms Mohrrir who states that on 19.5.2008 he was posted as Arms Mohrrir in police line at Indore and on that day a pistol and 3 live cartridges were sent to him in connection with crime No.201/08. The items were sealed which was opened up and as per the witness he found that the fire arm was a 25 bore pistol which was semi automatic and in working condition. The three live cartridges and 25 bore pistol were inspected and a report Ex.P/67 was given by the witness which carries his signature from A to A part. The pistol and live cartridges have been shown to the witness in the course of his deposition and he identifies them as the same articles, which he has inspected. In cross examination, he reiterates that the pistol and 3 live cartridges were brought to him in sealed condition and the seal was a wax seal which was embedded on the paper slip on these articles. A perusal of the seizure memo of the pistol and the 3 live cartridges which is Ex.P/24 was perused. In this document it has been shown that the words KF 7.65 has been written on the 3 live cartridges. Similarly on perusal of Ex.P/15 which is a seizure memo of the empty cartridges it has been shown that behind the cartridges the words KE 7.65 has been written. There is one difference ofcourse between Ex.P/15 and Ex.P/24 and the difference is that while Ex.P/15 the words inscribed on the empty cartridges has been shown to be KE 7.65 whereas the words shown in Ex/P24 are KF 7.65. Thus, there is a difference of E and F. However, the difference cannot be termed to be vital because there can be mistake in reading either E as F or F as E with very minute difference between the two letters. Thus, it can be seen that the cartridges which were found on the spot were the empty cartridges which were the same type of cartridges which were found to be live. It has already been found that Arms Mohrrir has found the pistol to be in working condition.

75. Witness Pradeep Sahukar (PW35) submits that on 31.5.2008, he was posted as arms clerk in the court of ADM Indore. The case diary of Crime No.201/08, Arms Mohrrir's report and the seized country made pistol and the cartridges were sent for inspection and these items were physically verified by ADM and thereafter permission for prosecution was given by him under Section

39 of Arms Act vide Ex.P/69. These statements have not been challenged in the cross-examination.

76. In written submissions submitted on behalf of accused Ashok, it has been stated that there is discrepancy regarding the type of pistol which was seized from Ashok. As per arms report the gun confiscated has been shown to be of 25 bore whereas in the seizure memo which is Ex.P/24, the pistol is shown to be a 3 bore pistol. A perusal of the evidence of a Mohan Singh (PW47) who has exhibited Ex.P/4 wherein it has been stated that the pistol had a magazine with 3 live cartridges round. In his examination-in-chief, he does not say that the pistol was a 3 bore pistol. However, the word 3 bore is written in Ex.P/24. It can be seen that Ex.P/24 is drawn by Mohan Singh (PW47) who is not an expert as far as fire arms are concerned. It is a common knowledge that a fire arm does not have a 3 bore specification. What one generally knows is that fire arms are of .22, . 25, .32 and 0.38 calibre specifications. Thus, the evidence of arms Mohrrir - Irfan Ali (PW33) would be relied upon and the pistol which was seized had a barrel of .25 bore calibre. It is further stated that the pistol which was seized was shown to be in working condition even though it was not tested by firing. Regarding this submission, it can be stated that it is not mandatory to fire from a gun to prove that it is in working condition. The live cartridges which were found in pistol were required to be preserved. Hence, they could not have been fired. Ifran Ali (PW33) was expected to know as to whether the pistol was in working condition or not because he was an expert and he has given his opinion which cannot be faulted with. The bare fact that there were 3 live cartridges inside the magazine of the pistol itself shows that the pistol was in working condition.

77. Thus, no doubt remains that the same pistol was used to fire at Brij Mohan Gupta and a conclusion can safely be given that the accused who had fired and shot dead Brij Mohan Gupta was none other than accused Ashok. It has also been found that the evidence of Mahesh Utwani (PW43) that there were call records between Ashok and other co-accused persons. To recapitulate, Mahesh Utwani (PW43) was the Assistant Manager in Reliance Smart Mobile Company and he was asked to provide the call details of the Mobile No.9827 85808. This is the mobile number of accused Ashok. The witness has given the call detail records as per Ex.P/72 which runs in three pages. A perusal of the call records shows that accused Ashok had used this mobile number to contact co-accused Rahul and Ankur at just about the time of the incident and even after the incident was over which shows that Ashok was in constant touch with other co-accused persons and which displays a well laid out plan by the accused persons to loot the bank money. This evidence is admissible under Section 6 and 7 the Evidence Act. There is nothing in the cross examination of Mohan Singh (PW47) so as to create a suspicion in the statement made by him in the examination in chief and thus, it is found beyond reasonable doubt that Ashok was the person who had shot from his

pistol resulting in death of Brij Mohan Gupta and thereafter the box was looted by the accused persons.

78. In the written synopsis, it has been mentioned that the Arms Moharir - Irfan (PW/33) has given no report as to whether the empty cartridge was fired from the pistol recovered from the accused-Ashok. Ex.P/68 is the report of Moharir-Irfan (PW33) and a perusal of which shows that three live cartridges were sent to him and he has given a report that these live cartridges could be fired from the pistol which was sent to him. It has been found that live cartridges contained markings which were identical to markings found at the back of spent cartridge. The pistol was also found to be in working condition. Ofcourse, the empty cartridge ought to have also been sent to the arms Moharir. However, not doing so does not weaken the prosecution story. The empty cartridge had identical markings as the live cartridge. The looted money was recovered from accused-Ashok and from Ashok only, the pistol was also recovered and the cartridge found at the spot had identical markings to as were on the live cartridges seized from Ashok. This evidence cumulatively proves that the empty cartridge was fired from the same pistol which was seized from the possession of Ashok.

79. In the written submission, a citation has been putforth by learned counsel which is *Mahavir Singh vs State of Madhva Pradesh* 201610 SCC 220 in which it has to be proved that the death of victim occurred from the bullet released from the seized gun. Learned counsel has submitted that the aforesaid condition has not been satisfied in the present case. However, as discussed earlier, the only conclusion which can be drawn is that the empty cartridge was the same cartridge which was fired from the pistol seized from the possession of accused-Ashok and therefore no breach of aforesaid citation has been made. Some other citations were also submitted by learned counsel which are *Kailash Dynaneshwar Tonchar vs State of Maharashtra* (2015) SCC 3314, *Pradip Sarkar vs State of Tripura* (2011) *Gauhati Law Reports 539 and Musheer Khan vs State of Madhya Pradesh* (2010) 2 SCC 748. The aforesaid citations were perused and we are afraid that these citations also do not come to the rescue to accused-Ashok. The aforesaid evidence, recovery of looted money from Ravi and his constant touch on mobile phone with co-accused persons cumulatively prove his involvement in dacoity and committing same with deadly weapon.

80. In view of the above discussion, conviction of Ashok under Sections 396 and 398 of IPC and under Section 25(1-b)(a) of Arms Act by the trial Court is affirmed.

Regarding Ghanshyam and Rajendra

81. Regarding Ghanshyam, Investigating Officer Mohan Singh (PW47) has stated that he had arrested Ghanshyam from the house of Rahul on information

received from a Mukhbir. An Ex.P/47 is the arrest memo. He states that on the basis of memorandum under Section 27 of the Evidence Act, which is Ex.P/50, which was executed on 14.6.2008 at 3.05 PM, Rs.90,000/- were recovered from below the cot from the house of Ghanshyam situated at Rau, Indore vide Ex.P/49 at 3.20 PM on the same day, ie., on 14.6.2008. The witness further states that Ghanshyam gave another memorandum which is Ex.P/48 on 15.6.2008 at 11.40 AM on the basis of which Rs.60,000/- were recovered from his rented house at Omkareshwar vide Ex.P/44. In his cross examination, this witness denies the suggestion that all the proceedings pertaining to Ghanshyam were executed in the police station. The independent witness of memo and seizure of Rs.90,000/- from his house are Sanjay (PW21) and Roop Singh (PW20) and both of whom have turned hostile and do not support the prosecution story apart from the fact that they identified their signatures on the memorandum and on seizure memo.

82. Regarding the evidence that Ghanshyam had rented the house at Omkareshwar from where Rs.60,000/- recovered, the relevant witnesses are Chintaram (PW36) who states that he had gone to the field of Ghanshyam for cutting Soyabean crops. This witness is resident of Omkareshwar. He states that at the instance of Ghanshyam, he had managed to get a house on rent. The house owner at Omkareshwar who had rented out his house to Ghanshyam is Madanlal Kushwah (PW17). He states that his wife had rented his house to Ghanshyam at Rs.800/- per month. However, he denies seizure of money from the house stating that he was not present at that time. This witness has been declared hostile. In cross examination, he states that Ghanshyam had taken the house for religious purposes but does not support the prosecution story regarding seizure of Rs.60,000/- from his house at Onkareshwar. The other witness of seizure of Rs.60,000/- from Onkareshwar house is Mahesh (PW35) who states in examination in chief that Rs.70,000/-was recovered by police from the house of Madan Kushwah. His signature in seizure memo Ex.P/44 from B to B part. In cross examination he states that he works as labourer (coolie) at Onkareshwar bus stand and police had called him to witness the seizure proceedings. In cross examination however he states that he was standing outside the house of Ghanshyam and police had gone inside and police told him that a plastic bag was recovered containing Rs.70,000/- but he never saw the money nor the plastic bag. This witness thus although in examination-in-chief supports the prosecution story regarding recovery of money from the house at Omkareshwar but in cross examination he submits that he did not see the money or the bag containing the money and in view of cross examination it cannot be stated that this witness had himself seen seizure of money from the house at Onkareshwar. However, from the statement of Mahesh (PW35), it becomes clear that police had indeed gone to the house of Madanlal Kushwah, the owner of the house who had rented out his house to Ghanshyam and police told Mahesh that they have recovered money from the

house. Even though independent witnesses have not fully supported the prosecution story, the evidence of Mohan Singh (PW47) has remained unimpeached through out. It can be seen that the share of Ghanshyam was almost equal to the other main co-accused persons and the prosecution story is that Ghanshyam was chiefly involved in the conspiracy and planning to commit loot.

83. Section 412 provides for the punishment of offence to any person who dishonestly receives or retains any stolen property, the possession whereof he knows or has reason to believe to have been transferred by the commission of decoity (sic : dacoity), or dishonestly receives from a person, whom he knows or has reason to believe to belonging or to have belonged to a gang of dacoits, property which he knows or has reason to believe to have been stolen.

84. As far as Ghanshyam is concerned, the manner in which he had hidden Rs.90,000/- a huge sum compared to his ordinary means of living and further the manner in which he had diverted Rs.60,000/- to another house at Omkareshwar from clearly shows that not only he knew that it was stolen money but also he knew it or had reason to believe that the money had been transferred by the commission of decoity (sic : dacoity). Thus, his conviction under Section 412 of IPC was absolutely appropriate.

85. Learned counsel for the appellant/accused in her final arguments has submitted that there must be some evidence that the accused was having knowledge or reason to believe that the amount was related with dacoity and it would not be sound to draw presumption beyond that the accused were the receivers of stolen property. The citation of *Nethraj Singh vs State of Madhya Pradesh* 1997 3 SCC 525 has been relied upon, as also the citation of *Bhaskar Chandra Navak and Another vs State of Orissa* 2010 Vol.-1 CRIMES 256 (Orissa).

86. In the judgment of *Bhaskar Chandra Nayak* (supra), it has been held that mere possession is not sufficient to convict a person under Section 412 IPC and onus on prosecution to prove that the properties were stolen.

87. The aforesaid citations whether would be applicable in case of accused Ghanshyam and Rajendra is to be seen.

88. As far as accused-Ghanshyam is concerned, it is found proved that he had received an amount approximately equivalent to other main perpetrators of the dacoity. He had hidden Rs.90,000/- below his Cot at his house and further kept Rs.60,000/- in a rented house at Omkareshwar. The accused-Ghanshyam has been termed by the prosecution as one of the main conspirators for committing loot. The manner in which he had hidden the sums of money as aforesaid very clearly shows that he was having the requisite knowledge or had the reason to believe that

the money was obtained by commission of dacoity or he knew that the money was received by him from a member of a gang of dacoits. Therefore the charge under Section 412 IPC has rightly been proved against him.

89. As far as accused-Rajendra is concerned who is the father of Hemraj and Hemraj had taken active part in the commission of dacoity. The prosecution case is that it was Hemraj who had given Rs.1,55,000/- to his father i.e. accused-Rajendra. The memorandum of Hemraj is Ex.P/26-A. On the basis of this memorandum Rs.1,55,000/- were recovered from accused-Rajendra vide Ex.P/28. As already described, these bundles had a seal of Union Bank of India also contained a slip. As per Ex.P/28, the accused-Rajendra had taken out the aforesaid amount from an 'Almirah' and the accused-Rajendra being the father of Hemraj, it is inconceivable to believe that Rajendra had bonafidely received huge amount from his son-Hemraj believing that it is obtained by Hemraj in legal and proper manner. Rajendra puts up no such defence in his accused statements. However, it is far-fetched to presume that Rajendra knew that this money is the result of commission of dacoity or that Hemraj was one of the member of gang of dacoits who had looted this money and had given to his father i.e. accused-Rajendra. It can only be found proved that accused-Rajendra had reason to believe that the amount of Rs.1,55,000/- were the stolen property and therefore accused-Rajendra would be held guilty for committing offence under Section 411 IPC and not under Section 412 IPC. To that extent the appeal of accused-Rajendra is allowed in part. His sentence from seven years of RI along with fine of Rs.1000/- is reduced to three years of RI with no change in fine amount.

Regarding accused-Shivraj, Arun and Mahesh.

90. All the three accused persons have been convicted under Section 412 IPC as per Mohan Singh-IO (PW47) on the basis of memorandum of accused-Ashok, Rs.1,50,000/- was recovered from Shivraj as per seizure memo Ex.P/25, Rs.40,000/- was recovered from Arun as per Ex.P/26, Rs.60,000/- were recovered from Mahesh as per Ex.P/27. The amount which was recovered from Shivraj were denomination of notes of Rs.50/- and there being 29 such bundles. Rs.40,000/- which were recovered from accused-Arun were also Rs.50/- denomination notes and there were 38 such bundles. Rs.60,000/- which were recovered from Mahesh were denomination of Rs.500/- notes and there were 100 such notes and further denomination of Rs.100 notes in one bundle was recovered.

91. No memorandum statements of accused-Shivraj Singh, Arun and Mahesh have been recorded. There is no evidence to show that these accused persons knew that accused-Ashok has committed dacoity/loot and the aforesaid property was the looted property. But of-course they had reason to believe that the aforesaid property was the stolen property. These accused persons in their accused statements or in the cross-examination of IO-Mohan Singh (PW/47) have

not given statements that they believed that the aforesaid property was given to them by accused-Ashok for a legal purpose. A recovery has been made barely four days after the incident and in that case, provisions of Section 114-a of Evidence Act, 1872 would get attracted under which the Court may presume that a person who is in possession of stolen goods soon after the theft, is either thief or has received goods knowing them to be stolen, unless he can account for his possession. This presumption, applies against all the three accused persons and these accused persons have not rebutted the presumption by offering any satisfactory reason for possessing such substantial quantity of money with them. Hence all the three of them (all three accused) are liable to be convicted and sentenced under Section 411 IPC. However, for the reasons stated earlier, they could not have been convicted under Section 412 IPC. The appeal filed by accused-Shivraj, Mahesh and Arun, thus, partly allowed to the extent that instead of Section 412 IPC they are liable to be convicted and sentenced under Section 411 IPC and instead of sentence of 7 years of RI with fine of Rs.1000/- to each of them is sentenced to 3 years RI with no change in fine amount.

92. Thus, after duly considering the appeals filed by the appellants, we are of the considered opinion that the appeals filed by appellants Pradeep, Ankur, Ravi, Hemraj, Rahul, Ashok and Ghanshyam be dismissed and the convictions and sentences imposed on them by the trial Court be affirmed.

Question No.7 was as follows :- Whether accused Aran, Mahesh, Rajendra, Ghanshyam and Shivraj Singh dishonestly received cash amounts from the members of the gang of decoits (sic : dacoits) and were they liable under Section 412 of IPC ?

93. From the discussion already gone into, it has been found proved that out of the above appellants only Ghanshyam has been found guilty under Section 412 of IPC. Rest of them, ie., Arun, Mahesh, Rajendra and Shivraj Singh are guilty under Section 411 of IPC.

94. The appeals filed by appellants Rajendra, Shivraj, Arun and Mahesh are partly allowed and they stand convicted under Section 411 IPC instead of Section 412 IPC and their jail sentences are reduced from 7 years RI each to 3 years RI each with no change in fine amount of Rs.1000/- on each of them with further default sentences of one month in respect of each of the above appellants.

95. Appellant Ravi in Cri.Appeal No.1070/2011, Appellant Mahesh in CRA.No.994/2011, Appellant Arun in CRA.No.953/2011, Appellant Rahul @ Vijendra in CRA.No.1081/2011, Appellant Pradeep in CRA.No.1205/2011, Appellant Shivraj Singh in CRA.No.1123/2011 and Appellant Rajendra @ Manju in CRA.No.1071/2011 have been released from jail after their suspension of jail sentence during the pendency of their appeals. Suspension of jail sentences of

these appellants are revoked and they shall be sent to jail for serving the residual jail sentences as per this judgment by the trial court. The record of the trial court be sent back for due compliance.

96. With the aforesaid, these appeals stand disposed of in above terms.

Order accordingly

I.L.R. [2020] M.P. 1955
CIVIL REVISION
Before Mr. Justice Vishal Dhagat
C.R. No. 566/2019 (Jabalpur) decided on 6 August, 2020

SURESH KESHARWANI & anr. …Applicants

Vs.

ROOP KUMAR GUPTA & anr. ...Non-applicants

***A. Civil Procedure Code (5 of 1908), Order 23 Rule 1 & 3 – Principle of Waiver of Rights* – Held – As per Order 23, Rule 3, plaintiff shall be precluded from instituting any fresh suit in respect of same subject matter or claim or part of claim of earlier suit – In previous and subsequent suit, subject matter and claim of plaintiff is not only same but identical – Plaintiff withdrawn earlier suit without liberty to file fresh suit, thus he is precluded from instituting fresh suit – Revision allowed. (Para 10 & 11)**

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 23 नियम 1 व 3 – अधिकारों के अधित्यजन का सिद्धांत – अभिनिर्धारित – आदेश 23, नियम 3 के अनुसार, वादी को पूर्व वाद के समान विषय वस्तु अथवा दावा अथवा दावे के भाग के संबंध में कोई नया वाद संस्थित करने से प्रवारित किया जावेगा – पूर्व तथा पश्चात्वर्ती वाद में, विषय वस्तु तथा वादी का दावा न केवल समान था बल्कि समरूप था – वादी ने नया वाद प्रस्तुत करने की स्वतंत्रता के बगैर ही पूर्व वाद वापस ले लिया, अतः उसे नया वाद संस्थित करने से प्रवारित किया गया है – पुनरीक्षण मंजूर।

***B. Civil Procedure Code (5 of 1908), Section 11 and Order 23 – Principle of Res-Judicata & Principle of Waiver of Rights* – Held – Order 23 and Section 11 of CPC are based on different principles – Distinction explained. (Para 8)**

ख. सिविल प्रक्रिया संहिता (1908 का 5), धारा 11 एवं आदेश 23 – पूर्व–न्याय का सिद्धांत व अधिकारों के अधित्यजन का सिद्धांत – अभिनिर्धारित – सिविल प्रक्रिया संहिता का आदेश 23 एवं धारा 11 भिन्न सिद्धांतों पर आधारित हैं – विभेद स्पष्ट किया गया।

A. Rajeshwar Rao, for the applicants.
A.K. Jain, for the non-applicants.

ORDER

VISHAL DHAGAT, J.:-Applicants namely Suresh Kesharwani and Geeta Kesharwani are defendants before the trial Court and non-applicant No. 1 is plaintiff before the trial Court. Applicants (hereinafter referred to as defendants) had filed an application under Order 7 Rule 11 of the Code of Civil Procedure, 1908 before the trial Court making a prayer that civil suit RCS No.430/2019 is not maintainable as same is barred by principle of *resjudicata*. Earlier non-applicant No. 1 (hereinafter referred to as plaintiff) has filed a suit bearing registration number RCS No. A769/2018. Defendants averred that parties, pleadings and prayer in former Civil Suit No. 769/2018 is same as made in the subsequent suit No. 430/2019. It was further pleaded in the application that plaintiff has filed an application under Order 23 Rule 1 of CPC in civil suit No. 769/2018 for simple withdrawal of suit. Learned trial Court vide its order dated 10/04/2019 allowed the application for withdrawal of suit on condition that plaintiff is precluded to file the suit on the same subject matter in future.

2. On basis of aforesaid pleadings, defendants made a prayer in their application to reject the plaint filed by the plaintiff and further be pleased to impose heavy cost on plaintiff for abuse of process of law in the interest of justice.

3. Learned trial Court vide its order dated 27/06/2019 rejected the application filed by the defendants. Learned trial Court held that former suit which was filed by the plaintiff was not decided on merits and nature of relief claimed in former suit, i.e. RCS-A769/2018 and subsequent suit, RCS No. 430/2019 is different, therefore, subsequent suit of plaintiff is not barred by the principle of resjudicata.

4. Impugned order dated 27/6/2019 is under challenge in civil revision on the grounds that fresh Civil Suit filed by the plaintiff is barred by the principle of resjudicata, learned trial Court has allowed withdrawal of suit under Order 23 Rule 1 of CPC with condition that plaintiff will be precluded to bring fresh suit again for the same cause of action. It was also pleaded that learned trial Court ignored the fact that former suit was amended on 18.01.2019 and Smt. Geeta Kesharwani and Suresh Kesharwani was made a party to the suit. Prayer for amending relief clause and to substitute clause a was also allowed ie. to declare sale deed dated 03.08.2018 to be null and void, prayer for permanent injunction to restrain purchasers to disturb plaintiff in enjoyment of 8 feet passage and declaration that purchasers have no right to dispossess plaintiff on basis invalid sale deed.

5. Counsel appearing for plaintiff opposed the application on the ground that cause of action in both the civil suits is different. In former suit cause of action is dated 02.08.2018 and in subsequent suit cause of action is 24.04.2019. Former

suit RCS-A769/2018 was not decided on merits therefore principle of resjudicata is not attracted and therefore Civil Revision filed by the defendants may be dismissed.

6. Heard the counsel appearing for both the parties. On perusing the application filed under Order 7 Rule 11 CPC, 1908, two points has been pleaded by the defendants firstly, the suit is barred by resjudicata and secondly, plaintiffs were allowed to withdraw the suit vide order dated 10.04.2019 without liberty to institute fresh suit and are precluded to file the suit on the same subject matter.

7. Now it is to be seen whether the trial Court has committed an error of jurisdiction in dismissing the application filed by defendants under Order 7 Rule 11 CPC, 1908. Trial Court came to finding that earlier suit was not decided on merits and relief sought in both the suits are different therefore suit is not barred under Section 11 of CPC by principle of resjudicata. Trial Court did not advert to fact whether plaintiff can bring a fresh suit in face of order dated 10.04.2019.

8. Section 11 of the Code of Civil Procedure is based on principle of *res judicata*. As per Section 11 of CPC, no Court shall try any suit or issue in which the matter is directly and substantially in issue has been directly and substantially in issue in the former suit between the same parties, 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 or the suit in which issue has been substantially raised and has been heard and finally decided by such Court. Section 11 of CPC creates bar on trial of subsequent suit by Court if issues which have been directly and substantially in issue between same parties in former suit has been decided on its merits. However, Order 23 of CPC is not based on principle of restjudicata (sic : res judicata) but it is based on principle of waiver of rights by the plaintiff. As per Order 23 Rule 1 of CPC, plaintiff may at any time after institution of the suit abandon his suit or abandon a part of his claim in suit or withdraws from suit or part of a claim against all or any of the defendants. If such withdrawal is made without permission of Court envisaged in Order 23 Rule 3, then plaintiff shall be precluded from instituting any fresh suit in respect of such subject matter or such part of the claim. Order 23 of Code of Civil Procedure,1908, is based on the principle of waiver of the rights of the plaintiff and not resjudicata. Order 23 of CPC and Section 11 of CPC are based on different principles.

9. Learned trial Court had appreciated section 11 of the Code of Civil Procedure,1908, and had rightly held that subsequent suit filed by the plaintiff is not barred by the principle of resjudicata but trial Court failed to appreciate whether plaintiff will be precluded to bring fresh suit on same subject matter as subsequent suit is hit by Order 23 Rule 3 of Code of Civil Procedure,1908.

10. Considered the pleadings made in civil suit No. 430/2019 and former suit bearing No. 769/2018. In previous suit and subsequent suit plaintiff subject matter and claim of petitioner is not only same but identical.

Prayer in Civil Suit No.430/2019 is as under :

(a) That a judgment and decree for declaration be passed and it be declared that plaintiff has an easement right of light and air to use 8 feet of open land lying behind the flat of 101, Sobhapur, Jabalpur. It be further declared that sale deed dated 04-08-2018, is void under law as the sale deed has been executed by seller who did not have absolute title over the land. It be further declared that purchasers defendants do not have any right to dispossess the plaintiff by force on the basis of invalid sale deed.

(b) That a judgment and decree for permanent injunction be passed and purchasers defendants be restrained permanently from causing any disturbance in the easement rights of the plaintiff over 8 feet of land as stated above and also cause any forceful dispossession of the plaintiff over 8 feet of land.

Prayer in Civil Suit No. 769/2018 after amendment is as under :

(a) That a judgment and decree for declaration be passed and it be declared that plaintiff has an easement right of light and air to use 8 feet of open land lying behind the flat of 101, Shobhapur, Jabalpur. It be further declared that sale deed dated 03.08.2018, is void under law as the sale deed has been executed by seller, who did not have any title over the land. It be further declared that purchasers defendants do not have any right to dispossess the plaintiff by force on the basis of invalid sale deed. And cause any disturbance in the enjoyment of passage of 8 feet as stated above.

(b) That a judgment and decree for permanent injunction be passed and purchasers defendants be restrained permanently from causing any disturbance in the easement rights of the plaintiff over 8 feet of land as stated above and also cause any forceful dispossession of the plaintiff over 8 feet of land.

Order 23 Rule 3 lays down that plaintiff shall be precluded from instituting any fresh suit in respect of such subject matter or claim or part of claim. The emphasis is on words subject matter and claim.

11. Plaintiff cannot bring a subsequent suit i.e. Civil Suit No. 430/2019 as former Civil Suit No. 769/2018 was withdrawn without liberty to institute fresh suit. Learned trial Court failed to appreciate Order 23 of CPC,1908, and passed impugned order dated 27.06.2019 only on basis of principle of resjudicata.

12. In view of aforesaid, I allow the civil revision filed by the applicants and set aside order dated 27.06.2019 and hold that plaintiff is precluded from filing subsequent Civil Suit No. 430/2019.

Revision allowed

I.L.R. [2020] M.P. 1959
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice G.S. Ahluwalia

M.Cr.C. No. 46932/2019 (Gwalior) decided on 30 November, 2019

VIJAY SINGH ...Applicant

Vs.

STATE OF M.P. & ors. …Non-applicants

A. Criminal Practice – Police Closure Report – Procedure – **Held – Police officers deliberately retained the closure report on frivolous ground with solitary intention to give undue advantage to accused and did not file it before Court – Magistrate was also aware of the fact of preparation of closure report by police but did not direct them to file the same – Police cannot keep closure report in police station – Procedure adopted by Magistrate is in utter disregard to provisions of Cr.P.C. – Impugned order set aside – Matter remanded to Magistrate for decision afresh – Application allowed.**

(Paras 18 to 21)

क. दाण्डिक पद्धति – पुलिस खात्मा प्रतिवेदन – प्रक्रिया – अभिनिर्धारित – पुलिस ने अभियुक्त को अनुचित लाभ पहुंचाने के एकमात्र आशय से तुच्छ आधार पर खात्मा प्रतिवेदन जान–बूझकर अपने पास रखा तथा इसे न्यायालय के समक्ष प्रस्तुत नहीं किया – पुलिस द्वारा खात्मा प्रतिवेदन तैयार करने के तथ्य से मजिस्ट्रेट भी अवगत था परंतु उसने उन्हें उक्त को प्रस्तुत करने हेतु निदेशित नहीं किया – पुलिस, खात्मा प्रतिवेदन को पुलिस थाने में नहीं रख सकती – मजिस्ट्रेट द्वारा अपनाई गई प्रक्रिया दं.प्र.सं. के उपबंधों की घोर अवहेलना है – आक्षेपित आदेश अपास्त – मामला नये सिरे से विनिश्चय करने हेतु मजिस्ट्रेट को प्रतिप्रेषित – आवेदन मंजूर।

B. Criminal Practice – Closure Report – Notice to Complainant – **Held – After the closure report is filed, the Court shall issue notice to the complainant.** **(Para 17 & 18)**

ख. दाण्डिक पद्धति – खात्मा प्रतिवेदन – परिवादी को नोटिस – अभिनिर्धारित – खात्मा प्रतिवेदन प्रस्तुत होने के पश्चात्, न्यायालय परिवादी को नोटिस जारी करेगा।

***C. Criminal Practice – Complaint Case* – Held – After the dismissal of complaint, if complainant challenges the order, then the persons arrayed as accused are required to be heard. (Para 3)**

***ग. दाण्डिक पद्धति – परिवाद प्रकरण* – अभिनिर्धारित – परिवाद की खारिजी होने के पश्चात्, यदि परिवादी आदेश को चुनौती देता है, तब अभियुक्त के रूप में दोषारोपित किये गये व्यक्तियों को सुना जाना अपेक्षित है।**

Cases referred:

(2012) 10 SCC 517, (2011) 12 SCC 302.

None, for the applicant.
Vijay Sundaram, P.L. for the non-applicant No. 1/State.

O R D E R

G.S. AHLUWALIA, J.:- The case was taken up on 19-11-2019 and this Court was of the view that the record of the Court below is necessary, therefore, the same was requisitioned on administrative side being the Portfolio Judge of Distt. Morena and the case was adjourned to 20-11-2019.

2. Shri Vijay Sundaram, Panel Lawyer was heard on 20-11-2019 and the record of the Court below was perused and the case was reserved for orders. As it was projected that the police has already filed the closure report, therefore, on the administrative side, the District and Sessions Judge, Morena was directed to send the record pertaining to the proceedings of Closure report, however, by letter dated 22-11-2019, it was informed that the police has never filed the closure report due to non-service of notice on the complainant. The case diary was also sent by the J.M.F.C. Morena on administrative side on 21-11-2019.

3. This Court is conscious of the fact that after the dismissal of the complaint, if the order is challenged by the complainant, then the persons arrayed as accused are required to be heard. The Supreme Court in the case of *Manharibhai Muljibhai Kakadia Vs. Shaileshbhai Mohanbhai Patel* reported in (2012) 10 SCC 517 has held as under :-

> **46.** The legal position is fairly well-settled that in the proceedings under Section 202 of the Code the accused/suspect is not entitled to be heard on the question whether the process should be issued against him or not. As a matter of law, up to the stage of issuance of process, the accused cannot claim any right of hearing. Section 202 contemplates postponement of issue of process where the Magistrate is of an opinion that further inquiry into the complaint either by himself is required and he proceeds with the further inquiry or directs an investigation to be made by a police officer or by such other person as he thinks fit for the

purpose of deciding whether or not there is sufficient ground for proceeding. If the Magistrate finds that there is no sufficient ground for proceeding with the complaint and dismisses the complaint under Section 203 of the Code, the question is whether a person accused of crime in the complaint can claim right of hearing in a revision application preferred by the complainant against the order of the dismissal of the complaint. Parliament being alive to the legal position that the accused/suspects are not entitled to be heard at any stage of the proceedings until issuance of process under Section 204, yet in Section 401(2) of the Code provided that no order in exercise of the power of the revision shall be made by the Sessions Judge or the High Court, as the case may be, to the prejudice of the accused or the other person unless he had an opportunity of being heard either personally or by pleader in his own defence.

47. Three expressions: "prejudice", "other person" and "in his own defence" in Section 401(2) are significant for understanding their true scope, ambit and width:

47.1. *Black's Law Dictionary* (8th Edn.) explains "prejudice" to mean damage or detriment to one's legal rights or claims. *Concise Oxford English Dictionary* [10th Edn., Revised] defines "prejudice" as under: *"Prejudice.—* n. (1) preconceived opinion that is not based on reason or actual experience. ■ unjust behaviour formed on such a basis. (2) chiefly Law harm or injury that results or may result from some action or judgment. ▶ v. (1) give rise to prejudice in (someone); make biased. (2) cause harm to (a state of affairs)."

47.2. *Webster Comprehensive Dictionary* (International Edn.) explains "prejudice" to mean (i) a judgment or opinion, favourable or unfavourable, formed beforehand or without due examination ... detriment arising from a hasty and unfair judgment; injury; harm.

47.3. *P. Ramanatha Aiyar; the Law Lexicon (The Encyclopaedic Law Dictionary)* explains "prejudice" to mean injurious effect, injury to or impairment of a right, claim, statement, etc.

47.4. "Prejudice" is generally defined as meaning "to the harm, to the injury, to the disadvantage of someone". It also means injury or loss.

47.5. The expression "other person" in the context of Section 401(2) means a person other than the accused. It includes suspects or the persons alleged in the complaint to have been involved in an offence although they may not be termed as accused at a stage before issuance of process.

47.6. The expression "in his own defence" comprehends, inter alia, for the purposes of Section 401(2), in defence of the order which is under challenge in revision before the Sessions Judge or the High Court.

> **48.** In a case where the complaint has been dismissed by the Magistrate under Section 203 of the Code either at the stage of Section 200 itself or on completion of inquiry by the Magistrate under Section 202 or on receipt of the report from the police or from any person to whom the direction was issued by the Magistrate to investigate into the allegations in the complaint, the effect of such dismissal is termination of complaint proceedings. On a plain reading of sub-section (2) of Section 401, it cannot be said that the person against whom the allegations of having committed the offence have been made in the complaint and the complaint has been dismissed by the Magistrate under Section 203, has no right to be heard because no process has been issued. The dismissal of complaint by the Magistrate under Section 203—although it is at preliminary stage —nevertheless results in termination of proceedings in a complaint against the persons who are alleged to have committed the crime. Once a challenge is laid to such order at the instance of the complainant in a revision petition before the High Court or the Sessions Judge, by virtue of Section 401(2) of the Code, the suspects get the right of hearing before the Revisional Court although such order was passed without their participation. The right given to "accused" or "the other person" under Section 401(2) of being heard before the Revisional Court to defend an order which operates in his favour should not be confused with the proceedings before a Magistrate under Sections 200, 202, 203 and 204. In the revision petition before the High Court or the Sessions Judge at the instance of the complainant challenging the order of dismissal of complaint, one of the things that could happen is reversal of the order of the Magistrate and revival of the complaint. It is in this view of the matter that the accused or other person cannot be deprived of hearing on the face of the express provision contained in Section 401(2) of the Code. The stage is not important whether it is pre-process stage or post process stage.

4. However, this application is being decided without issuing notice to the respondents no.2 to 6, as the Magistrate has dismissed the complaint in utter disregard to the directions issued by this Court by order dated 4-11-2016 passed in W.P. No.365/2016, order dated 9-9-2019 passed in M.Cr.C. No.36918 of 2019 and order dated 8-11-2016 passed in M.Cr.C. No.5544 of 2016. Since, the matter is not being decided on merits of the case, therefore, this Court is of the considered opinion, that it is not necessary to issue notices to the respondents no.2 to 6 because it would further delay the proceedings.

5. This application under Section 482 of Cr.P.C. has been filed against the order dated 22-10-2019 passed by J.M.F.C., Sabalgarh, Distt. Morena in unregistered case No of 2016.

6. The necessary facts for disposal of the present case in short are that on 7-10-2015, the complainant, along with his father Ramroop Tyagi were returning back from Sabalgarh Court. One Marshal Car stopped the way and the respondents no.2 to 6 alighted from the said car and the respondent no.2 Dwarika, fired a gunshot with an intention to kill the deceased Ramroop Tyagi, as a result of which he fell down and became unconscious. It was alleged that thereafter, the F.I.R. at crime no.340/2015 was lodged in Police Station Kailaras, Distt. Morena for offence under Sections 147, 307 of I.P.C. and under Section 25/27 of Arms Act. During the course of investigation, it is alleged that the dying declaration of the injured Ramroop Tyagi was recorded and looking to his critical condition, he was referred to JAH Hospital, Gwalior and on 8-10-2015, the deceased Ramroop Tyagi expired and consequently, an offence under Section 302 of I.P.C. was also added.

7. It is alleged that due to political pressure, the police was not conducting the investigation in a free and fair manner, therefore, the applicant filed a petition which was registered as W.P. No.365 of 2016 and the State was directed to submit the status report. A statement was made by the Counsel for the State that the closure report has been filed, and accordingly, by order dated 4-11-2016, the writ petition filed by the petitioner was disposed of with the following observations :

> "Looking to the fact situation of this case, this writ petition is disposed of with a direction to petitioner to prefer objection before the concerned Magistrate challenging the final report and/or file private complaint challenging the said final report. Nothing survives in the writ petition at this stage to adjudicate. Thus, petition is disposed of as rendered infructuous. Petitioner is at liberty to resort to the remedies available in accordance with law and it is needless to say that on due steps taken by the petitioner, concerned Magistrate would act in accordance with law."

8. From the record of the Court below, it is clear that since the police did not file the closure report, therefore, on 26-11-2016, the complainant/ applicant filed a criminal complaint against the respondents no.2 to 6 for offence under Sections 302, 347, 149 of I.P.C. and under Section 25/27 of Arms Act. The case was fixed for examination of witnesses and accordingly on 27-1-2017, the statements of Vijay Singh and Vishambhar Tyagi were recorded and the case was adjourned to 25-2-2017 for examination of remaining witnesses. Thereafter, the case was adjourned for 25-4-2017 and on the said date, the report from the police was also requisitioned and then, the case was adjourned on 8-7-2017, 16-8-2017, 9-10-2017, 26-12-2017, 9-1-2018, 26-3-2018, 24-5-2018, 30-7-2018, 5-9-2018, 30-10-2018, and 21-1-2019. The enquiry report was received on 11-4-2019 and thereafter, the case was fixed on 5-5-2019 for further action. Thereafter, it was adjourned to 17-7-2019 and on 15-10-2019, the case diary was summoned from

Police Station Kailaras and by order dated 16-10-2019, the case was fixed for 22-10-2019 for preliminary arguments and by order dated 22-10-2019, the complaint has been dismissed.

9. In the meanwhile, the complainant filed M.Cr.C. No.36918 of 2019 seeking a direction to the J.M.F.C., Sabalgarh, Distt. Morena to decide the complaint as well as to take cognizance of the offence registered at crime no.340/2015. Once again an impression was given by the Counsel for the parties that the police has already filed the closure report. Thus, the following order was passed on 9-9-2019 :

> "It appears from the documents of this petition that the State has filed the closure report, which according to the petitioner is still pending. It appears that the petitioner has also filed a complaint, which is also still pending. From the order dated 27/01/2017 passed by JMFC, Sabalgarh, District Morena. It appears that the statement of the complainant/petitioner and his witnesses were recorded and thereafter, the police report was summoned.
>
> In the considered opinion of this Court, there is no need to seek a further police report for the simple reason that the closure report is already pending before the same Court. Therefore, in case, if an application is filed by the petitioner before the trial Magistrate for clubbing both these cases together, then, in order to avoid any conflicting decisions as well as the complaint filed by the petitioner can be treated as a protest petition to the closure report, the JMFC, Sabalgarh, District Morena, is directed that the closure report as well as the complaint should be clubbed together and should be decided as early as possible preferably within a period of two months from the date of the receipt of the certified copy of this order.
>
> With the aforesaid direction, the petition is finally **disposed of."**

10. From the record, it appears that an application for urgent hearing was filed before the Court below along with the certified copy of the above mentioned order. It also appears that the respondents no.2 to 6 had also filed an application under Section 482 of Cr.P.C. for quashment of the F.I.R. registered in crime No.340/2015 by police station Kailaras, Distt. Morena for offence under Sections 147, 307, 302 of I.P.C. and also under Section 25/27 of Arms Act and the said application was dismissed as withdrawn by order dated 8-11-2016.

11. From the record, it is clear that along with the complaint, the applicant had filed the copy of the order passed by this Court in W.P. No.365 of 2016, Photocopy of the closure report which was prepared by the police on 24-7-2016, Copy of F.I.R. as well as the copy of F.R.

12. It also appears from the record, the police had submitted its status report on 11-4-2019. The operative part of this report reads as under :

> ''प्रकरण मे अभी तक की सम्पूर्ण विवेचना से साक्षियों के कथनों एवं टावर लोकेशन एवं साक्ष्य के अभाव से पाया गया कि अपराध क्रमांक 494/12 धारा 307,302,147,148,149 ता,.हि. के आरोपीगण मृतक रामरुप त्यागी द्वारा अपने पुत्र विजय सिंह त्यागी के न्यायालय सबलगढ़ से दिनांक 7.10.15 को अपने गांव वापस आते समय उपरोक्त प्रकरण मे सजा से बचने के लिये अपराध क्रमांक 494/12 धारा 307,307,147,148,149 ता.हि. के साक्षियों पूर्व उपरोक्त प्रकरणों के मृतकों के परिवारी जन बीरेन्द्र त्यागी, प्रवीण त्यागी, मनीष त्यागी निवासी गण नया गांव एवं द्वारिका त्यागी, मनोज त्यागी निवासी गण जौरा के विरूद्ध अपराध 340/15 धारा 147,302,307 ता.हि. 25–27 आर्म्स एक्ट का प्रकरण रजिशन दर्ज कराया जाना प्रतीत होता है। किसी अन्य व्यक्ति के द्वारा रामरुप त्यागी को गोली मारी गयी है। बक्त घटना दो ही व्यक्तियों विजयसिंह त्यांगी ,मृतक रामरुप त्यागी होना पाया गया है। गोली किसने मारी इसका अभी तक की विवेचना मे भरसक प्रयास के बावजूद कोई साक्ष्य नही मिला प्रकरण लंबे समय लंबित होने से श्रीमान पुलिस अधीक्षक महोदय मुरैना को प्रकरण में एफआए कता करने की अनुमति श्रीमान एसडीओपी महोदय कैलारस के माध्यम से प्राप्त कर प्रकरण मे एफआर क्रमांक 12/16 दिनांक 24.12.16 कता की गयी।
>
> प्रतिवेदन श्रीमान के सेवा मे सादर प्रेषित है।''

13. Thus, in the status report also, it was specifically mentioned that the Closure report has been prepared.

14. Thus, the Trial Magistrate, was well aware of the facts that the State had made a statement in W.P. No.365/2016 that closure report has been filed but in fact, the police had kept the said closure report with itself, and deliberately did not file the same. Thereafter, the applicant filed the complaint with the photocopy of the closure report, which was prepared by the police, but in spite of that the Trial Magistrate, did not direct the police authorities to submit their reply with regard to the closure report prepared by them. Thereafter, once again an impression was given to this Court, that the police has filed the closure report, therefore, this Court had directed the Court below to consider the closure report by treating the complaint as a protest petition. Surprisingly, all the orders passed by this Court, are on the record, but still the Trial Magistrate, has conveniently ignored the same, and in spite of the status report, that the closure report has been prepared, did not enquire from the police as to why the closure report is not being filed. The photocopy of the closure report prepared by the police was also on record, as the same was already filed by the complainant, but still the concerning Magistrate, did not take note of the same.

15. While considering the complaint filed by the Complainant/applicant, the Court below has taken note of a fact that the complainant party was already facing a criminal trial in crime no.494/2012 for offence under Sections 302, 307, 147, 148 and 149 of I.P.C. and the police has already prepared a closure report, on the ground that false allegations have been made out of enmity, but did not try to verify as to why the closure report has not been filed. The Magistrate also lost sight of fact that enmity is a double edged weapon. Even the case diary was carrying the copy of the closure report, however, the Magistrate lost sight of the fact, that the police cannot keep the closure report in the police station and should have filed the same before the Court of competent jurisdiction. The Magistrate has also ignored the dying declaration of the deceased. Thus, the procedure which was adopted by the Magistrate, is in utter disregard to the directions given by this Court as well as in utter disregard to the provisions of Cr.P.C.

16. The J.M.F.C., Sabalgarh, Distt. Morena by his communication dated 22-11-2019 has informed about the status of the Closure report which reads as under :

> ''माननीय महोदय उपरोक्त विषयांतर्गत यह भी लेख है कि संबंधित पीठासीन अधिकारी द्वारा अपंजीकृत परिवाद विजय सिंह विरूद्व द्वारिका तथा अन्य मे आदेश पारित करने से पहले थाना कैलारस के अप. क्रमांक 340 /2015 की केश डायरी अवलोकन हेतु बुलायी गयी थी, जो कि अंपजीकृत परिवाद मे आदेश करने के बाद थाना कैलारस को वापस की गयी। **थाना कैलारस के अप. क्रमांक 340/ 2015 मे न्यायालय द्वारा आज दिनांक तक क्लोजर रिर्पोट (एफ आर) स्वीकृत नही की है।** उपरोक्त संबंध मे थाना कैलारस से भी जानकारी प्राप्त की गयी तो थाना कैलारस द्वारा भी यही जानकारी दी गयी है कि फरियादी विजय सिंह के न्यायालय मे उपस्थित न होने के कारण अप. क्रमांक 340/ 2015 की केश डायरी खात्मा हेतु न्यायालय मे पेश नही की जा सकी है।''

17. Thus, it is clear that the Police Station, Kailaras, Distt. Morena, not only gave false information to this Court, at the time of hearing of W.P. No.365/2016, but also retained the closure report, without any reasonable reason. The only reason which has been assigned by the Police Station Kailaras for not filing the closure report is that since, the complainant was not appearing before the Court below, therefore, the Closure report was not filed. It is really surprising, that how the police can retain the closure report on the said ground. The Supreme Court in the case of *Jakia Nasim Ahesan Vs. State of Gujarat* reported in (2011) 12 SCC 302 has held as under :

> 11. However, at this juncture, we deem it necessary to emphasise that if for any stated reason SIT opines in its report, to be submitted in terms of this order, that there is no sufficient evidence or reasonable grounds for proceeding against any person named in the complaint dated 8-6-2006, before taking a final decision on such "closure" report, the

> court shall issue notice to the complainant and make available to her copies of the statements of the witnesses, other related documents and the investigation report strictly in accordance with law as enunciated by this Court in *Bhagwant Singh* v. *Commr. of Police.* For the sake of ready reference, we may note that in the said decision, it has been held that in a case where the Magistrate to whom a report is forwarded under Section 173(2)(i) of the Code, decides not to take cognizance of the offence and to drop the proceedings or takes a view that there is no sufficient ground for proceeding against some of the persons mentioned in the FIR, the Magistrate must give notice to the informant and provide him an opportunity to be heard at the time of consideration of the report.

18. Thus, it is clear that after the closure report is filed, the Court shall issue notice to the complainant, therefore, it is clear that the police has retained the closure report on frivolous ground, with a solitary intention to give undue advantage to the respondents no.2 to 6. Furthermore, when the Trial Magistrate had already directed the police to submit the status report, then the police was aware of the fact, that the complainant is already before the Court, therefore, there was no impediment for the police to file the closure report.

19. Number of petitions under Section 482 of Cr.P.C. were being filed by various complainants, seeking a direction to the police authorities to conclude the investigation. Accordingly, in M.Cr.C. No.37389/2019 *(Virendra Singh Vs. The State of M.P.),* this Court directed the Director General of Police, State of Madhya Pradesh, to file an affidavit as to why huge number of F.R.s and E.R.s are pending in the Police Stations, and accordingly, he had filed his affidavit and had stated that instructions have been issued to all the police stations to file the F.Rs. and E.Rs. In the District of Ashoknagar, more then 2300 E.Rs. and F.Rs. were found to be pending. Thus, it is clear that the S.H.O. and the investigating officer, Police Station Kailaras, Distt. Morena had deliberately retained the closure report, and did not file the same before the Court.

20. Therefore, the A.D.G.P., Chambal Range, Morena, is directed to hold an enquiry to find out that who are the police officials who have unauthorizedly retained the closure report, so that the undue advantage may be given to the accused persons. Let the enquiry be completed within a period of 1 month from today, and the A.D.G.P., Chambal Range, Morena is directed to submit its report to the Principal Registrar of this Court pointing out the action proposed against the guilty S.H.Os. and investigating officer.

21. So far as the procedure adopted by the Magistrate is concerned, the same cannot be approved. When the Magistrate was aware of the fact that the police has already prepared the closure report, and in the light of the order dated 4-11-2016 passed by this Court in W.P. No.365 of 2016 as well as order dated 9-9-2019

passed by this Court in M.Cr.C. No.36918 of 2019, should have considered the complaint along with the closure report. But the Magistrate did not direct the police to file the final report/closure report, which he could have done. Therefore, the order dated 22-10-2019 passed by J.M.F.C., Sabalgarh, Distt. Morena in unregistered complaint case..... of 2016 is **hereby set aside.** The matter is remanded back to the Court of J.M.F.C., Sabalgarh, Distt. Morena to decide the same in accordance with the directions given in W.P. No.365 of 2016 as well as order dated 9-9-2019 passed by this Court in M.Cr.C. No.36918 of 2019. The Police Station Kailaras, District Morena is directed to immediately file the Final Report **within three days** from today. While deciding the matter afresh, the J.M.F.C., Sabalgarh, Distt. Morena shall not get prejudiced by any of the observations made in order dated 22-10-2019. It is also directed that the J.M.F.C., Sabalgarh, Distt. Morena shall also consider the order dated 8-11-2016 passed by this Court in M.Cr.C. No.5544 of 2016. Let the entire exercise be done within a period of 2 months from today.

22. The complainant shall remain present before the Court below **on 06/12/2019.**

23. With aforesaid observations and directions, this application is **Allowed.**

24. A copy of this order be immediately sent to A.D.G. P., Chambal Range, Morena for necessary action.

25. The Public Prosecutor is also directed to inform the A.D.G.P., Chambal Range, Morena for necessary action.

Application allowed