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INDIAN LAW REPORT (M.P.) COMMITTEE

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THE HIGH COURT OF MADHYA PRADESH
JABALPUR 2020

(From 01-01-2020 to 31-12-2020)

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संविधान – अनुच्छेद 136 – कम स्टांप शुल्क – शास्ति – भुगतान का ढंग – अभिनिर्धारित – अपीलार्थी, प्रश्नगत संपत्ति का पश्चात्वर्ती क्रेता होने के नाते शास्ति जमा

करने का दायी है किंतु उसने छह उत्तर दिनांकित चेक के माध्यम से उक्त शास्ति जमा की – अभिनिर्धारित – उत्तर दिनांकित चेकों के माध्यम से शास्ति जमा करने की सुविधा को अनुमोदित नहीं किया जा सकता। (एमएसडी रीयल एस्टेट एलएलपी (मे.) वि. द कलेक्टर ऑफ स्टाम्प्स) **(SC)…2509**

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संविधान – अनुच्छेद 136 – कम स्टांप शुल्क – शास्ति व निर्माण अनुमति से इंकार – अभिनिर्धारित – कम स्टांप शुल्क तथा शास्ति के जमा होने के पश्चात् निर्माण की अनुमति हेतु आवेदन को पुनः विचार में लेने का उच्च न्यायालय का निदेश, पर्याप्त रूप से अपीलार्थी के अधिकारों को संरक्षित करता है – अपीलार्थी द्वारा शास्ति जमा किया जाने को दृष्टिगत रखते हुए, अपीलार्थी निर्माण की अनुमति हेतु आवेदन करने के लिए स्वतंत्र है, नगर निगम द्वारा विचार किया जाना है – अपील निराकृत। (एमएसडी रीयल एस्टेट एलएलपी (मे.) वि. द कलेक्टर ऑफ स्टाम्प्स) **(SC)…2509**

Constitution – Article 136 & 226/227 – Scope – Practice and Procedure **– Held – Orders and notices issued by Municipal Corporation and State Authorities are all subsequent actions which were not the subject matter of writ petition before High Court and thus cannot be considered in present appeal. [MSD Real Estate LLP (M/s.) Vs. The Collector of Stamps] (SC)…2509**

संविधान – अनुच्छेद 136 व 226/227 – विस्तार – पद्धति एवं प्रक्रिया – अभिनिर्धारित – नगर निगम तथा राज्य प्राधिकारियों द्वारा जारी आदेश एवं नोटिस, सभी पश्चात्वर्ती कार्रवाई हैं जो कि उच्च न्यायालय के समक्ष रिट याचिका की विषय वस्तु नहीं थे और इसलिए वर्तमान अपील में विचार में नहीं लिये जा सकते। (एमएसडी रीयल एस्टेट एलएलपी (मे.) वि. द कलेक्टर ऑफ स्टाम्प्स) **(SC)…2509**

Constitution – Article 141 and Prevention of Corruption Act (49 of 1988), Section 19(4), Explanation (a) – Binding Precedent & Obiter Dicta **– Held – When Apex Court interprets a statutory provision though not necessary for decision of the core issue involved in a case before it, same being an *obiter dicta* of Supreme Court would still be a binding precedent under Article 141 of Constitution on all subordinate Courts – Para 48 of judgment of *Prakash Singh Badal's* case is not a binding precedent but an *obiter dicta*, as it was not essential for decision on the core issue and as the *obiter dicta* does not consider provisions of Section 19(4) and explanation (a) thereto, the**

***obiter* is not binding on this Court. [State of M.P. SPE Lokayukta, Jabalpur Vs. Ravi Shankar Singh] (DB)…2663**

संविधान – अनुच्छेद 141 एवं भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 19(4), स्पष्टीकरण (a) – बाध्यकारी पूर्व निर्णय व इतरोक्ति – अभिनिर्धारित – जब सर्वोच्च न्यायालय एक कानूनी उपबंध का निर्वचन करता है, यद्यपि उसके समक्ष के प्रकरण में अंतर्ग्रस्त मूल मुद्दे के विनिश्यच हेतु आवश्यक नहीं, वह उच्चतम न्यायालय की इतरोक्ति होने के नाते, संविधान के अनुच्छेद 141 के अंतर्गत, सभी अधिनस्थ न्यायालयों पर एक बाध्यकारी पूर्व निर्णय बना रहेगा – प्रकाश सिंह बादल के प्रकरण के निर्णय का पैरा 48 एक बाध्यकारी पूर्व निर्णय नहीं है किन्तु एक इतरोक्ति है क्योंकि वह मूल मुद्दे के विनिश्चय हेतु आवश्यक नहीं था और क्योंकि इतरोक्ति में धारा 19 (4) एवं उसके स्पष्टीकरण (a) के उपबंधों को विचार में नहीं लिया गया है, इस न्यायालय पर इतरोक्ति बाध्यकारी नहीं है। (म.प्र. राज्य एसपीई लोकायुक्त, जबलपुर वि. रवि शंकर सिंह) **(DB)…2663**

***Constitution – Article 142 – Mahakaleshwar Temple – Erosion of Shivalingam – Preservation* – On basis of report submitted by Expert Committee, following directions issued :-**

(i) Any devotee/visitor should do no rubbing of Shivalingam. Rubbing not to be done by anyone except during traditional Puja and Archana performed on behalf of temple. If done by any devotee, accompanying Poojari/Purohit shall be responsible. Committee to provide water from Koti Thirth Kund, filtered and purified to maintain pH value.

(ii). pH value of Bhasma during Bhasma Aarti be improved.

(iii). Weight of Mund Mala and Serpakarnahas should be reduced to preserve from mechanical abrasion. Committee to find out whether it is necessary to use Metal Mund Mala or there can be a way out to use Mund Mala and Serpakarnahas without touching the Shivalingam.

(iv). Rubbing of curd, ghee, honey by devotees is also a cause of erosion. No panchamrita to be poured by any devotee. Only pouring a limited quantity of pure milk is allowed whereas all pure materials can be used during the traditional puja performed on behalf of temple.

(v). Entire proceedings of Puja and Archana in Garbh Griha to video recorded 24 hrs. and be preserved for atleast 6 months.

(vi). Myriad religious rituals and ceremonies to be performed regularly but by the expert/customary Poojaris and Purohits.

(vii). Necessary repair and maintenance be carried out urgently. Collector and S.P. Ujjain directed to remove encroachment within 500 mtrs of the temple premises.

(viii). Comprehensive plan be prepared and implemented for preservation and maintenance of Chandranageshwar Temple.

(ix). CBRI Roorkee and Ujjain Smart City Ltd were issued direction to submit report regarding structural stability of the temple.

(x). Modern additions shall be removed. Original work in the temple to be restored.

[Sarika Vs. Administrator, Mahakaleshwar Mandir Committee, Ujjain (M.P.)] (SC)…2419

संविधान – अनुच्छेद 142 – महाकालेश्वर मंदिर – शिवलिंगम का क्षरण – परिरक्षण – विशेषज्ञ समिति द्वारा प्रस्तुत प्रतिवेदन के आधार पर निम्नलिखित निदेश जारी किये गये:–

(I) कोई भक्त/आगंतुक शिवलिंगम को मलेगा नहीं। मंदिर की ओर से संपादित पारंपरिक पूजा अर्चना के दौरान छोड़कर किसी के द्वारा मला नहीं जाये। यदि किसी भक्त द्वारा किया जाता है, साथी पुजारी/पुरोहित उत्तरदायी होगा। समिति, **pH** मान बनाएं रखने के लिए कोटी तीर्थ कुण्ड से छाना हुआ और शुद्ध किया हुआ पानी उपलब्ध कराये।

(ii) भस्म आरती के दौरान भस्म का **pH** मान सुधारा जाए।

(iii) यांत्रिक घर्षण से परिरक्षण के लिए मुण्ड माला एवं सर्पकर्णहास का वजन घटाया जाए। समिति यह पता लगाये कि क्या धातु की मुण्ड माला का उपयोग आवश्यक है अथवा शिवलिंग को छुए बिना मुण्ड माला एवं सर्पकर्णहास के उपयोग का कोई अन्य मार्ग है।

(iv) भक्तों द्वारा दही, घी, शहद मलना भी क्षरण का एक कारण है। किसी भक्त द्वारा पंचामृत उड़ेला नहीं जाए। केवल शुद्ध दूध की सीमित मात्रा उड़ेलने की मंजूरी है जबकि मंदिर की ओर से संपादित पारंपरिक पूजा के दौरान सभी शुद्ध सामग्रियों का उपयोग किया जा सकता है।

(v) गर्भ गृह में पूजा अर्चना की संपूर्ण कार्यवाहियों की 24 घंटे वीडियो रिकार्डिंग होगी और कम से कम 6 महीनों तक सुरक्षित रखी जाए।

(vi) असंख्य धार्मिक अनुष्ठानों एवं विधियों को नियमित रूप से संपादित करना होता है, परंतु इसे विशेषज्ञ/रूढ़ीगत पुजारियों एवं पुरोहितों द्वारा किया जाए।

(vii) आवश्यक मरम्मत एवं अनुरक्षण अविलम्ब रूप से पूरा किया जाए। कलेक्टर एवं एस.पी., उज्जैन को मंदिर परिसर से 500 मीटर के भीतर के अतिक्रमण हटाने के लिए निदेशित किया गया।

(viii) चंद्रनागेश्वर मंदिर के परिरक्षण एवं अनुरक्षण हेतु व्यापक योजना तैयार एवं कार्यान्वित की जाए।

(ix) सी.बी.आर.आई. रूरकी एवं उज्जैन स्मार्ट सीटी लि. को भी मंदिर की संरचनात्मक स्थिरता के संबंध में प्रतिवेदन प्रस्तुत करने के लिए निदेश जारी किये गये थे।

(x) आधुनिक परिवर्धन हटाये जाएं। मंदिर में मूल रूप बहाल किया जाए।

(सारिका वि. एडमिनिस्ट्रेटर, महाकालेश्वर मंदिर कमेटी, उज्जैन (म.प्र.)) **(SC)…2419**

Constitution – Article 142 – See – Service Law **[State of M.P. Vs. Amit Shrivas] (SC)…2516**

संविधान – अनुच्छेद 142 – देखें – सेवा विधि (म.प्र. राज्य वि. अमित श्रीवास) **(SC)…2516**

Constitution – Article 166(i), 166(2), 166(3) & 226, Rules of Business of the Executive, Government of M.P., Rule 13 and M.P. Government Business (Allocation) Rules – Sanction to Alienate Government Property – Procedure – **Held – The decision to accord sanction to alienate government property is a policy decision to be taken by government and same cannot be replaced by a D.O. letter of an officer of State – As per Business Allocation Rules of State in respect of sale of property, letter has to be issued in name of Governor of State – Proposals involving alienation by way of sale, grant of lease of government property exceeding 10 lacs in value, is to be placed before Council of ministers – No such procedure followed – Chief Secretary is nobody to write a letter in respect of property of State. [State of M.P. Vs. Khasgi (Devi Ahilya Bai Holkar Charities) Trust, Indore] (DB)…2538**

संविधान – अनुच्छेद 166(i), 166(2), 166(3) व 226, म.प्र. कार्यपालक शासन के कार्य नियम, नियम 13 एवं म.प्र. शासन कार्य (आवंटन) नियम – सरकारी संपत्ति के अन्यसंक्रामण हेतु मंजूरी – प्रक्रिया – अभिनिर्धारित – सरकारी संपत्ति के अन्यसंक्रामण हेतु मंजूरी प्रदान करने का विनिश्चय, सरकार द्वारा लिया जाने वाला एक नीति निर्णय है और उसे राज्य के एक अधिकारी के डी.ओ. पत्र द्वारा प्रतिस्थापित नहीं किया जा सकता – संपत्ति विक्रय के संबंध में राज्य के कार्य आवंटन नियमों के अनुसार पत्र को राज्य के राज्यपाल के नाम से जारी किया जाना चाहिए – 10 लाख से अधिक मूल्य की सरकारी संपत्ति का विक्रय के जरिए, पट्टा प्रदान द्वारा अन्य संक्रामण के समावेश वाले प्रस्तावों को मंत्री परिषद के समक्ष रखना होता है – ऐसी किसी प्रक्रिया का पालन नहीं किया गया –

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दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 154 – द्वितीय प्रथम सूचना प्रतिवेदन – पोषणीयता – अभिनिर्धारित – सर्वोच्च न्यायालय ने यह निष्कर्षित किया है कि समान घटना के बारे में भिन्न कथन देते हुए विरोधी पक्षकार द्वारा द्वितीय प्रथम सूचना प्रतिवेदन अनुज्ञेय है – वर्तमान प्रकरण में, विरोधी पक्षकार के द्वारा काउंटर परिवाद के रूप में द्वितीय प्रथम सूचना प्रतिवेदन पंजीबद्ध नहीं कराया गया – प्रथम दृष्ट्या यह प्रतीत होता है कि द्वितीय प्रथम सूचना प्रतिवेदन पोषणीय नहीं है। (आरिफ मसूद वि. म.प्र. राज्य)
(DB)…2885

***Criminal Procedure Code, 1973 (2 of 1974), Section 195 & 340 – Preliminary Inquiry* – Held – Main dispute is attached with a letter alleged to be written by respondent to the Chief Justice praying to list the matter before the Bench other than Justice 'X' – Respondent submitted that petitioner himself wrote the alleged letter with his forged signature – Held – Petitioner was under apprehension that petition will not be decided in his favour, thus he was having the cause to file vakalatnama of relative advocate of the Judge or to file forged letter in the name of respondent – Matter being suspicious, Principal Registrar (J) directed to conduct inquiry to ascertain the author of alleged letter and submit the inquiry report – Application allowed. [Vinod Raghuvanshi Vs. State of M.P.] …2476**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 195 व 340 – प्रारंभिक जांच – अभिनिर्धारित – मुख्य विवाद एक पत्र से जुड़ा हुआ है जो कि अभिकथित रूप से प्रत्यर्थी द्वारा मुख्य न्यायाधिपति को यह प्रार्थना करते हुए लिखा गया है कि मामले को 'X' न्यायमूर्ति की न्यायपीठ से भिन्न किसी अन्य न्यायपीठ के समक्ष (लिस्ट) सूचीबद्ध किया जाए – प्रत्यर्थी द्वारा यह निवेदित है कि याची ने स्वयं उसके कूटरचित हस्ताक्षर के साथ अभिकथित पत्र लिखा था – अभिनिर्धारित – याची इस आशंका में था कि याचिका का विनिश्चय उसके पक्ष में नहीं होगा, अतः उसके पास न्यायाधीश के संबंधी अधिवक्ता का वकालतनामा प्रस्तुत करने का अथवा प्रत्यर्थी के नाम से कूटरचित पत्र प्रस्तुत करने का कारण था – मामला संदेहास्पद होने के कारण, प्रिंसिपल रजिस्ट्रार (न्यायिक) को अभिकथित पत्र के लेखक का पता लगाने हेतु जांच संचालित करने तथा जांच प्रतिवेदन प्रस्तुत करने हेतु निदेशित किया गया – आवेदन मंजूर। (विनोद रघुवंशी वि. म.प्र. राज्य)
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***Criminal Procedure Code, 1973 (2 of 1974), Section 195 & 340 – Preliminary Inquiry* – Held – Preliminary enquiry is not mandatory but if circumstances required, then before filing complaint, preliminary enquiry can be made. [Vinod Raghuvanshi Vs. State of M.P.] …2476**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 195 व 340 – प्रारंभिक जांच – अभिनिर्धारित – प्रारंभिक जांच आज्ञापक नहीं है लेकिन यदि परिस्थितियों की आवश्यकता है, तब परिवाद प्रस्तुत करने के पहले, प्रारंभिक जांच की जा सकती है। (विनोद रघुवंशी वि. म.प्र. राज्य) **…2476**

***Criminal Procedure Code, 1973 (2 of 1974), Section 340 & 362 – Recall & Review – Preliminary Enquiry* – While deciding appeal in High Court, trial Court directed to prosecute prosecution witnesses for deliberately giving false evidence – Prayer for recall of direction – Held – It was not obligatory to conduct preliminary enquiry after giving opportunity of hearing to applicant – Even without preliminary enquiry, Court can initiate u/S 340 Cr.P.C. – Court after considering every aspect had formed a *prima facie* opinion – Mere absence of preliminary enquiry would not vitiate a *prima facie* opinion formed by Court – Case is hit by Section 362 Cr.P.C. – Application dismissed. [Shambhu Singh Chauhan Vs. State of M.P.]**
(DB)…2675

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 340 व 362 – वापस लिया जाना एवं पुनर्विलोकन – प्रारंभिक जांच – उच्च न्यायालय में अपील विनिश्चित किये जाते समय, अभियोजन साक्षियों को जानबूझकर मिथ्या साक्ष्य देने के लिए अभियोजित करने हेतु विचारण न्यायालय को निदेशित किया गया – निदेश वापस लेने हेतु प्रार्थना – अभिनिर्धारित – आवेदक को सुनवाई का अवसर देने के पश्चात् प्रारंभिक जांच संचालित करना बाध्यकारी नहीं था – प्रारंभिक जांच के बिना भी न्यायालय, धारा 340 दं.प्र.सं. के अंतर्गत आरंभ कर सकता है – न्यायालय ने प्रत्येक पहलू का विचार करने के पश्चात् प्रथम दृष्ट्या राय निर्मित की थी – मात्र प्रारंभिक जांच की अनुपस्थिति से न्यायालय द्वारा निर्मित प्रथम दृष्ट्या राय दूषित नहीं होगी – प्रकरण पर धारा 362 दं.प्र.सं. प्रयुक्त होती है – आवेदन खारिज। (शम्भू सिंह चौहान वि. म.प्र. राज्य) **(DB)…2675**

***Criminal Procedure Code, 1973 (2 of 1974), Section 340 & 482 – Delay & Laches* – Held – Present application filed after about 2 years of passing of judgment – Application suffers from delay and laches. [Shambhu Singh Chauhan Vs. State of M.P.]** **(DB)…2675**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 340 व 482 – विलंब एवं अतिविलंब – अभिनिर्धारित – वर्तमान आवेदन को निर्णय पारित किये जाने के लगभग 2 वर्ष पश्चात् प्रस्तुत किया गया है – आवेदन विलंब एवं अतिविलंब से ग्रसित है। (शम्भू सिंह चौहान वि. म.प्र. राज्य) **(DB)…2675**

***Criminal Procedure Code, 1973 (2 of 1974), Sections 362, 437(5) & 439(2) – Interpretation* – Held – Power not directly and expressly provided to a Court cannot be said to be impliedly provided u/S 437(5) and 439(2) Cr.P.C. [Aniruddh Khehuriya Vs. State of M.P.]** **…2880**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 362, 437(5) व 439(2) – निर्वचन – अभिनिर्धारित – एक न्यायालय को प्रत्यक्ष एवं अभिव्यक्त रूप से जो शक्ति उपबंधित नहीं है उसे धारा 437(5) एवं 439(2) दं.प्र.सं. के अंतर्गत विवक्षित रूप से उपबंधित होना नहीं कहा जा सकता। (अनिरूद्ध खेहुरिया वि. म.प्र. राज्य) **…2880**

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PW-3 is planted witness and his conduct of not informing police about accident while he passed by the police station, makes him unreliable – Claimants failed to prove that deceased died in a accident with truck in question – Appeal allowed. [HDFC Agro General Insurance Co. Ltd. Vs. Smt. Anita Bhadoria] …*24

मोटर यान अधिनियम (1988 का 59), धारा 166 – साक्ष्य का मूल्यांकन – साक्षी की विश्वसनीयता – अभिनिर्धारित – चक्षुदर्शी साक्षी द्वारा दर्ज कराये गये प्रथम सूचना प्रतिवेदन के अनुसार, एक अज्ञात चौपहिया वाहन द्वारा दुर्घटना घटित हुई परंतु अन्य चक्षुदर्शी साक्षी (अ.सा.–3) के अनुसार, अभिकथित ट्रक द्वारा दुर्घटना कारित हुई – यह दर्शाने हेतु कोई साक्ष्य नहीं है, कि पुलिस को यह कैसे ज्ञात था कि अ.सा.–3 ने दुर्घटना होते देखी थी तथा उसने आक्षेपित ट्रक का पीछा किया था – अ.सा.–3 एक बनावटी साक्षी है तथा पुलिस थाने से गुजरते समय पुलिस को दुर्घटना के बारे में सूचित न करने का उसका आचरण, उसे अविश्वसनीय बनाता है – दावेदार यह साबित करने में विफल रहे कि मृतक की प्रश्नगत ट्रक द्वारा एक दुर्घटना में मृत्यु हुई – अपील मंजूर। (एचडीएफसी एग्रो जनरल इंश्योरेंस कं. लि. वि. श्रीमती अनीता भदौरिया) …*24

***Motor Vehicles Act (59 of 1988), Section 166 – Evidence of Criminal Case* – Held – Documents of criminal case are not decisive factors for deciding claim petition – It has to be decided on basis of evidence led in claim petition. [HDFC Agro General Insurance Co. Ltd. Vs. Smt. Anita Bhadoria] …*24**

मोटर यान अधिनियम (1988 का 59), धारा 166 – आपराधिक प्रकरण का साक्ष्य – अभिनिर्धारित – आपराधिक प्रकरण के दस्तावेज दावा याचिका को विनिश्चित करने हेतु विनिश्चय कारक नहीं हैं – दावा याचिका में प्रस्तुत किये गये साक्ष्य के आधार पर इसका विनिश्चय किया जाना चाहिए। (एचडीएफसी एग्रो जनरल इंश्योरेंस कं. लि. वि. श्रीमती अनीता भदौरिया) …*24

***M.P. Government Business (Allocation) Rules – See – Constitution – Article 166(i), 166(2), 166(3) & 226* [State of M.P. Vs. Khasgi (Devi Ahilya Bai Holkar Charities) Trust, Indore] (DB)…2538**

म.प्र. शासन कार्य (आवंटन) नियम – देखें – संविधान – अनुच्छेद 166(i), 166(2), 166(3) व 226 (म.प्र. राज्य वि. खासगी (देवी अहिल्या बाई होल्कर चैरिटीज) ट्रस्ट, इंदौर) **(DB)…2538**

***Municipal Corporation Act, M.P. (23 of 1956), Section 401 & Civil Procedure Code (5 of 1908), Section 80 – Notice* – Held – Objection as to non-issuance of notice u/S 401 of Act of 1956 lost significance as Corporation was issued notice u/S 80 CPC, moreso when defendant/State chose to remain reticent not only at the initial stage but even after framing of issues – Purpose of notice to bring the dispute before parties has been done. [State of M.P. Vs. Smt. Betibai (Dead) Through Her LRs.] …2826**

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but in a general sense, it means the order of cancellation of authority letter of running the fair price shop. [Deendayal Prathmik Shahkari Upbhokta Bhandar, Hata Vs. State of M.P.] …2636

सार्वजनिक वितरण प्रणाली (नियंत्रण) आदेश, म.प्र., 2015, खंड 16(3) व 16(4) – अंतिम आदेश – अभिनिर्धारित – अंतिम आदेश, नियंत्रण आदेश 2015 में परिभाषित नहीं है परंतु एक सामान्य अभिप्राय में, इसका अर्थ चल रही उचित मूल्य की दुकान के प्राधिकार–पत्र के रद्दकरण का आदेश है। (दीनदयाल प्राथमिक सहकारी उपभोक्ता भण्डार, हटा वि. म.प्र. राज्य) **…2636**

***Public Distribution System (Control) Order, M.P., 2015, Clause 16(3) & 16(4) – Principle of Natural Justice* – Held – Show cause notice was issued, detailed reply was filed in writing, same was considered by authority and after its consideration, final order has been passed – No violation of principle of natural justice has been followed – No prejudice caused to petitioner – Petition dismissed. [Deendayal Prathmik Shahkari Upbhokta Bhandar, Hata Vs. State of M.P.] …2636**

सार्वजनिक वितरण प्रणाली (नियंत्रण) आदेश, म.प्र., 2015, खंड 16(3) व 16(4) – नैसर्गिक न्याय का सिद्धांत – अभिनिर्धारित – कारण बताओ नोटिस जारी हुआ था, विस्तृत जवाब लिखित में प्रस्तुत किया गया था, प्राधिकारी द्वारा उक्त को विचार में लिया गया था तथा विचार करने के पश्चात्, अंतिम आदेश पारित किया गया – नैसर्गिक न्याय के सिद्धांत का कोई उल्लंघन नहीं किया गया है – याची को कोई प्रतिकूल प्रभाव कारित नहीं हुआ – याचिका खारिज। (दीनदयाल प्राथमिक सहकारी उपभोक्ता भण्डार, हटा वि. म.प्र. राज्य) **…2636**

***Public Distribution System (Control) Order, M.P., 2015, Clause 16(3) & 16(4) – Termination of Fair Price Shop – Show Cause Notice – Interpretation* – Held – Clause 16(4) is continuation of Clause 16(3) and it should not be read independently – Period of show cause notice starts from date of suspension – Show cause notice to be issued within a period of 10 days from date of suspension and final order to be passed within a period of three months – Clause 16(4) does not provide any requirement to issue any further notice/second opportunity of hearing but it only elaborates the manner in which principle of natural justice has to be followed before passing final order. [Deendayal Prathmik Shahkari Upbhokta Bhandar, Hata Vs. State of M.P.] …2636**

सार्वजनिक वितरण प्रणाली (नियंत्रण) आदेश, म.प्र., 2015, खंड 16(3) व 16(4) – उचित मूल्य दुकान की समाप्ति – कारण बताओ नोटिस – निर्वचन – अभिनिर्धारित – खंड 16(4) खंड 16(3) का ही क्रम है तथा उसे स्वतंत्र रूप से नहीं पढ़ा जाना चाहिए – कारण बताओ नोटिस की अवधि निलंबन की तिथि से प्रारंभ हो जाती है – कारण बताओ नोटिस निलंबन की तिथि से 10 दिनों की अवधि के भीतर जारी किया जाना चाहिए तथा अंतिम आदेश 3 माह की अवधि के भीतर पारित किया जाना चाहिए – खंड 16(4) कोई अतिरिक्त

जाना – अवधि की संगणना – अभिनिर्धारित – व्यपगत हुआ समझा जाना, के लिए उपबंधित करने वाली धारा 24(2) के उपबंध उस मामले में प्रयोज्य होते हैं जहाँ दिनांक 01.01.2014 को लंबित कार्यवाहियों में प्राधिकारीगण की निष्क्रियता के कारण, 2013 के अधिनियम के प्रवर्तन में आने से 5 वर्ष या उससे अधिक पूर्व तक कब्जा लेने तथा प्रतिकर का भुगतान करने में विफल रहे हों – न्यायालय द्वारा पारित किये गये अंतरिम आदेशों के अस्तित्व की अवधि को 5 वर्षों की संगणना में से अपवर्जित किया जाना चाहिए। (इंदौर डव्हेलपमेन्ट अथॉरिटी वि. मनोहरलाल) **(SC)…2179**

Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, (30 of 2013), Section 24(2) – Deemed Lapse of Proceedings **– Held – Deemed lapse u/S 24(2) takes place where due to inaction of authorities for five years or more prior to commencement to said Act, possession of land has not been taken nor compensation has been paid – In case possession has been taken and compensation has not been paid, then there is no lapse – Similarly, if compensation paid and possession not taken then also there is no lapse of proceedings. [Indore Development Authority Vs. Manoharlal] (SC)…2179**

भूमि अर्जन, पुनर्वासन और पुनर्व्यवस्थापन में उचित प्रतिकर और पारदर्शिता का अधिकार अधिनियम, (2013 का 30), धारा 24(2) – कार्यवाहियों का व्यपगत होना समझा जाना – अभिनिर्धारित – धारा 24(2) के अंतर्गत व्यपगत होना तब समझा जाता है जहां उक्त अधिनियम के प्रारंभ होने के, पांच वर्ष या उससे अधिक पूर्व से प्राधिकारियों की निष्क्रियता के कारण, भूमि का कब्जा नहीं लिया गया है, न ही प्रतिकर का भुगतान किया गया है – यदि कब्जा ले लिया गया है तथा प्रतिकर का भुगतान नहीं किया गया है, तब कोई व्यपगत नहीं हुआ है – उसी प्रकार से, यदि प्रतिकर का भुगतान किया गया और कब्जा नहीं लिया गया तब भी कार्यवाहियां व्यपगत नहीं होती। (इंदौर डव्हेलपमेन्ट अथॉरिटी वि. मनोहरलाल) **(SC)…2179**

Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, (30 of 2013), Section 24(2) – Lapse of Proceedings – Word "or" & "and" – Conjunctive/Disjunctive **– Held – Collation of words "or" can be meant in conjunctive sense where the disjunctive use of the word leads to repugnance or absurdity – Word "or" used in Section 24(2) between possession and compensation has to be read as "nor" or as "and" – Collation of words used on Section 24(2), two negative conditions are prescribed, thus if one condition is satisfied, there is no lapse of proceedings. [Indore Development Authority Vs. Manoharlal] (SC)…2179**

भूमि अर्जन, पुनर्वासन और पुनर्व्यवस्थापन में उचित प्रतिकर और पारदर्शिता का अधिकार अधिनियम, (2013 का 30), धारा 24(2) – कार्यवाहियों का व्यपगत होना – शब्द ''या'' व ''और'' – संयोजक/वियोजक – अभिनिर्धारित – ''या'' शब्द के समाकलन का अर्थ संयोजक के रूप में लिया जा सकता है जहां शब्द के वियोजक प्रयोग से प्रतिकूलता या अर्थहीनता उत्पन्न होती है – धारा 24(2) में कब्जा तथा प्रतिकर के मध्य प्रयोग किये

गये शब्द ''या'' को ''न तो'' या ''और'' के रूप में पढ़ा जाना चाहिए – धारा 24(2) में प्रयोग किये गये शब्दों का समाकलन, दो नकारात्मक शर्तें विहित की गई हैं, अतः यदि एक शर्त पूरी होती है, कार्यवाहियां व्यपगत नहीं होती हैं। (इंदौर डव्हेलपमेन्ट अथॉरिटी वि. मनोहरलाल) **(SC)…2179**

Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, (30 of 2013), Section 24(2), proviso and Land Acquisition Act (1 of 1894), Sections 4, 31 & 34 – Determination of Compensation – Expression "Paid" **– Held – Expression "paid" in main part of Section 24(2) does not include a deposit of compensation in Court – Consequence of non-deposit is provided in proviso to Section 24(2) in case not deposited for majority of land holdings, then all beneficiaries (landowners) as on date of notification u/S 4 of old Act shall be entitled to compensation as per Act of 2013 – In case obligation u/S 31 of old Act has not been fulfilled, interest u/S 34 can be granted – Non-deposit of compensation in Court does not result in lapse of proceedings – In case of non-deposit for majority of holdings for 5 years or more, compensation under Act of 2013 has to be paid to landowners as on date of notification for acquisition u/S 4 of Old Act. [Indore Development Authority Vs. Manoharlal] (SC)…2179**

भूमि अर्जन, पुनर्वासन और पुनर्व्यवस्थापन में उचित प्रतिकर और पारदर्शिता का अधिकार अधिनियम, (2013 का 30), धारा 24(2), परंतुक एवं भूमि अर्जन अधिनियम (1894 का 1), धाराएँ 4, 31 व 34 – प्रतिकर का अवधारण – अभिव्यक्ति ''भुगतान'' – अभिनिर्धारित – धारा 24(2) के मुख्य भाग में अभिव्यक्ति ''भुगतान'' के अंतर्गत न्यायालय में प्रतिकर का जमा किया जाना शामिल नहीं है – भुगतान न किये जाने का परिणाम धारा 24(2) के परंतुक में उपबंधित किया गया है, यदि अधिकांश धारित भूमि के लिए भुगतान नहीं किया गया, तब सभी हिताधिकारी (भूमि स्वामी) पुराने अधिनियम की धारा 4 के अंतर्गत अधिसूचना की तिथि को 2013 के अधिनियम के अनुसार प्रतिकर के हकदार होंगे – यदि पूर्व अधिनियम की धारा 31 के अंतर्गत दायित्व का निर्वहन नहीं किया गया, धारा 34 के अंतर्गत ब्याज प्रदान किया जा सकता है – न्यायालय में प्रतिकर का भुगतान न किये जाने के फलस्वरूप कार्यवाहियां व्यपगत नहीं होती – पांच वर्ष या उससे अधिक के लिए अधिकांश भूमि के गैर–भुगतान के मामले में, पूर्व अधिनियम की धारा 4 के अंतर्गत अर्जन की अधिसूचना की तिथि को भूमिस्वामियों को 2013 के अधिनियम के अंतर्गत प्रतिकर का भुगतान किया जाना चाहिए। (इंदौर डव्हेलपमेन्ट अथॉरिटी वि. मनोहरलाल) **(SC)…2179**

Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, (30 of 2013), Section 24(2), proviso and Land Acquisition Act (1 of 1894), Section 31(1) – Non-Deposit of Compensation – Lapse of Proceedings **– Held – In case a person has been tendered compensation u/S 31(1) of old Act, it is not open for him to claim that acquisition has lapsed u/S 24(2) due to non-payment or non-deposit of compensation in Court – Obligation to pay is complete by tendering the amount – Landowners who refused to accept compensation or who sought**

reference for higher compensation, cannot claim the proceedings to be lapsed u/S 24(2) of Act of 2013. [Indore Development Authority Vs. Manoharlal] (SC)…2179

भूमि अर्जन, पुनर्वासन और पुनर्व्यवस्थापन में उचित प्रतिकर और पारदर्शिता का अधिकार अधिनियम, (2013 का 30), धारा 24(2), परंतुक एवं भूमि अर्जन अधिनियम (1894 का 1), धारा 31(1) – प्रतिकर का जमा न किया जाना – कार्यवाहियों का व्यपगत होना – अभिनिर्धारित – यदि एक व्यक्ति को पूर्व अधिनियम की धारा 31(1) के अंतर्गत प्रतिकर प्रस्तुत किया जाता है, तो वह यह दावा नहीं कर सकता कि न्यायालय में प्रतिकर के भुगतान न किये जाने अथवा जमा न किये जाने के कारण धारा 24(2) के अंतर्गत अर्जन व्यपगत हो जाता है – राशि प्रस्तुत करते ही भुगतान का दायित्व पूर्ण हो जाता है – भूमि स्वामी जिन्होंने प्रतिकर स्वीकार करने से इंकार कर दिया है तथा जिन्होंने उच्चतर प्रतिकर के लिए निर्देश चाहा है, वे 2013 के अधिनियम की धारा 24(2) के अंतर्गत कार्यवाहियां व्यपगत हो जाने का दावा नहीं कर सकते। (इंदौर डव्हेलपमेन्ट अथॉरिटी वि. मनोहरलाल) **(SC)…2179**

***Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, (30 of 2013), Section 24(2) and Land Acquisition Act (1 of 1894), Section 16 – Vesting of land – Mode of Taking Possession* – Held – Mode of taking possession under old Act and as contemplated u/S 24(2) is by drawing of inquest report/memorandum – Once award is passed on taking possession u/S 16 of old Act, land vests in State, there is no divesting provided u/S 24(2) of Act of 2013, as once possession has been taken, there is no lapse u/S 24(2). [Indore Development Authority Vs. Manoharlal] (SC)…2179**

भूमि अर्जन, पुनर्वासन और पुनर्व्यवस्थापन में उचित प्रतिकर और पारदर्शिता का अधिकार अधिनियम, (2013 का 30), धारा 24(2) एवं भूमि अर्जन अधिनियम (1894 का 1), धारा 16 – भूमि निहित किया जाना – कब्जा लेने का ढंग – अभिनिर्धारित – पुराने अधिनियम के अंतर्गत तथा धारा 24(2) में अनुध्यात अनुसार जांच प्रतिवेदन/मेमो तैयार कर कब्जा लिया जा सकता है – एक बार पुराने अधिनियम की धारा 16 के अंतर्गत कब्जा लेने पर अधिनिर्णय पारित हो जाने पर, भूमि राज्य को निहित हो जाती है, 2013 के अधिनियम की धारा 24(2) के अंतर्गत कोई निर्निहितीकरण उपबंधित नहीं है, चूंकि एक बार कब्जा ले लिया गया है, धारा 24(2) के अंतर्गत कोई व्यपगत नहीं है। (इंदौर डव्हेलपमेन्ट अथॉरिटी वि. मनोहरलाल) **(SC)…2179**

***Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, (30 of 2013), Section 24(2) and Land Acquisition Act (1 of 1894), Section 17(1) – Possession under Urgency – Lapse of Proceedings* – Held – Where no award is passed and possession has been taken in urgency u/S 17(1) of old Act of 1894, there is no lapse of entire proceedings but only higher compensation would follow u/S 24(1)(a) of Act of 2013 even if payment has not been made or tendered under the old Act –**

सेवा विधि – नियुक्ति – चरित्र सत्यापन – अभिनिर्धारित – चरित्र सत्यापन के समय यदि एक अभ्यर्थी को न्यायालय द्वारा गुणदोषों पर दोषमुक्त पाया गया है, उसे सरकारी सेवा हेतु पात्र समझा जाएगा। (अनिल भारद्वाज वि. माननीय उच्च न्यायालय म.प्र.) **(SC)…2735**

***Service Law – Appointment – Select List* – Held – Mere inclusion in select list does not give an indefeasible right to a candidate – Employer has a right to refuse appointment on valid grounds. [Anil Bhardwaj Vs. The Hon'ble High Court of M.P.] (SC)…2735**

सेवा विधि – नियुक्ति – चयन सूची – अभिनिर्धारित – मात्र चयन सूची में समावेश, एक अभ्यर्थी को कोई अजेय अधिकार नहीं देता – नियोक्ता को विधिमान्य आधारों पर नियुक्ति से मना करने का अधिकार है। (अनिल भारद्वाज वि. माननीय उच्च न्यायालय म.प्र.) **(SC)…2735**

***Service Law – Constitution – Article 142 – Compassionate Appointment – Work Charged/Permanent/Regular Employee – Difference* – Held – Father of respondent was a work-charged employee and has been paid out of work-charged/contingency fund and having completed 15 yrs of service attained status of permanent employee which entitled him for pension and *krammonati* but this will however not *ipso facto* give him status of regular employee – Family of late employee has already been paid entitlement as per applicable policy – Exercising powers under Article 142, compassionate grant increased from 1 lakh to 2 lakhs – Appeal allowed. [State of M.P. Vs. Amit Shrivas] (SC)…2516**

सेवा विधि – संविधान – अनुच्छेद 142 – अनुकम्पा नियुक्ति – कार्य प्रभारित/स्थायी/नियमित कर्मचारी – अंतर – अभिनिर्धारित – प्रत्यर्थी का पिता एक कार्य प्रभारित कर्मचारी था और उसे कार्य प्रभारित/आकस्मिकता निधि से भुगतान किया गया तथा 15 वर्षों की सेवा पूर्ण करने पर स्थायी कर्मचारी का दर्जा प्राप्त किया जिससे वह पेंशन एवं क्रमोन्नति हेतु हकदार हुआ, परंतु यह स्वयंमेव ही उसे नियमित कर्मचारी का दर्जा नहीं देगा – मृत कर्मचारी के परिवार को, प्रयोज्य नीति के अनुसार पहले ही हकदारी का भुगतान किया जा चुका है – अनुच्छेद 142 के अंतर्गत शक्तियों का प्रयोग करते हुए अनुकम्पा अनुदान 1 लाख से बढ़ाकर 2 लाख किया गया – अपील मंजूर। (म.प्र. राज्य वि. अमित श्रीवास) **(SC)…2516**

***Service Law – Dismissal – Backwages – Grounds – Illegal release of pension of a widow to incompetent person* – Held – As per Tribunal's finding, pension illegally withdrawn from July 2007 to Nov 2009 and respondent joined in 2009 – Being a peon, he has no control over process of sanction/release of pension – Other officers who were responsible for issuance of pension were given minor punishments – Respondent was unnecessarily victimized and subjected to discriminatory and**

Municipal Corporation during 1961 to 1995 – Plaintiff established a high degree of probability in their favour – Onus shifted on defendant/State to prove the contrary, which they failed to discharge – Appeal dismissed. [State of M.P. Vs. Smt. Betibai (Dead) Through Her LRs.] …2826

हक – सबूत का भार – अभिनिर्धारित – 1946 से वादी का कब्जा, 1961 से 1995 के दौरान राज्य प्राधिकारीगण एवं नगरपालिका निगम द्वारा उन्हें विभिन्न अनुमतियॉ प्रदान की गई हैं – वादी ने उनके पक्ष में उच्च स्तर की संभाव्यता स्थापित की – इसके विपरीत सिद्ध करने का भार प्रतिवादी/राज्य पर चला जाता है जिसका निर्वहन करने में वे असफल रहे – अपील खारिज। (म.प्र. राज्य वि. श्रीमती बेटीबाई (मृतक) द्वारा विधिक प्रतिनिधि) **…2826**

***Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, M.P. 2005 (14 of 2006), Section 2(1) and Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 39(4) – Writ Appeal – Maintainability* – Held – Division Bench of this Court has earlier, in case of *Balu Singh* has opined that as per Section 39(4) of 1993 Adhiniyam, once office bearer is placed under suspension, such person shall also be disqualified for being elected during suspension period – Since consequences of such order is of final nature, writ appeal is maintainable. [Dhara Singh Patel Vs. State of M.P.] (DB)…2426**

उच्च न्यायालय (खण्ड न्यायपीठ को अपील) अधिनियम, म.प्र., 2005 (2006 का 14), धारा 2 (1) एवं पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 39(4) – रिट अपील – पोषणीयता – अभिनिर्धारित – इस न्यायालय की खंडपीठ ने पूर्व में बालू सिंह के प्रकरण में यह मत दिया था कि 1993 के अधिनियम की धारा 39 (4) के अनुसार, एक बार पदाधिकारी को निलंबित कर दिया जाता है, तो ऐसे व्यक्ति को निलंबन अवधि के दौरान निर्वाचित होने के लिए भी अयोग्य घोषित किया जाएगा – चूंकि उक्त आदेश के परिणाम अंतिम स्वरूप के हैं, रिट अपील पोषणीय है। (धारा सिंह पटेल वि. म.प्र. राज्य) **(DB)…2426**

***Uchchatar Nyayik Sewa (Bharti Tatha Sewa Shartein) Niyam, M.P., 1994 – Recruitment of District Judges – Character Verification – Criminal Case – Rejection of candidature on ground of pending criminal case* – Held – Since at the time of character verification, appellant had not been acquitted and was subsequently acquitted after more than a year from rejection of his candidature, appellant rightly held unsuitable for the post – High Court rightly dismissed the petition – Appeal dismissed. [Anil Bhardwaj Vs. The Hon'ble High Court of M.P.] (SC)…2735**

उच्चतर न्यायिक सेवा (भर्ती तथा सेवा शर्तें) नियम, म.प्र., 1994 – जिला न्यायाधीशों की भर्ती – चरित्र सत्यापन – दाण्डिक प्रकरण – लंबित दाण्डिक प्रकरण के आधार पर अभ्यर्थिता की अस्वीकृति – अभिनिर्धारित – चूंकि चरित्र सत्यापन के समय, अपीलार्थी को दोषमुक्त नहीं किया गया था एवं तत्पश्चात् उसकी अभ्यर्थिता की अस्वीकृति

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THE INDIAN LAW REPORTS M.P. SERIES, 2020
(Vol.-4)

JOURNAL SECTION

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

AMENDMENT IN THE MADHYA PRADESH MINOR MINERAL RULES, 1996

[Published in Madhya Pradesh Gazette (Extra-ordinary), dated 17 November 2020, page Nos. 901 to 902]

No. F.19-5-2019-XII-1-Part.— In exercise of the powers conferred by sub-section (1) of Section 15 of the Mines and Minerals (Development and Regulation) Act, 1957 (67 of 1957), the State Government, hereby, makes the following amendment in the Madhya Pradesh Minor Mineral Rules, 1996, namely:—

AMENDMENT

In the said rules, in rule 68, in sub-rule (3), in the end of proviso, for full stop, the colon shall be substituted and thereafter the following proviso shall be added, namely:—

> "Provided further that the State Government exempts the royalty on ordinary clay and murrum to be used in the works of the Bharatmala Pariyojana being implemented in the State of Madhya Pradesh by the Government of India, Ministry of Road Transport and Highways."

2. This exemption shall apply from the date of publication of this notification in the Official Gazette.

मध्यप्रदेश के राज्यपाल के नाम से तथा आदेशानुसार,
आर.आर.भोंसले, अपर सचिव.

NOTIFICATION REGARDING EXTENSION OF TIME FOR THE COMPLIANCE UNDER M.P. GOODS AND SERVICES TAX ACT, 2017

[Published in Madhya Pradesh Gazette (Extra-ordinary), dated 05 December 2020, page Nos. 956(1) to 956(2)]

No. F-A3-31-2020-1-V-(67).–In exercise of the powers conferred by Section 168A of the Madhya Pradesh Goods and Services Tax Act, 2017 (19 of 2017), (hereafter in this notification referred to as the said Act), in view of the

spread of pandemic COVID-19 across many countries of the world including India, the State Government, on the recommendations of the Council, hereby notifies, as under :-

(i) Where, any time limit for completion or compliance of any action, by any authority or by any person, has been specified in, or prescribed or notified under the said Act, which falls during the period from the 20th day of March, 2020 to 29th day of June, 2020, and where completion or compliance of such action has not been made within such time, then, the time limit for completion or compliance of such action, shall be extended upto the 30th day of June, 2020, including for the purposes of :-

(a) completion of any proceeding or passing of any order or issunace of any notice, intimation, notification, sanction or approval or such other action, by whatever name called, by any authority, commission or tribunal, by whatever name called, under the provisions of the Acts stated above; or

(b) filing of any appeal, reply or application or furnishing of any report, document, return, statement or such other record, by whatever name called, under the provisions of the Acts stated above;

but, such extension of time shall not be applicable for the compliances of the provisions of the said Act, as mentioned below:-

(a) Chapter IV;

(b) sub-section (3) of Section 10, Sections 25, 27, 31, 37, 47, 50, 69, 90, 122, 129;

(c) Section 39, except sub-section (3), (4) and (5);

(d) Section 68, in so far as e-way bill is concerned; and

(e) rules made under the provisions specified at clause (a) to (d) above;

(ii) Where an e-way bill has been generated under rule 138 of the Madhya Pradesh Goods and Services Tax Rules, 2017 and its period of validity expires during the period 20th day of March, 2020 to 15th day of April, 2020, the validity period of such e-way bill shall be deemed to have been extended till the 30th day of April, 2020.

2. This notification shall deemed to have come into force with effect from the 20th day of March, 2020.

By order and in the name of the Governor of Madhya Pradesh,
RATNAKAR JHA, Dy. Secy.

NOTIFICATION REGARDING EXTENSION OF TIME FOR ISSUANCE OF ORDER IN TERMS OF PROVISIONS OF SUB-SECTION 5 R/W SUB-SECTION 7 OF SECTION 54 UNDER M.P. GOODS AND SERVICES TAX ACT, 2017

[Published in Madhya Pradesh Gazette (Extra-ordinary), dated 05 December 2020, page No. 956(3)]

No. F-A3-32-2020-1-V(65).–In exercise of the powers conferred by Section 168A of the Madhya Pradesh Goods and Services Tax Act, 2017 (19 of 2017), (hereafter in this notification referred to as the said Act), in view of the spread of pandemic COVID-19 across many countries of the world including India, the State Government, on the recommendations of the Council, hereby notifies that in cases where a notice has been issued for rejection of refund claim, in full or in part and where the time limit for issuance of order in terms of the provisions of sub-section (5), read with sub-section (7) of Section 54 of the said Act falls during the period from the 20th day of March, 2020 to the 29th day of June, 2020, in such cases the time limit for issuance of the said order shall be extended to fifteen days after the receipt of reply to the notice from the registered person or the 30th day of June, 2020, whichever is later.

2. This notification shall deemed to have come into force with effect from the 20th day of March, 2020.

By order and in the name of the Governor of Madhya Pradesh,
RATNAKAR JHA, Dy. Secy.

THE MADHYA PRADESH ONION TRADERS (STOCK-LIMIT AND RESTRICTION ON HOARDING) ORDER, 2020

[Published in Madhya Pradesh Gazette (Extra-ordinary), dated 02 November 2020, page No. 856(2) to 856(5)]

No. F. 4-4-2014-XXIX-1.— WHEREAS, it is the opinion of the State Government that it is necessary and expedient to do so to ensure equitable distribution and availability of onions at reasonable prices.

THEREFORE, in exercise of the powers conferred under Section 3 of the Essential Commodities Act, 1955 (No. 10 of 1955) read with the Notification No.

S.O. 3776(E), dated 23rd October 2020 & GSR 929 (E), dated 29th September 2016 of the Ministry of Consumer Affairs, Food and Public Distribution (Department of Consumer Affairs), Government of India and GSR 800, dated 9th June 1978 of Department of Food, Ministry of Agriculture and Irrigation, hereby makes the following order, namely:—

1. Short title, extent and commencement :—

(i) This order may be called as "The Madhya Pradesh Onion Traders (Stock-Limit and Restriction on Hoarding) Order, 2020".

(ii) It extends to the whole of Madhya Pradesh.

(iii) This order shall come into force on its publication in the Gazette and shall be effective up to 31st December 2020 or till the extended date notified by the Government of India in this regard from time to time.

2. Definitions :—

In this order, unless the context requires otherwise:—

(a) "Commission agent" means a person who is engaged on behalf of any other trader for purchase, sale, transport and receipt to another trader on commission basis.

(b) "Form" means the forms attached to this order.

(c) "Mandi" means the Mandi specified in the Madhya Pradesh Agricultural Produce Market Act,1972 (No. 24, 1973).

(d) "Retailer" means such onion trader who is not a wholesaler and sells directly to consumers.

(e) "State Government" means the Government of Madhya Pradesh.

(f) "Trader" means a person or his representative which includes a commission agent who purchases, sells or stores for sale are intends to purchase, sell or storage for sale of onion at any time in such limit as mentioned in **Scheduled-I** of this order but it does not include the stock of onions produced by him through individual farming.

(g) "Wholeseller" means such a trader who sells onion to other traders.

3. Maximum stock limit :—

No trader shall have the stock of onion at any time in excess of the stock limit mentioned in **Schedule-I** of this order.

4. Restriction on purchase, sale and storage of onion :—

(A) Every wholesaler or commission agent by whom the onion mentioned in **Schedule-I** is received for purchase, sale, shall maintain the proper account of the purchase, sale and storage of the onion including stock register prescribed in Form 'A' invoice of the sale and receipt of the Mandi, and shall submit them on demand at the time of inspection.

(B) Every trader shall deal with the onion materially and not in a speculative manner which adversely affects its easy availability in the market.

(C) Every trader shall display the price list and stock of onion kept for sale on a board at the entrance of the premises or at any conspicuous place of his/her business premises written in legible Devnagri script in which the price of the onion and the opening stock of the onion shall be displayed separately.

(D) No trader shall refuse to sell the onions kept in his/her possession for sale.

(E) Every wholesaler or his commission agent shall submit the details of transaction prescribed in Form 'B' by 20th of the current month for the fortnight ending on 15th of the same month, and by 5th of the succeeding month for the fortnight ending on last date of the previous month.

5. Violation of order :—

No trader, his commission agent, or his servant or any other person acting on his behalf shall violate any of the provisions of this order.

6. Powers of entry, search and seizure etc :—

(1) In order to ensure proper compliance of the provisions of this order, an officer not below the rank of junior supply officer of the Food, Civil Supplies and Consumer Protection Department, or Naib Tehsildar of the Revenue Department and an officer not below the rank of Assistant Director of the Department of Horticulture and Food Processing of the State

Government, within their respective district/jurisdiction, with such assistance as the thinks fit :—

(A) shall expect the submission of the documents, accounts and other records related with the violated transactions in respect of a premise, vehicle, vessel whereof, he has reason to believe that the provisions of this order has been violated, is being violated or to be violated, from the owner or his manager or any other person in charge.

(B) enter and inspect or open or search such a place, premises, vehicle or vessel in respect of which it has reason to believe that any of the provisions of this order has been violated, is being violated or is about to be violated.

(C) may seize or cause to be seized the register, bill book or any other documents related to such violated transactions.

(D) shall search animals/vehicles/vessels or other conveyances being used in carrying the stock of onion in violation of provisions of this order and shall seize and remove them and thereafter, shall do or shall authorize to do such other activities which are essential for the presentation of the stock of onion and animals, vehicles, vessels or other conveyances before the competent court and for ensuring it safe custody until it presence before court.

(2) The provisions of the Code of Criminal Procedure, 1973 (No. 2 of 1974) which relate to search and seizure will apply to search and seizure under this section as far as possible.

7. Exemption :—

The State Government may, by ordinary or special order, exempt any class of persons from all or any of the provisions of this order and may suspend or revoke such exemption at any time :—

SCHEDULE I
(See clause 3)

Stock Limit

Name of Essential commodity (1)	Wholesaler/commission agent of wholesaler (2)	Retailer/commission agent of retailer (3)
Onion	250 Quintal	20 Quintal

SCHEDULE II

FORM-A
[See clause 4(1)]

Daily Stock Register

Date (1)	Opening Stock (2)	Receipt (3)	Total (4)	Sold quantity (in Quintal) (5)	Closing Stock (6)	Remarks (7)

FORM-B
[See clause 4(5)]

Fortnightly Return

Month .....Year .....Name of Wholesaler/ Commission Agent & Address of the business .....

Tin No. .....Mandi License No. .....Address of Godown approved in Mandi License.....

.....

Opening Stock of the beginning of the Month.....

Date (1)	Stock (2)	Purchased quantity (in Quintals) (3)	Name of the Source of purchase (with invoice no.) (4)

Date	Stock	Sold quantity (in Quintal)	Name of the Firms/person to whom sold (with invoice no.)
(1)	(2)	(3)	(4)

(Note :— Tick the submission period from 1st to 15th/16th to month End as applicable.

Signature of Trader
Name of Firm with Seal

By order and in the name of the Governor of Madhya Pradesh,
B.K. CHANDEL, Dy. Secy.

NOTES OF CASES SECTION

Short Note

****(26)***

Before Mr. Justice G.S. Ahluwalia

W.P. No. 25262/2018 (Gwalior) decided on 28 February, 2020

JITENDRA KUMAR GUPTA …Petitioner

Vs.

STATE OF M.P. …Respondent

A. Service Law – Recruitment – Criminal Antecedents – Suitability of Candidate – Post of Assistant Grade III in Excise Department **– Held – Although said post do require public standard and integrity but it may differ in comparison to any post in Police Department – Respondents committed material illegality in not considering suitability of petitioner in said post – Petitioner has not suppressed any material fact and disclosed registration as well as outcome (acquittal) of criminal cases – Impugned order quashed – Respondents directed to reconsider suitability of petitioner on said post – Petition allowed.**

क. सेवा विधि – भर्ती – आपराधिक पूर्ववृत्त – अभ्यर्थी की उपयुक्तता – आबकारी विभाग में सहायक ग्रेड III का पद – अभिनिर्धारित – यद्यपि उक्त पद, लोक मानक एवं सत्यनिष्ठा की अपेक्षा करता है, परंतु वह पुलिस विभाग में किसी पद की तुलना में भिन्न हो सकता है – प्रत्यर्थीगण ने उक्त पद पर याची की उपयुक्तता को विचार में न लेने में तात्विक अवैधता कारित की – याची ने किसी तात्विक तथ्य का छिपाव नहीं किया है और दाण्डिक प्रकरणों के पंजीयन के साथ साथ परिणाम (दोषमुक्ति) का भी प्रकटन किया है – आक्षेपित आदेश अभिखंडित – प्रत्यर्थीगण को उक्त पद पर याची की उपयुक्तता का पुनर्विचार करने के लिए निदेशित किया गया – याचिका मंजूर।

B. Service Law – Honourable Acquittal & Suitability of Candidate **– Held – In one case, petitioner was acquitted on basis of compromise and in the other, on basis of witness turning hostile – Although petitioner has not obtained honourable acquittal, but respondents failed to consider his suitability on post of Assistant Grade III in Excise Department.**

ख. सेवा विधि – सम्मानपूर्वक दोषमुक्ति व अभ्यर्थी की उपयुक्तता – अभिनिर्धारित – एक प्रकरण में याची को समझौते के आधार पर तथा अन्य में साक्षी पक्ष विरोधी हो जाने के आधार पर दोषमुक्त किया गया था – यद्यपि याची ने सम्मानपूर्वक दोषमुक्ति अभिप्राप्त नहीं की है किंतु प्रत्यर्थीगण, आबकारी विभाग में सहायक ग्रेड III के पद पर उसकी उपयुक्तता का विचार करने में विफल रहे।

Cases referred:

(2018) 18 SCC 733, (2018) 1 SCC 797, (2016) 8 SCC 471, C.A. No. 10571/2018 decided on 12.10.2018 (Supreme Court), 2018 (2) MPJR 178, W.A. No. 1257/2018 order passed on 29.10.2018.

Jitendra Kumar Sharma, for the petitioner.
RK Soni, G.A. for the respondents/State.

Short Note
****(27)***
Before Mr. Justice G.S. Ahluwalia
C.R. No. 31/2016 (Gwalior) decided on 3 March, 2020

PRAKASH CHANDRA CHANDIL …Applicant

Vs.

ARUN SINGHAL & ors. …Non-applicants

***Civil Procedure Code (5 of 1908), Order 7 Rule 11 – Cause of Action – Professional Misconduct of Advocate* – Held – It is within exclusive domain of bar Council to consider question of professional misconduct – Civil Court can neither consider/examine as to whether any action of a Lawyer is a misconduct nor can pass mandatory injunction against Bar Council to initiate disciplinary proceedings against a Lawyer – No cause of action disclosed against applicant/defendant – Suit barred by law – Impugned order set aside – Suit against applicant dismissed with cost of Rs. 5000 – Revision allowed.**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 11 – वाद हेतुक – अधिवक्ता का व्यावसायिक कदाचार – अभिनिर्धारित – यह विधिज्ञ परिषद् की अनन्य अधिकारिता के भीतर है कि वह व्यावसायिक कदाचार के प्रश्न को विचार में ले सके – व्यवहार न्यायालय एक अधिवक्ता का कार्य कदाचार है अथवा नहीं, इसको न तो विचार में ले सकता है अथवा न तो परीक्षण कर सकता है, न ही विधिज्ञ परिषद् के विरूद्ध एक अधिवक्ता के विरूद्ध अनुशासनिक कार्यवाहियाँ आरंभ करने हेतु आज्ञापक व्यादेश पारित कर सकता है – आवेदक/प्रतिवादी के विरूद्ध कोई वाद हेतुक प्रकट नहीं होता – वाद, विधि द्वारा वर्जित – आक्षेपित आदेश अपास्त – आवेदक के विरूद्ध वाद को 5000/– रूपये के शुल्क के साथ खारिज किया गया – पुनरीक्षण मंजूर।

Case referred:

W.P. No. 4308/2016 decided on 27.08.2019.

K.S. Tomar with *Kapil Sharma*, for the applicant.
None, for the non-applicants.

I.L.R. [2020] M.P. 2735 (SC)
SUPREME COURT OF INDIA

Before Mr. Justice Ashok Bhushan & Mr. Justice M.R. Shah

C.A. No. 3419/2020 decided on 13 October, 2020

ANIL BHARDWAJ …Appellant

Vs.

THE HON'BLE HIGH COURT OF MADHYA PRADESH & ors. …Respondents

***A. Uchchatar Nyayik Sewa (Bharti Tatha Sewa Shartein) Niyam, M.P., 1994 – Recruitment of District Judges – Character Verification – Criminal Case – Rejection of candidature on ground of pending criminal case* – Held – Since at the time of character verification, appellant had not been acquitted and was subsequently acquitted after more than a year from rejection of his candidature, appellant rightly held unsuitable for the post – High Court rightly dismissed the petition – Appeal dismissed.**

(Paras 14, 23, 24, 27 & 29)

क. उच्चतर न्यायिक सेवा (भर्ती तथा सेवा शर्तें) नियम, म.प्र., 1994 – जिला न्यायाधीशों की भर्ती – चरित्र सत्यापन – दाण्डिक प्रकरण – लंबित दाण्डिक प्रकरण के आधार पर अभ्यर्थिता की अस्वीकृति – अभिनिर्धारित – चूंकि चरित्र सत्यापन के समय, अपीलार्थी को दोषमुक्त नहीं किया गया था एवं तत्पश्चात् उसकी अभ्यर्थिता की अस्वीकृति से एक वर्ष से अधिक समय पश्चात् दोषमुक्त किया गया था, अपीलार्थी को पद हेतु अयोग्य, उचित रूप से ठहराया गया – उच्च न्यायालय ने याचिका उचित रूप से खारिज की – अपील खारिज।

***B. Service Law – Appointment – Character Verification* – Held – At the time of character verification, if a candidate is found acquitted on merits by Court, he shall be treated to be eligible for government service. (Para 27)**

ख. सेवा विधि – नियुक्ति – चरित्र सत्यापन – अभिनिर्धारित – चरित्र सत्यापन के समय यदि एक अभ्यर्थी को न्यायालय द्वारा गुणदोषों पर दोषमुक्त पाया गया है, उसे सरकारी सेवा हेतु पात्र समझा जाएगा।

***C. Service Law – Appointment – Select List* – Held – Mere inclusion in select list does not give an indefeasible right to a candidate – Employer has a right to refuse appointment on valid grounds. (Para 12)**

ग. सेवा विधि – नियुक्ति – चयन सूची – अभिनिर्धारित – मात्र चयन सूची में समावेश, एक अभ्यर्थी को कोई अजेय अधिकार नहीं देता – नियोक्ता को विधिमान्य आधारों पर नियुक्ति से मना करने का अधिकार है।

***D. Constitution – Article 226/227 – Appointment – Judicial Review – Scope* – Held – Any arbitrary decision taken by Selection Committee**

actuated by *malafide*, can very well be interfered by Constitutional Courts in exercise of judicial review jurisdiction. (Para 21 & 22)

घ. संविधान – अनुच्छेद 226/227 – नियुक्ति – न्यायिक पुनर्विलोकन – व्याप्ति – अभिनिर्धारित – असद्भाव से प्रेरित होकर चयन समिति द्वारा लिये गये किसी मनमाने विनिश्चय में, संवैधानिक न्यायालयों द्वारा न्यायिक पुनर्विलोकन अधिकारिता के प्रयोग में भली भांति हस्तक्षेप किया जा सकता है।

Cases referred:

C.A. No. 10571/2018 decided on 12.10.2018, 2008 (17) SCC 703, (2013) 7 SCC 685, (2015) 2 SCC 377, (2016) 8 SCC 471, (2018) 1 SCC 797.

J U D G M E N T

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

2. This appeal has been filed questioning the Division Bench judgment dated 06.01.2020 of the High Court of Madhya Pradesh dismissing the writ petition filed by the appellant. The appellant in the writ petition has prayed for quashing the orders dated 14.09.2018, 18.07.2018 and 21.09.2019 by which appellant has been held not suitable for being appointed to the post of District Judge (Entry Level).

3. The brief facts of the case are:

The High Court of Madhya Pradesh issued an advertisement dated 09.03.2017 inviting applications for recruitment in the post of District Judge(Entry Level) in the cadre of Higher Judicial Service by Direct Recruitment from amongst the eligible Advocates. In pursuance to the advertisement, the appellant submitted online application form. The appellant after being declared successful in the Main Examination was called for interview. The provisional select and waiting list was published in which the name of the appellant was included at Serial No.13 in the category of unreserved. The appellant received a communication on 06.04.2018 from the Law and Legislative Department informing that he has been selected for the post of District Judge (Entry Level). He was asked to appear before the Medical Board for the health tests. On 02.07.2018 the appellant was informed that in his attestation form FIR No.852/2014 under Section 498/406/34 IPC is shown and the copy of the same was asked for. On 14.09.2018 order was issued by the Principal Secretary, Madhya Pradesh, Law and Legislative Department declaring the appellant ineligible and directing for deletion the name of the appellant from the select list. The Government also issued a Gazette notification deleting the name of the appellant from the Merit No.13 of the main select list.

4. The appellant filed a Writ Petition No.27434 of 2018 before the High Court challenging the order dated 14.09.2018 and the Gazette notification dated 21.09.2018. On application submitted under the Right to Information Act, the appellant was provided extract of the Minutes of the Joint Meeting of Administrative Committee (Higher Judicial Service) and Examination-cum-Selection and Appointment Committee dated 18.07.2018 by which proceedings the appellant was not considered suitable for being appointed to the post of District Judge (Entry Level). On the basis of a complaint by the wife of the appellant, a criminal case was registered and vide judgment dated 18.09.2019 the appellant was acquitted of the charge framed against him.

5. The appellant filed an application for amendment of the writ petition to bring on record the order of the acquittal and other events occurred during the pendency of the writ petition. The appellant was permitted to withdraw his earlier writ petition with liberty to file a fresh writ petition. Writ Petition No.27779 of 2019 was filed by the appellant incorporating subsequent events, facts and acquittal order which writ petition has been dismissed by the impugned judgment dated 06.01.2020 by the High Court. Aggrieved by the impugned judgment, the appellant has come up in this appeal.

6. We have heard Shri R. Venkataramani, learned senior counsel for the appellant.

7. Learned senior counsel for the appellant submits that the appellant in his online application form has disclosed about the lodging of FIR No.852/2014 under Section 498A/406/34 IPC. He submits that appellant having disclosed the lodging of FIR against him has not concealed any fact before the High Court and he having been selected on merit was entitled to be appointed. Shri Venkataramani submits that on the subsequent acquittal of the appellant on 18.09.2019 his case for appointment was to be reconsidered by the High Court and the High Court committed an error in not considering the appellant for appointment. The candidature of the appellant could not have been cancelled merely on the ground of pendency of criminal case. The appellant could not have been deprived of the employment after acquittal. There was no other material on record to indicate that antecedent or conduct of the appellant was not upto the mark. The High Court ought to have sent the matter back before the Higher Judicial Service and Examination-cum-Selection Committee for reconsideration.

8. Learned counsel for the appellant has referred to the judgments of this Court which have been relied by the High Court in the impugned judgment. Learned counsel for appellant has also placed reliance on the judgment of this Court in *Mohammed Imran vs. State of Maharashtra and others* (C.A.No.10571 of 2018) decided on 12.10.2018. He submits that the judgment of *Mohammed*

Imran was also a case of a judicial officer who was directed by this Court to be given appointment.

9. We have considered the submissions of the learned counsel for the parties and perused the records.

10. The present is not a case where the name of the appellant was deleted in the select list on the ground of any concealment of criminal case against him. The appellant has brought on the record the proceedings of Examination-cum-Selection Committee dated 18.07.2018. At Item No.2 of the Agenda the Committee recorded the following decision:

> **"ITEM NO.02**.Consideration on the matter relates to Character Verification Reports of selected 13 candidates of MPHJS (District Judge-Entry Level) (Direct from Bar) Exam-2016 & 2017, received from Law Department, Bhopal for determination of their eligibility for the said post.
>
> 1.**Shri Anil Bhardwaj:-**
>
> Attestation Form submitted Shri Anil Bhardwaj and police verification report submitted by Deputy Commissioner of Police, Special Branch, New Delhi, goes to show that FIR 852/2014 under Section 498A/406/34 of IPC has been registered against Shri Anil Bhardwaj on the basis of complaint filed by Smt. Pooja wife of Shri Anil Bhardwaj.
>
> After due consideration resolved that a case against Shri Anil Bhardwaj under Section 498A, 406-34 IPC is still pending before Rohini Court, New Delhi. Therefore, he is not considered suitable for being appointed to the post of District Judge (Entry Level)."

10. The FIR against the appellant was lodged by his wife under Section 498A and 406 IPC in the year 2014 on the basis of which a charge-sheet was submitted in the Court on 15.07.2017 under Section 498A and 406 IPC. The appellant has disclosed lodging of the FIR against him in his online application form. The name of the appellant was included in the select list which was forwarded to the State. The State after character verification submitted a report which report was considered on 18.07.2018 by the Administrative Committee (Higher Judicial Service) and Examination-cum-Selection and Appointment Committee and a resolution was taken that due to pendency of the case under Section 498A, 406-34 IPC on the basis of complaint filed by the wife, Smt. Pooja, the appellant is not considered suitable for being appointed to the post of District Judge.

11. Before the High Court, the decision of the Committee dated 18.07.2018 as well as the order of the State dated 14.09.2018 for deleting the name of the appellant was challenged in the writ petition. The main issue to be considered was

as to whether resolution dated 18.07.2018 suffered from error which requires judicial review by the High Court in exercise of jurisdiction under Article 226. The submission which has been pressed by the counsel for the appellant is that appellant's case was required to be reconsidered in view of his subsequent acquittal on 18.09.2019.

12. The recruitment to the Judicial Service is governed by the provisions of Madhya Pradesh Uchchatar Nyayik Seva (Bharti Tatha Seva Sharten) Niyam, 1994. This Court issued direction to all States to fill up the vacancies in subordinate Courts in a time schedule. The direction was issued by this Court in *Malik Mazhar Sultan (3) and another vs. Uttar Pradesh Public Service Commission and others*, 2008(17) SCC 703. The selection process for filling up the post of District Judge has to be completed by all the High Courts as per the time schedule fixed by this Court. After declaration of the merit list the candidates have to be given appointments in time bound manner so that they may join the respective posts. There is no dispute that on the date when the Committee declared the appellant unsuitable, criminal case against him under Section 498A and 406 IPC was pending which was registered on a complaint filed by the appellant's wife, Smt. Pooja. The mere inclusion in the select list does not give an indefeasible right to a candidate. The employer has right to refuse appointment to the candidate included in the select list on any valid ground. The persons who occupy Judicial Service of the State are persons who are expected to have impeccable character and conduct. It is not disputed that the criminal case under Section 498A and 406 IPC was pending at the time when the appellant applied for the recruitment, when he appeared for the interview and when the result was declared. The character verification report was received from the State where pendency of the criminal case was mentioned which was the reason for the Committee to declare the appellant unsuitable. The submission which needs to be considered is that whether in view of the subsequent acquittal of the appellant, his case was required to be reconsidered and he was entitled to be appointed.

13. This Court in *Commissioner of Police, New Delhi and another vs. Mehar Singh,* (2013) 7 SCC 685, while considering a case of antecedents verification for appointment into Delhi Police Service made the following observation in paragraph 35:

> **"35.** The police force is a disciplined force. It shoulders the great responsibility of maintaining law and order and public order in the society. People repose great faith and confidence in it. It must be worthy of that confidence. A candidate wishing to join the police force must be a person of utmost rectitude. He must have impeccable character and integrity. A person having criminal antecedents will not fit in this category. Even if he is acquitted or discharged in the criminal case, that acquittal or discharge order will have to be examined to see whether he

> has been completely exonerated in the case because even a possibility of his taking to the life of crimes poses a threat to the discipline of the police force....."

14. The observation was made by this Court in the above case that a candidate wishing to join the police force must be a person having impeccable character and integrity. The above observations apply with greater force to the Judicial Service. This Court further observed that even in the case of acquittal, it has to be examined as to whether the person was completely exonerated in the case or not. In the present case the acquittal having taken place after the close of recruitment process, there was no question of examining the acquittal order by the High Court at the time of finalizing the selection process.

15. Learned counsel for the appellant has referred to the judgment of this Court in *Joginder Singh vs. Union Territory of Chandigarh and others*, (2015) 2 SCC 377, which was a case whether the appellant was acquitted by the trial court for a case under Section 148/149/323/325/307 IPC. In the above case acquittal took place even before the appellant was called for the interview/medical examination. This fact was recorded in paragraph 24 of the judgment in the following words:

> **"24.** However, in the present case, we have observed that the appellant was involved in a family feud and the FIR came to be lodged against him on 14-4-1998, after he had applied for the post of Constable. Further, he had been acquitted on 4-10-1999 i.e. much before he was called for the interview/medical examination/written test "

16. The above case is clearly distinguishable and does not help the appellant.

17. A three-Judge Bench of this Court in *Avtar Singh vs. Union of India and others,* (2016) 8 SCC 471, had occasion to examine different aspects of verification form after selection including the question of having criminal antecedents and pending of criminal case. This Court laid down that in the event criminal case is pending and incumbent has not been acquitted employer may well be justified in not appointing such an incumbent. In paragraph 32 following has been laid down:

> **"32.** No doubt about it that once verification form requires certain information to be furnished, declarant is duty-bound to furnish it correctly and any suppression of material facts or submitting false information, may by itself lead to termination of his services or cancellation of candidature in an appropriate case. However, in a criminal case incumbent has not been acquitted and case is pending trial, employer may well be justified in not appointing such an incumbent or in terminating the services as conviction ultimately may render him unsuitable for job and employer is not supposed to wait till outcome of criminal case. In such a case non-disclosure or submitting false information would assume significance

and that by itself may be ground for employer to cancel candidature or to terminate services."

18. Even in a case where candidates have been acquitted in criminal case, it was held that the decision of the Screening Committee being not actuated by mala fide regarding suitability of the candidate is to be respected. This Court in *Union Territory, Chandigarh Administration and others vs. Pradeep Kumar and another,* (2018) 1 SCC 797, laid down following in paragraphs 13 and 17:

> **"13.** It is thus well settled that acquittal in a criminal case does not automatically entitle him for appointment to the post. Still it is open to the employer to consider the antecedents and examine whether he is suitable for appointment to the post. From the observations of this Court in *Mehar Singh*[5] 2013 (7) SCC 685 and *Parvez Khan,* 2015 (2) SCC 591 cases, it is clear that a candidate to be recruited to the police service must be of impeccable character and integrity. A person having criminal antecedents will not fit in this category. Even if he is acquitted or discharged, it cannot be presumed that he was honourably acquitted/completely exonerated. The decision of the Screening Committee must be taken as final unless it is shown to be mala fide. The Screening Committee also must be alive to the importance of the trust reposed in it and must examine the candidate with utmost character.
>
> **17.** In a catena of judgments, the importance of integrity and high standard of conduct in police force has been emphasised. As held in *Mehar Singh case*[5], the decision of the Screening Committee must be taken as final unless it is mala fide. In the case in hand, there is nothing to suggest that the decision of the Screening Committee is mala fide. The decision of the Screening Committee that the respondents are not suitable for being appointed to the post of Constable does not call for interference. The Tribunal and the High Court, in our view, erred in setting aside the decision of the Screening Committee and the impugned judgment is liable to be set aside."

19. Now, we may notice the judgment of *Mohammed Imran* (supra) which has been heavily relied by the learned counsel for the appellant. In the above case the appellant was selected for Judicial Service whose selection was cancelled on 04.06.2010 due to the character verification report of the Police. Writ petition was dismissed by the High Court. It was contended before this court that the appellant was acquitted of the charge under Sections 363, 366, 34 IPC on 28.10.2004 that is much before he cleared the examination for appointment in the year 2009. The appellant disclosed his prosecution and acquittal by the Sessions Court. This Court noticed the aforesaid fact in paragraph 9 of the judgment in the following words:

> "9. It is an undisputed fact that one Shri Sudhir Gulabrao Barde, who had been acquitted on 24.11.2009 in Case No.3022 of 2007 under Sections 294, 504, 34 IPC, has been appointed"

20. This Court held that report received reveals that except for the criminal case, in which he had already been acquitted, the appellant has a clean record and there is no adverse material against him to deny him the fruits of his academic labour. This Court found decision rejecting the candidature of the appellant as untenable by making following observation in paragraph 11:

> "11. In the entirety of the facts and circumstances of the case, we are of the considered opinion that the consideration of the candidature of the appellant and its rejection are afflicted by a myopic vision, blurred by the spectacle of what has been described as moral turpitude, reflecting inadequate appreciation and application of facts also, as justice may demand."

21. There can be no dispute that in event it is found that decision by which the candidature of a candidate is rejected is arbitrary or actuated by malafide such decision can be interfered by the Constitutional Courts. We have already noticed the judgment of this Court in *Union Territory, Chandigarh Administration and others vs. Pradeep Kumar and another* (supra) that the decision of the Screening Committee must be final unless it is mala fide.

22. There can be no dispute to the above preposition. But there can be other valid reasons for not sustaining the decision of Screening Committee/ Selection Committee apart from the ground of mala fide. Any arbitrary decision taken by the Selection Committee can very well be interfered by the Constitutional Courts in exercise of Judicial Review Jurisdiction.

23. Reverting to the facts of the present case, the decision of Examination-cum-Section and Appointment Committee for holding the appellant unsuitable was based on the relevant consideration, i.e., a criminal case against the appellant under Section 498A/406/34 IPC was pending consideration which was registered on a complaint filed by the wife of the appellant. Such decision of the Committee was well within the jurisdiction and power of the Committee and cannot be said to be unsustainable. The mere fact that subsequently after more than a year when the person whose candidature has been cancelled has been acquitted cannot be a ground to turn the clock backward.

24. There being no infirmity in the decision dated 18.07.2018 of the Committee declaring the appellant unsuitable for the post and consequential decision taken by the State to delete the name of the appellant, the High Court did not commit any error in dismissing the writ petition. The fact that subsequently the appellant was acquitted in the criminal case did not furnish sufficient ground for reconsidering the appellant for appointment on the post.

25. One more submission advanced by learned counsel for the petitioner needs also to be considered. The petitioner's contention is that the decision declaring the petitioner unsuitable on the ground of pendency of criminal case under Section 498A, 406 IPC was contrary to the guidelines issued by the Government of Madhya Pradesh for character verification dated 05.06.2003. He submits that as per paragraph 6(viii) of the guidelines on the acquittal on merit of the case by the Court, the candidate will be eligible for Government service. He submits that the above clause of the Government Order has been breached in declaring the appellant unsuitable.

26. The guidelines dated 05.06.2003 has been issued by Government of Madhya Pradesh on the subject "regarding issuing of new guidelines for character verification." Paragraph 6 which has been relied by the counsel for the appellant is regarding column 12 of the Attestation form. It is useful to extract paragraph 6 and clause (viii) which are as follows: -

> "6. The Column 12 of the attestation form filled for character verification by selected candidates for government service, criminal background, judicial case and the information about acquittal or conviction in it, willfully or erroneously or ignorantly kept vacant subject to qualification for appointment in government service taking into consideration the policy as per rules by the state government with immediate effect decisions have been taken.
>
> (i) ....
>
> ....
>
> (viii) On the acquittal on merit of the case by the Hon'ble Court, the candidate will be eligible for government service."

27. Clause (viii) on which the reliance is placed contemplates that the candidate who has been acquitted on merit by the Court will be eligible for the Government service. The aforesaid contemplation relates to at the time of character verification. Thus, at the time of character verification, if a candidate is found to be acquitted on merits by the Court, the candidate shall be treated to be eligible for Government Service. The above clause (viii) as quoted above cannot come to the rescue of the appellant who at the time of character verification or at the time of consideration of the case of the appellant by the committee on 18.07.2018 had not been acquitted. Had the appellant in column 12 had mentioned about the acquittal or at the time of character verification it was found that the candidate has been acquitted on merit by the Court, Clause 6(viii) would have been attracted but in the present case the said clause is not attracted since at the time of character verification the appellant had not been acquitted and he was acquitted after more than a year from rejection of his candidature.

28. Learned counsel for the appellant lastly has contended that due to deletion of the name of appellant from select list a stigma is attached to him, for removal of which this Court may issue notice in this SLP. As noted above, the appellant having already been acquitted by the judgment dated 18.09.2019 stigma of criminal case has already washed out and the criminal case having resulted in acquittal no stigma is attached to the appellant's name on the above ground. The apprehension of the learned counsel for the appellant that a stigma shall continue with the name of the appellant is misconceived, stigma, if any, is already over by acquittal.

29. We, thus, are of the view that the High Court did not commit any error in dismissing the writ petition. The appellant was not entitled for any relief in the writ petition. In the result, while dismissing this appeal we observe that stigma, if any, of the criminal case lodged against appellant under Section 498A/406/34 IPC is washed out due to the acquittal of the appellant vide judgment dated 18.09.2019.

Appeal dismissed

I.L.R. [2020] M.P. 2744 (SC)
SUPREME COURT OF INDIA

Before Mr. Justice L. Nageswara Rao, Mr. Justice Hemant Gupta & Mr. Justice Ajay Rastogi

Cr.A. No. 715/2020 decided on 05 November 2020

HINDUSTAN UNILEVER LIMITED …Appellant

Vs.

STATE OF M.P. …Respondent

(Alongwith Cr.A. No. 716/2020)

***A. Prevention of Food Adulteration Act (37 of 1954), Section 17(1)(a) & (b) – Conviction – Company/Person Nominated* – Held – Section 17 makes the Company [u/S 17(a)] as well as Nominated Person [u/S 17(b)] to be held guilty of the offence and/or liable to be proceeded and punished – Clause (a) & (b) of Section 17 are not in alternative but conjoint – In absence of Company, Nominated Person cannot be convicted or *vice-versa* – Trial Court convicted Nominated Person and not Company, rendering entire conviction unsustainable – Order of remand by High Court not fair as Nominated Person facing trial for more than 30 years – Complaint dismissed – Appeals allowed. (Paras 21 to 23)**

***क. खाद्य अपमिश्रण निवारण अधिनियम (1954 का 37), धारा 17(1)(a) व (b) – दोषसिद्धि – कम्पनी/नामनिर्दिष्ट व्यक्ति* – अभिनिर्धारित – धारा 17, कम्पनी [धारा 17(a) अंतर्गत] के साथ साथ नामनिर्दिष्ट व्यक्ति [धारा 17(b) अंतर्गत] को अपराध का**

दोषी तथा/अथवा कार्यवाही करने एवं दण्डित करने के लिए दायी बनाती है – धारा 17 के खण्ड (a) व (b), विकल्प में नहीं है अपितु संयुक्त है – कम्पनी की अनुपस्थिति में, नामनिर्दिष्ट व्यक्ति को दोषसिद्ध नहीं किया जा सकता या विपर्ययेन – विचारण न्यायालय ने नामनिर्दिष्ट व्यक्ति को दोषसिद्ध किया और न कि कम्पनी को, जिससे संपूर्ण दोषसिद्धि न टिक सकने योग्य हो जाती है – उच्च न्यायालय द्वारा प्रतिप्रेषण का आदेश उचित नहीं क्योंकि नामनिर्दिष्ट व्यक्ति 30 वर्षों से अधिक समय से विचारण का सामना कर रहा है – परिवाद खारिज – अपीलें मंजूर।

***B. Prevention of Food Adulteration Act (37 of 1954) Section 2(ia)(m) r/w 7(i) & 16(1)(a)(i) and Food Safety and Standard Act (34 of 2006), Section 3(1)(zx), 3(1)(i) & 97 and General Clauses Act (10 of 1897), Section 6 – Prosecution & Punishment under Repealed Act – Effect* – Held – Act of 1954 provides for punishment of sentence alongwith fine whereas Act of 2006 provides for punishment of fine only – Section 97 of 2006 Act protects prosecution and punishment given under the repealed Act of 1954 – No benefit can be taken under Act of 2006 in view of Section 97 of the Act of 2006 and Section 6 of General Clauses Act. (Paras 11 & 13 to 18)**

ख. खाद्य अपमिश्रण निवारण अधिनियम (1954 का 37), धारा 2 (ia)(m) सहपठित 7(i) व 16 (1)(a)(i) एवं खाद्य सुरक्षा और मानक अधिनियम (2006 का 34), धारा 3(1) (zx), 3(1)(i) व 97 एवं साधारण खण्ड अधिनियम (1897 का 10), धारा 6 – निरसित अधिनियम के अंतर्गत अभियोजन व दण्ड – प्रभाव – अभिनिर्धारित – 1954 का अधिनियम, दंडादेश के साथ साथ अर्थदण्ड उपबंधित करता है जबकि 2006 का अधिनियम केवल अर्थदण्ड का दण्ड उपबंधित करता है – अधिनियम 2006 की धारा 97, 1954 के निरसित अधिनियम के अंतर्गत दिये गये अभियोजन एवं दण्ड का संरक्षण करती है – 2006 के अधिनियम की धारा 97 एवं साधारण खंड अधिनियम की धारा 6 को दृष्टिगत रखते हुए, 2006 के अधिनियम के अंतर्गत कोई लाभ नहीं लिया जा सकता।

***C. Food Safety and Standard Act (34 of 2006), Section 97(1)(iii) & 97(1)(iv) – Repeal & Saving Clause* – Held – Section 97(1)(iii) & (iv) provides that repeal of Act shall not affect any investigation or remedy in respect of any penalty, forfeiture or punishment under the repealing Act – Punishment may be imposed as if Act of 2006 had not been passed. (Para 15)**

ग. खाद्य सुरक्षा और मानक अधिनियम (2006 का 34), धारा 97(1)(iii) व 97(1)(iv) – निरसन और व्यावृत्ति खंड – अभिनिर्धारित – धारा 97 (1) (*iii*) व (*iv*) उपबंधित करती हैं कि अधिनियम के निरसन का प्रभाव, निरसित अधिनियम के अंतर्गत किसी शास्ति, समपहरण या दण्ड के संबंध में किसी अन्वेषण अथवा उपचार को प्रभावित नहीं करेगा – दण्ड अधिरोपित किया जा सकता है मानो 2006 का अधिनियम पारित ही नहीं किया गया था।

***D. Criminal Procedure Code, 1973 (2 of 1974), Section 401(2) – Notice/ Opportunity of Hearing* – Held – Order of remand by High Court to**

the trial Court against Company cannot be sustained as the order was passed without giving an opportunity of hearing as contemplated u/S 401(2) of the Code, moreso when Company was not convicted by Trial Court. (Para 12 & 19)

घ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 401 (2) – नोटिस/सुनवाई का अवसर – अभिनिर्धारित – उच्च न्यायालय द्वारा कम्पनी के विरूद्ध विचारण न्यायालय को प्रतिप्रेषण का आदेश कायम नहीं रखा जा सकता क्योंकि सुनवाई का अवसर, जैसा कि संहिता की धारा 401 (2) के अंतर्गत अनुध्यात है, दिये बिना आदेश पारित किया गया था और अधिक, जब विचारण न्यायालय द्वारा कम्पनी को दोषसिद्ध नहीं किया गया था।

Cases Referred :

(1992) 2 SCC 552, (2018) 17 SCC 448, (1983) 1 SCC 177, Criminal Appeal No. 1831/2010 decided on 01.10.2019 (S.C.), AIR 1955 SC 84, (1975) 4 SCC 101, (2012) 5 SCC 661.

J U D G M E N T

The Judgment of the Court was delivered by:

HEMANT GUPTA, J.:- The challenge in the present appeals is to an order passed by the High Court of Madhya Pradesh, Jabalpur on 9.1.2020 whereby the revision filed by Shri Nirmal Sen, appellant/Nominated Officer (Incharge) of the Hindustan Unilever Limited[1], was allowed, however the matter was remitted back to the trial court to revisit the evidence adduced by both the parties, so far it relates to the appellants, Nirmal Sen and the Company. The operative part of the order reads thus:

> "8. If the company-Hindustan Lever Limited is acquitted of the charges, the said benefit will also directly go to the applicant. In view whereof, this Court finds a glaring and patent defect in the judgment of the trial Court as well as in the judgment of the appellate Court, thus, this Court, in these premises, finds it fit to interfere in the judgment of the trial Court in exercise of the revisional jurisdiction under Section 401(1) of Cr.P.C., hence, this Court is inclined to set aside the conviction and sentence passed against the applicant being a nominated person of the company and remitted back the matter to the trial Court for passing fresh judgment considering the company-Hindustan Lever Limited that had already been arrayed as an accused along with the applicant.
>
> 9. In view of aforesaid discussions, this revision is allowed. The impugned conviction and sentence passed against the applicant

[1]Hereinafter referred to as "Company".

> is hereby set aside and the matter is remitted back to the trial Court to revisit the evidence adduced by both the parties and also revisit its judgment dated 16/06/2015, so far as it relates with the applicant and company-Hindustan Lever Limited thereafter again pass a separate judgment after providing opportunity of hearing to the applicant as well as the company-Hindustan Lever Limited without getting prejudice with the discussions made by the appellate Court and this Court."

2. Brief facts leading to the present appeals are that a complaint was filed by Shri H.D. Dubey, Inspector, Food and Health, on the basis of a sample taken on 7.2.1989 in respect of Dalda Vanaspati Khajoor Brand Ghee manufactured by the Company, in terms of the provisions of The Prevention of Food Adulteration Act, 1954[2]. The sample of Vanaspati Ghee was taken from the godown of Lipton India Limited which was found to be adulterated as the melting point was found to be 41.8 degree centigrade which is higher than the normal range i.e. as against 31-41 degree centigrade. Initially, the complaint was filed against the Directors of the Company as well as that of Lipton India Limited. However, the said proceedings came to be decided by this Court in a judgment reported as *R. Banerjee & Ors.* v. *H.D. Dubey & Ors.*[3] wherein it was held as under:

> "12. In the result, the appeals are allowed. The order of the learned Magistrate as well as the impugned order of the High Court are set aside. The matters are remanded to the learned trial Magistrate with a direction to inquire into the question whether the nomination forms nominating H. Dayani and Dr Nirmal Sen were received and acknowledged by the Local (Health) Authority competent to receive and acknowledge the same. This question will be considered as a preliminary question and the learned magistrate will record a finding thereon. If he comes to the conclusion that the nomination forms had been acknowledged by the competent Local (Health) Authority he shall drop the proceedings against the Directors of the company, other than the company and the nominated persons. If on the other hand he comes to the conclusion that the prescribed forms had been acknowledged by a person other than the competent Local (Health) Authority he will proceed against all the persons who are shown as the accused in the complaint i.e. all the Directors including the nominated person and the company. The appeals are allowed accordingly."

3. In terms of the directions of this Court, it appears that the learned trial court passed an order on 6.7.1993 absolving the Directors of the Company and the

[2]For short, the '1954 Act'
[3](1992) 2 SCC 552

prosecution was ordered to continue against the appellant Nirmal Sen. The said order is not on record but it appears that no proceedings were continued against the Company inasmuch as it has four accused, namely, Lipton India Limited, Mohd. Saleem, Harish Dayani and Nirmal Sen were arrayed as accused.

4. The Act was then repealed and the Food Safety and Standards Act, 2006[4] came into force on 23.8.2006.

5. The learned trial court vide judgment dated 16.6.2015 convicted the appellant/Nominated Officer under various provisions of the 1954 Act. The learned trial court held as under:

> "58. That on the basis of the above complete evidence analysis, it is certified that on the day of the incident, the accused Dr. Nirmal Sen was a nominee of Hindustan Limited Company and the goods of the said company were given to the palm plantation oil vanaspati from Godown Rathore Clearing and Forwarding Agency, Panagar, Jabalpur, Mohd. Salim. Sale of Vanaspati by Hindustan Liver Limited to the complainant food inspector H.D. Dubey went to purchase there. At the time when the said product was sold, the adulteration was came in light, and according to rule 32(f) of the Act, the details were not even duly marked, which comes under the category of false impression in print of the packet or pouch.
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> xx xx xx
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> 60. Therefore, the accused Dr. Nirmal Sen was found to be guilty under Section 2(1G)(K) r/w Section 32(F)/7(i)/16(A)(i) and Section 2(ia)(m) r/w 7(i)/16(1)/(a) (i) of Food Adulteration Act, 1954 and Food Adulteration and Prevention Act under Section 14 r/w Rule 2(A) r/w Section 7(v)/16(1C)."

6. A complete reading of the order passed by the trial court does not lead to an inference that the Company was represented at any stage during the course of trial. It is to be noted that in the aforementioned judgment, there was no order passed by the learned trial court to convict the appellant-Company of any offence. The appellant Nirmal Sen contested the proceedings and was convicted by the trial court.

7. In an appeal against the said judgment, the learned Additional Sessions Judge held that the prosecution was found to be maintainable against Rathore Clearing and Forwarding Agency and the Company but the same was not mentioned in the impugned judgment and order. The Court held as under:

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[4] For short, the '2006 Act'

> "31. .....As per order dated 6.7.1993, the Hindustan Lever Limited also has been held accused, but erroneously, it could not have been mentioned in the impugned judgment and order. As per law, any company is a legal personality and it cannot be undergo imprisonment sentence. The appellant Nirmal Sen being the nominee for the offence of the aforesaid company, has been punished. In such situation, the appellant does not seem to be entitled for get any benefit only on the mere technical grounds."

8. The learned counsel for the appellant placed reliance on the judgment of this Court reported as *Nemi Chand* v. *State of Rajasthan*[5] before the learned Additional Sessions Judge, in support of the argument that pursuant to the repeal of the Act, only punishment of fine has been contemplated under the 2006 Act. Thus, since the provisions of the 2006 Act are beneficial to the accused, the accused is entitled to such benefits provided by the 2006 Act. It was found that the decision in *Nemi Chand* has been passed in exercise of the jurisdiction conferred on the constitutional courts, but the First Appellate Court does not have any such specific constitutional power. The Court rejected the applicability of the 2006 Act as the punishments imposed under the repealed Act have been saved by Section 97 of the 2006 Act. The Court held as under:

> "39. There is no doubt in it that as a result of amendment made by the post facto laws, if the sentence given for any offence is lessened or rejected then the accused is entitled to get benefit of it under Article 20 of the Constitution of India. But is also mentionable that the accused has been prosecuted and sentenced under the "Act" of 1954 in the matter under consideration and in place of it, the Food Safety and Standard Act, 2006 has been implemented since 24.08.2006. By section 97 (1) of this new Act, the Act of 1954 has been repealed but it also has been provided that action could be kept continued under the repealed Act and any such penalty, confiscation or punishment could be charged like it that as if this Act be not passed.
>
> 40. Thus, with regard to the offence occurred before the date of implementation of the new Act, the provisions of the "Act" of 1954 have applicability and it cannot be held the punishment has been lessened by amending in the offence under Section 16 of the old Act by the new Act. It seems from the records that the case has remained pending for several years before the Ld. Trial Court but several Stays submitted by the accused persons are also responsible for this delay and on this ground, they are not entitled for any sympathy. Keeping in view to the gravity of the offence, the sentence awarded to the appellant Nirmal Sen by

[5](2018) 17 SCC 448

> the Ld. Subordinate Court in the case seems in accordance with law and of appropriate and no need to interfere in it does not seem."

9. With the aforesaid discussion, the learned Additional Sessions Judge affirmed the conviction of the appellant/Nominated Officer but the conviction of the accused Harish Dayani and Mohd. Saleem was set aside and they were acquitted.

10. The High Court in its order noticed that if the Company is acquitted of the charges, the said benefit will also directly go to the appellant/Nominated Officer. A glaring and patent defect in the judgment of the trial court as well as in the judgment of the appellate court was observed by the High Court. Thus, the conviction and sentence passed against the appellant, being a nominated person of the Company, was set aside and the matter was remitted back to the trial Court for passing fresh judgment.

11. Before this Court, two-fold arguments were raised by the learned counsels for the appellants. Dr. Abhishek Manu Singhvi, learned senior counsel appearing on behalf of the appellant/Nominated Officer argued that the appellant was charged for the violation of Section 2(ia)(m) read with Section 7(i) of the Act. Such violation attracted a sentence of not less than six months and up to 3 years and a fine of Rs.1,000/- under Section 16(1)(a)(i), whereas under the 2006 Act, the punishment of such adulteration which is related to only higher melting point is fine of Rs.5 lakhs and Rs.1 lakh under Sections 3(1)(zx) and 3(1)(i) respectively. The reliance is placed upon judgments of this Court in *T. Barai* v. *Henry Ah Hoe & Anr.*[6]*, Nemi Chand* and *Trilok Chand* v. *State of Himachal Pradesh*[7].

12. Mr. Siddharth Luthra, learned senior counsel for the appellant-Company raised an argument that the Company was not convicted by the trial court. Therefore, the High Court in revision could not have passed an order of retrial, more so when the Company was not given any notice of being heard. Since there was no order of conviction by the trial court, as also no opportunity of hearing was given, such order is in contravention of sub-section (2) of Section 401 of the Code of Criminal Procedure, 1973[8]. Section 401 (2) of the Code reads thus:

> "401(2). No order under this section shall be made to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by pleader in his own defence."

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[6] (1983) 1 SCC 177

[7] Criminal Appeal No. 1831 of 2010 decided on 1.10.2019

[8] For short, the 'Codc'

13. We do not find any merit in the arguments raised by Dr. Singhvi with respect to the punishment provided under the 2006 Act. The judgment of this Court in *T. Barai* is consequent to amendment in the Act when Section 16A was inserted by the Parliament. Similarly, the judgment in *Nemi Chand* was a judgment arising out of the amendment in the Act only. The benefit of amendments in the Act, has been rightly granted to the accused in an appeal arising out of the proceedings under the Act. But in the present case, the Act has been repealed by Section 97 of the 2006 Act, however, the punishments imposed under the Act have been protected. Section 97 of the 2006 Act, which came into force on 5.8.2011, is as follows:

> "97. Repeal and savings.—(1) With effect from such date* as the Central Government may appoint in this behalf, the enactment and orders specified in the Second Schedule shall stand repealed:
>
> Provided that such repeal shall not affect:—
>
> *(i) the previous operations of the enactment and orders under repeal or anything duly done or suffered thereunder; or*
>
> *(ii) any right, privilege, obligation or liability acquired, accrued or incurred under any of the enactment or orders under repeal; or*
>
> *(iii) any penalty, forfeiture or punishment incurred in respect of any offences committed against the enactment and orders under repeal;* or
>
> *(iv) any investigation or remedy in respect of any such penalty, forfeiture or punishment,*
>
> *and any such investigation, legal proceedings or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed, as if this Act had not been passed:*
>
> (2) If there is any other law for the time being in force in any State, corresponding to this Act, the same shall upon the commencement of this Act, stand repealed and in such case, the provisions of Section 6 of the General Clauses Act, 1897 (10 of 1897) shall apply as if such provisions of the State law had been repealed.
>
> (3) Notwithstanding the repeal of the aforesaid enactment and orders, the licences issued under any such enactment or order, which are in force on the date of commencement of this Act, shall continue to be in force till the date of their expiry for all purposes, as if they had been issued under the provisions of this Act or the rules or regulations made thereunder.

> (4) Notwithstanding anything contained in any other law for the time being in force, no court shall take cognizance of an offence under the repealed Act or orders after the expiry of a period of three years from the date of the commencement of this Act." *(Emphasis Supplied)*

14. Section 6 of the General Clauses Act, 1897 provides the effect of repeal as under:

> "Where this Act or any Central Act or Regulation made after the commencement of this act repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not-
>
> (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment ....
>
> and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the Repealing Act or Regulation had not been passed."

15. In terms of Section 6 of the General Clauses Act, 1897, unless different intention appears, the repeal of a statute does not affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the Repealing Act or Regulation had not been passed. But in the 2006 Act, the repeal and saving clause contained in Section 97 (1)(iii) and (iv) specifically provides that repeal of the Act shall not affect any investigation or remedy in respect of any such penalty, forfeiture or punishment and the punishment may be imposed, "as *if the 2006 Act had not been passed"*. The question as to whether penalty or prosecution can continue or be initiated under the repealed provisions has been examined by this Court in *State of Punjab* v. *Mohar Singh*[9], wherein this Court examined Section 6 of the General Clauses Act which is on lines of Section 38(2) of the Interpretation Act of England. It was held as under:

> "6. Under the law of England, as it stood prior to the Interpretation Act of 1889, the effect of repealing a statute was said to be to obliterate it as completely from the records of Parliament as if it had never been passed, except for the purpose of those actions, which were commenced, prosecuted and concluded while it was an existing law [Vide *Craies on Statute*

[9] AIR 1955 SC 84

Law, 5th edn, p. 323] . A repeal therefore without any saving clause would destroy any proceeding whether not yet begun or whether pending at the time of the enactment of the Repealing Act and not already prosecuted to a final judgment so as to create a vested right [Vide *Crawford on Statutory Construction,* p. 599-600w] . To obviate such results a practice came into existence in England to insert a saving clause in the repealing statute with a view to preserve rights and liabilities already accrued or incurred under the repealed enactment. Later on, to dispense with the necessity of having to insert a saving clause on each occasion, Section 38(2) was inserted in the Interpretation Act of 1889 which provides that a repeal, unless the contrary intention appears, does not affect the previous operation of the repealed enactment or anything duly done or suffered under it and any investigation, legal proceeding or remedy may be instituted, continued or enforced in respect of any right, liability and penalty under the repealed Act as if the Repealing Act had not been passed. Section 6 of the General Clauses Act, as is well known, is on the same lines as Section 38(2) of the Interpretation Act of England.

9. The offence committed by the respondent consisted in filing a false claim. The claim was filed in accordance with the provision of Section 4 of the Ordinance and under Section 7 of the Ordinance, any false information in regard to a claim was a punishable offence. The High Court is certainly right in holding that Section 11 of the Act does not make the claim filed under the Ordinance a claim under the Act so as to attract the operation of Section 7. Section 11 of the Act is in the following terms:

> "The East Punjab Refugees (Registration of Land Claims) Ordinance 7 of 1948 is hereby repealed and any rules made, notifications issued, anything done, any action taken in exercise of the powers conferred by or under the said Ordinance shall be deemed to have been made, issued, done or taken in exercise of the powers conferred by, or under this Act as if this Act had come into force on 3rd day of March, 1948".

.....The truth or falsity of the claim has to be investigated in the usual way and if it is found that the information given by the claimant is false, he can certainly be punished in the manner laid down in Sections 7 and 8 of the Act. If we are to hold that the penal provisions contained in the Act cannot be attracted in case of a claim filed under the Ordinance, the results will be anomalous and even if on the strength of a false claim a refugee

> has succeeded in getting an allotment in his favour, such allotment could not be cancelled under Section 8 of the Act. We think that the provisions of Sections 47 and 8 make it apparent that it was not the intention of the Legislature that the rights and liabilities in respect of claims filed under the Ordinance shall be extinguished on the passing of the Act, and this is sufficient for holding that the present case would attract the operation of Section 6 of the General Clauses Act. It may be pointed out that Section 11 of the Act is somewhat clumsily worded and it does not make use of expressions which are generally used in saving clauses appended to repealing statutes; but as has been said above the point for our consideration is whether the Act evinces an intention which is inconsistent with the continuance of rights and liabilities accrued or incurred under the Ordinance and in our opinion this question has to be answered in the negative."

16. In another judgment reported as *Tiwari Kanhaiyalal & Ors.* v. *Commissioner of Income Tax, Delhi*[10], the assessments were completed under the Income Tax Act, 1922 after the Income Tax Act, 1961 came into force. There was search on the premises of the assessee. The revised returns were filed after the Income Tax Act, 1961 came into force. The penalty proceedings were initiated and it was levied under the 1961 Act. Later, the complaints were filed alleging commission of the offences under Section 277 of 1961 Act. Another set of complaints were filed under the Income Tax Act, 1922. This Court held that the complaints under the 1922 Act remains unaffected. It was held as under:

> "7. It is advisable to discuss and dispose of a new point which arose during the hearing of these appeals. Sub-section (1) of Section 297 of the 1961 Act repealed the 1922 Act including Section 52. In sub-section (2) no saving seems to have been provided for the launching of the prosecution under the repealed Section 52 of the 1922 Act. It does not seem correct to take recourse to clause (h) of Section 297(2) to make the offences come under Section 277 of the 1961 Act as was endeavoured to be done by the respondent in the first 12 complaint petitions. But then from no clause under sub-section (2) a different intention appears in this regard from what has been said in Section 6 of the General Clauses Act. On the facts alleged the criminal liability incurred under Section 52 of the 1922 Act remains unaffected under clause (c) of Section 6 of the General Clauses Act...."

17. Thus, in view of Section 97 of the 2006 Act, as also under Section 6 of the General Clauses Act, 1897, the proceedings would continue under the Act. No benefit can be taken under the 2006 Act as the prosecution and punishment under the Act is protected.

[10] (1975) 4 SCC 101

18. The judgment of this Court in *Trilok Chand* is the only judgment which has given benefit of the 2006 Act and the sentence was imposed by imposing a fine of Rs.5,000/-. The attention of the Court was not drawn to Section 97 of the 2006 Act, which protects the punishments given under the repealed Act. Therefore, the order in *Trilok Chand* is on its own facts.

19. However, we find merit in the argument of Mr. Luthra that the order of remand by the High Court to the trial court against the Company cannot be sustained for the reason that such an order was passed without giving an opportunity of hearing, as contemplated under Section 401(2) of the Code. The question thus now narrows down as to whether the course adopted by the High Court to remand the matter to the trial court after more than 30 years to cure the defect which goes to the root of the trial, though permissible in law, is justified.

20. A three-Judge Bench of this Court in *Aneeta Hada* v. *Godfather Travels & Tours Private Limited*[11] considered the question of conviction of the Directors in the absence of the Company in proceedings under Section 138 of the Negotiable Instruments Act, 188[12] as also in the proceedings under Information Technology Act, 2000. This Court held that Section 141 of the NI Act dealing with offences by companies contemplates that every person who at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. This Court, considering the said provision, held as under:

> "38. From the aforesaid pronouncements, the principle that can be culled out is that it is the bounden duty of the court to ascertain for what purpose the legal fiction has been created. It is also the duty of the court to imagine the fiction with all real consequences and instances unless prohibited from doing so. That apart, the use of the term "deemed" has to be read in its context and further, the fullest logical purpose and import are to be understood. It is because in modern legislation, the term "deemed" has been used for manifold purposes. The object of the legislature has to be kept in mind.
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> xx xx xx
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> 56. We have referred to the aforesaid passages only to highlight that there has to be strict observance of the provisions regard being had to the legislative intendment because it deals with penal provisions and a penalty is not to be imposed affecting the rights of persons, whether juristic entities or individuals, unless

[11](2012) 5 SCC 661
[12]For short, the 'NI Act'

they are arrayed as accused. It is to be kept in mind that the power of punishment is vested in the legislature and that is absolute in Section 141 of the Act which clearly speaks of commission of offence by the company. The learned counsel for the respondents have vehemently urged that the use of the term "as well as" in the section is of immense significance and, in its tentacle, it brings in the company as well as the Director and/or other officers who are responsible for the acts of the company and, therefore, a prosecution against the Directors or other officers is tenable even if the company is not arraigned as an accused. The words "as well as" have to be understood in the context.

xx xx xx

58. Applying the doctrine of strict construction, we are of the considered opinion that commission of offence by the company is an express condition precedent to attract the vicarious liability of others. Thus, the words "as well as the company" appearing in the section make it absolutely unmistakably clear that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. One cannot be oblivious of the fact that the company is a juristic person and it has its own respectability. If a finding is recorded against it, it would create a concavity in its reputation. There can be situations when the corporate reputation is affected when a Director is indicted.

59. In view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative....."

21. Section 17 of the Act reads as under:

"17. Offences by companies—(1) Where an offence under this Act has been committed by a company—

(*a*) (*i*) the person, if any, who has been nominated under sub-section (2) to be in charge of, and responsible to, the company for the conduct of the business of the company (hereinafter in this section referred to as the person responsible), or

(*ii*) where no person has been so nominated, every person who at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of the business of the company; *and*

(b) the company,

shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act if he proves that the offence was committed without his knowledge and that he exercised all due diligence to prevent the commission of such offence.

(2) **** ****"

22. Clause (a) of Sub-Section (1) of Section 17 of the Act makes the person nominated to be in charge of and responsible to the company for the conduct of business and the company shall be guilty of the offences under clause (b) of Sub-Section (1) of Section 17 of the Act. Therefore, there is no material distinction between Section 141 of the NI Act and Section 17 of the Act which makes the Company as well as the Nominated Person to be held guilty of the offences and/or liable to be proceeded and punished accordingly. Clauses (a) and (b) are not in the alternative but conjoint. Therefore, in the absence of the Company, the Nominated Person cannot be convicted or vice versa. Since the Company was not convicted by the trial court, we find that the finding of the High Court to revisit the judgment will be unfair to the appellant/Nominated Person who has been facing trial for more than last 30 years. Therefore, the order of remand to the trial court to fill up the lacuna is not a fair option exercised by the High Court as the failure of the trial court to convict the Company renders the entire conviction of the Nominated Person as unsustainable.

23. In view of the above, the appeals are allowed and the order passed by the High Court is set aside. Resultantly the complaint is dismissed.

Appeal allowed

I.L.R. [2020] M.P. 2757 (DB)
WRIT APPEAL

Before Mr. Justice S. A. Dharmadhikari & Mr. Justice Vishal Mishra

W.A. No. 881/2020 (Gwalior) decided on 14 October 2020

SUNIL KUMAR JEEVTANI …Appellant

Vs.

STATE OF M.P. & ors. …Respondents

***A. Arms Act (54 of 1959), Section 13 & 14 – Grant of Arms License – Grounds – Application for grant of license rejected by State* – Held – Application of petitioner duly recommended by S.P., Collector and Commissioner – Provisions of Section 13 & 14 of the Act of 1959 not considered by**

State Government as well as by Single Judge – Impugned order appears to be a non speaking order and thus set aside – Order of State Government is quashed – Matter remanded back to State Government for fresh consideration – Appeal allowed. (Paras 11 to 14)

क. आयुध अधिनियम (1959 का 54), धारा 13 व 14 – आयुध अनुज्ञप्ति का प्रदान – आधार – राज्य द्वारा अनुज्ञप्ति हेतु आवेदन नामंजूर किया गया – अभिनिर्धारित – याची का आवेदन एस.पी., कलेक्टर एवं आयुक्त द्वारा सम्यक रूप से अनुशंसित – 1959 के अधिनियम की धारा 13 व 14 के उपबंधों को राज्य सरकार के साथ–साथ एकल न्यायाधीश द्वारा विचार में नहीं लिया गया – आक्षेपित आदेश एक कारण विहीन आदेश प्रतीत होता है और इसलिए अपास्त – राज्य सरकार का आदेश अभिखंडित – राज्य सरकार को नये सिरे से विचार करने हेतु मामला प्रतिप्रेषित – अपील मंजूर।

***B. Interpretation – "Executive Instructions"* – Held – Although executive instructions issued from time to time, looking to changing scenario of society, can be taken into consideration by authorities but alongwith statutory provisions provided under the Act and Rules. (Para 13)**

ख. निर्वचन – ''कार्यपालिक अनुदेश'' – अभिनिर्धारित – यद्यपि, बदलते सामाजिक परिदृश्य को देखते हुए समय–समय पर जारी किये गये कार्यपालिक अनुदेशों को प्राधिकारीगण द्वारा विचार में लिया जा सकता है किन्तु अधिनियमों एवं नियमों में दिये गये कानूनी उपबंधों के साथ।

Cases referred :

W.A. No. 1249/2018 decided on 10.1.2019 (D.B.), 2013 (3) MPLJ 219, W.P. No. 7879/2016 decided on 4.7.2018, W.P. No. 20488/2018 decided on 14.07.2020 (2010) 9 SCC 496

Arvind Dudawat, for the appellant.
Sankalp Sharma, for the respondents/State.

O R D E R

(Heard through Video Conferencing)

The Order of the Court was passed by :
VISHAL MISHRA, J: - With the consent of learned counsel for the parties, the matter is heard finally.

1. This intra-court appeal under Section 2 (1) of Madhya Pradesh Uchcha Nyayalya (Khand Nyayapeeth Ko Appeal) Adhiniyam, 2005 is directed against the order dated 25.8.2020 passed in Writ Petition No.2396/2017, whereby the writ petition preferred by the petitioner challenging the order passed by the State Government rejecting the application for grant of arms licence has been dismissed.

2. It is argued that the petitioner is a businessman carried out his business in Dabra and looking to the law and order situation in Dabra he has applied for grant of N.P. Bore Revolver/Pistol arms licence. It is submitted that the case of the petitioner was duly taken up for consideration by the Superintendent of Police and after due verification into the matter he has recommended for grant of licence vide its letter dated 18.5.2015. The District Magistrate has given his recommendation vide letter dated 15.1.2016. The matter was placed before the Commissioner, Gwalior Division, Gwalior, who has also given his recommendation on 16.3.2016 and has forwarded the matter to the State Government. The State Government without giving any show cause notice to the petitioner and without giving any opportunity of hearing to the petitioner has rejected the application vide order dated 9.9.2016, without considering the relevant provisions of Arms Act, 1959 which was put to challenge by filing the writ petition before this Court.

3. It is argued that there is no criminal case registered against the petitioner. It was argued before the learned Writ Court that the provisions of sections 13 and 14 of the Arms Act, 1959 are relevant for considering the application for grant of arms licence and for refusal of arms licence. It is argued that the order passed by the State Government which was put to challenge in the writ petition does not show that the State Government while considering the application for grant of arms licence has considered the provisions of section 13 and 14 of the Arms Act, 1959. It is argued that the reason shown for rejection of the application is that the petitioner could not point out any incident or has not mentioned in the application that his life is in danger or he is having threat to his life or liberty from anyone. In absence of any such specific incident being shown by the applicant and considering the new policy of the arms licence the application of the petitioner was rejected. It is argued that the question regarding consideration of application for grant of arms licence has been dealt by the Division Bench of this Court in the case of *Chhotelal Pachori Vs. State of M.P. and others,* (W.A.No.1249/2018, decided on 10.1.2019), wherein after exhaustive consideration with respect to Section 13 and 14 of the Arms Act, the Division Bench of this Court has quashed the order issued by the State Government for grant of refusal of arms licence. It is submitted that the case of the petitioner is exactly identical to that which has been considered by the Division Bench of this Court. It is further pointed out that the aforesaid aspect was put-forth before the learned Single Judge, but no consideration is being made and only on the pretext that neither the petitioner nor the State has pointed out the application filed by the petitioner for grant of arms licence and in view of the new policy of the State Government which gives discretion to the State to refuse for grant of licence in case there is no danger to life is shown, no illegality is found in the order passed by the State Government and has dismissed the writ petition.

4. It is argued that the question regarding consideration of application for grant of arms licence has been dealt with in large number of cases by this Court. In Writ Appeal No. 1249/2018 (Chhotelal Pachori Vs. State of M.P. and others) this Court has remanded the matter for fresh consideration to the State Government in terms of sections 13 and 14 of the Arms Act. The aforesaid case is identical to the present facts of the case. It is submitted that although holding of arms licence is not a fundamental right, but life to livelihood and carrying out the business in free and fair manner without there being any threat to life is a fundamental right provided under the Constitution of India. It is submitted that the application of the petitioner was duly considered and report was submitted by the Police Authorities as required under the Arms Act and thereafter the Superintendent of Police has recommended the petitioner's application and thereafter by the Collector and Commissioner and the State Government was not having any other option except to consider the application for grant of arms licence in terms of sections 13 and 14 of the Arms Act. A detailed procedure is being prescribed under the Arms Act for consideration of application of arms licence, despite of the same being followed by the authorities and has recommended the case of petitioner for grant of Arms licence, the State Government has rejected the application without considering the provisions. The learned Single Judge has not considered the aforesaid aspect while passing the impugned order. It is argued that in catena of judgments the aforesaid analogy is being followed and orders have been passed by this Court which were placed for consideration before the learned Single Judge, but of no consequence. It is argued that learned Single Judge has considered the judgment passed by the Full Bench in the case of *Smt. Pratibha Chauhan Vs. State of M.P. and others*, 2013 (3) MPLJ 219, and has held that it is within the domain of the State Government to issue executive instructions with respect to grant or refusal of arms licence and considering the aforesaid has held that the order passed by the State Government rejecting the application of the petitioner was well within the jurisdiction of the State Government and the petition was dismissed.

5. It is argued that the Rules are being framed for grant of arms licence and the executive instructions cannot override the statutory provisions provided under the Act and the Rules. In these circumstances, the executive instructions issued cannot override the Rules and Regulations and the application should have been decided in terms of Section 13 and 14 of the Arms Act, 1959. He has prayed for setting aside of the impugned order and for further direction to the State Government to reconsider the application for grant of arms licence in terms of Section 13 and 14 of the Arms Act, 1959 and also the judgment passed by the Division Bench of this Court in the case of *Chhotelal Pachori* (supra).

6. Per contra counsel for the State has opposed the contentions raised by the appellant and has argued that the well reasoned and justified order has been passed by the learned Single judge. The petitioner has not even filed the application before

the learned Writ Court to show that on what ground he has applied for arms licence. It is argued that it is the discretion of the State Government to consider the applications for grant of arms licence and the question regarding issuance of executive instructions for grant of arms licences was considered by this Court in the case of *Smt. Pratibha Chauhan* (supra) in Full Bench and it was held that in certain cases it is the discretion of the authorities to pass executive instructions looking to the facts and circumstances and looking to the circumstances prevailing in the society at large. A new executive instructions have been issued by the State Government in the year 2016 and new policy for grant of arms licence has been formulated and in terms of the new policy the petitioner was not found entitled for grant of arms licence, accordingly, his application was rejected. It is argued that heavy burden lies upon the petitioner/person who is applying for the arms licence to demonstrate that he is having any danger of his life from any person or he is required to point out any such incident which could have endangered his life and in such circumstances only the application for grant of arms licence can be considered. In the present case, the petitioner has totally failed to demonstrate that under what circumstances he has filed the application. The learned Single Judge has correctly observed that bald allegation has been levelled by the petitioner to point out the fact that he is having threat of his life and liberty. No incident could have been pointed out by the petitioner. He has not even filed his application in the writ petition to show that on what grounds the application for grant of arms licence was preferred. In these circumstances, the learned Writ Court has not committed any error and has rightly rejected the application for grant of arms licence. There is no illegality in the impugned order. He has prayed for dismissal of the writ appeal.

7. Heard the learned counsel for the parties and perused the record.

8. On perusal of the record it is seen that the appellant who is a businessman in City Dabra, District Gwalior has applied for grant of short arms licence. After the inquiry into the matter the report was submitted before the Superintendent of Police and he has recommended for grant of licence to the petitioner vide his recommendation letter dated 18.5.2015 which is Annexure P/2 in the writ petition. Subsequent thereto the recommendation was made by the District Magistrate vide its letter dated 15.1.2016 (Annexure P/3) and the matter was forwarded to the Divisional Commissioner, who has also recommended for grant of licence to the petitioner vide letter dated 16.3.2016 (Annexure P/4) and the matter was forwarded to the State Government. The State Government vide impugned order dated 9.9.2016 has rejected the application of the petitioner on the ground that the petitioner could not point out any unfavourable incident or point out any person from whom his life is in danger. Therefore, in absence of any specific stipulation to the aforesaid the application for grant of arms licence cannot be considered in terms of the new policy of the arms licence. The relevant

provisions of Arms Act which deals with consideration of application for grant or refusal of licence is required to be seen. Section 13 and Section 14 of the Arms Act, 1959 are relevant which reads as under:

> **"13. Grant of licences.—***(1)* An application for the grant of a licence under Chapter II shall be made to the licensing authority and shall be in such form, contain such particulars and be accompanied by such fee, if any, as may be prescribed.
>
> [(*2*) On receipt of an application, the licensing authority shall call for the report of the officer in charge of the nearest police station on that application, and such officer shall send his report within the prescribed time.
>
> *(2-A)* The licensing authority, after such inquiry, if any, as it may consider necessary, and after considering the report received under sub-section (*2*), shall, subject to the other provisions of this Chapter, by order in writing either grant the licence or refuse to grant the same:
>
> Provided that where the officer in charge of the nearest police station does not send his report on the application within the prescribed time, the licensing authority may, if it deems fit, make such order, after the expiry of the prescribed time, without further waiting for that report.] (3) The licensing authority shall grant—
>
> (*a*) a licence under section 3 where the licence is required—
>
> (*i*) by a citizen of India in respect of a smooth bore gun having a barrel of not less than twenty inches in length to be used for protection or sport or in respect of a muzzle loading gun to be used for *bona fide* crop protection:
>
> Provided that where having regard to the circumstances of any case, the licensing authority is satisfied that a muzzle loading gun will not be sufficient for crop protection, the licensing authority may grant a licence in respect of any other smooth bore gun as aforesaid for such protection, or
>
> *(ii)* in respect of a point 22 bore rifle or an air rifle to be used for target practice by a member of a rifle club or rifle association licenced or recognised by the Central Government;
>
> (*b*) a licence under section 3 in any other case or a licence under section 4, section 5, section 6, section 10 or section 12, if the licensing authority is satisfied that the person by whom the licence is required has a good reason for obtaining the same.

> **14. Refusal of licences.—***(1)* Notwithstanding anything in section 13, the licensing authority shall refuse to grant—
>
> (*a*) a licence under section 3, section 4 or section 5 where such licence is required in respect of any prohibited arms or prohibited ammunition;
>
> (*b*) a licence in any other case under Chapter II,—
>
> (*i*) where such licence is required by a person whom the licensing authority has reason to believe —
>
> (*1*) to be prohibited by this Act or by any other law for the time being in force from acquiring, having in his possession or carrying any arms or ammunition, or
>
> (2) to be of unsound mind, or
>
> (3) to be for any reason unfit for a licence under this Act; or
>
> (*ii*) where the licensing authority deems it necessary for the security of the public peace or for public safety to refuse to grant such licence.
>
> *(2)* The licensing authority shall not refuse to grant any licence to any person merely on the ground that such person does not own or possess sufficient property.
>
> (3) Where the licensing authority refuses to grant a licence to any person it shall record in writing the reasons for such refusal and furnish to that person on demand a brief statement of the same unless in any case the licensing authority is of the opinion that it will not be in the public interest to furnish such statement."

9. From perusal of the aforesaid sections, it is seen that the consideration on application for grant of arms licence could only be made in terms of section 13 and 14 of the Arms Act, 1959.

10. The Division Bench of this Court in the case of *Chhotelal Pachori* (supra) had an occasion to deal with the similar issue, whereby the application for grant of arms licence was rejected by the State Government. Merely assigning the reason of absence of threat to life or security of the applicant and grant not being in line with the new policy of the State Government, the application was rejected. The Division Bench of this Court in the aforesaid case has considered the new arms policy issued by the State Government and after minute consideration to the overall facts and circumstances and the relevant provisions, has held as under:

> "10. In view of discussion supra it seems that the over riding character of Sec.14 over and above Sec.13 and the mandatory

provision of Sec.14 (3) missed the attention of the learned Single Judge who thus fell in error in sustaining the impugned order of the State.

Reliance placed by the writ Court upon the full bench decision of the Patna High Court in **Kapil Deo Singh Vs. State of Bihar AIR 1987 Patna 122** is misplaced as the question before the full Bench was as follows:- Would the registration and pendency of criminal case for a major or capital offence justify the suspension or revocation of a licence under Clause (a) of Sub-sec.(3) of Sec.17 of the Arms Act is the significant question necessitating this reference to the full Bench.

11. The full Bench of Patna High Court primarily analysed Sec.17 of the Amrs Act with only passing reference to Sec.13 and 14 while answering the question posed before it in the affirmative that registration and pendency of a criminal case for a major or capital offence may for adequate reason justify the suspension or revocation of an arms licence under clause (1) of Sub-Sec.(3) Sec.17 of the Arms Act. The aforesaid comparative analysis of Sec.13 and 14 of Arms Act, in particular the over riding effect of Sec.14(3) over Sec.13 was neither the subject matter before the full Bench and, therefore, was not discussed. Thus, the decision of the full Bench of the Patna High Court in the case of Kapil Deo (supra) is of no avail qua to the controversy involved herein.

12. Consequently, this Court has no manner of doubt that the reasons assigned by the Licencing Authority/State Government in the impugned order while refusing to grant licence to the petitioner do not satisfy the mandatory requirement of Sec.14 (3) of the Arms Act.

13. Consequently this writ appeal stands allowed in the following terms :-

a. The impugned order dated 06.07.2018 passed in W.P.No.23123/2017 and of the State Govt. dated 24.06.2017 vide Annexure P-1 stand quashed.

b. Accordingly, the W.A.No.23123/2017 stands allowed and the respondent/State is directed to reconsider the application of petitioner for grant of arms licence in accordance with the statutory provision under the Arms Act as explained above and pass a speaking order within outer limit of three months from the date of receipt of certified copy of the order. No cost".

11. It was pointed by the appellant's counsel that in large number of cased (sic : cases) the learned Single Judge has also considered the similar preposition and has passed order in the case of *Jitendra Gupta Vs. State of M.P.,* W.P.No.7879/2016 decided on 4.7.2018 and in the case of *Keshav Upadhyay Vs. State of M.P.,* W.P.No.20488/2018 decided on 14th July, 2020. The aforesaid judgments passed by the Division Bench as well as by the Single Bench were brought to the notice of the learned Single Judge, but they were not considered. It is seen from the impugned order in the writ petition that the State Government has only rejected the application on the ground that the petitioner could not point out any threat to his life and in terms of new policy of the Arms Act, the application was rejected. But the fact remains that the application of petitioner was duly recommended by the Superintendent of Police, Collector and Commissioner respectively. It is clear from the impugned order that there is no consideration with respect to the provisions of section 13 and section 14 of the Arms Act, which deals with grant and refusal of arms licence and it appears to be a non-speaking order. The Hon'ble Supreme Court in the case of *Kranti Associates Private Ltd. and another Vs. Masood Ahmed Khan and others*, (2010) 9 SCC 496 has held as under:

> "51. Summarizing the above discussion, this Court holds:-
>
> a. In India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially.
>
> b. A quasi-judicial authority must record reasons in support of its conclusions.
>
> c. Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.
>
> d. Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power.
>
> e. Reasons reassure that discretion has been exercised by the decision maker on relevant grounds and by disregarding extraneous considerations.
>
> f. Reasons have virtually become as indispensable a component of a decision making process as observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies.
>
> g. Reasons facilitate the process of judicial review by superior Courts.
>
> h. The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned

decisions based on relevant facts. This is virtually the life blood of judicial decision making justifying the principle that reason is the soul of justice.

i. Judicial or even quasi-judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is important for sustaining the litigants' faith in the justice delivery system.

j. Insistence on reason is a requirement for both judicial accountability and transparency.

k. If a Judge or a quasi-judicial authority is not candid enough about his/her decision making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism.

l. Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or 'rubber-stamp reasons' is not to be equated with a valid decision making process.

m. It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency in decision making not only makes the judges and decision makers less prone to errors but also makes them subject to broader scrutiny. (See David Shapiro in Defence of Judicial Candor (1987) 100 Harward Law Review 731-737).

n. Since the requirement to record reasons emanates from the broad doctrine of fairness in decision making, the said requirement is now virtually a component of human rights and was considered part of Strasbourg Jurisprudence. See (1994) 19 EHRR 553, at 562 para 29 and Anya vs. University of Oxford, 2001 EWCA Civ 405, wherein the Court referred to Article 6 of European Convention of Human Rights which requires, "adequate and intelligent reasons must be given for judicial decisions".

o. In all common law jurisdictions judgments play a vital role in setting up precedents for the future. Therefore, for development of law, requirement of giving reasons for the decision is of the essence and is virtually a part of "Due Process".

12. Thus, from the aforesaid analysis it is clear that the grounds raised by the petitioner were not considered by the learned Single Judge. As far as the consideration of learned Single Judge with respect to the Full Bench judgment in the case of *Smt. Pratibha Chauhan* (supra) is concerned, the case of *Smt. Pratibha*

Chauhan (supra) was dealing with an issue with respect to grant of arms dealer licence and not of the arms licence. The notification dated 16.7.2010 issued by the State Government whereby certain instructions prescribing a certain number of arms and ammunitions as a condition precedent for renewal was placed for consideration before the Full Bench. The Full Bench of this Court in *Smt. Pratibha Chouhan* (supra) has answered the reference as under:

> "26. On the basis of the aforesaid discussion we answer the substantial questions of law accordingly:
>
> (i) That the State Government or its authorities are competent to issue executive instructions or conditions for issuing, varying or renewing the arms licence as far as the aforesaid conditions or instructions are not contrary to the provisions of Act of 1959 and Rules of 1962 or statutory order issued thereunder from time to time by the Union of India in exercise of power of discretion endowed on the authorities under the provisions of Act of 1959 and Rules of 1962.
>
> (ii) That, the view taken by the Gwalior Bench in Arun Mangal and others Vs. State of M.P. and others, W.P.No.1224/2005 to the effect that the State Authorities are competent to issue instructions to a licensing authority in regard to grant of license in exercise of discretion by the authorities provided to them under Act of 1959 and Rules of 1962 is in accordance with law and correct.
>
> (iii) xxxx xxxxx"

13. In the case in hand, deals with grant of arms licence, although the executive instructions issued from time to time looking to the changing scenario of the society, can be taken into consideration by the authorities but along with the statutory provisions provided under the Act and Rules. The State Government has only rejected the application considering the new policy issued by the State Government with respect to grant of arms licence, but none of the provisions provided under Section 13 and 14 have been considered by the State Government.

14. In the aforesaid facts and circumstances, the order passed by the State Government is unsustainable. The aforesaid aspect was not considered by the learned Single Judge. Accordingly, the order impugned dated 25.8.2020 passed in W.P.No.2396/2017 is set aside. The order dated 9.9.2016 passed by the State Government rejecting the application for grant of arms licence is quashed. The matter is remanded back to the State Government for fresh consideration of the application of the appellant for grant of short arms licence N.P. Bore Revolver/Pistol licence, taking into consideration the relevant provisions section 13 and 14 of the Arms Act, 1959 and considering the judgment passed by Full

Bench in the case of *Smt. Pratibha Chauhan* (supra) and the Division Bench judgment in the case of *Chhotelal Pachori* (supra) the State Government is also free to consider the executive instructions along with the statutory provisions provided under the Act.

15. In view of above, the writ appeal filed by the appellant is hereby allowed with no order as to costs.

Appeal allowed

I.L.R. [2020] M.P. 2768 (DB)
WRIT PETITION

Before Mr. Justice S.C. Sharma & Mr. Justice Shailendra Shukla

W.P. No. 7902/2020 (Indore) decided on 8 October, 2020

AKSHAY N. PATEL (MR.) …Petitioner

Vs.

RESERVE BANK OF INDIA & anr. …Respondents

***A. Foreign Trade (Development & Regulation) Act, (22 of 1992), Section 3 and Constitution – Article 19(1)(g), 19(6) & 21 – Merchanting Trade Transactions (MTT) – Prohibition of Supply of KN 95 Mask* – Held – Even though goods are not coming to India at any point of time under MTT, only those goods which are permitted for export or for import are eligible for MTT – It is a policy decision taken by Government of India – Statutory provisions, rules, circulars and notifications are issued from time to time for MTT under the prevailing Foreign Trade Policy – Circular of RBI not violating rights of petitioner – Fundamental rights of freedom of trade & Commerce can be subject to reasonable restrictions – No absolute ban on MTT – Circular not *ultra vires* and not violating freedom of trade and commerce of petitioner – Petition dismissed.**

(Paras 38, 40 to 46, 48, 53, 54 & 61)

क. विदेशी व्यापार (विकास और विनियमन) अधिनियम (1992 का 22), धारा 3 एवं संविधान – अनुच्छेद 19(1)(g), 19(6) व 21 – वाणिज्यिक व्यापार संव्यवहार (मर्चेन्टिंग ट्रेड ट्रान्जेक्शन) (MTT) – KN95 मास्क के प्रदाय पर प्रतिषेध – अभिनिर्धारित – चूंकि वाणिज्यिक व्यापार संव्यवहार के अंतर्गत किसी भी समय भारत में माल नहीं आ रहा है, केवल वह माल, जो निर्यात अथवा आयात हेतु अनुमति प्राप्त है, वाणिज्यिक व्यापार संव्यवहार हेतु पात्र है – यह भारत सरकार द्वारा लिया गया एक नीति निर्णय है– वाणिज्यिक व्यापार संव्यवहार हेतु समय समय पर, विद्यमान विदेश व्यापार नीति के अंतर्गत, कानूनी उपबंधों, नियमों, परिपत्रों एवं अधिसूचनाओं को जारी किया गया है – आर.बी.आई. का परिपत्र, याची के अधिकारों के उल्लंघन में नहीं – व्यापार व वाणिज्य की स्वतंत्रता के मूलभूत अधिकार, युक्तियुक्त निर्बंधनों के अधीन हो सकते हैं– वाणिज्यिक व्यापार

संव्यवहार पर आत्यंतिक पाबंदी नहीं – परिपत्र अधिकारातीत नहीं एवं याची के व्यापार एवं वाणिज्य की स्वतंत्रता का उल्लंघन नहीं करता – याचिका खारिज।

***B. Constitution – Article 226/227 – Scope & Jurisdiction* – Held – Courts normally do not interfere with the State policy particularly in financial matter unless fraud or lack of *bonafides* is alleged and established. (Para 46)**

ख. संविधान – अनुच्छेद 226/227 – व्याप्ति व अधिकारिता – अभिनिर्धारित – न्यायालय, सामान्यतः, राज्य की नीति में हस्तक्षेप नहीं करेंगे, विशिष्ट रूप से वित्तीय मामलों में, जब तक कि कपट अथवा सद्भाविकता के अभाव को अभिकथित एवं स्थापित नहीं किया गया है।

Cases referred :

2020 SCC OnLine SC 275, AIR 1952 SC 196, AIR 1960 SC 430, AIR 1966 Cal 167, 2001 SCC OnLine AP 421, (1995) 1 SCC 274, (1996) 5 SCC 268, (2011) 3 SCC 778, (2005) 8 SCC 612, (2003) 7 SCC 589, (2003) 7 SCC 628, (2016) 7 SCC 592, (2005) 8 SCC 534, AIR 1958 SC 731, (2004) 3 SCC 402, 1994 Supp (1) SCC 160, AIR 1960 SC 530.

Abhinav Malhotra, for the petitioner.
Bharat A. Chitale, for the respondent No. 1.
Milind Phadke, for the respondent No. 2.

O R D E R

The petitioner before this Court has filed this present petition challenging the circular issued by the Reserve Bank of India dated 23/01/2020 which is in respect of Merchanting Trade Transactions (MTT).

2. The petitioner's contention is that the petitioner is an Indian citizen and is engaged in the business of manufacturing and trading of Pharmaceutical, Herbal, Skin Care and Personal Protective Equipment (PPE) products in India and several other countries. The petitioner has further stated that Corona Virus has infected large number of people over the entire globe and Personal Protective Equipment (PPE) Kits, Masks and Ventilators are in acute shortage all over the globe.

3. The petitioner has further stated that as there was an acute shortage of PPE Kits, Masks, Sanitizer, etc. and as some of the countries were manufacturing more than the demand in their own country, the petitioner wanted to supply the goods to United States of America (USA).

4. The petitioner has further stated that he has negotiated the supply of PPE Kits and other goods with a buyer of United States of America and he has placed an order for purchase of KN95 Masks from a manufacturing Company based in

China, meaning thereby, the petitioner wanted to purchase the goods from China and to supply in United States of America by exploiting the system of Merchanting Trade Transactions which involves an Indian Bank as well as Reserve Bank of India.

5. The petitioner has further stated that under the Merchanting Trade Transactions an Indian Citizen facilitates the export of any goods or material from a Company or individual of an export country (other than India) and then import / supply of the said goods to a Company in another country, which is also other than India. Thus, in short their contention is that goods are neither manufactured in India nor imported to India at any point of time, however, the profit comes to India in various currencies.

6. The petitioner has further stated that Merchanting Trade Transaction Contracts are regulated and governed by Reserve Bank of India by issuing circulars from time to time and the Reserve Bank of India in the year 2000 in exercise of its powers conferred under Section 10(4) and Section 11(1) of the Foreign Exchange Management Act, 1999 has issued a circular dated 24/08/2000 to regulate any Merchanting Trade Transaction contract entered into by any Indian national. The aforesaid circular was amended later on in the year 2014 i.e. on 27/01/2014.

7. The petitioner has further stated that on 23/01/2020 the Reserve Bank of India has issued another notification dated 23/01/2020 and revised guidelines for Merchanting Trade Transactions have been issued superseding its earlier guidelines. The petitioner's grievance is that Rule 2 Clause (iii) provides that MTT shall be undertaken for the goods that are permitted for export / import under the prevailing Foreign Trade Policy (FTP) as on the date of shipment.

8. The petitioner has further stated that after receiving the Merchanting Trade Transaction contracts for supply of KN95 Masks manufactured in China to the buyer based in United States of America, the petitioner on 01/05/2020 contacted its banker for execution of necessary international trade documents and requested its bankers to open a Letter of Credit in favour of manufacturer / supplier based in China.

9. The petitioner has further stated that on 05/05/2020 the officials of HDFC Bank wrote to the petitioner that at present on account of spread of Corona Virus Disease, the Union of India through Director General of Foreign Trade (DGFT) has prohibited export of PPE Kits, Masks, Ventilators and Sanitizer from India and because Merchanting Trade Transactions regulations dated 23/01/2020 as contained in Clause 2(iii) which is in respect of the MTT contracts read with the Foreign Trade Policy of India prohibited such contracts, the Reserve Bank of India has refused the permission for the subject MTT contract for supply of KN95 masks from China to United States of America. The officials of HDFC Bank have

expressed their inability to the petitioner as the petitioner was carrying out the business which is not permissible.

10. The petitioner has further stated that the Director General of Foreign Trade, Ministry of Commerce through various notifications issued from January to May 2020 has prohibited export of PPE Kits, Masks, Ventilators, Sanitizer out of India to ensure that they are available to the Citizens, Doctors and Hospitals within our country. It has been stated by the petitioner that restrictions imposed by the Director General of Foreign Trade does not come in way of the petitioner as the petitioner on account of MTT Contract which has been executed with a buyer in America is exporting goods from China to America. There is no export out of India.

11. The petitioner has further stated that on 12/05/2020 the petitioner has wrote several letters to the Ministry of Commerce, Director General of Foreign Trade and requested for grant of exemption and for grant of permission to procure goods manufactured from China to supply to a Company in United States of America.

12. The petitioner has further stated that a request was also made to the banker to seek a clarification from Reserve Bank of India in respect of Clause 2(iii) of the guidelines dated 23/01/2020, however, as Reserve Bank of India has not issued any clarification and as the petitioner on account of Clause 2(iii) of the guidelines / circular dated 23/01/2020 has not been able to carry out its MTT contract for supply of goods from China to United States of America, he has approached this Court.

13. The petitioner's contention is that prohibition imposed by Reserve Bank of India is a total prohibition which violates petitioner's fundamental rights guaranteed under Section 19(1)(g) and 21 of the Constitution of India and therefore, Clause 2(iii) deserves to be struck down by this Court.

14. Another grounds has been raised stating that the absolute and total prohibition of Merchanting Trade Transactions in respect of PPE products runs afoul of reasonableness enshrined under Article 19 of the Constitution of India. It has also been argued that prohibition imposed by Reserve Bank of India has no rational nexus with the underlying purpose of maintaining sufficient supplies of PPE products in India.

15. The petitioner has stated that while regulation of a trade or business through reasonable restrictions imposed under a law made in the interest of the general public is saved by Article 19(6) of the Constitution, however, in the present case, a total prohibition on MTT of PPE products has been imposed through a subordinate legislation (impugned guidelines dated 23/01/2020) on a business and trade which is legal. Such a total prohibition is violative of protection

offered under Article 19(1)(g) of the Constitution of India. The Hon'ble Supreme Court recently in the case of *Internet and Mobile Association of India Vs. Reserve Bank of India* reported in 2020 SCC OnLine SC 275 quashed the total prohibition of virtual currencies by the respondent No.1 - Reserve Bank of India through a circular.

16. Petitioner has further stated that when a statute invests a regulator with power to regulate, say, for example, a trade, it does not invest the authority with power wholly to prohibit or to put a stop to a trade. This view has been emphasized upon and affirmed several times. Therefore, where the objective of the impugned guideline was merely to facilitate and regulate the financial arm of Merchanting Trade Transaction, Reserve Bank of India cannot assume and exercise the power to completely prohibit MTT of PPE products. The subject MTT contract involves supply of KN95 masks (one of PPE products) manufactured by a company in China to a buyer at United States of America, therefore, the subject transaction has no bearing or reasonable connection on the availability of stock of PPE products within the territory of India. It has been further contended that the Hon'ble Supreme Court has laid down the test of reasonableness of restriction and held that laws imposing total prohibition would require close scrutiny in the cases of *State of Madras Vs. V.G. Row* reported in AIR 1952 SC 196 and *Narender Kumar Vs. Union of India* reported in AIR 1960 SC 430.

17. Learned counsel for the petitioner has stated that MTT contracts in PPE products such as the present one do not affect the stock or availability of PPE products within India and it does not fall within the prohibition on export of PPE products imposed by respondent No.2. The mischief or intention of the respondent No.2 -Ministry of Commerce, DGFT to prohibit export of PPE products is ensuring adequate quantity and availability of PPE products for Indian citizens, doctors and hospitals. The aforesaid objective or mischief is totally unaffected by a MTT contract entered and executed by an Indian citizen where goods manufactured at China are supplied to a buyer at the United States of America. The Calcutta High Court in the case of *Nani Gopal Paul Vs. State of West Bengal* reported in AIR 1966 Cal 167 quashed a total prohibition imposed on a trade and business.

18. He has further stated that the absolute prohibition on MTT of PPE products is arbitrary and completely disproportionate to the stated public interest of ensuring adequate supplies of PPE products within the territory of India. He has further contended that the latest briefings of the Central Government fairly informs that adequate quantity of PPE products is presently available across India and therefore, in light of the fact that the object has been substantially achieved, further restrictions on any trade activities relating to PPE would be disproportionate in nature for want of requirements. It has been further contended that the Andhra Pradesh High Court quashed a total prohibition imposed on operation of public

taxis on ground disproportionate in the case of *State of A. P. Vs. Mini Taxi Owners Association, Hyderabad* reported in 2001 SCC OnLine AP 421. His further contention is that the absolute prohibition of MTT of PPE products serves no larger public interest as MTT is concerned with those PPE products that are not manufactured in India or meant for use by people in India.

19. It has been stated that merchant trading of PPE kits is a legal and acceptable form of international business and trade and the respondent No.1 has no power or authority to completely prohibit such merchant trade or business as there is no illegality in the merchant trade and business of PPE products. It has been further contended that where the regulator or State imposes a restriction in the nature of complete prohibition, constitutional Courts are vested with the power and jurisdiction to see whether such special circumstances exist to justify total prohibition. In the present case, the objectives of Director General of Foreign Trade notifications to ban exports of PPE products is completely unrelated to and has no relation or nexus with prohibition on MTT of PPE products.

20. The petitioner has prayed for the following reliefs:-

a. Issue a writ of Certiorari or any other appropriate writ /order/direction in the nature of Certiorari quashing Clause 2(iii) of the Impugned Guidelines titled : RBI/2019- 20/152 A.P. (DIR Series) Circular No.20 dated 23.1.2020 issued by Respondent No.1 - Reserve Bank of India as being violative of the Petitioner's fundamental rights under Article 19(1)(g) and 21 of the Constitution of India;

OR

b. Issue a writ of Certiorari or any other appropriate writ/ order/direction to the Respondents directing them to issue a necessary clarification that Clause 2(iii) of the Impugned Guidelines titled : RBI/2019-20/152 A.P. (DIR Series) Circular No.20 dated 23.1.2020 would not be applicable with respect to any MTT contracts that the Petitioner may enter into for PPE products such as Personal Protection Equipment Kits, masks, ventilators and sanitisers;

c. Pass any other Order or Order(s) or grant any other relief as this Hon'ble Court deems fit and proper in the facts and circumstances of the present case.

21. The respondent No.1 - Reserve Bank of India has filed a detailed reply in the matter. It has been stated in the return that number of Corona Virus patients in India has crossed 42,04,614 cases and the death toll has crossed 71,642 (at the time the return was filed). India has taken over Brazil to have the second highest case load in the world. It has been further stated that India requires a steady and

assured supply of ventilators, PPE Kits, Sanitizer and Gloves as well as other lifesaving equipment and drugs.

22. It has been further stated that in times of global shortage, developed countries have far greater financial clout than developing countries to draw scarce medical supplies to themselves, since they can afford to pay higher prices for them. It has been further stated that in larger public interest Government of India *vide* notification dated 31/01/2020 and 16/05/2020 issued in exercise of its power under Section 3 of the Foreign Trade (Development & Regulation) Act, 1992 has amended its Foreign Trade Policy 2015-2020 and has prohibited export of lifesaving equipment such as Ventilators, PPE kits and Gloves from India.

23. It has been further stated that it will also be wholly inappropriate and contrary to the national interest for Union of India to permit India's foreign exchange reserve to be engaged in enabling Indian entities, through Merchanting Trade Transactions, to preferentially divert lifesaving supplies to overseas countries rather than to India, merely for higher profits. The respondent No.1 has also stated that the petitioner is certainly free to carry on the business of import of such products into India, since only export, and not import is prohibited.

24. The respondent No.1 has further stated that revised guidelines on Merchanting Trade Transactions permits transactions of goods only which are permitted for exports / imports under the prevailing Foreign Trade Policy (FTP) of India as on the date of shipment. It has been further stated that circular which is under challenge is of general nature. It does not mention particular goods such as Ventilators, Medical Personal Protection Equipment (PPE) kits or Gloves. The Reserve Bank of India does not classify and notify particular goods or services for the purpose of permitting Merchanting Trade Transactions, since that function is within the domain of the Government of India. However, the circular of Reserve Bank of India ensures that the country's foreign exchange reserves are managed by keeping in view with the country's Foreign Trade Policy issued by the Government of India.

25. It has been further stated that circular No.20 comprising the "Revised Guidelines on Merchanting Trade Transactions" has been issued by the Reserve Bank of India in exercise of powers under Section 10(4) and 11(1) of the Foreign Exchange Management Act, 1999. The revised guidelines are not new and they have been in force with some variation since 2000.

26. The respondent No.1 has further stated that circular challenged by the petitioner, viz. Clause 2(iii) of Circular No.20, is also not new and has been substantially in force since 2000. This will be clear from a perusal of 'Part B' of the above-mentioned earlier Circular No.9, and the same reads as under:

> "Authorised dealers may take necessary precautions in handling merchant trade transactions or intermediary trade transactions to ensure that (a) goods involved in the transaction are permitted to be imported into India, (b) such transactions do not involve foreign exchange outlay for a period exceeding three months, and (c) all Rules, Regulations, and Directions applicable to export out of India are complied with by the export leg and all Rules, Regulations, and Directions applicable to import are complied with by the import leg of merchanting trade transactions. Authorised dealers are also required to ensure timely receipt of payment for the export leg of such transactions."
>
> (Emphasis supplied)

It has been stated that the impugned clause of Circular No.20 dated 23/01/2020, (a) restricting Merchanting Trade Transaction to "... goods that are permitted for exports / imports under the prevailing Foreign Trade Policy (FTP) of India as on the date of shipment", and (b) requiring that "... all rules, regulations and directions applicable to exports (except Export Declaration Form) and imports (except Bill of Entry) shall be complied with for the export leg and import leg respectively", are not novel. They may also be found, substantially in the present form,in the following prior Reserve Bank Circulars relating to Merchanting Trade Transaction:-

> "(i) A.P. (DIR. Series) Circular No.9 dated 24.8.2000 (see Annex.P/4 at page 50);
>
> (ii) A.P. (DIR. Series) Circular No.106 dated 19.6.2003;
>
> (iii) A.P. (DIR. Series) Circular No.95 dated 17.1.2014;
>
> (iv) A.P. (DIR. Series) Circular No.115 dated 28.3.2014 (see Annex.P/4 at page 51)."

27. It has been stated that the aforesaid two conditions have been a fundamental and essential part of the policy relating to Merchanting Trade Transaction for decades. The said conditions - restricting Merchanting Trade Transaction to goods that are permitted for exports / imports under the prevailing Foreign Trade Policy (FTP) of India, and requiring compliance of the rules, regulations and directions applicable to exports and imports - go to the root of the Reserve Bank's policy relating to Merchanting Trade Transaction. Respondent No.1 has submitted that the conditions are of general application to every Indian entity wishing to carry on Merchanting Trade Transactions. The conditions are neither specific either to the petitioner's business, nor to particular products such as ventilators or medical personal protection equipment.

28. It has been further stated that according to clause 2(i) of the Circular Annex. P/1, for a trade to be classified as a Merchanting Trade Transaction, the goods in question shall neither enter, nor exit, India (the "Domestic Tariff Area"). Merchanting trade transactions are very closely analogous to, and have all the trappings of, export as well as import except the fact that the goods are physically not located in India. The first leg of the transaction (termed as the "import leg") requires *outlay of foreign exchange* by the entity located in India carrying on the transaction ("the intemediary"), for the purpose of making payment for the goods being purchased overseas. The payment is made by the Indian intermediary by drawing foreign exchange or obtaining a letter of credit in India from its banker, which is a Reserve Bank - authorised dealer of foreign exchange ("authorized dealer bank") also located in India. Thus, there is a clear nexus of the first leg of the transaction to India and the involvement of its foreign exchange reserves.

29. Respondent No.1 has stated that similarly, in a successful trade, the Indian entity so purchasing the goods overseas recovers its money in the second leg of the transaction (termed as the "export leg"), by selling the goods to its buyer, also located overseas, but the money is under the law to be repatriated to India to the credit of the Indian intermediary which is located in India which had engaged in the Merchanting Trade business, within a strict time frame. The Reserve Bank has the statutory authority to regulate the foreign exchange held by or due to an entity located in India. Thus, even though both legs of the Merchanting Trade Transaction are carried on abroad, they are carried on by an entity located in India and subject to Indian laws, viz. the intermediary, and there is a clear and close nexus of the Merchanting Trade Transaction with India. Both legs of the Merchanting Trade transaction, the "import" leg and the "export" leg, require the Indian intermediary to deal in foreign exchange issued in India, through a Reserve Bank - authorised dealer.

30. Sub-sections (1) and (4) of section 10 of the Foreign Exchange Management Act, 1999 reads as under:

> **"10. Authorised person.**— (1) The Reserve Bank may, on an application made to it in this behalf, authorise any person to be known as authorised person to deal in foreign exchange or in foreign securities, as an authorised dealer, money changer or off-shore banking unit or in any other manner as it deems fit.
>
> [.....]
>
> (4) An authorised person shall, in all his dealings in foreign exchange or foreign security, comply with such general or special directions or orders as the Reserve Bank may, from time to time, think fit to give, and, except with the previous permission of the Reserve Bank, an authorised person shall not engage in any transaction involving any foreign exchange or foreign security

which is not in conformity with the terms of his authorisation under this section."

Sub-section (1) of section 11 of the said Act reads as under:-

"11. Reserve Bank's powers to issue directions to authorised person.

(1) The Reserve Bank may, for the purpose of securing compliance with the provisions of this Act and of any rules, regulations, notifications or directions made thereunder, give to the authorised persons any direction in regard to making of payment or the doing or desist from doing any act relating to foreign exchange or foreign security".

It has been stated that under the Foreign Exchange Management Act, 1999, the regulation and management of the country's foreign exchange reserves has been entrusted to the Reserve Bank of India, which accordingly has the full statutory authority to enact the circular Annex.P/1 under section 10(4) and 11(1) of the Foreign Exchange Management Act, 1999. Such circulars and directions are issued by the Reserve Bank in exercise of its statutory duty to regulate and manage the country's foreign exchange reserves, and embody the foreign exchange policy of the State. It is well settled that the Courts do not normally interfere with State policy, particularly in financial matters, unless fraud or lack of *bona-fides* is alleged and established. In the present case, the petitioner has neither pleaded, nor proved either of such grounds.

31. Learned counsel for the respondent No.1 has placed reliance upon judgment delivered in the case of *Kasinka Trading Vs. Union of India,* reported in (1995) 1 SCC 274, *P.T.R. Exports (Madras) (P) Ltd. Vs. Union of India* reported in (1996) 5 SCC 268 and *State of Haryana Vs. Mahabir Vegetable Oils (P) Ltd.* Reported in (2011) 3 SCC 778 and has prayed for dismissal of the writ petition.

32. The Union of India - respondent No.2 has also filed an application and has adopted the return filed by respondent No.1 Reserve Bank of India. The Union of India in addition to the return which they have adopted has stated that *vide* notification dated 25/08/2020 an amendment has been made in the Export Policy and the Personal Protective Equipment / Masks i.e. N-95 / FFP2 Mask and N-95 / FFP2 or equivalent had been categorized as "restricted", which were earlier "prohibited" *vide* notification issued earlier on the subject. The notification dated 25/08/2020 is quoted as under:-

"(To be published in the Gazette of India Extraordinary Part-II, Section - 3, Sub-Section (ii))

Government of India
Ministry of Commerce & Industry
Department of Commerce
Directorate General of Foreign Trade
Udyog Bhawan
New Delhi

Notification No. 29 / 2015-2020
Dated: 25th August, 2020

Subject:- Amendment in Export Policy of Personal Protection Equipment/Masks.

S.O. (E) in exercise of powers conferred by Section 3 of the Foreign Trade Development & Regulation Act, 1992 (No. 22 of 1992), as amended, read with Para 1.02 and 2.01 of the Foreign Trade Policy, 2015-20, the Central Government hereby makes following amendment in the **Notification No. 21 dated 28.07.2020** amending the Schedule 2 of the ITC (HS) Export Policy 2018 related to the export of Personal Protection Equipments/Masks, as under:

Serial Number	ITC HS Codes	Description	Export Policy	Policy Condition
207A	901850 901890 9020 392690 621790 630790	Following Personal Protection Equipments (PPEs) exported either as part of kits or as individual items -		
		1. Medical Coveralls of all Classes/ Categories	Free	**PPE Medical coveralls are freely exportable.**
		2. Medical Goggles	Restricted	Monthly export quota of 20 Lakh units of Medical Goggles
		3. N95/FFP2 masks or its equivalent	**Restricted**	**[Monthly export quota of 50 Lakh units]**
		4. All masks (Except N95/FFP2 masks or its equivalent)	Free	**[All masks (except N95/FFP2 masks or its equivalent) are freely exportable]**
		5. Nitrile/NBR Gloves	Prohibited	
		6. Face Shields	Free	Face Shields are freely exportable

2. Effect of the Notification:

Notification No. 21 dated 28.07.2020 is amended to the extent that the export policy of 2/3 Ply Surgical masks, medical coveralls of all classes and categories (including medical coveralls for COVID-19) is amended from "Restricted" to "Free" category and these coveralls (including gowns and aprons of all types) are now freely exportable. Medical goggles continue to remain in restricted category with monthly quota of 20 Lakh units and Nitrile/NBR gloves continue to remain prohibited.

The export police of N-95/FFP2 masks or its equivalent masks is revised from "Prohibited" to "Restricted" category. A monthly export quot of 50 lakh units has been fixed for N-95/FFP2 masks or its equivalent, for issuing export licenses to eligible applicants as per the criteria to be separately issued in a Trade Notice.

Sd/- 25/08/2020
(Amit Yadav)
Director General of Foreign Trade
Ex-Officio Additional Secretary, Government of India
E-mail:dgft@nic.in

(Issued from File No.01/91/180/21/AM20/EC/E-21933)"

The aforesaid notification makes it very clear that all masks except N-95 / FFP2 Masks or its equivalent comes under "restricted" category. The other items mentioned in the notification are now freely exported. The Union of India has also prayed for dismissal of the writ petition.

33. Heard learned counsel for the parties at length and perused the record. The matter is being disposed of at motion hearing stage itself through Video Conferencing finally with the consent of the parties.

34. The petitioner before this Court as stated in the writ petition is a businessman engaged in the business of manufacturing and trading of Pharmaceutical, Herbal, Skin Care and Personal Protective Equipment (PPE) products. The petitioner under the Merchanting Trade Transactions (MTT) wishes to supply KN95 masks manufactured in China to a buyer in United States of America. The Reserve Bank of India in exercise of powers conferred under Section 10(4) and 11(1) of the Foreign Exchange Management Act, 1999 has framed guidelines on Merchanting Trade Transactions. Section 10(4) and Section 11(1) of the Foreign Exchange Management Act, 1999 reads as under:-

"10. Authorised person.—

(1) .....

(2) .....

(3) .....

(4) An authorised person shall, in all his dealings in foreign exchange or foreign security, comply with such general or special directions or orders as the Reserve Bank may, from time to time, think fit to give, and, except with the previous permission of the Reserve Bank, an authorised person shall not engage in any transaction involving any foreign exchange or foreign security which is not in conformity with the terms of his authorisation under this section.

11. Reserve Bank's power to issue directions to authorised person.-(1) The Reserve Bank may, for the purpose of securing compliance with the provisions of this Act and of any rules, regulations, notifications or directions made thereunder, give to the authorised persons any direction in regard to making of payment or the doing or desist from doing any act relating to foreign exchange or foreign security."

35. The guidelines framed by the Reserve Bank of India are in force since 2000 with various variations from time to time. The relevant extracts of the circular issued by Reserve Bank of India in exercise of powers conferred under the Foreign Exchange Management Act, 1999 dated 24/08/2000 reads as under:-

"A. P. (DIR Series) Circular No.9 (August 24, 2000)

RESERVE BANK OF INDIA
CENTRAL OFFICE
EXCHANGE CONTROL DEPARTMENT
MUMBAI-400 001

A. P.(DIR Series) Circular No. 9 August 24, 2000

To

All Authorised Dealers in Foreign Exchange

Dear Sirs,

Foreign Exchange Management Act, 1999

Attention of authorised dealers is invited to the Government of India Notification No.GSR.381(E) dated May 3, 2000, notifying the Foreign Exchange Management (Current Account Transactions) Rules, 2000, in terms of which drawal of exchange for certain current account transactions has been prohibited and restrictions have been placed on certain other transactions. IN terms of Rule 4 ibid, the transactions specified in Schedule II to the said Notification required prior approval of the Government of India and in terms of the Rule 5, the

transactions specified in Schedule III to the Notification require prior approval of the Reserve Bank. Authorised dealers may follow directions contained in Annexure while dealing with applications relating to import of goods and services into India.

Part A : Import of Goods : .....

Part B : Merchanting Trade

Authorised dealers may take necessary precautions in handling merchant trade transactions or intermediary trade transactions to ensure that (a) goods involved in the transaction are permitted to be imported into India, (b) such transactions do not involve foreign exchange outlay for a period exceeding three months, and (c) all Rules, Regulations, and Directions applicable to export out of India are complied with by the export leg and all Rules, Regulations, and Directions applicable to import are complied with by the import leg of merchanting trade transactions. Authorised dealers are also required to ensure timely receipt of payment for the export leg of such transactions.

Part C : Import of Currency

C.1 Import of Currency

(i) Import of currency, including cheques, is governed by clause (g) of sub-section (3) of Section 6 of the Foreign Exchange Management Act, 1999, and the Foreign Exchange Management (Export and import of currency) Regulations 2000, made by the Reserve Bank vide Notification No. FEMA 6/RB-2000 dated May 3, 2000.

(ii) All imports of currency not covered by the general permission granted under the Regulations require prior permission of the Reserve Bank."

The aforesaid circular of the year 2000 makes it very clear that the restriction imposed in respect of Merchanting Trade Transactions are in existence since 2000.

36. The petitioner is aggrieved by Clause 2(iii) of Circular No.20 of revised guidelines dated 23/01/2020 and the same reads as under:-

"**2**.(iii) The MTT shall be undertaken for the goods that are permitted for exports / imports under the prevailing Foreign Trade Policy (FTP) of India as the date of shipment. All rules, regulations and directions applicable to exports (except Export Declaration Form) and imports (except Bill of Entry) shall be complied with for the export leg and import leg respectively. **"**

The aforesaid clause restricts trading of goods which are not permitted to be imported / exported under the prevailing Foreign Trade Policy. A similar policy is in force on account of various circulars issued by Reserve Bank of India dated 24/08/2000, 19/06/2003, 17/01/2014 and 28/03/2014. The import and export and framing of a policy on the subject of import and export is purely within the domain of Central Government and the Central Government in exercise of its power conferred under Section 3 of the Foreign Trade (Development & Regulation) Act, 1992 read with paragraph No.1.02 and 2.01 of the Foreign Trade Policy 2015-2020 has issued various amendments from time to time and its a purely policy decision to allow import / export or of particular goods keeping in view the policy framed by Central Government. Section 3 of the Foreign Trade (Development & Regulation) Act, 1992 reads as under:-

> **"3. Powers to make provisions relating to imports and exports.**—(1) The Central Government may, by Order published in the Official Gazette, make provision for the development and regulation of foreign trade by facilitating imports and increasing exports.
>
> (2) The Central Government may also, by Order published in the Official Gazette, make provision for prohibiting, restricting or otherwise regulating, in all cases or in specified classes of cases and subject to such exceptions, if any, as may be made by or under the Order, the import or export of goods
>
> (3) All goods to which any Order under sub-section (2) applies shall be deemed to be goods the import or export of which has been prohibited under section 11 of the Customs Act, 1962 (52 of 1962) and all the provisions of that Act shall have effect accordingly."

37. The Government of India has issued a notification dated 28/07/2020 and later on 25/08/2020 which has already been reproduced earlier and N-95 / FFP2 Mask or its equivalent are under "restricted" category.

38. The Reserve Bank of India has to be adhere to the policy decision taken by the Government of India and in that backdrop the Reserve Bank of India issued executive instructions/circular dated 23/01/2020. Once import of a particular product is barred or export of a particular product is barred, the question of permitting the Merchanting Trade Transactions in respect of that particular products does not arise.

39. The circular dated 23/01/2020 provides a restriction upon the Merchanting Trade Transactions and goods which are permitted for export / import under the prevailing Foreign Trade Policy can be subjected to Merchanting Trade Transactions. The Merchanting Trade Transactions also requires adherence to all

rules, regulations and directions applicable to exports (except Export Declaration Form) and imports (except Bill of Entry).

40. The conditions imposed by Government of India as well as Reserve Bank of India are of general application to every Indian entity wishing to carry on Merchanting Trade Transactions. The conditions are neither specific either to petitioner's business, nor to a particular products such as Ventilators or Medical Personal Protective Equipment.

41. Clause 2(i) of the Circular dated 23/01/2020 provides that a Merchanting Trade Transactions means goods in question shall neither enter nor export India (Domestic Tariff Area). The Merchanting Trade Transactions have all the trappings of, export as well as import except the fact that the goods are physically not located in India.

42. The Merchanting Trade Transactions involves foreign exchange and issuance of a Letter of Credit in India from a banker as well as Reserve Bank of India through its authorised dealer in foreign exchange. The banker as well as Reserve Bank of India are located in India and therefore, there is a clear nexus between the transactions and the involvement of foreign exchange reserves of Reserve Bank of India.

43. Shri Abhinav Malhotra, learned counsel for the petitioner has placed reliance upon a judgment delivered by the apex Court in the case of *Internet and Mobile Association of India Vs. Reserve Bank of India* reported in 2020 SCC OnLine SC 275 which was in respect of Digital Currency / Virtual Currency / Cryptocurrency and his contention is that a complete ban by Reserve Bank of India in respect of Digital Currency was struck down being violative of Article 19(1)(g) of the Constitution of India.

44. This Court has carefully gone through the aforesaid judgment, however, the judgment delivered by the Hon'ble Supreme Court is distinguishable on facts. There is no absolute ban imposed by Reserve Bank of India in respect of the Merchanting Trade Transaction contracts.

45. The Foreign Trade Policy is in existence framed by Government of India in exercise of powers conferred under the Foreign Trade (Development & Regulation) Act, 1992 and notifications have been issued by Government of India keeping in view the powers conferred by Section 3 of the Act of 1992. Its purely a policy decision taken by Government of India in larger public interest as there is an acute shortage of the goods which are the subject matter of the present writ petition.

46. The Courts normally do not interfere with the State policy particularly in financial maters (sic: matters) unless fraud or lack of *bona-fides* is alleged and

established. In the case of *Kasinka Trading v. Union of India,* reported in (1995) 1 SCC 274, the Hon'ble Supreme Court has held as under:-

> "23. [...] The courts, do not interfere with the fiscal policy where the Government acts in "public interest" and neither any fraud or lack of bona fides is alleged much less established. The Government has to be left free to determine the priorities in the matter of utilisation of finances and to act in the public interest while issuing or modifying or withdrawing an exemption notification...."

In a judgment delivered in the case of *P.T.R. Exports (Madras) (P) Ltd. v. Union of India* reported in (1996) 5 SCC 268, the Hon'ble Supreme Court has held as under:-

> "5. [...] The court ... would prefer to allow free play to the Government to evolve fiscal policy in the public interest and to act upon the same. Equally, the Government is left free to determine priorities in the matters of allocations or allotments or utilisation of its finances in the public interest. It is equally entitled, therefore, to issue or withdraw or modify the export or import policy in accordance with the scheme evolved."

47. The apex Court in the case of *State of Haryana v. Mahabir Vegetable Oils (P) Ltd.* reported in (2011) 3 SCC 778, has again held as under:-

> "27. In cases where the Government on the basis of material available before it, bona fide, is satisfied that public interest would be served by granting, withdrawing, modifying or rescinding an exemption already granted, it should be allowed a free hand to do so. The withdrawal of exemption "in public interest" is a matter of policy and the courts should not bind the Government in its policy decision. The courts should not normally interfere with fiscal policy of the Government more so when such decisions are taken in public interest and where neither fraud nor lack of bona fides is alleged, much less established."

In light of the aforesaid judgments, the question of interference in the policy decision taken by Government of India does not arise.

48. Thus, in short the statutory provisions, rules, circulars and notifications issued from time to time permits Merchanting Trade Transactions only in respect of goods that are permitted for export and import under the prevailing Foreign Trade Policy of India and the question of complete ban in respect of freedom of trade and commerce as argued by learned counsel does not arise.

49. In our country keeping in view the COVID-19 Pandemic large number of front line health workers and Doctors have succumbed to Corona Virus on account

of inadequate Personal Protective Equipment Kits. The Ventilators are also in short supply and therefore, the Government of India is the best judge either to ban export of the aforesaid items or to place the aforesaid items under the restricted categories.

50. Shri Malhotra while the matter was being argued has stated before this Court that the petitioner is now importing goods from South Africa and is exporting it to United States of America and therefore, the petitioner now be permitted to avail the facility of Merchanting Trade Transactions. In the considered opinion of this Court, once import of a particular item is banned in India or its export is banned, such permission can never be granted, even though the item is not touching the Indian soil.

51. If analogy canvassed by Shri Abhinav Malhotra is accepted, then the Reserve Bank of India will have to grant permission for Merchanting Trade Transactions in respect of "Sniper Riffles". The petitioner on the basis of reasoning assigned by Shri Malhotra, even though he is procuring Sniper Riffles from United States of America and is supplying to Pakistan will have to be granted permission by Reserve Bank of India and Government of India and therefore, the analogy and the arguments canvased by Shri Malhotra are illogical and does not have support of statutory provisions.

52. The another example to make things more clear is of "Blood Diamonds" The Blood Diamonds are diamonds mined in a war zone and sold to finance insurgency, invading army's war efforts, or warlord's activity. India is a very big base in respect of cutting and polishing of diamonds. India cuts 10 out of 11 diamonds sold in the world market. Import of Blood Diamond is not permissible and a diamond imported into India has to be duly certified under the "Kimberley Process". The Kimberley Process is a joint initiative by Governments. The international diamond industry and civil society to stem the flow of Conflict Diamonds ("Blood Diamonds" are also known as "Conflict Diamonds") and therefore, the Blood Diamonds from Zimbabwe cannot be imported to India. The diamonds only with Kimberley Process certification are permitted for import. The petitioner if he wants to import Blood Diamonds / Conflict Diamonds from Zimbabwe to China as per reasoning canvassed by Shri Malhotra has to be given a permission for Merchanting Trade Transactions, as the diamonds are not coming to India.

53. By no stretch of imagination such a permission can be given as statute does not permit for the same. Even though the goods are not coming to India at any point of time under the Merchanting Trade Transactions, only those goods which are permitted for export or for import are eligible for Merchanting Trade Transactions. The circular issued by the Reserve Bank of India is in no way violating the petitioner's right guaranteed under Article 19(1)(g) of the Constitution of India.

54. In the case of *Krishna Kumar Vs. Municipal Corporation* reported in (2005) 8 SCC 612, the Hon'ble Supreme Court has held that prohibition with respect to the exercise of a right referable only in a particular area of activity, or relative to only particular matters, does not amount to a total prohibition but only a restriction. In the present case the petitioner is free to import (but not export) PPE kits into India. The petitioner is also free to carry on Merchanting Trade Transactions in respect of all other goods where the export and import of which is permitted under the country's Foreign Trade policy.

55. In the case of *Indian Handicrafts Emporium Vs. Union of India* reported in (2003) 7 SCC 589, the Hon'ble Supreme Court upheld a complete ban on ivory. In the aforesaid case the apex court held as under:-

> **"38.** In order to determine whether total prohibition would be reasonable, the Court has to balance the direct impact on the fundamental right of the citizens thereby against the greater public or social interest sought to be ensured. Implementation of the directive principles contained in Part IV is within the expression of restrictions in the interest of the general public."

56. In the case of *Balram Kumawat Vs. Union of India* reported in (2003) 7 SCC 628, the apex Court has held that the complete ban on ivory extended even to mammoth ivory.

57. In the case of *Kamlesh Vaswani Vs. Union of India* reported in (2016) 7 SCC 592, the Hon'ble Supreme Court has approved of a complete prohibition on child pornography.

58. Complete ban on slaughter of cow and its progeny in the State of Gujarat has been upheld by the apex Court in the case of *State of Gujarat Vs. Mirzapur Moti Kureshi Kassab Jamat* reported in (2005) 8 SCC 534 and in Bihar in the case of *Mohd. Hanif Quareshi Vs. State of Bihar* reported in AIR 1958 SC 731. Complete prohibition on the sale of eggs within the municipal limits of *Haridwar, Rishikesh* and *Muni-ki-Reti* has been found reasonable by the Hon'ble Supreme Court in the case of *Om Prakash Vs. State of U.P.* reported in (2004) 3 SCC 402. Similarly, in the case of *Systopic Laboratories (P) Ltd. Vs. Prem Gupta (Dr)* reported in 1994 Supp (1) SCC 160, the apex Court has upheld a complete ban on the sale of fixed-dose corticosteroids in other drugs.

59. The judgments of the Hon'ble Supreme Court in the case of *State of Madras Vs. VG Row* reported in AIR 1952 SC 196 and *Narender Kumar Vs. Union of India* reported in AIR 1960 SC 530 are on different facts and are not of direct relevance to the present case. As observed in *VG Row* (Supra), "Indeed, a decision dealing with the validity of the restrictions imposed on one of the rights conferred by Article 19 (1) cannot have much value as a precedent for adjudging

the validity of the restrictions imposed on another right, even when the constitutional criterion is the same, namely reasonableness, as the conclusion must depend on the cumulative effect of the varying facts and circumstances of each case" (see para 19).

60. Article 19(1)(g) and 19(6) of the Constitution of India reads as under:-

> **"19. Protection of certain rights regarding freedom of speech, etc**.-(1) All citizens shall have the right—
>
> (*g*) to practise any profession, or to carry on any occupation, trade or business.
>
> .....
>
> (6) Nothing in sub clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub clause, and, in particular, nothing in the said sub clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,
>
> (*i*) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or
>
> (*ii*) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise."

It is true that the Constitution of India guarantees fundamental right in respect of freedom of trade and commerce, however, the same can be subjected to reasonable restrictions as the same has been done in the present case.

61. In light of the aforesaid by no stretch of imagination the circular can be said to be *ultra vires.* The restriction imposed by Government of India and Reserve Bank of India amounts to reasonable restriction and in noway violating the freedom of trade and commerce as pleaded by the petitioner. No case for interference is made out in the matter and the writ petition is dismissed.

Certified copy as per rules.

Petition dismissed

I.L.R. [2020] M.P. 2788
WRIT PETITION

Before Mr. Justice Prakash Shrivastava

W.P. No. 14632/2020 (Indore) decided on 23 October, 2020

VIJAY KUMAR SHARMA …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

(Alongwith W.P. Nos. 14654/2020, 14689/2020, 14790/2020, 14791/2020, 14793/2020, 14795/2020, 14797/2020 & 14802/2020)

***A. Municipal Service (Executive) Rules, M.P., 1973, Rule 13 (amended) – Promotion – Post of Chief Municipal Officer* – Held – Since petitioners were only having charge of Chief Municipal Officer and their substantive post were different, therefore they have no right to continue as Chief Municipal Officer – Petitions disposed with directions.**

(Paras 9, 14 & 22)

क. नगरपालिका सेवा (कार्यपालन) नियम, म.प्र., 1973, नियम 13 (संशोधित) – पदोन्नति – मुख्य नगरपालिका अधिकारी का पद – अभिनिर्धारित – चूंकि याचीगण के पास मुख्य नगरपालिका अधिकारी का केवल प्रभार था तथा उनके अधिष्ठायी पद भिन्न थे, इसलिए उन्हें मुख्य नगरपालिका अधिकारी के रूप में बने रहने का कोई अधिकार नहीं है – निदेशों के साथ याचिकाएं निराकृत।

***B. Municipal Service (Executive) Rules, M.P., 1973, Rule 13 (amended) – Post of Chief Municipal Officer – Eligibility* – Held – Post of CMO should be given to those who fall in the feeder cadre to the post of Chief Municipal Officer – Employees/post which are eligible or to be considered for promotion to the post Chief Municipal Officer Class A, Class B & Class C enumerated. (Para 16 & 17)**

ख. नगरपालिका सेवा (कार्यपालन) नियम, म.प्र., 1973, नियम 13 (संशोधित) – मुख्य नगरपालिका अधिकारी का पद – पात्रता – अभिनिर्धारित – मुख्य नगरपालिका अधिकारी का पद उन्हें दिया जाना चाहिए जो मुख्य नगरपालिका अधिकारी के पद हेतु फीडर काडर में आते है – मुख्य नगरपालिका अधिकारी श्रेणी **A**, श्रेणी **B** व श्रेणी C के पद पर पदोन्नति हेतु पात्र या विचार में लिये जाने वाले कर्मचारी/पद प्रगणित किये गये।

Cases referred:

W.P. No. 5135/2012 order passed on 03.10.2013, W.P. No. 625/2015 order passed on 22.04.2015.

Peyush Jain, for the petitioners.

Pushyamitra Bhargava, Addl. A.G. with *Amol Shrivastava* for the respondents/State.

O R D E R

PRAKASH SHRIVASTAVA, J.:- This order will govern the disposal of WP No.14632/2020, 14654/2020, 14689/2020, 14790/2020, 14791/2020, 14793/2020, 14795/2020, 14797/2020 & WP No.14802/2020 since it is jointly submitted by learned counsel for parties that all these writ petitions involve same issue on the identical fact situation.

2. These writ petitions have been filed by the petitioners challenging the order dated 23rd September, 2020 whereby the charge of the Chief Municipal Officer has been taken from the petitioners and they have been posted to their substantive post of Accountant, Sanitary Inspector, Head Clerk-cum-Accountant, Assistant Grade I and II etc.

3. For convenience facts are taken from WP No.14632/2020.

4. The case of the petitioner is that he was working as Head Clerk-cum-Accountant in the Municipal Council and was given the charge of the Chief Municipal Officer long back. Since then he is working as Chief Municipal Officer and the post of petitioner falls in the feeder cadre for promotion to the post of Chief Municipal Officer, therefore, by the impugned order the charge of Chief Municipal Officer cannot be taken from the petitioner on the ground that the substantive post of the petitioner is not in the feeder cadre.

5. Respondents have filed their reply taking the stand that the petitioner was only having the charge of the Chief Municipal Officer, therefore, no right was created in favour of the petitioner and that the substantive post of the petitioner is not in the feeder cadre for promotion to the post of Chief Municipal Officer.

6. Shri Peyush Jain, learned counsel for petitioners submits that the petitioners are in the feeder cadre for promotion to the post of Chief Municipal Officer. He further submits that in terms of M.P. Municipal Service (Executive) Rules, 1973, an employee of the Municipal Council having requisite experience and qualification is eligible for promotion to the post of Chief Municipal Officer and the Rules do not restrict the feeder cadre to the Superintendent, Revenue Inspector or Revenue Sub Inspector only. He further submits that the similarly situated employees were earlier promoted as Chief Municipal Officer, therefore, the petitioners cannot be discriminated. He has also submitted that the judgment of the High Court on the basis of which the impugned order has been passed relates to employees working on different post, therefore, on that basis charge of the Chief Municipal Officer cannot be taken from the petitioners. He also submits that the petitioners had earlier filed WP No.7592/2016 and by order dated 22/11/2016 (Annexure P/7) this Court had directed to decide the representation, but instead of deciding the representation the impugned order has been passed. Referring to the promotion orders dated 25/6/2020, 19/7/2019 and 3/8/2015 he

has submitted that the ministerial employees have been promoted as Chief Municipal Officer, therefore, the same benefit should be extended to the petitioners also.

7. Shri Pushyamitra Bhargava, learned Addl.Advocate General submits that under the amended Rules of 1973, the petitioners do not fall within the feeder cadre for promotion to the post of Chief Municipal Officer, therefore, they are not entitled to continue as Incharge Chief Municipal Officer in view of the earlier direction of this Court in WP No.5135/2012 and WP No.625/2015. He further submits that since the petitioners were only officiating the post as Chief Municipal Officer, therefore, they have no right to the said post and that the provisions relating to the feeder cadre contained in the Rules are to be given a purposive interpretation keeping in view the intention of the legislature, having due regard to the fact that interpretation may not lead to absurd result. He further submits that till now only the employees of the feeder cadre have been promoted and that there was some error in the order dated 26/9/2020 Annexure P/10 which has subsequently been corrected vide Annexure R/2 by recalling the order of posting in respect of ineligible person. He has also submitted that the promotion orders of other employees on which the petitioner is relying upon have been passed in the review DPC based upon the gradation list dated 1/1/2014 and if any petitioner comes forward demonstrating that on the basis of gradation list of 1/1/2014 any junior has been promoted ignoring his claim, then the respondents are ready to consider it. He has also submitted that the Madhya Pradesh State Urban Finance Service (Recruitment and Conditions of Service) Rules, 2017 has been framed in which the provision has been made for promotion of Accountant as Assistant Accounts Officer and that the channel of promotion to the post of Accountant is different. He has also submitted that prior to the amendment of 2015, employees of the Municipal Council with 10 years service were eligible, but after the amendment now the feeder cadre is different and that the respondents are filling up the post of Chief Municipal Officer by direct recruitment and thereafter if any posts remains vacant, then the same will be filled up by giving charge to other eligible persons.

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

9. It is undisputed before this Court that the substantive post of the petitioners is Accountant, Head Clerk-cum-Accountant, Assistant Grade I, Assistant Grade II etc and they are merely officiating on the post of Chief Municipal Officer, therefore, as such they have no legal right to continue on the said post unless they are able to demonstrate that the action of the State is arbitrary or discriminatory.

10. This Court in WP No.5135/2012 in the case of *Sanjay Soni & ors. Vs. State of MP and Ors* by the order dated 3/10/2013 had taken note of the fact that the

employees holding post not falling in the feeder cadre are working as Incharge Municipal Officer, therefore, this Court had issued clear direction to ensure that in all such places where Chief Municipal Officer are posted in the Municipal Council and Nagar Panchayat in incharge capacity, only those should be allowed to continue on the post who are holding substantive post which are in the feeder cadre for regular promotion on the post of Chief Municipal Officer. In the case of *Sanjay Soni* (supra) it was directed that:-

> "9- Admittedly the petitioners are working in the Executive services of the Municipal Councils. Their post is not included in the Second Schedule of 1973 Rules. They are not working on the feeder post to be considered for promotion on the post of Chief Municipal Officer in C category Municipal Council or Nagar Panchayat. At any rate, they cannot be promoted on the said post. It has rightly been pointed out by learned Deputy Advocate General that separate channel of promotion is made available for Sanitary Inspectors and they can be promoted under the different Rules made in the year 2011, on the post of Health Officers but are not to be promoted on the post of Chief Municipal Officer at any rate. The petitioners are not working on a cadre post, which falls amongst the feeder posts for promotion on the post of Chief Municipal Officer. The reliance placed by the petitioners on circular dated 28.08.1991 is totally misconceived. As has been pointed out from Rule 5 of 1973 Rules, the enlargement of the feeder post, inclusion of certain more feeder posts without making an amendment in the 1973 Rules or the Schedule appended to the said Rules was not permissible even in exercise of administrative powers by the State Government. Such a circular will not give any benefit to the petitioners.
>
> 10. In the light of this, if the circular dated 04.02.2012 is examined, only this much is said that because of shortage of the Chief Municipal Officers, earlier action was taken to post certain persons as Incharge Chief Municipal Officers and that being so, when the entire Rules were examined by this Court in earlier writ petition and direction was given that the posts of Chief Municipal Officers are to be filled in by the respondents in accordance to the provisions of 1973 Rules, it was necessary to send back those, who were not appointed on the feeder post for promotion on the post of Chief Municipal Officer but were made to function as Incharge Chief Municipal Officer to their substantive posts. If such instructions have been issued on the strength of an order passed by this Court, which has attained finality, how could it be said that the circular issued by the State Government is illegal or runs contrary to the provisions of the

Rules. In view of this, challenge to the circular dated 04.02.2012 is not acceptable.

11. Now the only question is whether the petitioners could be permitted any longer to continue on the post of Chief Municipal Officer in incharge capacity ? In accordance to the service laws and the well recognized principles, it is clear that an employee is entitled to hold his substantive post on which he is appointed in accordance to the Rules. No employee can claim a posting on a different post dehors the Rules. Even if such an improper order was earlier issued, the said order will not constitute a right in favour of such an employee to claim his posting in such capacity. Such directions cannot be issued as no right to the petitioners is available in such circumstances even in exercise of powers under Article 226 of the Constitution of India by this Court. However, the grievance of the petitioners is also to be noted that such an order is issued only in respect of petitioners and in respect of few persons only whereas in the entire State large number of persons are working as Incharge Chief Municipal Officers, though they are not substantively holding the feeder post for their promotion on regular basis as Chief Municipal Officers.

12. Keeping in view these submissions and in view of the discussions made herein above, while dismissing the writ petition and vacating the interim stay, it is directed that the State Government will ensure that in all such places where the Chief Municipal Officers are posted in the Municipal Councils and Nagar Panchayats in Incharge capacity, only those would be allowed to continue on the post who are holding substantive posts, which are in feeder cadre for regular promotion on the post of Chief Municipal Officer. All others, who are not substantively holding the feeder post for promotion on the post of Chief Municipal Officer would be sent back to work on their substantive post forthwith."

11. Similarly the issue again came up in WP No.625/2015 and this Court while passing the order dated 22/4/2015, after taking note of the relevant provisions of the M.P. Municipalities Act, 1961, had held that:-

"5. Looking to the aforesaid scheme of the Act, which is in fact, is in consonance to the fulfillment of the constitutional mandate as referred to hereinabove it is the statutory requirement of the State Government to make appointment/posting of Chief Municipal Officer in every Municipal Council from the date the State Municipal Service (Executive) was constituted by making the Rules.

6. The Rules prescribed the mode of recruitment of the Chief Municipal Officer in different grades of Municipal Council and Nagar Panchayat. Classification of Chief Municipal Officers is also made. For appointment on the lowest category of Chief Municipal Officer, the provision is made to fill in 50% post by direct recruitment and 50% post by promotion of the Municipal employees serving in different Municipal Councils. Since the Rules are made under the provisions of the Act, they have the force of law and their violation is not permissible. Since the Chief Municipal Officer is required to discharge the statutory duty, only the competent persons are required to be appointed by both modes i.e. by direct recruitment and promotion. The Full Bench of this Court in the case of Suresh Chandra Sharma Vs. State of M.P. and others [2000 (2) MPLJ 530], has held that the Chief Municipal Officers are the holder of the civil post of the State. Thus, this is onerous responsibility of the respondents-State to see that the posts of Chief Municipal Officer are manned by competent persons and in any case the adhocism may not be resorted in the matter of posting of Chief Municipal Officer.

7. It appears that the State Government has failed to discharge its statutory obligation of making appointment of regular Chief Municipal Officer by direct recruitment or by promotion of municipal employees and this has resulted in giving current charge of the post of Chief Municipal Officer to the subordinate municipal employees. It is seen by this Court on various occasion that such powers of the Chief Municipal Officer are given to some Municipal employees who are not even eligible to be promoted/appointed on the post of Chief Municipal Officer in terms of the scheme of the Act and the Rules.

8. xxxxxxxxxxx

9. xxxxxxxxxxx

10. In view of the aforesaid, the order of posting of the petitioner as also the respondent No.3 both cannot be sustained in eye of law. Both the orders stand quashed. The petitioner and respondent No.3 would be posted on their substantive post in appropriate Municipal Council or Nagar Parishad as the case may be. The respondent No.1 will issue an order of giving current charge of the post of Chief Municipal Officer of Nagar Parishad, Birshingpur, District Satna, to the senior most Municipal employee, who is in the zone of consideration to be appointed on the post of Chief Municipal Officer, who will continue to

> function as such till the regular Chief Municipal Officer in terms of the statutory Rules is appointed and posted in the said place.
>
> 11. Let this order be brought to the notice of the Chief Secretary of the State Government who will direct the concerned Secretary of the department to issue instructions in that respect and to withdraw the current charge of the post of Chief Municipal Officer from ineligible persons who are functioning as Incharge Chief Municipal Officer and will assign the charge of the said post to the concerned senior most Municipal employee, who is in the zone of consideration to be appointed on the post of Chief Municipal Officer. The State Government will ensure making of regular posting of the Chief Municipal Officer in every Municipal Council and Nagar Parishad within a period of six months from today."

12. Hence, there was a clear mandate of this Court to withdraw the current charge of the post of Chief Municipal Officer from the ineligible persons who are functioning as Incharge Chief Municipal Officer and assign the charge of the post to the concerned senior most municipal employee who is in the zone of consideration for appointment on the post of Chief Municipal Officer.

13. The opening para of the impugned order dated 23/7/2020 in the present case reveals that the impugned order has been passed in pursuance to the directions issued in the aforesaid writ petitions.

14. This Court has already noted above that since the petitioners were only having the charge of Chief Municipal Officer and their substantive posts were different, therefore, they have no right to continue as Chief Municipal Officer. The matter does not rest here because the impugned order states that the post of the petitioners do not fall in the feeder cadre for promotion to the post of Chief Municipal Officer. Hence, this Court is required to examine if the petitioner's substantive post is a feeder cadre post for promotion to the post of Chief Municipal Officer.

15. There is no dispute between the parties that the appointment as Chief Municipal Officer is to be made in terms of the M.P. Municipal Service (Executive) Rules 1973 (for short "Rules of 1973"). The Rule 13 of the Rules of 1973 provides that the post of Chief Municipal Officer in Selection Grade, Class I, Class II and Class III shall be filled up by promotion as laid down in II Schedule. As per Schedule II, 50% post of Chief Municipal Officer is to be filled up by direct recruitment and remaining 50% by promotion. The aforesaid Rules have been amended vide Notification dated 10th April, 2015 and the English version of the amended Schedule II is as under:-

S.No	Name of Posts	No. of posts	Classification of Grade	Scale of pay	Mode of Recruitment		Minimum Age limit	Mixi mum Age limit	Posting	Educational qualification	
					By Direct recruitment	By promotion				for directed recruitment	for promotion
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)
1	-	-	-	-	-	-	-	-	-	-	-
2	-	-	-	-	-	-	-	-	-	-	-
3	Chief Municipal Officer (Class-A)	84	Class-I	15600-39100-Grade pay 6600	-	100%	-	-	1- Deputy Directorate-2 (On Deputation) 2. In Divisional Office-01 3. SUDA-50 4. In Municipal Council (above 1 lakh Population) -19 5. Deputy Commissioner and reserve in Municipal Corporation-12	-	By promotion of Officer of Chief Municipal Officer Class-B, and Revenue Officer of class AA, or class A Municipal Council having at least 5 years experience of the respective post
4.	Chief Municipal Office (Class B)	107	Class-II	15600-39100-Grade pay 5400	50%	50%	21 Years	40 Years	1. Asst. Director In Directorate-8 (On Deputation) 2. In Divisional Office-5 3. In Municipal Council (below 1 lakh Population)-78 4. Asst. Commissioner and reserve in Municipal Corporation-16	Graduate of a Recognized University	By promotion of Officer of Chief Municipal Officer of Class-C, and Revenue inspectors of class AA, A and class B Municipal Council having at least years experience of the respective post.

5.	Chief Municipal Officer (Class-C)	267	Class-III	9300-34800-Grade pay 3600	50%	50%	21 Years	40 Years	1. Municipal Council-257 2. Reserve-10	Graduate of a Recognized University	By promotion of Superintendent of Class-A Municipal Council, Revenue Inspectors and Revenue sub Inspectors of class C Municipal Council and employee of the Municipal Council having at least 5 years experience of the respective post.

16. Since there is some dispute in respect of the reading of these Rules, therefore, the Hindi version of the amended Schedule II is also reproduced as under:-

द्वितीय अनुसूची

{नियम 5 के उप–नियम (1) का खण्ड (ग) देखिए}

अनु कमांक	पदों के नाम	पदों की संख्या	ग्रेड का वर्गीकरण	वेतमान	भर्ती का तरीका		न्यूनतम आयु सीमा	अधिकतम आयु सीमा	पदस्थापना	शैक्षणिक अर्हताएं	
					सीधी भर्ती द्वारा	पदोन्नति द्वारा				सीधी भर्ती के लिए	पदोन्नति के लिए
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)
1	-	-	-	-	-	-	-	-	-	-	-
2	-	-	-	-	-	-	-	-	-	-	-
3	मुख्य नगरपालिका अधिकारी (वर्ग–क)	84	प्रथम श्रेणी	15600 से 39100 ग्रेड वेतन 6600	-	100 प्रतिशत	-	-	1.सचालनालय में उप संचालक–2 (प्रतिनियुक्ति पर) 2. संभागीय कार्यालय में–01 3. जिला श.विअभि. – 50 4. नगर पालिका परिषद् में (1 लाख से अधिक जनसंख्या)–19 5. उपायुक्त तथा नगर निगम में आरक्षित–12	-	संबंधित पद का कम से कम 5 वर्ष का अनुभव रखने वाले मुख्य नगरपालिका अधिकारी वर्ग–ख के अधिकारियों तथा कक अथवा क श्रेणी की नगर पालिका परिषद् के राजस्व अधिकारियों के पदोन्नति द्वारा
4	मुख्य नगरपालिका अधिकारी (वर्ग–ख)	107	द्वितीय श्रेणी	15600 से 39100 ग्रेड वेतन 5400	50 प्रतिशत	50 प्रतिशत	21 वर्ष	40 वर्ष	1.सचालनालय में सहायक संचालक–8 2. संभागीय कार्यालय में–5 3. नगरपालिका परिषद् (1 लाख से कम) जनसंख्या–78 4. नगर निगम में सहायक आयुक्त आरक्षित–16	मान्यता प्राप्त विश्वविद्यालय का स्नातक	संबंधित पद का कम से कम 5 वर्ष का अनुभव रखने वाले मुख्य नगरपालिका अधिकारी वर्ग–ग के अधिकारियों तथा कक, क तथा ख श्रेणी की नगर पालिका परिषद् के राजस्व निरीक्षक की पदोन्नति द्वारा.

5	मुख्य नगरपालिका अधिकारी (वर्ग–ग)	267	तृतीय श्रेणी	9300 से 34800 ग्रेड वेतन 3600	50 प्रति शत	50 प्रतिशत	21 वर्ष	40 वर्ष	1. नगर पालिका परिषद्–257 2. आरक्षित–10	मान्यता प्राप्त विश्वविद्यालय का स्नातक	क श्रेणी की नगर पालिका परिषद के अधीक्षक, ग श्रेणी की नगर पालिका परिषद् के राजस्व निरीक्षकों तथा राजस्व उप निरीक्षकों तथा संबंधित पद का कम से कम 5 वर्ष का अनुभव रखने वाले नगर पालिका परिषद् के कर्मचारियों की पदोन्नति द्वारा

17. A fair reading of the amended Rules reveals that the following employees are eligible for consideration for promotion to the post of Chief Municipal Officer Class A, Class B and Class C.

[A] Chief Municipal Officer Class A-- (i) Chief Municipal Officer Class B; (ii) Revenue Officer of Class AA and A Municipal Council.

The above officers should have atleast five years experience on their post.

[B] Chief Municipal Officer Class B-- (i) Chief Municipal Officer Class C; (ii) Revenue Inspector of Class AA, A and B Municipal Council.

The above officers should have atleast five years experience on their post.

[C] Chief Municipal Officer (Class C)-- (i) Superintendent of Class A Municipal Council; (ii) Revenue Inspector of Class C Municipal Council; (iii) Revenue Sub Inspector of Class C Municipal Council; [iv] Employees of the Municipal Corporation having atleast five years experience of above post.

18. So far as feeder cader for promotion to the post of Chief Municipal Officer Class A and B is concerned, the Column 12 of Schedule is very clear only Chief Municipal Officers and Revenue Inspector/Sub Inspector mentioned therein are eligible. The main dispute is in respect of the feeder cadre for the post of Chief Municipal Officer Class C because in Column 12 it is mentioned that "employee of the Municipal Council having atleast five years experience of the respective post". "Respective post" in above expression means posts mentioned in the preceding part of the same sentence i.e. Superintendent Class A Municipal Council and Revenue Inspector/Sub Inspector of Class B Municipal Council. This position is clearly reflected in the Hindi version of the Rules. If petitioner's contention that above expression means any employee of Municipal Council having experience on his post is accepted, then such an interpretation would lead to absurd result as even a Peon having graduate degree with five years experience as peon will become eligible for appointment to the post of Chief Municipal Officer. That is not the intention of the Ruls. (sic: Rules) The Rule is required to be

interpreted keeping in view the object that a person competent to discharge the duties attached to the post and having sufficient experience is appointed.

19. Having regard to above legal position and keeping in view the expressed language of column 12 of the Schedule, it is held that the Superintendent of Class A Municipal Council and Revenue Inspector/Revenue Sub Inspector Class C Municipal Council and also any employee of Municipal Council who has five years experience of the above post of Superintendent and Revenue Inspector/Sub Inspector is eligible for promotion as Chief Municipal Officer Class C.

20. Counsel for the State has pointed out that in terms of Sec.86 of the Municipalities Act, vide notification dated 6/8/2014, five different services namely State Administrative Service, Urban Sanitary Service, Engineering Service, Finance Service and Revenue Service have been constituted. The State has also framed Rules in exercise of the powers conferred by Sec.355 read with Sec.86 of the M.P. Municipalities Act, 1961 by the name of Madhya Pradesh State Urban Finance Service (Recruitment and Conditions of Service) Rules 2017 constituting State Urban Finance Service. In terms of Schedule IV, the Accountants are eligible for promotion as Assistant Accounts Officers, therefore, separate channel for promotion has been provided for the Accountant.

21. Though counsel for petitioner has referred to the promotion orders dated 25/6/2020, 19/7/2019 and 3/8/2015 in support of his plea that ministerial employees have been promoted as Chief Municipal Officer, but he has failed to point out any material to controvert the plea of the counsel for State that those promotions were made under the unamended Rules on the basis of the seniority list existing as on 1/1/2014 and error in the order dated 26/9/2020 has been corrected by issuing Annexure R/1.

22. In view of the above analysis, the Writ Petitions are **disposed of** with following directions:-

> (i) Challenge to the impugned order dated 23/10/2020 is found to be devoid of any merit.
>
> (ii) If any of the petitioner raises an issue about his/her eligibility for promotion to the post of Chief Municipal Officer or the issue that his/her post falls in the feeder cadre for promotion to the post of Chief Municipal Officer, then the competent authority will decide that issue in the light of the conclusion drawn by this court in this order about the feeder cadre for promotion to the post of Chief Municipal Officer.
>
> (iii) The respondents are directed to make regular appointment to the post of Chief Municipal Officer by direct recruitment/promotion as per Rules without any unnecessary delay.

(iv) if for any reason the charge of Chief Municipal Officer is required to be given on account of administrative exigency to the officer/employee of the feeder cadre to that post then the same will be done having due regard to the directions already issued in WP No.5135/2012 and WP No.652/2015.

23. The signed order be placed in the record WP No.14632/2020 & a copy whereof be placed in the record of connected WP No.14654/2020, 14689/2020, 14790/2020,14791/2020, 14793/2020, 14795/2020, 14797/2020 & WP No.14802/2020.

Order accordingly

I.L.R. [2020] M.P. 2799
WRIT PETITION

Before Mr. Justice Vivek Rusia

W.P. No. 18190/2019 (Indore) decided on 3 November, 2020

DEVENDRA KUMAR SONI …Petitioner

Vs.

STATE OF M.P. & ors. …Respondents

***A. School Education Teacher Education and Training Academic (Gazetted) Service Recruitment and Conditions of Service Rules, M.P, 2011, Rule 4(2)(a) & 6(c) and School Education District Institute of Education and Training (Gazetted) Service Recruitment Rules, M.P., 1991, Rules 4, 6 & 11 – Repatriation to Parent Department* – Held – Petitioner was neither holding the post of Lecturer at the time of commencement of Rules of 2011 nor he was absorbed in DIET cadre under Rules of 1991, nor he is a person directly recruited to service under Rules of 2011 & Rules of 1991 – He cannot be treated to be in service of DIET after commencement of Rules of 1991 & 2011 – No ground of interference – Petition dismissed. (Paras 8 to 10)**

क. स्कूल शिक्षा, शिक्षक–शिक्षा एवं प्रशिक्षण अकादमिक (राजपत्रित) सेवा भर्ती तथा सेवा की शर्तें नियम, म.प्र., 2011, नियम 4(2)(a) व 6(c) एवं स्कूल शिक्षा, जिला शिक्षा एवं प्रशिक्षण संस्थान (राजपत्रित) सेवा भर्ती नियम, म.प्र., 1991, नियम 4, 6 व 11 – मूल विभाग को संप्रत्यावर्तन – अभिनिर्धारित – 2011 के नियम प्रारंभ होने के समय याची न तो प्राध्यापक का पद धारण किये था, न 1991 के नियमों के अंतर्गत, जिला शिक्षा एवं प्रशिक्षण संस्थान (डी.आई.ई.टी.) संवर्ग में उसका संविलयन किया गया था और न ही वह नियम, 2011 व नियम, 1991 के अंतर्गत, सेवा में सीधी भर्ती किया गया एक व्यक्ति है – 1991 व 2011 के नियमों के प्रारंभ होने के पश्चात्, उसे डी.आई.ई.टी. की सेवा में होना नहीं माना जा सकता – हस्तक्षेप का कोई आधार नहीं – याचिका खारिज।

***B. Service Law – Repatriation* – Held – It is always the prerogative of borrowing department to retain service of person on deputation and at any**

point of time they can be repatriated to the parent department – Since service of petitioner was not found satisfactory, he was repatriated to parent department – Repatriation order is neither punitive nor casting any stigma on petitioner because he has already been earlier punished for irregularities.

(Para 11)

ख. सेवा विधि – संप्रत्यावर्तन – अभिनिर्धारित – प्रतिनियुक्ति पर व्यक्ति की सेवा प्रतिधारित करना, सदैव, सेवा उधार लेने वाले विभाग का परमाधिकार होता है और किसी भी समय उन्हें मूल विभाग को संप्रत्यावर्तित किया जा सकता है – चूंकि याची की सेवा संतोषजनक नहीं पाई गई थी, उसे मूल विभाग को संप्रत्यावर्तित कर दिया गया था – संप्रत्यावर्तन आदेश न तो दण्डात्मक है और न ही याची पर कोई कलंक लगाने वाला है क्योंकि उसे अनियमितताओं के लिए पूर्व में ही दण्डित किया जा चुका है।

Manoj Manav, for the petitioner.
Romil Malpani, P.L. for the respondents/State.

O R D E R

VIVEK RUSIA, J.:- Petitioner has filed the present petition being aggrieved by the order dated 22.08.2019 (Annexure P/2) whereby the Director of Public Education has repatriated him to the parent department i.e. School Education

Facts of the case, in short, are as under:

2. Vide order dated 15.12.1988 the petitioner was appointed as Lecturer by the Director, Public Education. In the year 1996, the petitioner did Masters in Education course with the prior permission of the Department. In order to provide better education in the State of Madhya Pradesh, the State Govt. has established District Institute of Education & Training (hereinafter referred to a **DIET**) in the state . Vide order dated 07.07.2001 the petitioner was transferred in the capacity of Lecturer to the DIET, Indore and since then he is working there.

3. On the basis of the enquiry report submitted by the Joint Director, Public Education a show-cause notice dated 05.07.2019 was issued to the petitioner alleging 5 irregularities said to have been committed by him. Petitioner submitted a detailed reply to the show cause notice and vide order dated 01.08.2019 a stoppage of increment with non-cumulative effect (minor punishment) was imposed and the enquiry was closed. Thereafter, vide **impugned order dated 22.08.2019** the petitioner has been repatriated to the parent department by the Director, Public Education Centre, Bhopal. Being aggrieved by the aforesaid order, the petitioner has filed the present petition before this Court mainly on the ground that he has been repatriated to the parent department by way of penalty that too by an incompetent authority. For the alleged misconduct he had already

been punished by order dated 01.08.2019, hence now the present repatriation based on the same charges amounts to double jeopardy to the petitioner.

4. After notice respondents No.1 to 4 have filed the return by submitting that the petitioner's services were handed over to the DIET, Indore in the year 2001 under the administrative exigency. Since he has been found guilty of commission of serious irregularities and dereliction of duty assigned to him which stands proved after the departmental enquiry, the petitioner has rightly been repatriated to the parent department. The petitioner has not challenged the punishment imposed to him, therefore, he cannot deny the charges levelled against him. Since his services are no more required in the DIET, therefore, he has rightly been sent back to the parent department. He has no enforceable right to claim continuance in the DIET.

5. By way of rejoinder the petitioner has raised an additional ground that by virtue of Rule 4(2)(a) of the M.P School Education Teacher Education and Training Academic (Gazetted) Service Recruitment and Conditions of Service Rules, 2011 (hereinafter referred to as **"the Rules of 2011")** he is holding the substantive post of Lecturer in the DIET, hence he cannot be repatriated to the School Education Department. Rule 6(c) of the Rules of 2011 provides the mode of recruitment by way of transfer or on deputation on a substantive post in the DIET, therefore, the petitioner has become a regular employee of the DIET and he could not have been repatriated to the parent department.

6. Respondents have filed the additional return by submitting that after coming into force of Rules of 2011 a separate cadre of employees working in the DIET has been formed. The only eligible Lecturers working in the School Education Department fulfilling the criteria laid down in the aforesaid rules were included in the service and relieved by the State Govt. from their lien. The petitioner being Lecturer of the School Education Department does not find his name in the list of such cadre of Lecturers published by the DIET. The petitioner is still holding his lien in the parent department. He has already been promoted as Principal, High School in the Education Department w.e.f 15.08.2008 on the basis of seniority as Lecturer, therefore, he is no more the employee of the DIET and since his services are required in the DIET, he has rightly been sent back to the parent department, hence the writ petition is liable to be dismissed.

Heard the arguments and perused the record.

7. Before deciding the validity of the impugned order it would be appropriate to decide the issue as to whether the petitioner's services have been absorbed in the cadre of DIET or not. According to the petitioner under Rule 4(2)(a) of the Rules of 2011 a person who at the time of commencement of these rules are holding any post as specified in Schedule-IA substantively or in officiating capacity shall be

treated in service of the DIET. Rule 6(1)(c) provides the method of recruitment by way of transfer or on deputation of the persons appointed on a substantive post in such services as may be specified by the govt. in this behalf.

8. It is not in dispute that the petitioner was initially appointed on the post of Lecturer in the School Education Department by the Commissioner Public Education. Vide order dated 07.07.2001 he was transferred in the same capacity to the DIET, Indore by the order of the Governor. At the relevant point of time, the rules called the M.P School Education District Institute of Education and Training (Gazetted) Service Recruitment Rules, 1991 (hereinafter referred to as **'the Rules of 1991")** was in force. Rule 4 of the Rules of 1991 says about the constitution of the service and as per Rule 4(1) persons, who at the commencement of these rules are holding substantively the posts specified in Schedule shall be in the service of the DIET apart from the persons recruited in service before or after the commencement of the Rules of 1991. Rule 6 provides the method of recruitment i.e. (a) by direct recruitment by competitive examination (b) by the promotion of members already in the service (c) by transfer of persons who hold in a substantive capacity. The petitioner was transferred to the DIET after the commencement of the Rules of 1991, therefore, he is not falling in either of the sub-rules (1) to (3) of Rule 4. So far the method of recruitment as provided under rule 6 is concerned after the commencement of the Rules of 1991 recruitment to the services shall be made by (a) direct recruitment (b) by promotion & (c) by transfer. The petitioner is claiming himself to be in the service of DIET by virtue of section 6(1)(c) i.e. by way of transfer. It is correct that if any person who holds a post in substantive capacity such post in such service as may be specified in this behalf as transferred to the DIET shall be treated as recruited under Rule 6. Rules 7 provides that all the appointments in service after commencement of these rules shall be made by the Government after selection by one of the methods of recruitment specified in Rule 6.

9. **Schedule I** appended to the Rules of 1991 provides the list of posts included in the service with pay-scale and its appointing authority. At that time 757 posts of Lecturers were sanctioned to be appointed by the Direct Council. As per Schedule-II (Rule 6) 100% posts of Lecturers are to be filled by direct recruitment. Posts from 1 to 5 i.e. Principal to Senior Lecturers are to be filled by direct recruitment or by way of promotion as per the percentage mentioned in Schedule-II. Rules 6 applies to all the six services right from Principal (DIET) to Lecturer, therefore, as per Schedule-I & II the Lecturers are liable to be appointed by way of direct recruitment by competitive examination under Rule 6 (1) (a) only. The mode of direct recruitment is provided in Rule 11. The Lecturer cannot be appointed by way of promotion and by way of transfer because as per Schedule-II 100% post of Lecturer is to be filled up by way of **direct recruitment**.

10. The Rules of 1991 has been repealed by the Rules of 2011 in which Rule 4 provides constitution of service and sub-rule (2) of Rule 4 provides that the

services shall consist of the following persons who are working in the DIET on such posts as specified in Schedule-IA &1B. The persons, who at the time of commencement of these Rules, are holding any posts as specified in Schedule-IA substantively or in officiating capacity, the persons at the time of commencement of these Rules will be absorbed in the service cadre and the persons recruited to the service in accordance with the provisions of these Rules shall be treated in the service of the DIET. There is no change in Rules 6 & 7 and Rule 11 in respect of method or recruitment, appointment in service and direct recruitment through competitive examination. In Schedule-IA appended to the Rules of 2011, 407 posts of Lecturers are sanctioned and as per Schedule-IIA 100% posts of Lecturer are to be filled by way of direct recruitment, therefore, the petitioner was neither holding the post of Lecturer at the time of commencement of the Rules of 2011 nor he was absorbed in the DIET cadre under the Rules of 1991 as discussed above nor he is a person recruited to the service under the Rules of 2011. 100% posts of Lecturer are liable to be filled up by way of direct recruitment for which procedure is prescribed in the Rules of 2011. The posts other than Lecturer in the cadre of DIET are liable to be filled up either by promotion or by transfer under Rule 6(a),(b) & (c) but so far the post of Lecturer is concerned no one is liable to be treated in service or appointed in the service of DIET as Lecturer by way of promotion and by way of transfer, therefore, the petitioner was neither directly recruited to the post of Lecturer under Rule 11 of the Rules of 1991 & Rules of 2011, therefore, he cannot be treated in the service of DIET after the commencement of the Rules of 1991 & 2011. Hence, the contention of Shri Manav that the petitioner has become the employee of the DIET is hereby rejected.

11. So far the repatriation of the petitioner by the impugned order is concerned it is always the prerogative of the borrowing department to retain the service of the person on deputation and at any point of time, they can be repatriated to the parent department. Since the services of the petitioner were not found satisfactory, therefore, he has been repatriated to the parent department. The respondent has only mentioned the reasons for his repatriation in the impugned order which became the basis of his repatriation hence cannot be termed as double punishment. The impugned order is neither punitive nor casting any stigma on the petitioner because he had already been punished vide order dated 01.08.2019 and that order has attained finality.

12. In view of the foregoing discussion, I do not find any ground to interfere in the impugned order. Accordingly, the petition is dismissed.

No order as to cost.

Petition dismissed

I.L.R. [2020] M.P. 2804 (DB)
WRIT PETITION

Before Mr. Justice Sanjay Yadav, Acting Chief Justice &
Mr. Justice Vijay Kumar Shukla

W.P. No. 13291/2020 (Jabalpur) decided on 3 December, 2020

JUSTICE SHAMBHU SINGH (RTD.) …Petitioner

Vs.

UNION OF INDIA & ors. …Respondents

(Alongwith W.P. No. 15461/2020)

***A. Supreme Court Judges (Salary and Conditions of Service) Act (41 of 1958), Section 16B and High Court Judges (Salaries and Conditions of Service) Act, (28 of 1954), Section 17B – Pension/Family Pension – Additional Quantum – Interpretation of word "From"* – Held – Interpretation of Section 17B of Act of 1954 shall apply *mutatis mutandis* to Section 16B of Act of 1958 i.e. the expression "From" in each entry of scale provided u/S 16B will mean "starting point" of "the year" instead of "after" the completion of "the year". (Para 7)**

क. उच्चतम न्यायालय न्यायाधीश (वेतन और सेवा शर्तें) अधिनियम, (1958 का 41), धारा 16B एवं उच्च न्यायालय न्यायाधीश (वेतन और सेवा शर्तें) अधिनियम (1954 का 28), धारा 17B – पेंशन/परिवार पेंशन – अतिरिक्त मात्रा – 'से'' शब्द का निर्वचन – अभिनिर्धारित – 1954 के अधिनियम की धारा 17B का निर्वचन 1958 के अधिनियम की धारा 16B पर यथावश्यक परिवर्तन सहित लागू होगा अर्थात् धारा 16B के अंतर्गत उपबंधित पैमाने की प्रत्येक प्रविष्टि में अभिव्यक्ति ''से'' का अर्थ ''वर्ष'' के पूर्ण होने के ''पश्चात्'' के बजाय ''वर्ष'' का ''प्रारंभ बिंदु'' होगा।

***B. Supreme Court Judges (Salary and Conditions of Service) Act (41 of 1958), Section 16B, High Court Judges (Salaries and Conditions of Service) Act, (28 of 1954), Section 17B and Constitution – Article 226 – Scope & Jurisdiction* – Held – Relief of general nature sought by petitioner for extension of benefits of Section 16B of Act of 1958 and Section 17B of Act of 1954 to the retired Judges of High Courts and Supreme Court or their respective family pensioner cannot be acceded to – Respondents directed to construe the word "From" as first day of entering minimum age of slab to the petitioners – Petitions allowed to such extent. (Para 8 & 9)**

ख. उच्चतम न्यायालय न्यायाधीश (वेतन और सेवा शर्तें) अधिनियम, (1958 का 41), धारा 16 B, उच्च न्यायालय न्यायाधीश (वेतन और सेवा शर्तें) अधिनियम (1954 का 28), धारा 17 B एवं संविधान – अनुच्छेद 226 – व्याप्ति व अधिकारिता – अभिनिर्धारित – याची द्वारा उच्च न्यायालयों एवं सर्वोच्च न्यायालय के सेवानिवृत्त न्यायाधीशों या उनके परिवार के संबंधित पेंशनभोगी को 1958 के अधिनियम की धारा 16B

तथा 1954 के अधिनियम की धारा 17B के लाभ का विस्तार करने के लिए चाहा गया सामान्य स्वरूप का अनुतोष स्वीकार नहीं किया जा सकता – प्रत्यर्थीगण को ''से'' शब्द का अर्थ याचीगण के न्यूनतम आयु स्लैब में प्रवेश करने के प्रथम दिन के रूप में लगाये जाने हेतु निदेशित किया गया – याचिकाएँ उक्त सीमा तक मंजूर।

Cases referred:

AIR 1972 SC 1293, (2010) 12 SCC 210, AIR 1954 SC 207.

Sumeet Samvatsar, for the petitioners.
J.K. Jain, Asstt. Solicitor General for the respondent Nos. 1 & 2.
S.P. Nair, for the respondent No. 3 in W.P. No. 13291/2020.

O R D E R

The Order of the Court was passed by :
SANJAY YADAV, ACTING CHIEF JUSTICE :- These writ petitions by the Association of Retired Judges of Supreme Court and High Courts of India and a retired judge of this Court raises the issue as to interpretation of Section 16B of the Supreme Court Judges (Salaries and Conditions of Service) Act, 1958 and Section 17B of the High Court Judges (Salaries and Conditions of Service) Act, 1954.

These provisions are reproduced below :

Section 16B of the Supreme Court Judges (Salaries and Conditions of Service) Act, 1958.

> *"16B. Additional quantum of pension of family pension.* - Every retired Judge or after his death, the family, as the case may be, shall be entitled to an additional quantum of pension or family pension in accordance with the following scale :-

Age of pensioner or family pensioner	*Additional quantum of pension or family pension*
From eighty years to less than eighty-five years	Twenty per cent of basic pension or family pension
From eighty-five years to less than ninety years	Thirty per cent of basic pension or family pension
From ninety years to less than ninety-five years	Forty per cent of basic pension or family pension
From ninety-five years to less than hundred years	Fifty per cent of basic pension or family pension
From hundred years or more	Hundred per cent of basic pension or family pension

Section 17B of the High Court Judges (Salaries and Conditions of Service) Act, 1954.

> *"17-B. Additional quantum of pension or family pension.* - Every retired Judge or after his death, the family, as the case may be, shall be entitled to an additional quantum of pension or family pension in accordance with the following scale :

Age of pensioner or family pensioner	*Additional quantum of pension or family pension*
From eighty years to less than eighty-five years	Twenty percent of basic pension or family pension
From eighty-five years to less than ninety years	Thirty percent of basic pension or family pension
From ninety years to less than ninety-five years	Forty percent of basic pension or family pension
From ninety-five years to less than hundred years	Fifty percent of basic pension or family pension
From hundred years or more	Hundred percent of basic pension or family pension

2. Precise submission on behalf of the petitioners is that the expression "From" in each entry of the scale provided under Section 17B of 1954 Act has been interpreted by the Division Bench of the Gauhati High Court in W.P.(C) 4224/2016 (Virendra Dutt Gyani vs. The Union of India & ors.) decided on 15.03.2018 to mean "starting point" of "the year" instead of "after" the completion of "the year". It is urged that the decision in Virendra Dutt Gyani (supra) was put to test before the Supreme Court by the Union of India vide Special Leave Petition (Civil) Diary No.18133/2019 which was dismissed on 08.07.2019. The grievance of the petitioners is that the expression "From" in the Central Act having been interpreted in a particular manner need to be universally applied in similar fact situation. However, the Union of India, it is urged, is not adhering to the same and the benefit of enhanced pension are extended only to those pensioners who approaches the Court. The petitioners accordingly seek direction to the respondents to extent the benefit of Section 16B of the Act of 1958 and Section 17B of the Act of 1954 by interpreting the word "From" as the first day of entering the minimum age slab (i.e. 80, 85, 90, 95 and 100 years) along with other consequential benefits with regard to the retired Supreme Court and High Court Judges or their respective family pensioner.

3. In W.P.No.13291/2020, Respondent-Union of India has filed an Affidavit through Under Secretary, Department of Justice, Ministry of Law and Justice, New Delhi and has adopted the same in W.P.No.15461/2020; wherein, while not disputing that based on the recommendation of Sixth Pay Commission, the Central Government had decided to grant additional quantum of pension/family pension to retired civil servants with reference to the age of the pensioner/family pensioner. And on the same analogy, it was proposed to extend similar benefit to all the retired Judges of High Court and Supreme Court. The civil pensioners and family pensioners, it is urged, are being sanctioned additional quantum of pension on completion of the age of 80 years. It is further contended that after dismissal of Special Leave Petition and the legal opinion for not seeking Review, the respondent is now holding inter-departmental consultation for deciding further course. On these contentions the respondents seek dismissal of petition.

4. In *Virendra Dutt Gyani* (supra) the Division Bench of Gauhati High Court while disgressing from the well established principle applicable to the construction of statute that ordinarily in computing time, the rule observed is to exclude the first and include the last as contained in Section 9 of the General Clauses Act, 1897 [please see - *Haru Das Gupta vs. The State of West Bengal* AIR 1972 SC 1293 : Para-5 and *State of Himachal Pradesh vs. Himachal Techno Engineers ;* (2010) 12 SCC 210 : Para-13] and taking recourse to purposive interpretation held :

> "22. Therefore, as per the dictionary meaning, the expression "from eighty years" would indicate the starting point of eighty years. However, as a note of caution, it has also been clarified that inclusiveness or exclusiveness associated with the expression would have to be interpreted having regard to the intention for use of such word or expression.
>
> 23. Petitioner is right when he says that section 17B was inserted in the parent Act in the year 2009 to provide some succour to the ageing retired judges. Long back Winston Churchill had said that service rendered by judges demands the highest qualities of learning, training and character. These qualities are not to be measured in terms of pounds, shilling and pence according to the quantity of work done. After rendering such service to the nation, it is the duty of the State to ensure that a retired judge who has entered the autumn of his life is adequately looked after. A retired judge at the fag end of his life has peculiar problems on account of his advanced years and failing health. It is to cater to such a situation that Parliament in its wisdom had amended the Act in the year 2009 by inserting section 17B entitling every retired judge to additional quantum of pension or in case of death, the family to additional quantum of family pension in the scale mentioned.

24. If this is the object behind insertion of section 17B, we must adopt such an interpretation which effectuates the object of the provision and which does not frustrate the object.

25. Justice G.P. Singh in his seminal work Principles of Statutory Interpretation dealt with the subject of purposive construction of statutes. According to him, when material words are capable of bearing two or more constructions, the most firmly established rule for construction of such words of all statutes is the rule laid down in Hey don's case. This rule which is also known as "purposive construction" or "mischief rule", requires consideration of four matters while construing an Act—

(i) what was the law before the making of the Act;

(ii) what was the mischief or defect for which the law did not provide;

(iii) what is the remedy that the Act has provided; and

(iv) what is the reason of the remedy.

The rule than directs that the courts must adopt that construction which shall suppress the mischief and advance the remedy.

25.1 In Bengal Immunity Co. v. State of Bihar, AIR 1955 SC 661, Supreme Court succinctly explained the rule holding that it is a sound rule of construction of a statute for the sure and true interpretation of all statutes in general, including beneficial ones. After discerning and considering the four things as noticed above, the court is always to make such construction as shall suppress the mischief and advance the remedy; to suppress subtle inventions and evasions for continuance of the mischief; and to add force and life to the cure and remedy, according to the true intent of the makers of the Act.

25.2 According to Lord Reid, "the word mischief is traditional". He expanded it to include "the facts presumed to be known to Parliament when the Bill which became the Act in question was before it" and "the unsatisfactory state of affairs" disclosed by these facts "which Parliament can properly be supposed to have intended to remedy by the Act".

25.3 As has been observed by the Supreme Court, to interpret a statute in a reasonable manner, the Court must place itself in the chair of a reasonable legislator. So done, the rules of purposive construction have to be resorted to which would require the construction of the Act in such a manner as to see that the object of the Act is fulfilled.

25.4 In selecting different interpretations, court would adopt that which is just, reasonable and sensible. A construction that results in hardship, serious inconvenience, injustice, absurdity or anomaly or which leads to inconsistency or uncertainty has to be avoided.

25.5 Of course this rule would have no application when the words are susceptible to only one meaning and no alternative construction is reasonably open.

26. While on purposive construction, it would be useful to refer to the decision of the Supreme Court in New India Assurance Co. Ltd. v. Nusli Neville Wadia, (2008) 3 SCC 279, which was placed before us by learned counsel for the petitioner. In that case, Supreme Court was considering the question as to who should lead evidence in a proceeding under the Public Premises (Eviction of Unauthorised Occupants) Act, 1971. In the context of that question, Supreme Court observed that a literal construction would lead to an anomalous situation because the landlord may not be heard at all or may not even be permitted to adduce any evidence in rebuttal. In such a situation, the rules of purposive construction have to be resorted to which would require the construction of the Act in such a manner so as to see that the object of the Act is fulfilled. Referring to Purposive Interpretation in Law by Aharom Barak, Justice Sinha speaking for the Bench explained purposive construction as under:

"Hart and Sachs also appear to treat 'purpose' as a subjective concept. I say 'appear' because, although Hart and Sachs claim that the interpreter should imagine himself or herself in the legislator's shoes, they introduce two elements of objectivity: First, the interpreter should assume that the Legislature is composed of reasonable people seeking to achieve reasonable goals in a reasonable manner; and second, the interpreter should accept the non-rebuttable presumption that members of the legislative body sought to fulfill their constitutional duties in good faith. This formulation allows the interpreter to inquire not into the subjective intent of the author, but rather the intent the author would have had, had he or she acted reasonably. "

27. Let us now revert back to section 17B of the Act which though quoted above, is again extracted hereunder for convenience of the deliberation:

"17B. Additional quantum of pension or family pension.— Every retired Judge or after his death, the family, as the case may be, shall be entitled to an additional quantum of pension or family pension in accordance with the following scale :

Age of pensioner or family pensioner	*Additional quantum of pension or family pension*
From eighty years to less than eighty-five years	Twenty percent of basic pension or family pension
From eighty-five years to less than ninety years	Thirty percent of basic pension or family pension
From ninety years to less than ninety-five years	Forty percent of basic pension or family pension
From ninety-five years to less than hundred years	Fifty percent of basic pension or family pension
From hundred years or more	Hundred percent of basic pension or family pension

> 28. If we look at the first two slabs, we find that the first slab is from 80 years to less than 85 years and the second slab is from 85 years to less than 90 years. The second expression in both the slabs is quite clear : it is either less than 85 years or less than 90 years. Now, if we apply the interpretation given by the respondents to the first expressions, i.e., from 80 years and from 85 years, consequence would be that on completion of 80 years to less than 85 years a retired judge would be entitled to the first scale of additional pension and again on completion of 85 years to less than 90 years, the retired judge would be entitled to the second scale of additional pension. In this process, not only the 80th year would stand excluded, even the 85th and 90th years would be excluded. Likewise, the 95th year as well as the 100th year would also be excluded. This could not be and certainly was not the intention of the law makers. Therefore, by applying purposive interpretation, we have no hesitation in our mind that the interpretation put forward by the respondents is not only unreasonable and irrational leading to an anomalous situation, it would also defeat the very object behind insertion of section 17B in the Act."

5. The judgment in *Virendra Dutt Gyani* (supra) has since been affirmed by Hon'ble Supreme Court in SLP (C) Diary No.18133/2019 decided on 08.07.2019; wherein, it is held :

> "Delay Condoned.
>
> Having heard learned counsel for the petitioners and on perusing the relevant material, we are not inclined to interfere. The special leave petition is accordingly dismissed."

6. And, as it turn out from the Affidavit (supra) filed by the Union of India, the order passed in *Virendra Dutt Gyani* (supra) has been allowed to attain finality as would escape its application to the petitioners herein.

7. That, Section 16B of the Act of 1958 is also worded in the same terms as Section 17B of the Act of 1954. The same deserves to be interpreted in the same manner as Section 16B of the Act of 1658 (sic : 1958). The interpretation of Section 17B of the Act of 1954 shall apply *mutatis mutandis* to Section 16B of the Act of 1958 i.e. the expression "From" in each entry of the scale provided under Section 16B of the Act of 1958 will mean "starting point" of "the year" instead of "after" the completion of "the year".

8. The question, however, is whether in a petition of this nature a declaration can be given to make the decision in *Virendra Dutt Gyani* (supra) applicable to all the retired judges of Supreme Court and the High Court irrespective of their residence. The answer lies in the decision in *K.S.Rashid vs. The Income Tax Investigation Commission* AIR 1954 SC 207; wherein, it is held:

> "3. ... The whole law on this subject has been discussed and elucidated by this court in its recent pronouncement in Election Commission v. Venkata Rao [AIR 1953 SC 210] where the observations of the Judicial Committee in Parlakimedi's case, upon which reliance has been placed by the Punjab High Court, have been fully explained. It is to be noted first of all that prior to the commencement of the Constitution the powers of issuing prerogative writs could be exercised in India only by the High Courts of Calcutta, Madras and Bombay and that also within very rigid and defined limits. The writs could be issued only to the extent that the power in that respect was not taken away by the Codes of Civil and Criminal Procedure [Vide in this connection Beasant v. The Advocate General of Madras, 46 IA 176] and they could be directed only to persons and authorities within the original civil jurisdiction of these High Courts. The Constitution introduced a fundamental change of law in this respect. As has been explained by this Court in the case referred to above, while Article 225 of the Constitution preserves to the existing High Courts the powers and jurisdictions which they had previously, Article 226 confers, on all the High Courts, new and very wide powers in the matter of issuing writs which they never, possessed before. "The makers of the Constitution" thus observed Patanjali Sastri C.J. in delivering the judgment of the court, "having decided to provide for certain basic safeguards for the people in the new set-up, which they called fundamental rights, evidently thought it necessary to provide also a quick and inexpensive remedy for the enforcement of such rights, and, finding that the prerogative writs, which the courts in England

> had developed and used whenever urgent necessity demanded immediate and decisive interposition, were peculiarly suited for the purpose, they conferred, in the State's sphere, new and wide powers on the High Courts of issuing directions, orders, or writs primarily for the enforcement of fundamental rights, the power to issue such directions, etc. 'for any other purpose' being also included with a view apparently to place all the High Courts in this country in somewhat the same position as the Court of King's Bench in England". There are only two limitations placed upon the exercise of these powers by a High Court under Article 226 of the Constitution; one is that the power is to be exercised "throughout the territories in relation to which it exercises jurisdiction", that is to say, the writs issued by the court cannot run beyond the territories subject to its jurisdiction. The other limitation is that the person or authority to whom the High Court is empowered to issue writs "must be within those territories" and this implies that they must be amenable to its jurisdiction either by residence or location within those territories. It is with reference to these two conditions thus mentioned that the jurisdiction of the High Courts to issue writs under Article 226 of the Constitution is to be determined. ..."

9. In view whereof the relief of general nature sought by the petitioner for extension of benefits of section 16B of the Act of 1958 and Section 17B of the Act of 1954 to the retired Judges of High Courts and Supreme Court or their respective family pensioner cannot be acceded to. Instead the respondents are directed to construe the word "From" as it appear in the slab under Section 16B of the 1958 Act and Section 17B of the 1954 Act as the first day of entering the minimum age of the slab (i.e. 80, 85, 90, 95 and 100 years) alongwith other consequential benefits to the petitioner in Writ Petition No.13291/2020 and the members of the Petitioner in W.P.No.15461/2020.

10. Consequently, the Writ Petitions are ***allowed*** to the extent above. No costs.

Petition allowed

I.L.R. [2020] M.P. 2813
MISCELLANEOUS PETITION
Before Mr. Justice G.S. Ahluwalia

M.P. No. 158/2020 (Gwalior) decided on 5 February, 2020

CHANDRA SHEKHAR DUBEY & ors. …Petitioners

Vs.

NARENDRA & ors. …Respondents

***A. Land Revenue Code, M.P. (20 of 1959), Section 178 – Partition Proceedings – Fard Batwara* – Held – *Fard Batwara* was neither published nor it contains the signatures of respondents, thus order of partition was defective and illegally passed by Tehsildar – Case rightly remanded to revenue authorities – Petition dismissed. (Paras 12, 13 & 17)**

क. भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 178 – विभाजन कार्यवाहियां – फ़र्द बँटवारा – अभिनिर्धारित – फ़र्द बँटवारा न तो प्रकाशित किया गया था न ही उसमें प्रत्यर्थीगण के हस्ताक्षर मौजूद हैं, अतः विभाजन का आदेश, त्रुटिपूर्ण था एवं तहसीलदार द्वारा अवैध रूप से पारित किया गया – प्रकरण को उचित रूप से राजस्व प्राधिकारियों को प्रतिप्रेषित किया गया – याचिका खारिज।

***B. Land Revenue Code, M.P. (20 of 1959), Section 178(1) & 178(2) – Partition Proceedings – Question of Title* – Held – As per Section 178(1), if any question of title is raised, Tehsildar shall stay the proceeding before him for three months to facilitate institution of civil suit for determination of title – If Tehsildar fails to stay proceedings, it would be a violation of mandatory provision of proviso to Section 178(2) of the Code. (Para 12)**

ख. भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 178(1) व 178(2) – विभाजन कार्यवाहियां – हक का प्रश्न – अभिनिर्धारित – धारा 178(1) के अनुसार यदि हक का प्रश्न उत्पन्न किया जाता है, तहसीलदार उसके समक्ष की कार्यवाहियों को, हक के अवधारण हेतु सिविल वाद संस्थित करना सुगम बनाने के लिए, तीन माह तक रोकेगा – यदि तहसीलदार कार्यवाहियां रोकने में विफल होता है, यह संहिता की धारा 178(2) के परंतुक के आज्ञापक उपबंध का उल्लंघन होगा।

***C. Land Revenue Code, M.P. (20 of 1959), Section 49(3) – Power of Appellate Authority – Remand of Case* – Held – Appellate authority shall not "ordinarily" remand the case for disposal to any Revenue Officer subordinate to it – Use of word "ordinarily" lays down that unless and until there are exceptional circumstances, appellate authority shall not remand the case. (Para 17)**

ग. भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 49(3) – अपीली प्राधिकारी की शक्ति – प्रकरण का प्रतिप्रेषण – अभिनिर्धारित – अपीली प्राधिकारी ''सामान्यतः''

प्रकरण को उसके अधीनस्थ किसी राजस्व अधिकारी को निपटान हेतु प्रतिप्रेषित नहीं करेगा – शब्द ''सामान्यतः'' का उपयोग अधिकथित करता है कि जब तक कि असाधारण परिस्थितियां न हों, अपीली प्राधिकारी प्रकरण प्रतिप्रेषित नहीं करेगा।

Niraj Shrivastava, for the petitioners.

(Supplied: Paragraph numbers)

O R D E R

G.S. AHLUWALIA, J.:- This petition under Article 227 of the Constitution of India has been filed against the order dated 04.11.2019 passed by the Board of Revenue in Revision No. 1009-1/2008/Datia/LR, by which the revision filed by the respondent has been allowed and the matter has been remanded back after setting aside the order of partition.

2. The necessary facts for disposal of the present petition in short are that Premnarayan and one Jay Dayal were the co-owner and Bhumiswami of land bearing Survey No. 20, 74, 218/1, 423, 425/1, 435, 436, 437, 445/1, 447, 448, 449/3, 450, 884 and 889, total area 12.011 hectare situated in village Tharet, District Datia.

3. After the death of Jay Dayal, the names of his legal representatives, i.e., Narendra Kumar, Surendra Kumar and Smt. Ramshree were mutated along with Premnarayan. It is the case of the petitioner that since Jay Dayal and Premnarayan were living separately, therefore, in the year 1969-70, they mutually partitioned the land, however, no partition was done on the revenue record and since for the purpose of loan / KCC separate agricultural holding was required, therefore, Premnarayan filed an application under Section 178 of MPLRC for partition of the land. Respondents filed an application raising the question of title and, thereafter, a suit was also filed which was dismissed in default and the appeal filed by them has also been dismissed by the Appellate Court. The case of Premnarayan is that in the partition proceedings, *Fard Batwara* was put up by Patwari in accordance with the land, which were in occupation of the respective parties. No objection was filed by the respondents no. 1 to 3 and after hearing both the parties, the Tahsildar passed an order of the partition. The order passed by the Tahsildar was challenged by the respondents no. 1 and 2 by filing an appeal before the SDO, Seondha which was registered as Appeal No. 15/Appeal/2005-06 and after hearing both the parties, the SDO, Seondha District dismissed the appeal by order dated 19.04.2006. The order passed by the SDO was challenged by the revisionist by filing second appeal before the Court of Additional Commissioner, Gwalior Division, Gwalior, which was registered as Appeal No. 389/Appeal/2005-06 and the Additional Commissioner by order dated 18.08.2008 has allowed the appeal and set aside the order of partition.

4. Being aggrieved by the order of the Additional Commissioner, Premnarayan filed a revision before the Board of Revenue, which was registered as Revision No.1009-1/2008/Datia/LR. During the pendency of the revision, Premnarayan also expired. The revision has also been dismissed by order dated 04.11.2019.

5. Challenging the order passed by the authorities below, it is submitted by the counsel for the petitioners that since Premnarayan had already expired during the pendency of the revision proceedings and the said revision was allowed without substitution of the legal representatives of Premnarayan, therefore, the final order has been passed against a dead person. It is further submitted that Additional Commissioner committed a material illegality by holding that the *Fard Batwara* was not published thereby materially affecting the interest of the respondents. It is further submitted that since the civil suit filed by the respondents was also dismissed, therefore, merely because the Tahsildar had not stayed its proceedings under Section 178 of MPLRC, would not nullify the said proceedings.

6. Heard the learned counsel for the petitioner.

7. So far as the death during the pendency of the revision is concerned, except by mentioning that Premnarayan had expired during the pendency of the revision, the petitioners have neither filed the death certificate of Premnarayan on record nor have disclosed the date of death of Premnarayan. On the contrary, in paragraph 5.5 of the writ petition, it is mentioned that "During this proceeding Premnarayan met to unfortunate death. The petitioners (being sons, daughters & widow of deceased) who were taken on record". Whereas in Ground - B of the petition, it has been alleged that the "Board of Revenue has passed the order impugned against a dead person (Premnarayan), which is not permissible in law". Thus, it is clear that two self-contradictory submissions have been made in the writ petition. However, from the cause title of the impugned order dated 04.11.2019, it is clear that the petitioners were never brought on record and the revisionist has been shown to be Premnarayan.

8. Under these circumstances, it was incumbent upon the petitioners to disclose the date of death of Premnarayan. If Premnarayan had expired after passing the order dated 04.11.2019 or in between hearing of the revision and delivery of the order, then the death of Premanrayan will not have any adverse effect on the matter and if Premnarayan had expired prior to conclusion of hearing of revision, then the revision would stand abated for not bringing the legal representatives of the revisionist on record. As the petitioners have failed to disclose the date of death of Premnarayan, therefore, this Court is not in a position to give a specific finding as to whether the revision filed before the Board of Revenue was abated or not.

9. Accordingly, the ground of death of Premnarayan raised by the petitioners is rejected for want of basic averments.

10. So far as the merits of the present case are concerned, the Board of Revenue has specifically stated that the *Fard Batwara* which was produced in the partition proceedings did not contain the signatures of the respondents and even the *Fard Batwara* was not got published. The respondents had raised an objection that since a civil suit has been filed, therefore, the Tahsildar must stay the proceedings but the said objection was not taken into consideration.

11. Section 178 of the MPLRC reads as under:-

> "178. Partition of holding.-- (1) If in any holding, which has been assessed for purpose of agriculture under Section 59, there are more than one Bhumiswami any such Bhumiswami may apply to a Tahsildar for a partition of his share in the holding :
>
> Provided that if any question of title is raised the Tahsildar shall stay the proceeding before him for a period of three months to facilitate the institution of a civil suit for determination of the question of title.
>
> (1-A) If a civil suit is filed within the period specified in the proviso to sub-section (1), and stay order is obtained from the Civil Court, the Tahsildar shall stay his proceedings pending the decision of the civil court. If no civil suit is filed within the said period, he shall vacate the stay order and proceed to partition the holding in accordance with the entries in the record of rights.
>
> 2) The Tahsildar, may, after hearing the co-tenure holders, divide the holding and apportion the assessment of the holding in accordance with the rules made under this Code.
>
> [(3) x x x]
>
> [(4) x x x]
>
> [(5) x x x]
>
> *Explanation I.* -For purposes of this section any co-sharer of the holding of a bhumiswami who has obtained a declaration of his title in such holding from a competent Civil Court shall be deemed to be a co-tenure holder of such holding."

12. From the plain reading of proviso to Section 178(1) of MPLRC, it is clear that if any question of title is raised, the Tahsildar shall stay the proceeding before him for a period of three months to facilitate the institution of civil suit for determination of the question of title and if the Tahsildar fails to stay the proceedings,

then, it would be violative of mandatory provision of proviso to Section 178(2) of MPLRC. Furthermore, the Tribunal below have come to a specific finding that *Fard Batwara* was neither published nor it contains the signatures of the respondents, thus, it is clear that the order of partition was illegally passed by the Tahsildar.

13. Under these circumstances, this Court is of the considered opinion that the Tribunal below did not commit any mistake in holding that the proceedings before the Tahsildar were not in accordance with law.

14. So far as the question of remanding the case back to the Tahsildar is concerned, it is submitted by the counsel for the petitioners that in view of Section 49 of the MPLRC, the Appellate Authorities should not have remanded the matter back to the Tahsildar.

15. Heard the learned counsel for the petitioners.

16. Section 49 Sub-Section 3 of the MPLRC reads as under:-

> **"49. Power of appellate authority.** - (1) The appellate authority may either admit the appeal or, after calling for the record and giving the appellant an opportunity to be heard, may summarily reject it :
>
> Provided that the appellate authority shall not be bound to call for the record where the appeal is time-barred or does not lie.
>
> (2) If the appeal is admitted date shall be fixed for hearing and notice shall be served on the respondent.
>
> (3) After hearing the parties, the appellate authority may confirm, vary or reverse the order appealed against, or may take such additional evidence as it may consider necessary for passing its order:
>
> [Provided that the appellate authority shall not ordinarily remand the case for disposal to any Revenue Officer subordinate to it;]"
>
> Provided further that all such cases which have been remanded to the sub-ordinate Revenue Officers by the Appellate or Revisional Authorities before the commencement of the Madhya Pradesh Land Revenue Code (Amendment) Act, 2011 shall be heard and decided by such Revenue Officer."

17. From the plain reading of first proviso to Section 49(3) of MPLRC, it is clear that the Appellate Authority shall not**"ordinarily"** remand the case for disposal to any Revenue Officer subordinate to it. The use of word "ordinarily" clearly indicates that there is no absolute bar of remand of the case by the Appellate Court. However, the use of word "ordinarily" clearly lays down that

unless and until exceptional circumstances are there, the Appellate Authority shall not "ordinarily" remand the case. If the facts of the present case are considered, then it is clear that the Additional Commissioner as well the Board of Revenue have already come to a conclusion that the proceedings before the Tahsildar were defective and were not in accordance with law. If the contention of the counsel for the petitioner that the matter should not have been remanded back to the Tahsildar is accepted, then the only option which was left to the Appellate Authority was to quash the entire proceedings, whereas in order to do complete justice, if the authorities have decided not to quash the proceedings in *toto* but to remand the matter back to the revenue authorities, then in the considered opinion of this Court, the order of remand is in fact in favour of the petitioners.

18. Accordingly, it is held that no perversity could be pointed out by the counsel for the petitioners.

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

Petition dismissed

I.L.R. [2020] M.P. 2818
MISCELLANEOUS PETITION
Before Mr. Justice Sujoy Paul

M.P. No. 3848/2019 (Jabalpur) decided on 27 November, 2020

PRAKASH PATHYA …Petitioner

Vs.

BATI BAI …Respondent

***A. Land Revenue Code, M.P. (20 of 1959), Section 131 – Easementary Rights – Adjudication* – Held – Although order of Tehsildar contained infirmities, learned SDO cured the same by directing Tehsildar for local enquiry – Findings of SDO based on finding/report given by Tehsildar, equally based on statement of witnesses who deposed regarding customary right of respondent regarding use of way – SDO also considered previous customs and convenience of parties – No reason to disturb the findings of fact exercising writ jurisdiction – Petition dismissed. (Paras 20, 22, 24 & 25)**

क. भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 131 – सुखाचार अधिकार – न्यायनिर्णयन – अभिनिर्धारित – यद्यपि तहसीलदार के आदेश में कमियां हैं, विद्वान उपखंड अधिकारी ने तहसीलदार को स्थानीय जांच हेतु निदेशित कर उक्त को ठीक कर दिया – उपखंड अधिकारी के निष्कर्ष तहसीलदार द्वारा दिये गये निष्कर्ष/प्रतिवेदन पर आधारित हैं, जो कि समान रूप से साक्षीगण के कथन पर आधारित हैं जिन्होने मार्ग के उपयोग के संबंध में प्रत्यर्थी के रूढ़िक अधिकार से संबंधित अभिसाक्ष्य दिया – उपखंड अधिकारी ने भी पुरानी रूढ़ि एवं पक्षकारों की सहूलियत को विचार में लिया – रिट अधिकारिता का प्रयोग कर तथ्य के निष्कर्षों को छेड़ने का कोई कारण नहीं – याचिका खारिज।

B. ***Land Revenue Code, M.P. (20 of 1959), Section 131 – Easementary Rights – Adjudication – Ingredients*** **– Held – After satisfying necessary ingredients of Section 131 namely (i) local enquiry, (ii) decision with reference to previous custom and (iii) convenience of parties, SDO decided that respondent is entitled to get right of way. (Para 19 & 22)**

ख. भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 131 – सुखाचार अधिकार – न्यायनिर्णयन – घटक – अभिनिर्धारित – धारा 131 के आवश्यक घटक जैसे कि **(i)** स्थानीय जांच, **(ii)** पूर्ववर्ती रूढ़ि के संदर्भ में विनिश्चय तथा, **(iii)** पक्षकारों की सहूलियत को संतुष्ट करने के पश्चात् उपखंड अधिकारी ने यह विनिश्चित किया कि प्रत्यर्थी मार्ग का अधिकार पाने का हकदार है।

C. ***Land Revenue Code, M.P. (20 of 1959), Section 131 – Easementary Rights – Adjudication – Competent Authority*** **– Held – Apex Court concluded that Tehsildar, after local enquiry may decide such disputes with reference to previous customs and with due record to the convenience of all parties concerned. (Para 15 & 16)**

ग. भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 131 – सुखाचार अधिकार – न्यायनिर्णयन – सक्षम प्राधिकारी – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया है कि तहसीलदार, स्थानीय जांच के पश्चात् पूर्व रूढ़ि के संदर्भ में तथा सभी संबंधित पक्षकारों की सुविधा के लिए सम्यक् अभिलेख के साथ ऐसे विवादों का विनिश्चय कर सकता है।

D. ***Land Revenue Code, M.P. (20 of 1959), Section 43 and Civil Procedure Code (5 of 1908), Section 107 – Powers of Appellate Court*** **– Held – In absence of any other express provision in Code of 1959 which limits the jurisdiction of Appellate Authority, the Appellate Authority under Code of 1959 is also conferred with same powers as are conferred on the original Court. (Para 24)**

घ. भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 43 एवं सिविल प्रक्रिया संहिता (1908 का 5), धारा 107 – अपीली न्यायालय की शक्तियाँ – अभिनिर्धारित – 1959 की संहिता में ऐसे किसी अन्य अभिव्यक्त उपबंध जो कि अपीली प्राधिकारी की अधिकारिता को सीमित करता है की अनुपस्थिति में, 1959 की संहिता के अंतर्गत अपीली प्राधिकारी को भी मूल न्यायालय को प्रदत्त शक्तियों के समान शक्तियां प्रदत्त हैं।

Cases referred :

2011 (7) SCC 452, 2011 (4) MPLJ 160, 2016 (1) MPLJ 419, (1988) 2 SCC 222, (2002) 4 SCC 183, (1996) 11 SCC 586, 2006 (1) MPHT 511.

Sankalp Kochar, for the petitioner.
Sourabh Singh Thakur, for the respondent.

O R D E R

SUJOY PAUL, J.:- In this petition filed under Article 226 of the Constitution, the petitioner has challenged the order dated 12.10.2018 (Annexure P/3) passed by Tehsildar, Gairatganj, District Raisen in Case No.0006/a-13/2016-17 which is affirmed in appeal No.0004/Appeal/2018-19 by order dated 30.5.2019 (Annexure P/6) by Sub Divisional Officer (SDO).

2. In short, the necessary facts for adjudication of this matter are that the respondent filed an application (Annexure P/1) under Section 131 of M.P. Land Revenue Code, 1959 (for brevity **'Code')** seeking right of way through the land of petitioner and other persons.

3. A spot inspection was carried out wherein it was found that there is no approach road to the land of respondent. Copy of *panchnama* and report are cumulatively filed by the petitioner as Annexure P/2. The petitioner contends that respondent prayed for providing right of way through a number of agricultural fields but all such affected agriculturists/owner of properties were not made party in the said proceedings filed under Section 131 of the Code. Resultantly, the affected parties were not provided any opportunity of any nature by learned Tehsildar.

4. Shri Sankalp Kochar, learned counsel for the petitioner submits that by a cryptic order and without recording any evidence of parties, the Tehsildar conducted the spot inspection and passed the impugned order dated 12.10.2018 (Annexure P/3). The petitioner was directed to provide approach road through his land in order to enable the respondent to approach her agricultural field. Aggrieved, petitioner filed an appeal (Annexure P/4) before the SDO. In addition, written submissions (Annexure P/5) alongwith recent judgment were filed. The learned SDO by order dated 30.5.2019 upheld the order passed by Tehsildar.

5. Criticising the impugned orders, Shri Kochar urged that both the authorities below have miserably failed to understand the true scop (sic: scope) and application of Section 131 of the Code. Section 131 of the Code aforesaid recognizes a customary way which must be available in consonance with easmentary right of a party flowing from Section 18 of the The Indian Easements Act, 1882 (for short **'Easement Act').** Section 131 of the Code nowhere provides a right of creation of altogether new way whereas authroties (sic : authorities) below have directed to create a new approach road/way which is bad in law.

6. The inspection reports/panchnama makes it clear that there existed no easementary way on the spot and in absence thereto, a direction to creat (sic : create) such way runs contrary to the ambit and scope of Section 131 of the Code.

7. The Tehsildar is under a statutory obligation under Section 131 of the Code to undertake the spot inspection. In the instant case, Tehsildar never visited the spot nor any spot inspection report has been prepared by him.

8. The right of way directed to be given by impugned orders goes through various khasra numbers of various land owners. All such land owners were not put to notice and heard. The Patwari report dated 01.07.2014 shows that there was no approach road existing on the spot. Since no past route was available on the spot, power under Section 131 of the Code could not have been exercised. The petitioner has never given consent in the manner it is understood by revenue courts. In the impugned orders, the grounds taken by petitioner has not been dealt with in a judicious manner.

9. To bolster aforesaid submissions, reliance is placed on Annexure P/2 wherein it is mentioned that for approaching Khasra No.75/1/3, there is no existing way available and agriculturists of adjacent lands have not given permission to approach the respondent's land when they were telephonically contacted. Reliance is placed on *'Panchnama'* dated 02.08.2018 to contend that the respondent was unable to carry out agricultural work for the last four years. Respondent's youngest son informed that to reach relevant khasra number, way travels from Khasra No.73/1 of Malkhan S/o Raghunath Dangi and from Khasra No.73/2 which belongs to Prathmesh. Shri Kochar urged that there are contradictory findings in different reports on the strength of which impugned orders were passed. Yet another representataion dated 05.12.2018 was relied upon for this purpose.

10. Lastly, Shri Kochar placed reliance on certain paragraphs of impugned orders and urged that the basic contention raised by petitioner regarding impermissibility of providing new way in exercise of power under Section 131 of the Code is not dealt with by both the authorties (sic : authorities) whereas curtains on this aspect are finally drawn by Apex Court in the case reported in 2011 (7) SCC 452 *(Ramkanya Bai and another vs. Jagdish and others).* The impugned orders are based on contraditory (sic : contradictory) reports which are liable to be interfered with.

11. Countering the aforesaid arguments, Shri Sourabh Singh Thakur, learned counsel for the respondent supported the impugned orders. He submits that spot map (page 17) shows that respondent's land Khasra No.75/1/3 is surrounded by other lands. The map further shows that a way exists which travels adjacent to field boundary (*'Medh'*) of certain khasra numbers of different lands for which land owners had no objection. The only objection raised was by present petitioner because a small portion of way is travelling from his piece of land. The other land owners have given consent for right of way to the respondent which is duly recorded by learned Tehsildar in impugned order dated 12.10.2018. This is not the

scheme of Section 131 of the Code to deprive a land owner to use her own land for agriculture purpose for want of approach road. Thus, right of way is recognized as a different right by catena of judgments of this Court including 2011 (4) MPLJ 160 *(Rukmani Bai and others vs. Chunnilal and others*). He prayed for dismissal of writ petition. Lastly, Shri Sourabh Singh Thakur placed reliance on a judgment dated 06.08.2007 passed in Civil Suit No.13A/05 whereby prayer for permanent injunction was granted in favour of Mehtab Singh. In this litigation, present petitioner was a party. In the said case, the permanent injunction was issued against non-applicant No.1 and 2 by restraining them from interference in the possession of plaintiff therein. The present respondent is the wife of plaintif Mehtab Singh. Thus, the benefit of said judgment is available to present respondent also.

12. Shri Kochar in his rejoinder submission again placed reliance on the judgment of Supreme Court in *Rukmani Bai*(Supra). He urged that the judgments of this Court wherein the view putforth by Shri Sourabh Singh was taken, could not find favour from the Apex Court.

13. Parties confined their arguments to the extent indicated above.

14. I have bestowed my anxious consideration on the rival contentions of the parties and perused the record. It is apposite to quote Section 131 of the Code as under:

> ***"131. Rights of way and other private easements.*** *— (1) In the event of a dispute arising as to the route by which a cultivator shall have access to his fields or to the waste or pasture lands of the village, otherwise than by the recognised roads, paths or common land, including those road and paths recorded in the village Wajib-ul-arz prepared under Section 242 or as to the source from or course by which he may avail himself of water, a Tahsildar may, after local enquiry, decide the matter with reference to the previous custom in each case and with due regard to the conveniences of all the parties concerned.*
>
> *(2) No order passed under this section shall debar any person from establishing such rights of easement as he may claim by a civil suit."*
>
> *(Emphasis supplied)*

15. As per Section 131 of the Code, the Tehsildar is required to adjudicate in respect of the dispute raised by cultivator relating to any of the following three private easementary rights:

> (i) the route by which a cultivator shall have access to his fields;

(ii) the route by which a cultivator shall have access to waste or pasture lands of the village; and

(iii) the route by which a cultivator shall have access to the source from which, or the course by which, he may avail himself of water.

16. In the case of *Ramkanya Bai* (Supra), it was clearly held that Tehsildar after a local inquiry may decide such disputes *with reference to previous custom and with due record to the convenience of all parties concerned.* This view was followed by Gwalior Bench in 2016 (1) MPLJ 419 *(Major Singh and others vs. State of MP and others).*

The scope and ambit of Section 131 of the Code is regarding a dispute/claim for the customary easement over a private land relating to a right of way or right to take water which right is not recognised and recorded as a customary easement in the village wajib-ul-arz.

17. In the case of *Rukmani Bai* (Supra), this Court has taken a contrary view. This Court came to hold that Section 131 applies to private right in contradiction to public right i.e. by the recognised roads, paths and common lands including those recorded in village wajib-ul-arz. It was further held in *Rukmani Bai* (Supra) that whether or not right of way is covered under the Easement Act application under Section 131 of the Code can be entertained.

18. The aforesaid view taken in *Rukmani Bai* (Supra) runs contrary to the law laid down in the case of *Ramkanya Bai* (Supra). Pertinently, in *Ramkanya Bai* (Supra), the Apex Court has specifically taken note of certain decisions of Madhya Pradesh High Court which were based on erroneous assumption that the private easements including right of way referred to under Section 131 of the Code are not the easements which are dealt with in the Easement Act but are a new type of easement unknown to general law of easement which needs to be decided by the Tehsildar only. This distinction sought to be drawn by this Court was specifically disapproved by the Supreme Court in the case of *Ramkanya Bai* (Supra). Thus, judgment of *Rakmani Bai* (Supra) is of no assistance to the learned counsel for the respondent.

19. A conjoint reading of Section 131 of the Code which was considered by Supreme Court in *Ramkanya Bai* (Supra) makes it clear that (i) Tehsildar is required to decide the question of right of way after local inquiry; (ii) the decision of Tehsildar must be in reference to previous customs in each case and by giving due regard to the convenience of parties concerned.

20. The order of learned Tehsildar dated 12.10.2018 shows that it is founded upon the report of Revenue Inspector, Circle Gairatganj. The Tehsildar has made no efforts to conduct local inquiry himself. In his order, he has not given any finding

regarding any previous customs and convenience of the parties. The impugned order of Tehsildar does not satisfy the requirement of Section 131 of the Code.

21. The learned SDO has taken note of these aspects and opined as under:

> *''यह है कि पंचनामा में दिनांक 3/1/16 को स्थल निरीक्षण किया जाना अंकित किया गया है। राजस्व निरीक्षक के हस्ताक्षर में दिनांक 3/1/17 तारीख अंकित है। इससे उक्त स्थल* ***निरीक्षण पंचनामा संदेहास्पद प्रतीत होने के कारण प्रकरण में तहसीलदार गैरतगंज से पुनः मौका जांच कराई गई,*** *जिसमें तहसीलदार गैरतगंज ने प्रतिवेदित किया गया है कि प्रकाश पठया द्वारा दिये जाने वाला रास्ता जो लगभग–2 किलोमीटर का रास्ता है* ***जो प्रकाश पठया की सम्पूर्ण पारिवारिक भूमि के बीच से होकर जाता है।*** *जबकि मोके पर पूर्व से उपयोग हो रहे रास्ते की दूरी लगभग 200 मीटर है, 150 मीटर नाले के किनारे से रास्ता हैं शेष लगभग 50 मीटर का रास्ता प्रकाश पठया के खेत से होकर जाता है, जिसके उपयोग से प्रकाश पठया को आपत्ति है। आवेदिका वतीबाई की खेत के चारों ओर प्रकाश पठया का खेत लगा हुआ है। प्रकाश पठया द्वारा वर्तमान में वाधा के लिये 5 फिट गहरी और 5 फिट चौड़ी नाली खुदवा दी गई है। जिससे वतीबाई को ट्रेक्टर या अन्य वाहन लाने से रोका जा सके। मोके पर उपस्थित अर्जुन सिंह, सौदानसिंह व हीरालाल द्वारा बताया गया कि वतीबाई अपने खेत पर कृषि कार्य करने के लिये* ***पूर्व से ही नाले के वगल से होते हुये प्रकाश पठया के खेत के बीच से होकर जाते रहे है।*** *इस आशय का नजरी नक्शा तैयार किया जाकर संलग्न है। प्रस्तावित नजरी नक्शे के आधार पर श्रीमति वतीबाई को कृषि कार्य करने हेतु रास्ता दिये जाने की तहसीलदार द्वारा अनुशंसा की गई है।*
>
> *उपरोक्त विवेचना के आधार पर तथा तहसीलदार गैरतगंज के प्रतिवेदन (जो प्रदर्श पी–1 है) से सहमत होते हुये, प्रस्तावित नजरी नक्शा जो प्रदर्श पी–2 है के अनुसार आवेदिका कृषक वतीबाई पत्नी मेहतावसिंह निवासी ग्राम पडरियागंज की भूमि खसरा नं0 75/1/3 रकवा 1.619 हे0 स्थित ग्राम पिपलियाखुर्द पर कृषि कार्य करने हेतु म0प्र0 भू0 रा0 संहिता 1959 की धारा–131 सुखचार के तहत कृषक को कृषि कार्य करने हेतु सुविधाजनक व पूर्व प्रचलित रास्ता होने से रास्ता दिये जाना आदेशित किया जाता है। अपीलार्थी की अपील अस्वीकार की जाती है।''*
>
> *(Emphasis supplied)*

The learned SDO was well aware about the duty of concerned Tehsildar to undertake the exercise of local inquiry. He disbelieved the Revenue Inspector's report/panchnama dated 03.01.2016 which became foundation of the order passed by the Tehsildar.

22. The learned SDO as an appellate authority directed spot inspection by the Tehsildar, Gairatganj and passed the impugned order on the basis of this report. The said report is marked as Exhibit P/1 in his order. The highlighted portion shows that the statements of certain independent persons namely; Arjun Singh, Soudan Singh and Heeralal were recorded who have categorically stated that- ***पूर्व से ही नाले के*** वगल से होते हुये प्रकाश पठया के खेत के बीच से होकर ***जाते रहे है ।***'

Thus, the learned SDO has taken into account the necessary ingredients by giving reference to the previous custom for deciding the right of way in favour of the respondent. After satisfying the necessary ingredients namely; (i) local inquiry; (ii) decision with reference to previous custom and (iii) convenience of parties, he decided that respondent is entitled to get right of way under Section 131 of the Code.

23. So far argument of Shri Kocher regarding non joinder of other farmers is concerned, suffice it to say that the order of Tehsildar and SDO clearly shows that except present petitioner, all such persons have given their consent for providing way to the respondent. They neither felt aggrieved nor challenged the impugned orders of Tehsildar and SDO. Hence, their non-impleadent (sic:non-impleadment) will not vitiate the impugned orders.

24. The learned S.D.O./Appellate Authority in exercise of its appellate powers obtained the local enquiry report from Tehsildar. On the basis of said report and evidence on record, he passed the appellate order. This is trite that the powers of Appellate Court are indicated in Section 107 of CPC, which provides that the Appellate Court shall have the same powers as are conferred on the original Court. [See (1988) 2 SCC 222 *(State of Punjab vs. Bakshish Singh)*] The same view is taken by the Supreme Court in catena of judgments. [See *(*2002) 4 SCC 183 *(Vasant Ganesh Damle vs. Shrikant Trimbak Datar)* and (1996) 11 SCC 586 *(Jagtar Singh vs. Pargat Singh)*]

Section 43 of Code reads as under:-

> ***"43. Code of Civil Procedure to apply when no express provision made in this Code-*** *Unless otherwise expressly provided in this Code, the procedure laid down in the Code of Civil Procedure, 1908 (V of 1908) shall, so far as may be, be followed in all proceedings under this Code."*
>
> *(Emphasis Supplied)*

In view of Section 43, in absence of any other express provision in the code, which limits the jurisdiction of Appellate Authority, the Appellate Authority under the Code is also conferred with the same powers as are conferred on the original Court. In 2006 (1) MPHT 511 *(Suraj Prasad Sahu vs. Arjun Prasad)***,** this Court opined that the procedure applicable in the appeal as envisaged under the CPC shall be applicable to the appeals filed before the Collector.

Apart from this, the finding of learned SDO is based on a factual finding/report given by the Tehsildar, Gairatganj. It is equally based on the statements of witnesses namely; Arjun Singh, Soudan Singh and Heeralal who have deposed regarding customary right of respondent regarding use of way. No amount of arguments were advanced to show that these statements were either perverse or untrustworthy. Thus, while exercising writ jurisdiction, I find no reason to disturb the said finding of facts.

25. As analysed above, although order of Tehsdildar (sic:Tehsildar) was pregnant with certain infirmities, the learned SDO (Appellate Authority) has passed a detailed order by taking into account the necessary ingredients of Section 131 of the Code.

26. In the considered opinion of this Court, the learned SDO has taken a plausible view which does not warrant any interference by this Court. Resultantly, petition fails and is hereby **dismissed.**

Petition dismissed

I.L.R. [2020] M.P. 2826
APPELLATE CIVIL

Before Mr. Justice S. A. Dharmadhikari

F.A. No. 155/2001 (Gwalior) decided on 08 October 2020

STATE OF M.P. & anr. …Appellants

Vs.

SMT. BETIBAI (DEAD) THROUGH HER LRs. & anr. …Respondents

A. Title – Burden of Proof **– Held – Plaintiff in possession since 1946, various permissions have been granted to them by State Authorities and Municipal Corporation during 1961 to 1995 – Plaintiff established a high degree of probability in their favour – Onus shifted on defendant/State to prove the contrary, which they failed to discharge – Appeal dismissed.**

(Para 9)

क. हक – सबूत का भार **– अभिनिर्धारित – 1946 से वादी का कब्जा, 1961 से 1995 के दौरान राज्य प्राधिकारीगण एवं नगरपालिका निगम द्वारा उन्हें विभिन्न अनुमतियॉ प्रदान की गई हैं – वादी ने उनके पक्ष में उच्च स्तर की संभाव्यता स्थापित की – इसके विपरीत सिद्ध करने का भार प्रतिवादी / राज्य पर चला जाता है जिसका निर्वहन करने में वे असफल रहे – अपील खारिज।**

B. Khasra Entries **– Held – On strength of Khasra entries of certain years, State cannot claim title over disputed land – Entry in revenue records is not a document of title – Revenue Authorities cannot decide a question of title.** **(Para 9)**

ख. खसरा प्रविष्टियां – अभिनिर्धारित – कतिपय वर्षों की खसरा प्रविष्टियों के बल पर राज्य, विवादित भूमि पर हक का दावा नहीं कर सकता – राजस्व अभिलेखों में प्रविष्टि, हक का दस्तावेज नहीं है – राजस्व प्राधिकारीगण हक के प्रश्न का विनिश्चय नहीं कर सकते।

***C. Municipal Corporation Act, M.P. (23 of 1956), Section 401 & Civil Procedure Code (5 of 1908), Section 80 – Notice* – Held – Objection as to non-issuance of notice u/S 401 of Act of 1956 lost significance as Corporation was issued notice u/S 80 CPC, moreso when defendant/State chose to remain reticent not only at the initial stage but even after framing of issues – Purpose of notice to bring the dispute before parties has been done. (Para 10)**

ग. नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धारा 401 एवं सिविल प्रक्रिया संहिता (1908 का 5), धारा 80 – नोटिस – अभिनिर्धारित – 1956 के अधिनियम की धारा 401 के अंतर्गत नोटिस जारी न किये जाने के बारे में आक्षेप का महत्व खो जाता है क्योंकि निगम को धारा 80 सि.प्र.सं. के अंतर्गत नोटिस जारी किया गया था, और अधिक तब जब प्रतिवादी/राज्य ने न केवल प्रारंभिक प्रक्रम पर बल्कि विवाद्यकों को विरचित किये जाने के पश्चात् भी चुप रहना पसंद किया – पक्षकारों के समक्ष विवाद लाने का नोटिस का प्रयोजन पूरा किया गया है।

***D. Limitation* – Held – Full Bench concluded that a period of 180 days from date of detection of illegality, impropriety and/or irregularity of order/ proceedings committed by Revenue Authority subordinate to Revisional Authority would be a reasonable period for exercise of *Suo Motu* powers despite involvement of government land or public interest in cases involving irreparable loss – NOC issued to plaintiff by Nazul Department in 1992 which would be deemed to have been issued after verification and after a lapse of 4 years notice was issued to plaintiff – Notice is certainly beyond limitation. (Para 11)**

घ. परिसीमा – अभिनिर्धारित – पूर्ण न्यायपीठ ने निष्कर्षित किया कि पुनरीक्षण प्राधिकारी के अधीनस्थ राजस्व प्राधिकारी द्वारा कारित अवैधता, अनौचित्य एवं/अथवा आदेश/कार्यवाहियों की अनियमितता के पता लगने की तिथि से 180 दिनों की अवधि, ऐसे प्रकरणों में जिसमें अपूरणीय हानि अंतर्ग्रस्त है, सरकारी भूमि या लोकहित अंतर्ग्रस्त होने के बावजूद स्वप्रेरणा से शक्तियों का प्रयोग करने हेतु एक युक्तियुक्त अवधि होगी – नजूल विभाग द्वारा 1992 में वादी को अनापत्ति प्रमाणपत्र जारी किया गया था जिसे सत्यापन पश्चात् जारी किया जाना समझा जाएगा तथा 4 वर्ष व्यपगत हो जाने के पश्चात् याची को नोटिस जारी किया गया था – नोटिस निश्चित रूप से परिसीमा से परे है।

Cases Referred :

2010 (4) MPLJ 178, 2012 (2) MPLJ 562, AIR 1966 SC 735, (1987) 2 SCC 555, (2003) 8 SCC 752, (2008) 8 SCC 12, (2007) 6 SCC 186.

Purushottam Pandey, G.A. for the appellants/State.

Anshuman Singh, *S.K. Shrivastava* & *Anuj Shrivastava*, for LRs. of respondent no.1.

J U D G M E N T

S.A. DHARMADHIKARI, J.:- This first appeal, under section 96 of the Code of Civil Procedure, has been filed, being aggrieved of the judgment and decree dated 7/11/2000 in Civil Suit No. 7A/97 passed by V Additional District Judge, Gwalior, whereby the suit filed by plaintiff/respondents seeking declaration of title and permanent injunction has been decreed.

2. The admitted facts of the case are that the original plaintiff Smt. Betibai died during pendency of the civil suit and her legal representatives were brought on record. Therefore, the present appeal has been filed by the legal representatives of late Betibai.

3. The necessary facts for just and proper adjudication of the appeal are summarized as under:-

(i) The plaintiffs/respondents, who are legal representatives of the original plaintiff Betibai, had filed a suit for declaration of title and permanent injunction claiming that the *Patta* of the suit property situated at Survey No.36, Village Mehra, Tahsil and District Gwalior was granted in favour of late Machal Singh by the then Cantonment Officer (Ad. and Quarter Master General, Gwalior Army Q.M.G. Branch) for rendering exemplary services in the wars fought between 1939-1945 (II World War), under the authority of Maharaja Scindia and the Army Minister, on 26/10/1946 (Ex.P/1).

(ii) In the *Khasra Panchsala* of the year 1951-1952, the suit land was recorded in the name of Lal Singh and Bhagwan Singh, both sons of Machal Singh, after the death of Machal Singh and thereafter in the name of original plaintiff Smt. Betibai. The suit continued to be recorded as *"Aabadi"* land since the year 1950 and in column no.12 of the *Khasra Panchsala,* the name of original plaintiff Betibai was continuously recorded as *Bhumiswami* of the land. The name of Lal Singh, husband of Betibai, was recorded in the revenue records of the Municipal Corporation, Gwalior on 19/03/1960 (Ex.P/3) in place of his father Machal Singh.

(iii) With a view to appreciate the factual aspects at a glance, the chronological dates and events are reproduced below in a tabular form as under:-

Dates	Document	Details
26.10.1946 (Copy issued on 7/2/1950)	Ex. P/1	*Patta* of the suit property in Survey No. 36, Village Mehra, Pargana and District Gwalior (suit property) granted in favour of Late Machal Singh by the then Cantonment Officer (Ad. And Quarter Master General, Gwalior Army Q.M. Sq. Branch) for rendering exemplary service in the wars between 1939 and 1945 under authority of Mahraja Sindhia and the Army Minister.
22.01.1952	Ex. P/2	House Tax receipt for year ending 31.03.1952.
19.03.1960	Ex. P/3	Name of Lal Singh mutated in the records of Municipal Corporation Gwalior in place of his father Machal Singh.
06.07.1961	Ex. P/6 Ex. P/7	Layout plan for house and garden/ open space sanctioned by Municipal Corporation Gwalior.
10.04.1972	Ex. P/5	Name of Smt. Beti Bai mutated in lieu of her husband Shri Lal Singh by Municipal Corporation Gwalior.
12.03.1992	Ex. P/11	NOC issued by Nazul Department for further construction/ reconstruction on some part of suit property.
24.11.1992	Ex. P/17	Certificate issued by Municipal Corporation Gwalior with regard to property tax assessment in the name of the plaintiff.
03.04.1993	Ex. P/16	NOC issued by Education Department for construction proposed by the plaintiff.
08.02.1993	Ex. P/13 Ex. P/14	Permission granted by Town and Country Planning Department for construction to the plaintiff on the suit property
04.12.1993	Ex. P/8	Building permission issued by Municipal Corporation Gwalior for construction by plaintiff on the suit property.
04.12.1993	Ex. P/9	Final plan sanctioned by Town and Country Planning Department on suit property.
08.12.1993	Ex. P/10	Sanction by Town and Country Planning Department issued to the plaintiff.

08.02.1994 27.11.1994	Ex. P/15 Ex. P/21	Time extension for building permission granted in favour of the plaintiff.
09.07.1996	Ex. P/41	Notice of Municipal Corporation Gwalior stating that suit property has been declared to be government land and therefore building permission had been revoked and plaintiff was asked to remove the alleged encroachment

The issuance of notice dated 9/7/1996 (Ex.P/41) gave rise to cause of action to the plaintiff/respondents to file suit.

(iv) The appellants/defendant nos. 1 and 2 filed their written statements jointly, whereas defendant no.3/Municipal Corporation filed its written statement separately. In their respective written statements, the defendants denied the plaint allegations. It was denied by defendant nos.1 and 2 that the suit land was the ancestral property of the plaintiffs, or was given by any competent Officer of the Cantonment to Machal Singh, or that any permission for raising construction over the suit land was granted to the plaintiffs on 7/2/1990, as claimed by them. It was pleaded that even assuming, though without admitting, that the permission, if any, was obtained by collusion with any Officer of the cantonment or any permission was obtained for construction, the same was void and inoperative.

(v) It is also alleged that in Col. No.5 of *Khasra Panchasla (sic : Panchsala)* of Samvat 1997 (Year 1940-1941), the land in dispute i.e. comprising of Survey No.36, area 2 Bighas and 1 Biswa is entered as *Milkiyat Sarkar* Gwalior Government and in Col. No.6 thereof, *Aahatman* Military Department and Parade is entered. From the year 1992-1993 to 1995-1996, the land is entered as *Nazul* land, therefore, the same is Government land.

It was never in ownership and possession of original plaintiff Betibai or her so called father-in-law Machal Singh and as per Col. No.12 encroachment by Machal Singh has been shown. Vide order dated 8/10/1993, the Joint Director, Town & Country Planning had also not granted permission to raise construction.

4. Learned counsel for the appellants contended that in fact the respondents/plaintiffs are encroachers. The impugned judgment dated 7/11/2000 is illegal, contrary to law, facts and evidence available on record. The learned trial Court did not appreciate the evidence properly before arriving at the findings. There is nothing on record to indicate that the land in question had been given as reward or otherwise to the respondents/plaintiffs by the competent Authority of the Cantonment. The learned trial Court erred in holding that the notice under

section 80, CPC served on the defendants/appellants herein, would be treated to be a notice served on defendant no.3/Municipal Corporation under section 401 of the M.P. Municipal Corporation Act. No notice under section 401 of the said Act was ever served before filing the instant suit, therefore, the suit was not maintainable and, as such, was liable to be dismissed on this ground alone. The so called "No Objection Certificate" issued by the *Nazul* Officer was subsequently cancelled. Similarly, the permission granted by the Municipal Corporation was a conditional one and did not create any right or title in favour of the respondents/plaintiffs. Besides, the suit also suffered from the defect of non-joinder of parties, inasmuch as Government of India being a necessary party ought to have been impleaded as a defendant.

He further contended that inconsistent pleas cannot be raised and that plaintiffs/respondents cannot claim title by way of adverse possession. The burden lies on the respondents to show that the land belonged to Cantonment and not the State. On perusal of the *Patta,* it can be seen that there was no seal. The respondents/plaintiffs failed to mention from when they are in adverse possession. The findings of the learned trial Court are absolutely perverse, therefore, the impugned order is liable to be set aside and the instant appeal deserves to be allowed.

5. On the other hand, learned counsel for the respondents/plaintiffs submitted that so far as title of the suit property is concerned, the same is categorically proved through the *Patta* (Ex.P/1) and other documents with regard to mutation of the names in the Govt. records, tax deposit receipts, No Objection Certificate and building permission etc. granted by different departments. The respondents/plaintiffs have been able to establish the title so also the undisturbed possession from 1946 to 1996. In the year 1996, for the first time, the respondents/plaintiffs have been declared encroachers on the ground that the alleged property had been declared as a Government land. It is pertinent to mention that the *Patta* has never been cancelled. Learned counsel has relied on decision of Full Bench of this Court in *Ranveer Singh (since dead) through LRs Kishori Singh and others Vs. State of M.P.* (2010 (4) MPLJ 178), wherein the question of limitation to exercise of *suo motu* powers of revision by the revisional Authority as envisaged under section 50 of the *M.P. Land Revenue Code, 1959 (for short "theMPLRC")* was considered. The Full Bench has held as under:-

> "35. It is trite law that if no period of limitation has been prescribed, the statutory authority must exercise its jurisdiction: within a reasonable period. What should be the reasonable period should be judged from this angle also that what is the nature of the statute itself, rights and liabilities thereunder and other relevant factors. The Supreme Court in *Bhatinda District Cooperative Milk Producers Union Ltd.* (supra) in para 19 has

held that the reasonable period of limitation may be borne out from the statutory scheme of the Act. The Supreme Court while considering the various provisions of Punjab General Sales Tax Act, 1948 in para 19 has held that looking to the scheme of the said Act the maximum period of limitation provided in sub-section (6) of section 11 of the Act is five years and therefore, in those circumstances the Supreme Court has held that as per the scheme of the Act, the reasonable period should be three years. Since in the present case, as we have noticed hereinabove, different type of periods of limitation which are prescribed for exercising particular right and liability under different Chapters, looking to the aim, object and the purpose of enacting the provisions of *suo motu* powers 180 days of the period of the limitation would be the reasonable period and, according to us, for this another reason also the same period should be the reasonable period to exercise *suo motu* powers by the revisional authority from the date of coming into the knowledge of illegality, impropriety and irregularity of the proceeding having been done by the authority subordinate to it.

36. *Ex consequenti* we hereby hold that in order to exercise *suo motu* power of revision envisaged under section 50 of the Code and looking to the scheme of Chapter V, it should be exercised by the revisional authority within 180 days from the date of the knowledge of the illegality or impropriety of any order passed or as to the irregularity of the proceedings of any revenue officer subordinate to it and it will not be justifiable to stretch it for any length of period even for protection of the Government land or public interest".

It is submitted that in view of the above, the appellant/defendants could never have cancelled the *Patta.*

Secondly, it is contended that proviso to section 248 of the MPLRC, specifically provides that the Tahsildar shall not exercise the powers conferred by this sub-section in regard to encroachment made by buildings or works constructed

(i) .....

(ii) in the Madhya Bharat region, before the fifteenth day of August, 1950;

It is further contended that DW1 of defendant no.3, in paragraph 16, has categorically admitted that the possession of plaintiffs is from prior to 1950 and the houses were constructed prior to that, therefore, the appellants would have no power or jurisdiction to take any action against the plaintiffs in respect of the suit

property. Learned counsel has placed reliance on the judgment in *Maa Kalika Devi Enterprises Vs. State of M.P.* (2012 (2) MPLJ 562), wherein it is held thus:-

> As per the proviso of section 248 of the M.P. Land Revenue Code, a Tahsildar has no power and authority to initiate proceedings in regard to removal of encroachment made by building or works construction in the Madhya Bharat Region before 15th August, 1950. As per the record of of the then Municipal Council, Gwalior of Samvat 1968, the property was in the name of a Family and it consisted of a house. Some portions of the house was purchased by the petitioner firm. Hence, the Tahsildar had no power and authority to initiate proceedings under section 248 of the M.P. Land Revenue Code, 1959. No notice was served in accordance with the aforesaid Rules, neither these Rules have been followed. The authority has also not decided the fact that whether there was any encroachment over the land or not. The authority cannot become the law unto themselves. It would be in violation of rule of law and the Government can resume possession only in a manner known or recognized by law. In the present case, the authorities have acted in such a manner that they became a law unto themselves. The possession of property of the petitioners has been taken in most arbitrary manner without following due process of law. The action of the respondents in regard to initiation of proceedings under section 248 of the Code and recovery of possession are quashed. Now the area is an open land because construction has been demolished, hence, possession of the petitioners over the land is restored.

Thirdly, it is pointed out that under section 159 of the MPLRC, every person holding land as "Inamdar" in Madhya Bharat Region has been held to be Bhumiswami of the land.

Learned counsel further submitted that so far as the allegation of the appellants with regard to *Patta* is concerned, the respondents/plaintiffs have stated in paragraph 1 of the plaint that the land was allotted to Machal Singh by the then Cantonment Oficer (sic : Officer) which is marked as Ex.P/1. They relied on decision of the Apex Court in the case of *Bhagwati Prasad Vs. Shri Chandramaul* (AIR 1966 SC 735" (para 10) and upon *Ram Sarup Gupta (Dead) By Lrs vs Bishun Narain Inter College & Ors* ((1987)2 SCC 555) wherein it has been categorically held that "Pleadings" should receive a liberal construction and the trial Court must decide the real issue between the parties without adopting a very technical approach. If the parties are substantially aware of the issue and have led evidence, they cannot later claim lack of pleadings.

It has further been averred that the claim of the plaintiffs is not based on adverse possession but is based on title and settled possession with all necessary permissions from the defendants. It is submitted that the judgment of the trial Court is not based on adverse possession.

So far as burden and onus of proof is concerned, learned counsel submitted that the Apex Court in Paras 29 and 30 of *R.V.E. Venkatachala Gounder vs Arulmigu Viswesaraswami & V.P* ((2003) 8 SCC 752) has categorically held that while burden of proof always stays with the plaintiff, onus of proof continues to shift depending upon evidence lead by parties. It was held that in a suit for title the plaintiff is required to lead sufficient evidence to establish a high degree of probability in his favour and that would shift the onus on the defendant to prove to the contrary. If the defendant then fails to lead sufficient evidence to shift the onus back on plaintiff, the title would be held to be proved in favour of the plaintiff. In the present case the trial Court has found that there is overwhelming evidence in favour of plaintiffs establishing their title over the suit property while the defendants have failed to bring on record anything to the contrary. The only document filed by the defendants are *Khasra* sheets on 1997 without showing as to on what basis the name of government was recorded in place of plaintiffs. Hence, the decree was rightly passed in favour of the plaintiff.

With regard to appellants' contention as to non impleadment of Government of India, learned counsel argued that no relief is claimed against the Government of India and relief was sought only against the State and the Municipal Corporation. Thus, the Government of India was not a necessary party and in view of Sec. 99 of the Code of Civil Procedure, 1908 the appellants cannot raise such a ground in appeal.

With the aforesaid submissions, it has been asseverated (sic : asserted) that the appeal being devoid of any merit or substance, is liable to be dismissed.

6. Heard, learned counsel for the parties.

7. The visceral of the arguments put forth by learned counsel for the appellants, in essence, is that there was no material on record to hold that the ancestor of the plaintiffs/respondents had ever been in lawful possession of the land in dispute and, therefore, the learned trial Court has erred in holding that the plaintiffs/respondents have proved that their ancestor namely Machal Singh had been in lawful possession of the land in dispute and further that the learned trial Court has erred in treating the notice served under section 80 CPC on the appellants/defendants as one under section 401 of the M.P. Municipal Corporation Act.

8. Vinod Singh Tomar (PW1) is the son of Lal Singh and grandson of Machal Singh. He has tendered in evidence *Patta* (Ex.P/1), House Tax receipt dated 31/3/1952 (Ex.P/2), mutation dated 19/3/1960 in favour of his father Lal Singh

(Ex.P/3), mutation in favour of his mother Betibai (Ex.P/5), spot map of garden (Ex.P/6), spot map of house (Ex.P/7), House Building permissions granted by Joint Director, Town & Country Planning (Ex.P/8 dated 4/12/1993 & Ex.P/13 dated 8/12/1993), NOC issued by Collector Nazul (Ex.P/11), Extension of time of building permission granted by Commissioner, Town and Country Planning (Ex.P/15) and by Municipal Corporation (Ex.P/21), receipts of house tax (Ex.P/20 to P/35), property tax receipt of municipal corporation (Ex.P/36) wherein Betibai has been shown as owner of the house and other revenue documents (Ex.P/37 to P/40) wherein Machal Singh has been depicted as *Up Krishak* and in possession since 1951 to 1988. The document (Ex.P/1) mentions that the land in question was given on *Patta* to Machal Singh on 26/10/1946 in Case No. 8/2003-2/6 No.669.

Prabhudayal More (PW2) has created the spot map. He has acknowledged the possession of the plaintiffs on the house in question since 1954. He has been supported by Bashir Ahmad (PW4). He has deposed that plaintiffs' ancestor Machal Singh had been residing there.

Feran Singh Patwari (PW3), who was Patwari of the area during the period 1980 to 1982, has admitted possession of Betibai-Lalsingh since prior to 1980. He has deposed that he has been watching the place in question since 10-12 years prior to 1980.

On the contrary, Laxman Prasad Patwari (DW1) has supported the Khasra Panchsalas of *Samvat* 1997 (1940-41) (Ex.D/1c) and that of 1992 to 1995-1996 (Ex.D/2c). In the *Khasra Panchsala* of Samvat 1997, in col.5 of Survey No.36 *"Milkiyat Sarkar* Gwalior Government" is mentioned and in col.6 *"Vaitmaam* Military Department *Murdje Khevat* No.8" is mentioned. In Ex.D/2c, Survey No.36 has been mentioned as *Pared AajadRajaswa Vibhaag Nazool.* He has deposed that in Khasra Panchsalas Ex.D/1c and D/2c, name of Betibai or plaintiffs is not mentioned. He has further deposed that previously this land was a Government land. He further deposed that as per Ex.P/37 the land falling in Survey Nos. 36 and 38 is of Village Mehra. However, he could not say as to whether the said entry was made based on original record or not. He also did not know as to whether name of Machal Singh and Lal Singh was there in the records in 1951-52 or not.

Roop Singh Bhadoriya (DW3) has deposed that the disputed land is Government land whereon a Boundary-wall has been constructed by Betibai. He has admitted granting of NOC by the Nazool department and building permission by Town and Country Planning department on 8/2/1993. However the same was conditional and has been cancelled in the wake of land dispute. He has supported the documents Ex.P/3 to P/17, P/20 to P/26, P/31 to P/36, P/41 to P/43 and has not disputed the various permissions granted in favour of plaintiffs by the State

Authorities. However, he deposed that the same being conditional have been cancelled in pursuance of Ex.P/41 which is notice of Municipal Corporation stating the suit property to be Government land. However, he has admitted possession of plaintiffs thereon and deposed that plaintiffs have their house built thereon.

9. The learned trial Court, after appreciating the evidence on record found that the defendants could not prove that the Army under the control of the then Maharaja Scidia had not granted the disputed land as reward to Machal Singh, Lal Singh and Bhagwan Singh for their services in Armed forces. They were also bestowed with War Medal, Burma Star, Defence Medal and Scindia Medal. The erstwhile Gwalior State later having merged in the Union of India, the orders passed by Ruler thereof could only have been cancelled by the Government of India and none else. However, there was nothing on record to show that the said document (Ex.P/1) was ever cancelled by any order of the Government. The plaintiffs having established a high degree of probability in their favour, the onus had shifted on the defendants to prove the contrary, which they failed to discharge *(RVE Venkatachala Gounder* (Supra), referred to). Moreover, on the strength of Khasra entries of certain years, the State cannot claim title over the disputed land as it is well settled that an entry in the revenue records is not a document of title. Revenue Authorities cannot decide a question of title *(Faqruddin (Dead) through LRs. v. Tajuddin (Dead) through LRs.* [(2008) 8 SCC 12], referred to) . In this regard, the Apex Court in the case of *Suraj Bhan Vs. Financal Commr.* ((2007)6 SCC 186) has held as under:

> "It is well settled that an entry in Revenue Records does not confer title on a person whose name appears in Record of Rights. It is settled law that entries in the Revenue Records or Jamabandi have only 'fiscal purpose' i.e. payment of land-revenue, and no ownership is conferred on the basis of such entries. So far as title to the property is concerned, it can only be decided by a competent Civil Court (vide *Jattu Ram v. Hakam Singh and Ors., AIR 1994 SC 1653)"*

10. That apart, this Court is in complete agreement with the reasoning assigned by the learned trial Court that objection as to non issuance of notice under section 401 of the M.P. Municipal Corporation Act lost significance in the wake of the Corporation having been issued notice under section 80 of the CPC, moreso when the defendants chose to remain reticent not only at the initial stage but even after framing of issues. The trial Court rightly held that the purpose of notice is to bring the dispute to the fore of parties, which had already been done; the Corporation having been made party in pursuance of order dated 4/2/1997 of this Court passed in LPA No. 52/1997.

11. This brings me to yet important facet of the matter. The plaintiffs/ respondents have been in possession since 1946. Various permissions have been granted to them by the State Authorities and Municipal Corporation during the period 1961 to 1995. Suddenly in the year 1996, the land has been declared as Government land and the said permissions have been revoked. It is pertinent to mention that NOC of Nazul Department (Ex.P/11) was issued on 12/3/1992, which would be deemed to have been issued after due verification. Now after an elapse of about 4 years from 1992, the State Authorities have come up with a case that the land in question was recorded as Government land. A Full Bench of this Court in the case of *Ranveer Singh* (Supra) has held that a period of 180 days from the date of detection of illegality, impropriety and/or irregularity of the order/proceedings committed by Revenue Authority subordinate to Revisional Authority would be a reasonable period for exercise of *suo motu* powers despite involvement of Government land or public interest in cases involving irreparable loss. The appellants/defendants have failed to bring on record any conclusive proof to demonstrate their date of knowledge. Fraud/manipulation, if any, ought to have come to the knowledge of respondents at the time of granting various permissions including Nazool NOC. As such, Ex.P/41 was certainly way beyond limitation.

12. Thus, this Court does not find any illegality or perversity in the judgment delivered by the learned trial Court. The appeal *sans* merit and is, accordingly, dismissed.

Appeal dismissed

I.L.R. [2020] M.P. 2837
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice Shailendra Shukla

M.Cr.C. No. 28386/2020 (Indore) decided on 11 November, 2020

EKTA KAPOOR ...Applicant

Vs.

STATE OF M.P. & anr. …Non-applicants

A. Information Technology Act (21 of 2000), Section 67 & 67-A and Criminal Procedure Code, 1973 (2 of 1974), Section 482 – Applicability – Web Series – "Sexually Explicit Acts" – **Held – Once it is determined that material is obscene, person liable for depicting such material or causing to depict such material cannot escape his liability on ground that subscriber having opted to watch it cannot make a complaint thereafter – Investigation is still in progress, it cannot be stated at this stage that offence u/S 67 & 67-A is not attracted – FIR cannot be quashed at this stage u/S 482 Cr.P.C. – Application dismissed. (Paras 73, 95, 96 & 110)**

क. सूचना प्रौद्योगिकी अधिनियम (2000 का 21), धारा 67 व 67–A एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – प्रयोज्यता – वेब सीरीज – ''कामुकता व्यक्त करने वाले कृत्य'' – अभिनिर्धारित – एक बार जब यह अवधारित किया जाता है कि सामग्री अश्लील है, उक्त सामग्री चित्रित करने अथवा उक्त सामग्री को चित्रित किया जाना कारित करने हेतु दायी व्यक्ति, इस आधार पर उसके दायित्व से बच नहीं सकता कि उपयोगकर्ता ने उसे देखने का विकल्प चुना, उसके पश्चात् वह परिवाद नहीं कर सकता – अन्वेषण अभी चल रहा है, इस प्रक्रम पर यह कथन नहीं किया जा सकता है कि धारा 67 व 67–A के अंतर्गत अपराध आकर्षित नहीं होता – इस प्रक्रम पर प्रथम सूचना प्रतिवेदन को धारा 482 दं.प्र.सं. के अंतर्गत अभिखंडित नहीं किया जा सकता – आवेदन खारिज।

***B. Information Technology Act (21 of 2000), Section 67 & 67-A – Disclaimer – Effect – Right to Complaint* – Held – Disclaimer only warned against scenes of intimacy in the episode but if depicted scenes transcend into gross display of lust, it enters into realm of obscenity and a subscriber would be well within his right to complain – Disclaimer cannot prevent a person from lodging FIR in respect of such offence. (Para 91 & 95)**

ख. सूचना प्रौद्योगिकी अधिनियम (2000 का 21), धारा 67 व 67–A– अस्वीकरण – प्रभाव – परिवाद का अधिकार – अभिनिर्धारित – अस्वीकरण केवल कड़ी में अंतरंग दृश्यों के विरूद्ध चेतावनी देता है किंतु यदि चित्रित किये गये दृश्य, सीमा पार कर काम वासना का घोर संप्रदर्शन करते हैं, वे अश्लीलता के क्षेत्र में प्रवेश करते है और उपयोगकर्ता का परिवाद करना, भली–भांति उसके अधिकार के भीतर है – अस्वीकरण, उक्त अपराध के संबंध में प्रथम सूचना प्रतिवेदन दर्ज करने से किसी व्यक्ति को निवारित नहीं कर सकता।

***C. Information Technology Act (21 of 2000), Section 67 – Presumption* – Held – Even if content is not known and a person publishes or transmits or caused to do so even without knowledge, provisions of Section 67 would be attracted – Presumption of knowledge to petitioner shall have to be assumed and onus will be upon him to rebut it by leading evidence. (Para 54)**

ग. सूचना प्रौद्योगिकी अधिनियम (2000 का 21), धारा 67 – उपधारणा – अभिनिर्धारित – यदि अंतर्वस्तु ज्ञात नहीं है एवं एक व्यक्ति बिना ज्ञान के भी प्रकाशित या पारेषित करता है या ऐसा करवाता है तब भी, धारा 67 के उपबंध आकर्षित होंगे – याची को ज्ञान होने की उपधारणा की धारणा की जाएगी और साक्ष्य पेश कर उसे खंडित करने का भार उस पर होगा।

***D. Information Technology Act (21 of 2000), Section 85 – Offence by Company* – Held – Apex Court concluded that the word "as well as the company" itself shows that neither the Director nor the Company can be prosecuted in isolation – In instant case, FIR reveals that complainant has prayed for appropriate action not only against petitioner but also against the company – No breach of Section 85. (Paras 56 to 58)**

घ. सूचना प्रौद्योगिकी अधिनियम (2000 का 21), धारा 85 – कंपनी द्वारा अपराध – अभिनिर्धारित – सर्वोच्च न्यायालय ने निष्कर्षित किया कि शब्द ''के साथ–साथ कंपनी'' अपने आप में दर्शाता है कि न तो निदेशक को और न ही कंपनी को अकेले अभियोजित किया जा सकता है – वर्तमान प्रकरण में, प्रथम सूचना प्रतिवेदन प्रकट करता है कि परिवादी ने न केवल याची के विरूद्ध बल्कि कंपनी के विरूद्ध भी समुचित कार्रवाई हेतु प्रार्थना की है – धारा 85 का कोई भंग नहीं।

***E. State Emblem of India (Prohibition of Improper Use) Act, (50 of 2005), Section 3 – Applicability* – Held – Breach of this provision would occur only when the emblem is used in order to create an impression that it relates to Government or it is an official document of Central Government – It applies in case where a person actually would use such emblem in his car or uniform or any other place, giving impression that the car, uniform etc relates to government and person shows as if he is authorized to use such property – In instant case, breach of provision not established.**

(Paras 105 to 108 & 110)

ङ. भारत का राज्य संप्रतीक (अनुचित प्रयोग प्रतिषेध) अधिनियम, (2005 का 50), धारा 3 – प्रयोज्यता – अभिनिर्धारित – इस उपबंध का भंग केवल तब घटित होगा जब संप्रतीक का उपयोग ऐसी धारणा सृजित करने हेतु किया गया है कि वह सरकार से संबंधित है या वह केंद्रीय सरकार का एक शासकीय दस्तावेज है – यह ऐसे प्रकरण पर लागू होता है जहां एक व्यक्ति उक्त संप्रतीक का उपयोग उसकी कार में या वर्दी या किसी अन्य स्थान पर यह प्रभाव दिखाते हुए करता है कि वह कार, वर्दी इत्यादि, सरकार से संबंधित है और व्यक्ति दर्शाता है जैसे कि वह उक्त संपत्ति का उपयोग करने के लिए प्राधिकृत है – वर्तमान प्रकरण में, उपबंध का भंग स्थापित नहीं।

***F. Penal Code (45 of 1860), Section 298 – Applicability* – Held – In the episode of web series, when the love interest of male physician invites him to attend "*Satyanarayan Katha*", on hearing this, physician makes facial expression showing disgust – Such utterance or expressions of disgust has been shown in background of intentions of physician who was more inclined towards physical intimacy rather than attending religious function – *Prima facie*, no deliberate intention appears to wound religious feelings of complainant – Offence u/S 298 IPC not attracted. (Para 103 & 104)**

च. दण्ड संहिता (1860 का 45), धारा 298 – प्रयोज्यता – अभिनिर्धारित – वेब सीरीज की कड़ी में, जब पुरूष चिकित्सक की प्रेम रूचि उसे *''सत्यनारायण कथा''* में उपस्थित होने के लिए आमंत्रित करती है, यह सुनने पर चिकित्सक घृणा दर्शाते हुए चेहरे का हाव–भाव बनाता है – घृणा के उक्त उच्चारण या हाव–भाव को चिकित्सक के आशयों की पृष्ठभूमि में दर्शाया गया है, जिसका झुकाव धार्मिक कार्यक्रम में उपस्थिति की बजाय शारीरिक संबंधों की ओर था – प्रथम दृष्ट्या, परिवादी की धार्मिक भावनाओं को चोट पहुँचाने का कोई जानबूझकर आशय प्रतीत नहीं होता – धारा 298 भा.दं.सं. के अंतर्गत अपराध आकर्षित नहीं होता।

***G. Penal Code (45 of 1860), Section 294 and Information Technology Act (21 of 2000), Section 80(1) – Public Place – Ingredients* – Held – Hotel, shop, public conveyance are also public place – The words "*any other place intended for use by or accessible to the public*" would not only include free to air transmission but also transmissions based on subscription – *Prima facie*, offence u/S 294 is attracted. (Paras 97 to 102 & 110)**

छ. दण्ड संहिता (1860 का 45), धारा 294 एवं सूचना प्रौद्योगिकी अधिनियम (2000 का 21), धारा 80(1) – सार्वजनिक स्थान – घटक – अभिनिर्धारित – होटल, दुकान, सार्वजनिक वाहन भी सार्वजनिक स्थान हैं – शब्द *''कोई अन्य स्थान जो जनता द्वारा उपयोग के लिए आशयित है या उनकी पहुंच में है''*, में न केवल मुफ्त पारेषण बल्कि अभिदान आधारित पारेषण भी शामिल है – प्रथम दृष्टया, धारा 294 के अंतर्गत अपराध आकर्षित होता है।

***H. Maxim "Volenti non-fit injuria" – Applicability* – Held – This principle applies in a matter involving tortuous liability and not criminal liability. (Para 95)**

ज. सूत्र स्वेच्छा से उठाई गई क्षति, क्षति की श्रेणी में नहीं आती (''वोलेंटी नॉन–फिट इन्जूरिया'') – प्रयोज्यता – अभिनिर्धारित – यह सिद्धांत उस मामले में लागू होता है जिसमें अपकृत्य दायित्व अंतर्ग्रस्त है और न कि दाण्डिक दायित्व।

Cases referred:

1992 Suppl. (1) SCC 335, 1996 8 SCC 433, AIR 2014 SC 1493, 2000 (2) SCC 426, (2017) 2 SCC 18, AIR 1965 SC 881, 2012 (5) SCC Page 661, (2007) 1 SCC 143, (1969) 2 SCC 687, (2014) 4 SCC 257, (1985) 4 SCC 289, 2006 8 SCC 433, 413 US 25 (1973), 1973 SCC Online Bombay Page 141, (2008) 2 SCC 370, 2007 (2) ALT-345, (2002) 3 KLT (SN 71) 50 (KERALA HC), 2015 SCC Online Cal 756, AIR 1959 Cal. 704, MANU/WB/0199/1959, AIR 1930 Oudh 394, AIR 1927 ALL 560, (1982) 75 Cr. App.R. 211, [1948] 1 K.B. 68, [1992] 95 Cr.App. 415.

Siddharth Luthra with *Nitesh Jain, Anand Soni* and *Manoj Silawat*, for the applicant.

Pushyamitra Bhargava, Addl. A.G. with *Aniruddha Gokhale,* P.P. and *Yash Tiwari,* for the non-applicant/State.

B. Gautam with *Neeraj Gautam*, for the non-applicant No. 2.

Valmik Sakargayen, present-in-person.

O R D E R

SHAILENDRA SHUKLA, J. :- This order seeks to dispose of the petition filed under Section 482 of Cr.P.C for quashment of FIR bearing Crime No.02142020, registered at police station Anapurna, Indore (M.P.), under the provisions of Sections 294, 298 and 34 of IPC, under Sections 67 and 67-A of I.T. Act and Section 3 of State Emblem Act.

2. Facts which are relevant for discussion in this matter are that the respondent No.2 filed a complaint against the petitioner with regard to transmission of an episode in web series (XXX Uncensored) on Zee 5 which is being promoted by ALT Balaji, a concern owned by petitioner and her mother.

3. The web series contains different stories or episodes which the complainant has mentioned as obscene and vulgar to an extent that it calls for penal action. Of specific reference is an episode entitled as 'Pyar Aur Plastic' which is episode 1 of season 2.

4. The story revolves around 3 characters Dr. Sanjay who is a plastic surgeon, his girl friend namely Priya and one another lady who is step mother of Priya. The step mother visits Dr. Sanjay for cosmetic treatments for her body transformation as a gift to her husband on his 60th birthday who is a retired Army Officer. During the course of interaction the step mother and Dr. Sanjay grow close to each other and become physically intimate with each other. On the other hand, Priya, the girl friend of Dr. Sanjay decides to introduce him to her parents. When Dr. Sanjay meets Priya's parents, he is left dumb founded, as the step mother of Priya is the same lady who had earlier become intimate with Dr. Sanjay. However, Dr. Sanjay and Priya eventually get married. The step mother, however entices Dr. Sanjay to continue physical intimacy with her. This intimacy is discovered by Priya. Shocked Priya files divorce case against Dr. Sanjay and her step mother claims that it was Dr. Sanjay who was forcing himself on her. Priya claims Rs.5.00 Crores along with life time of free Botox treatment from Sanjay as alimony.

5. The complainant submits that the sole purpose of making the episode is to titillate and arouse the baser instincts of audience, that such obscene depiction on public platform has caused annoyance, that it intentionally hurts religious feelings when the male protagonist expresses disgust on knowing about *'Satyanarayan Katha'* in the house of his love interest and that a particular scene breaches the sanctity of National emblem amounting to its dishonour.

6. The petitioner submits that during the moments of physical intimacy of step mother of Priya with Dr. Sanjay, the step mother is shown to have made Dr. Sanjay wear her husband's uniform and later during the course of intimacy she

unbuttons the said blazer. This scene has been objected against by the complainant saying that it tarnishes the reputation of Indian Army.

7. The petitioner in his petition filed under Section 482 of Cr.P.C submits that the web series is about interpersonal relationship and different circumstances/ situations arising therefrom. The petitioner submits that the web series is a drama/comedy/parody, which explores schemes of romance and human sexuality in different modern day scenario. The web series and episode are not remotely connected with Indian Army or religion.

8. The petitioner submits that he is a Managing Director of ALT Digital Media Entertainment Ltd, registered under the Companies Act, 2013 and having registered Office at C-13, Balaji House Dalai Industrial Estate (Opposite Laxmi Industrial Estate), New Link Road, Andheri (West), Mumbai (Maharashtra). This Company is a subsidiary of Balaji Telefilm, which is a Prominent Media and Entertainment Company registered under the Companies Act, 1956, which produces and has produced some well known Indian soap operas and entertainment programmes and shows in various Indian languages. On 16.4.2017, this Company launched an OTT (Over the Top) digital platform named ALT Balaji, which is a subscription based video on demand service that offers content to consumers using an internet connection over mobile, tablet devices and web browsers etc. Browsing the content transmitted on this platform is commenced by a request and viewer is required to pay a recurring subscription fee or one time subscription fee in exchange for right to view the content. The transmission of the content by SOVD (Subscription Based Video on Demand) is termed as narrow casting which is fundamentally different in nature from broadcasting. While in broadcasting, the time for transmission is chosen by broadcaster, while in narrow casting the consumer chooses the time and extent of content at place of their convenience with additional facility to play, pause and resume watching their chosen content without being interrupted by advertisements and having ability to exercise parental control. The frame work, rules, law and regulations applicable to broadcast services is completely inapplicable to the SOVD services. Certain policy issues that are of fundamental importance to broadcasters such as interconnect, licensing, QoS etc are completely inapplicable to SOVD services. The content which is streamed on OTT platform is not regulated by Central Board of Film Certification. Further, ALT Balaji, being an OTT platform is not covered under Cinematograph Act. The OTT service providers like ALT Balaji comes under the aegis of "Internet and Mobile Association of India" and have adopted a voluntary censorship code, which is called "Code For Self-Regulation of Online Curated Content Providers". This Code regulates the dissemination of the content, ensures that age appropriate content is made available to the audience and restrict the OTT service providers including ALT Balaji from executing and/or promoting

obscene internet content. The aforesaid Code has been annexed as Annexure P/2. The petitioner submits that the allegations contained in the impugned FIR do not primafacie constitute any offence. The impugned FIR contains certain allegations against the web service. Hence, the petitioner has thought it appropriate to discuss the episode in brief.

9. The petitioner denies the aforesaid allegations and states that the scene refers to a specific incident in the plot of episode (1) and relates to one particular lady, ie., step mother of Priya. This scene is not primal focal point of the story, as per the petitioner, but is merely a part of the whole story and does not revolve around the scene. This scene is necessary to portray the fictional intimate relationship between Dr. Sanjay and Mrs. Parmindar Roy, ie., the step mother of Priya. This scene in no manner amounts to obscenity under the law. There has been no insult/harm/derogation, actually or intended to the National Emblem or any institution of India. This scene does not even touch upon the character of Indian Army or the families of Indian Army or the Uniform of the Indian Army or the National Emblem. It purely depicts the attitude of the character of Mrs. Parminder Roy towards her sexual desire in the said scene under certain peculiar circumstances. The petitioner, however submits that there is no depiction or slightest reference to any Hindu gods, costumes or tradition in the scene and there was no intention to wound the religious feelings. The web series is purely work of fiction and as stated even in its disclaimer that it is aimed only to be viewed by viewers of age 18 years or above. The web series is purely a work of fiction and does not relate to any person, sex, section, community or any event and is not intended to harm or damage their reputation or feelings. The disclaimer further states that any resemblance to real person dead or alive or other real live entities, past or present is purely coincidental. The disclaimer also states that the web series contains strong language, mature contents and intimate scenes between the characters, which are creatively placed in the programme to support the story line of the programme. It further records that parental guidance is strongly advised. The disclaimer states that ALT Balaji does not intend to offend, criticize or prejudice any group of people through the content of the programme. A copy of the disclaimer has been placed as Annexure P/5. In the description of the web series, it is specifically mentioned that the content is suitable to be viewed by viewers above the age of 18 years. The web series is rated as 18 + on the platform. Further, the viewer is required to digitally give a declaration that he/she is 18 years or above in the age. Only upon making such declaration, it is possible for a viewer to watch the web series. The disclaimer clarifies that the strong language, mature and intimate scenes between the characters are necessary and indispensable for correct portrayal of the story line. These aspects are depicted in the "terms of use" flashing on the screen. The content of the web series does not breach any Indian law.

10. The petitioner further makes submission regarding her role in the creation of the aforesaid web series and states that she is not involved in the day to day creative decision in making the web series. The petitioner is not involved in the conceptualization and dramatization etc of the episodes. The petitioner is mainly involved in Balaji motion pictures limited and Balaji tele films. No credits are also given to the petitioner of the episode one of the season two of the web series. The company ALT Balaji engages writers who develop the concept, write the scripts (story, screen play and dialogues) and then engages a production house for production and post production of the show.

11. The petitioner submits that the scenes depicted in the web series does not cause depravity of a mind of a person with normal state of mind, therefore, nothing in the series satisfy the definition of obscenity. There is substantial safeguard against the same being viewed by minors. The episode is a creative work of art that deals with certain themes of sexuality in the 21st Century and is in no manner offensive to public decency and morality and is not likely to pander to lascivious, prurient or sexually precocious minds. The petitioner further submits that in order to attract the provision of Section 67-A of I.T. Act, the impugned material should contain sexually explicit act, which is missing in the present case. The word "explicit" would be justified when there is description or representation of sexual activity in a direct and detailed way. There is no such explicit sexual activity. The Court must take an over all view of the matter complained of as obscene in the setting of a whole work, which is a work of artistic value. Such scene should not be considered in isolation and the episode must be judged as a whole. Whether a particular scene is obscene or not is the standard of an ordinary man of commonsense and prudence and not an "out of the ordinary or hypersensitive man".

12. The petitioner further submits that in order to invite the penal provision of Section 294 of IPC, the prosecution is obliged to make out that the obscene acts were performed at a public place whereas, the web series in question is accessible on ALT Balaji platform which is only for adults who have selected to pay for the subscription and cannot be construed as a public place. It is further submitted that the provision of Section 67-A of I.T. Act are parts of a special law and the prosecution of petitioner cannot be liable under both, i.e. general law of IPC and special law of I.T. Act. The warranties/representation in terms of Clause IV of the terms of use includes express representation that the viewer/subscriber "*has voluntarily chosen to access such content because he wants to view the same and does not find the said content to be offensive or objectionable*". The petitioner further submits that the respondent has failed to disclose the manner in which the web series had annoyed him. Thus, prima facie offence under Section 298 of IPC is not made out. Regarding disrespect of the State Emblem of India, the petitioner submits that the scene does not include an emblem, ie., similar or deceptively

similar to the State Emblem of India. There is not even the colourable imitation of the State Emblem. In the Cinematography Act also there is no mention of the State Emblem Act. The petitioner submits that State Emblem Act is different from Emblems and Names (Prevention of Improper Use) Act, 1950. Thus CBFC guidelines provides that CBFC shall ensure that national symbols and emblems are not shown except in accordance with the provision of the Emblems and Names Act, which is an entirely separate statute. In the Cinematograph Act also Emblems and Names Act is applicable. The Cinematograph Act and the guidelines do not apply to ALT Balaji. ALT Balaji cannot be subjected to a higher degree of scrutiny and censorship which include the application of the State Emblem Act to its content. More so, under the Code For Self-Regulation of On-line Curated Content Providers, the Emblems and Names Act has been included. The State Emblem Act specifically provides that the prosecution for any offence punishable under the Act can be instituted only with the previous sanction of the State Government. The provisions of Section 34 of the IPC are not applicable because the petitioner does not play any role in the conceptual script and dramatization of the scenes episode or web series. Thus, under no stretch of imagination, can there be any meeting of minds or a prearranged plan by the petitioner to commit an offence. The petitioner cannot be held vicariously liable for the alleged offence under the IPC, I.T. Act and the State Emblem Act. The petitioner is only involved in the policy and planning of the business of the company and she is in no way concerned or involved in the episode or its conceptualization, dramatization or its script.

13. The petitioner further submits that the impugned FIR has been filed after a substantial and an unexplained delay of 118 days from the date of release of the scene. The said scene was telecasted on 8.2.2020 whereas, the FIR has been filed only on 5.6.2020. The FIR contains misleading allegations and proceedings have been instituted maliciously and with ulterior motives.

14. The respondent has misconstrued and twisted the story line by setting that it shows pictures of family members of the Indian Army as being characterless and involved an illicit relationship and that it insults the State Emblem of India and uniform of Indian Army.

15. The petitioner submits that contrary to this, the actual facts shown in the episode is that the Army Officer is a retired Army Officer aged 60 years. The entire plot does not even in the remotest, touch upon Army Officials or disrespects the Army Officers or their families or any institution or State Emblem of India. It is mere coincidence that one of the fictional character plays the character of an Ex-Military Officer. The respondent No.2 does not talk about existence of the disclaimer in the web series and has intentionally suppressed the information. The petitioner submits that the so called objectionable scene is in accordance with "Code for Self-Regulations of Online Curated Content Providers", which is applicable to ALT Balaji. The provisions of Cinematograph Act are not applicable

to films transmitted through internet therefore, certifications of a film by CBFC are not applicable to the contents streamed on OTT platforms. The petitioner seeks protection enshrined under Article 19(1)(A) of the Constitution of India and the Right of Creative Liberty. Writers of various film and Indian Television Series have taken the creative liberty to portray characters from various professions in a negative role. However, this does not *ipso-facto* imply that the profession itself is tainted and drawing any such conclusion would not be logical as such portrayal is small creative expression of the writers. There are reasonable restrictions imposed under Article 19(2) of the Constitution of India but the aforesaid scene in the web series does not fall under any of the said grounds justifying any restriction on the creative freedom in terms of Article 19(2) of Constitution of India. Accordingly, it is only logical that what is sanctioned by the Indian Constitution cannot be deemed to be an offence under the Penal Law or any other law. Dissenters of free speech and expression have no censorial right in respect of intellectual, moral, religious, dogmatic or other choices of all man kind and the Constitution of India does not confer or tolerate such individualized, hypersensitive, private censorial intrusion into and regulation of the guarantee of freedom of others.

16. The petitioner refers to the citation of the Supreme Court in the case of *State of Haryana & Ors. V/s. Bhajanlal,* 1992 Suppl. (1) SCC 335 in which it has been held that where the allegations made in the FIR, even if taken at the face value and accepted in its entirety, do not prima facie constitute an offence and "where allegations made in the FIR are so absurd and inherently improbable on the basis of which no prudent man can ever reach a just decision, that there is sufficient ground for proceeding against the accused". The petitioner ultimately makes a prayer that this Court exercising the inherent powers under Section 482 of Cr.P.C read with Section 226 of the Constitution of India may be pleased to quash and set aside the impugned FIR No.0214/2020 dated 5.6.2020, which has been registered against the petitioner by the Police Station Anapurna, Indore (M.P.) under Sections 294, 298 and 34 of IPC, 67 and 67-A of I.T. Act and Section 3 of the State Emblem Act.

17. In its reply, the State has submitted that ALT Balaji has claimed itself to be under the aegis of *"the Internet and Mobile Association of India"* which is governed by a Code for regulation of contents posted online. As per the State, this bylaw of a society cannot override or to be repugnant to a statutory law. The Code itself provides for prohibition of content which is disrespectful to the National Emblem and the National Flag-Annexure-P/2. It is submitted that Code also prohibits the contents which deliberately and maliciously intends to outrage the religious sentiments of caste and community. As per the State, the content of web-series being displayed by the petitioner is in-contravention of the Code itself inasmuch as the content displays the use of National Emblem embedded in the

Army Uniform to be torn during intimate scene. It is further submitted that Section 3 of State Emblem of India (Prohibition of Improper Use) Act, 2005, prohibits the use of National Emblem for commercial purposes or as a part of patent title, trademark or design, except, in-case as specified by the Central Government. The Act also prohibits the restriction of any such intellectual property. A bare perusal of this Act would show that the National Emblem of India is not be used at all except in cases specified by the Central Government. A bare perusal of relevant scene would demonstrate that an Army Officer's Uniform carrying National Emblem has been used with utmost disrespect and immorally corrupt manner and hence a prima-facie case is made out against the petitioner. In the reply, it has been further submitted that the story line around the web-series is not only obscene but is truly perverted in its spirit which would certainly have the tendency of inciting lustful thoughts. In the case of *Director General of Doordarshan and Another vs. Anand Patwardhan* reported in 1996 8SCC 433**,** the Hon'ble Apex Court has held that a film must be judged from an average healthy and common sense point of view. However, in the aforesaid web series, the story line is neither healthy nor does it carry any sense. The message of the film scene portrayed is totally perverse, obscene and contrary to the ethics and morality of Indian society and hence the petitioner cannot take recourse to the contention that the work was purely fictional. In such story line, where mother-in-law is shown to be in physical relationship with her daughter's husband is socially and morally corrupt and would by all means come under the definition of obscenity and hence offence under Section 294 of Indian Penal Code, 1860 and Section 67 of Information Technology Act, 2000 are clearly made out.

18. In its reply, the State further submits that the Information and Technology Act, 2000 was brought in force with an aim to curb and penalize the publication of sexually explicit contents in electronic media. Section 67 of the said Act deals with punishment for publishing or transmitting such obscene material in electronic form. A bare perusal of Section 67 of IT Act makes it very clear that any material which is sexually explicit cannot be circulated or transmitted through cyber space. The word *'obscene'* has not been defined clearly under IPC or any such other law and hence the recourse will have to be taken to the judgments passed by the Hon'ble Supreme Court on various occasions upon the subject matter. The Hon'ble Apex Court has adopted two tests initially in order to see if the contention would be categorized as obscene, the first test is **Hicklin test** and the second test is **Roth test.**

19. In the case of *Regina vs Hicklin*, it was laid down that the publication can be judged for obscenity, based on isolated part of the work considered out of the content. While applying Hicklin Test, the work is taken out of the whole context of the work and then it is seen that if that work is creating any apparent influence on the most susceptible readers/viewers such as children or weak minded adults. In

the Roth test which was developed by US Courts in 1957 to judge such obscenity, it was held that only those sex related materials which had the tendency of exciting lustful thoughts were found to be obscene and the same has to be judged from the view of an average person by applying contemporary community standards. This test was sharper and narrower than the Hicklin test as it does not isolate the alleged contents but limits itself to the dominant theme of the whole material and checks whether if taken as a whole, it has redeeming social value or not.

20. The State has pointed out that the Hon'ble Apex Court in the matter of *Aveek Sarkar vs State of West Bengal* reported in AIR 2014 SC1493 reported in AIR 2014 SC1493 held as under:

> *"The correct test to determine the obscenity would be the community standard test i.e. Roth Test and not Hicklin Test and in order to check whether there is obscenity or not the material in question is to be taken as a whole. When the material taken as whole, it is found to be lascivious and tends to deprave a person who reads or sees or hears that material only can be said to be obscene. The Court observed that Hicklin test is in contravention to the Indian Penal Code. Further the Hon'ble Court observed that as the term 'obscene and obscenity' is not defined in Indian law. This makes the community standard test to be more suitable for Indian law regime. Also, the community standard test is more adaptive in need of changing the society. "*

21. Based upon the aforesaid principle, the State submits that it can be deduced that the content uploaded on the OTT platform would certainly deprave and totally corrupt a person who reads or watches such contents. The content would certainly fall in the category of obscenity inasmuch as even if the content is taken as a whole taken into consideration the same would excite lustful thoughts, would deprave a person who watches or sees such contents. The message that such web series is likely to spread is that the wife of an Army Officer is open to illicit extra-marital affair. This cannot be allowed to be done as having illicit relationship within the family is morally corrupt and ethically perverse and does not happen in Indian society. Whether the predominant theme or purpose of the series is an appeal to the unhealthy interest of "average person of a community as a whole" is a judgment which must be made in light of contemporary standards as would be applied by a average person with an average and normal attitude and mind towards interest in sex. By no stretch of imagination, it can be held that the depiction of mother-in-law having sex with her son-in-law shall not affect the moral values of an average person which is not acceptable to the Indian society. The content and script itself demeans and deteriorates the social and moral values.

22. The State in its reply then refers to the petitioner's contention that any intervention in transmission of such web series would violate Article 19 of the

Constitution of India i.e. freedom of speech and expression which is a fundamental right guaranteed to every citizen of the country. The State submits that Article 19(2) of the Constitution of India is a provision of Constitution which provides for curbing the freedom of speech and expression if such expression is against the interests of sovereignty and integrity of India, security of State, friendly relations with foreign States, public order, decency or morality or in relation to Contempt of Court, defamation or incitement to offence is the result thereof.

23. It is submitted by the State that a bare perusal of the aforesaid provision of Constitution would make it clear that right to freedom of expression is open to reasonable restrictions and in the present matter, the content which is uploaded in the OTT Platform is in total disregard to the law of land. The web series has tendency to corrupt the minds of people watching the content and hence unrestricted right to freedom cannot be allowed. It is further submitted in the reply that FIR cannot be a encyclopedia of the entire events. It is further submitted in reply that the petitioner has suppressed the fact that there are many complaints which have been filed against the petitioner in various cities throughout the country. The complaint has been filed in **Bandra Court (Mumbai)** and thereafter a PIL before the **Hon'ble Allahabad High Court** has been filed which is still pending. The petitioner has also contended that the complainant voluntarily chose to cause injury to him.

24. Regarding, the defence of *Volunti Non Fit Injuria* taken by the petitioner, the State submits that the content which is being screened depicts intimate scenes of the people bounded by degree of prohibited relationship and it was not a simplicitor case of possible intimacy depicted on screen. Hence proper disclaimer by petitioner would not come to the aid of petitioner.

25. Regarding the submission of petitioner, that the provision of Section 294 IPC is not attracted because OTT platform is a subscription based platform which is not a public place and which is prerequisite for bringing the case under Section 294 of IPC, the State submits that the term "public place" has not been defined under IPC and hence the definition of public place shall have to be borrowed from the Information Technology Act, 2000.

26. Section 80(1) of IT Act, 2000 defines it to be a place as any place which is intended to be used by public or which is accessible to the public. The explanation of Section 80(1) of IT Act 2000 is being reproduced as under: -

> **Explanation:-**
>
> **For the purposes of this sub-section, the expression "public place" includes any public conveyance, any hotel, any shop or any other place intended for use by, or accessible to the public.**

27. As per the reply, a bare perusal of explanation would make it clear that the definition of "public place" has weighed enough to cover all such places intended for the use of public which is accessible to the public.

28. The respondent/State further submits that the definition of "public space" is wide enough to cover cyberspace as well inasmuch as the same being in the virtual world, is available and accessible to the public. Thus, the aforesaid contention of the petitioner is also of no consequence, as per the reply submitted by the State of Madhya Pradesh.

29. It has been further submitted that the present matter is still under investigation and the investigation is a vested right with the police officer which cannot be curbed. The present petition is premature in as much as the right to investigate the offence is inherent and is a statutory right guaranteed to a police officer and hence on this count, the present petition deserves to be dismissed. It is also submitted that the present content which was being aired on the OTT platform has been deleted and it also attracts offence punishable under Section 201 of IPC. All the contentions which have been raised by the petitioner bank upon the disputed question of facts which cannot be gone into the provision of Section 482 of Criminal Procedure Code, 1973. Thus, in the wake of the matter, the petition deserves to be dismissed.

30. The content of web-series showing involvement of mother-in-law with her son-in-law in sexual activities demolishes the moral fabric of the society and hence falls in the category of obscenity and thus, in the wake of the matter, this petition deserves to be dismissed.

31. Learned Additional Advocate General for the respondent/State in his written submission has laid stress on the limited scope of quashment of FIR by the Court while exercising powers under Section 482 of Criminal Procedure Code, 1973. It has been stated that FIR is at the preliminary stage and the investigation is in progress. Even otherwise the quashment of FIR must be resorted to in the rarest of rare cases and such quashment is permissible if the Court considers that it is necessary for securing ends of justice. This view has been taken by Hon'ble Apex Court in the case of *Parbatbhai Aahir and Others vs. State of Gujarat and Another* reported in (2017) 9 SCC and in the case of *Medehl Chemical and Pharma (P) Limited vs. Biological E. Limited and Others* reported in 2000(2) SCC 426 in which it has been held that inherent power under Section 482 of Criminal Procedure Code, to have a complaint or the charge-sheet quashed is an exception rather than rule and a case for quashment at the initial stage must have to be treated as rarest of rare cases, so as not to scuttle prosecution. With the lodging of FIR, ball is set to role and thenceforth the law takes its own recourse and the investigation ensues in accordance with the provisions of law. The jurisdiction, as such, is rather limited and restricted and its undue expansion is neither practicable nor warranted.

31A. Submissions of learned counsel of both the sides were considered.

32. The celebrated judgment providing guidelines for exercising power under Section 482 of Criminal Procedure Code, 1973 is the case of *State of Haryana and Others vs. Bhajanlal and Others* reported in 1992 SUPP (1) SCC 335. These guidelines are as follows:

> *1. Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.*
>
> *2. Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.*
>
> *3. Where the allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.*
>
> *4. Where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.*
>
> *5. Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which, no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.*
>
> *6. Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or, where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.*
>
> *7. Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.*

33. Thus, this Court is required to tread the course leading to quashment of FIR at the investigation stage with a great deal of care and caution keeping in mind the mandate and guidelines laid down by the Hon'ble Apex Court and in its various other citations mentioned earlier.

34. Reverting back to the case in hand, it would be apt to recall the provisions of law under which the case has been registered against the petitioner and these

provisions are Sections 294, 298 and 34 of Indian Penal Code, 1860 and Sections 67 and 67(A) of Information Technology Act, 2000 and Section 3 of State Emblem Act, 2005.

35. Before dwelling on the applicability of Section 294 of Indian Penal Code, it would be appropriate to first consider as to whether provisions of Section 67 of Information Technology Act are attracted or not because Section 294 IPC talks of obscene acts etc and concept of obscenity figures in Section 292 of Indian Penal Code and Section 67 of Information Technology Act is based on the same principle as Section 292 of Indian Penal Code. The Hon'ble Apex Court in the case of *Sharat Babu Digumarti vs. Government of Delhi (NCT)* (2017)2 SCC 18 has held that Information Technology Act, 2000, being a special legislation dealing with obscenity in electronic form has overriding effect on the proceedings under general provisions of Section 292 of Indian Penal Code and an activity emanating from electronic form which may be obscene is exclusively punishable under Section 67 of Information Technology Act and not under Section 292 of Indian Penal Code, nor both under Section 67 of Information Technology Act and Section 292 of Indian Penal Code.

36. The Apex Court in the case of *Ranjit D. Udeshi vs. State of Maharashtra* reported in AIR 1965 SC 881 has observed in para no.16 which is as under:-

> *"that the Indian Penal Code does not define the word 'obscene' and this delicate task of how to distinguish between that which is artistic and that which is obscene has to be performed by Courts, and in the last resort by us. The test which we evolve must obviously be of a general character but it must admit of a just application from case to case by indicating a line of demarcation not necessarily sharp but sufficiently distinct to distinguish between that which is obscene and that which is not. None has so far attempted a definition of obscenity because the meaning can be laid bare without attempting a definition by describing what must be looked for. It may, however, be said at once that treating with sex and nudity in art and literature cannot be regarded as evidence of obscenity without something more ".*

37. Now coming to the question as to whether the provisions of Section 67 of Information Technology Act are attracted or not, it would be appropriate to reproduce Section 67 of Information Technology Act, 2000, which runs as under:-

> *67. Punishment for publishing or transmitting obscene material in electronic form. -Whoever publishes or transmits or causes to be published or transmitted in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are*

likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, shall be punished on first conviction with imprisonment of either description for a term which may extend to three years and with fine which may extend to five lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to five years and also with fine which may extend to ten lakh rupees.

38. One can see that the contents of aforesaid section are akin to that of Section 292(1) of IPC which is as under:-

Section 292(1) in The Indian Penal Code

(1) For the purposes of sub-section (2), a book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object, shall be deemed to be obscene if it is lascivious or appeals to the prurient interest or if its effect, or (where it comprises two or more distinct items) the effect of any one of its items, is, if taken as a whole, such as to tend to deprave and corrupt person, who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.

39. The learned senior counsel for the petitioner has submitted that due care has been taken to ensure that the content of the episode does not breach any existing provision of law pertaining to obscenity and other alleged offences because in absence of any independent censor board etc, responsibility lies heavily upon the producers of such web series to ensure that no such breach occurs.

40. It would be appropriate to refer to the written submissions made by the petitioner regarding a regulation pertaining to objectionable scenes on the ground that they are obscene.

41. The petitioner in his written submission has submitted that unlike Central Board of Film Certification (CBFC), OTT Platform does not require a CBFC and that the provisions of Cinematograph Act, 1952 are also not applicable to ALT Balaji and OTT Platform. It has been stated that OTT Platform service providers like ALT Balaji comes under the aegis of Internet and Mobile Association of India and have adopted a voluntary censorship i.e. "Code for self regulation of Online curated content providers" which regulates the dissemination of the content ensuring that the age appropriate content is made available to the audience and restricts the OTT service providers from exhibiting the public or promoting inappropriate content.

42. From the above submission, it becomes clear that there is no independent agency or authority having the sanction of Government to oversee the content of such web series, as in the present case. The producers/promoters etc involved in

publishing or promoting such contents resorted to self regulation in the dissemination of the content. Needless to say, that such service providers have twin responsibility i.e. of ensuring that the contents of material transmitted are such that it caters to the expectations of targeted audience so that such transmission reaps expected profits monetarily and at the same time care has to be taken that the content may not transgress the thin boundary between the outer limits of decency and obscenity and while dealing with such twin responsibility, such service providers cannot match the self regulation with that of an impartial regulatory authority.

43. The petitioner has submitted that the need for framing guidelines for regulating online platform was agitated in a Public Interest Litigation (PIL) filed before the Delhi High Court in *Injustice for Rights Foundation vs. Union of India,* WP (C) No.11164 of 2018, however, the Delhi High Court has held that in view of the express provisions of Information Technology Act and the rules framed therein, writ of mandamus cannot be issued and a person who is aggrieved can approach the statutory authority under the Information Technology Act for framing guidelines. This order has been challenged before the Hon'ble Apex Court and the matter is still pending.

44. The petitioner submits that no provision of Information Technology Act has been violated and, if at all, the complainant has any grievance, he may seek proper recourse before the competent authority under Information Technology Act.

45. The petitioner further placed reliance upon the decision of Hon'ble Apex Court in the case of *Ashutosh Dubey vs NETFLIX* reported in 2020 SCC Online, wherein the suit for decree of permanent injunction against the defendant against streaming of episodes of web series ***('Hasmukh')*** which allegedly contained derogatory remarks against the Advocates. The Court held that this web series is a dark satirical comedy, attempting to expose the ills of various professions and protagonist makes a statement as a stand-up-comedy about the ills of profession. The Court held that it is a known fact that the stand-up-comedian exaggerates particular view point so that it becomes highlighted. The people did not view the comments or jokes made by stand-up-comedian as a statement of truth but take them with a pinch of salt. The Court further held that the plaintiff was not able to show that the impugned comments in any manner referred to the plaintiff or referred to a definite group of individuals or lawyers out of the entire class of lawyers to which the plaintiff belongs. Thus, no injury is caused to the plaintiff.

46. The reason for citing this case by the petitioner is that the Court had observed that the web series, being a work of fiction is only meant to be taken in the context of a figment of imagination and humour and not as a matter of truth.

47. On perusal of the aforesaid citation, this Court is constrained to observe that no parallel can be drawn between the issues involved in the aforesaid citation and that involved in the present case. Drawing of comparison is ill-conceived and the only common ground is that the facts of present case and that of the citation are both imaginary. This apart, there is no matching elsewhere. The pertinent question involved in the present case relates to obscenity and related offence and also the issue relating to breach of National Emblem and there is no humour involved in tackling these issues.

48. Before determining as to whether the episode prima facie can be considered to be obscene as per Section 67 and 67A of IT Act, the other contentions of petitioner seeking exemption from liability shall be considered.

49. The first contention which has been raised by learned senior counsel for the petitioner is that ALT Balaji is neither producer nor is involved in the day to day activities/decisions involved in the making of web series. No credits are even given to the petitioner of Episode 1 of Season 2 of web series and there is no applicability of Section 34 of Indian Penal Code which may only be fastened on a person who shares a common intention in the sense of a pre-arranged plan.

50. Learned senior counsel for the petitioner submits that platform for publishing the web series has been provided by ZEE Network and the petitioner is not involved in the production or direction of web series and, hence, there is no liability of the petitioner regarding the above.

51. Regarding this submission, the defendant/State in his written submission has mentioned that ALT Balaji and ZEE 5 have entered in an agreement dated 29.07.2019 for the content alliance to grow the *'Subscription Video On Demand' ('SVOD').* As per this agreement, ZEE-5 will be authorized to share a *'SVOD'* content owned by ALT-Balaji. The aforesaid agreement has been marked as Annexure-WS/1. The aforesaid document was perused in which it has been mentioned that ZEE 5 and ALT Balaji have collaborated to co-create the original content which will only be made available on both platform. The petitioner-**Ekta Kapoor** who is a Joint Managing Director (JMD) of *Balaji Telefilms Limited* has mentioned that as part of this partnership, ZEE-5 subscribers will get seamless access to ALT Balaji's clutter breaking originals in addition to ZEE 5 existing content.

52. The aforesaid agreement itself shows that ALT Balaji is involved in the creation of episodes which are streamed on ZEE-5 Platform. Thus, ALT Balaji which is an 'SVOD' platform, is a product of Balaji Telefilms Limited of which the petitioner is a Joint Managing Director (JMD) and the petitioner being one of the co-creators of ALT Balaji would definitely be considered to have the aforesaid episode to be published or transmitted in the electronic form.

53. The petitioner is intrinsically involved in the constitution of *SVOD* Platform called ALT Balaji would be considered to have caused to publish or transmit the impugned episode in the electronic form. The association of ALT Balaji with ZEE 5 is reflected on screen before the episode begins. The petitioner, thus, cannot state that she was not aware about the content of episode. The Hon'ble Apex Court in the case of celebrated judgment of *Ranjit D. Udeshi vs. State of Maharashtra* reported in AIR 1965 SC 881 has held as under:

> *10. Before dealing with that problem we wish to dispose of Mr. Garg's third argument that the prosecution must prove that the person who sells or keeps for sale any obscene object knows that it is obscene, before he can be adjudged guilty. We do not accept this argument. The first sub-section of s. 292 (unlike some others which open with the words "whoever knowingly or negligently etc.") does not make knowledge of obscenity an ingredient of the offence. The prosecution need not prove something which the law does not burden it with. If knowledge were made a part of the guilty act (acts reus), and the law required the prosecution to prove it, it would place an almost impenetrable defence in the hands of offenders. Something much less than actual knowledge must therefore suffice. It is argued that the number of books these days is so large and their contents so varied that the question whether there is mens rea or not must be based on definite knowledge of the existence of obscenity. We can only interpret the law as we find it and if any exception is to be made it is for Parliament to enact a law. As we have pointed out, the difficulty of obtaining legal evidence of the offender's knowledge of the obscenity of the book etc., has made the liability strict. Under our law absence of such knowledge, may be taken in mitigation but it does not take the case out of the sub-section.*
>
> *11. Next to consider is the second part of the guilty act (actus reus), namely, the selling or keeping for sale of an object which is found to be obscene. Here, of course, the ordinary guilty intention (mens rea) will be required before the offence can be said to be complete. The offender must have actually sold or kept for sale, the offending article. The circumstances of the case will then determine the criminal intent and it will be a matter of a proper inference from them. The argument that the prosecution must give positive evidence to establish a guilty intention involves a supposition that mens rea must always be established by the prosecution through positive evidence. In criminal prosecution mens rea must necessarily be proved by circumstantial evidence alone unless the accused confesses. The sub-section makes sale and possession for sale one of the elements of the offence. As sale has taken place and the appellant is a book-seller the necessary inference is readily*

> *drawn at least in this case. Difficulties may, however, arise in cases close to the border. To escape liability the appellant can prove his lack of knowledge unless the circumstances are such that he must be held guilty for the acts of another. The court will presume that he is guilty if the book is sold on his behalf and is later found to be obscene unless he can establish that the sale was without his knowledge or consent.*

54. The aforesaid concept is importable while interpreting Section 67 of Information Technology Act, 2000. In the aforesaid provision, there are no such words that the person who publishes or transmits or caused to be published or transmitted in the electronic form any lascivious material or such material which appeals to prurient interest was having or supposed to be having the knowledge about the content of the material. Thus, even if the content is not known and a person publishes or transmits or caused to do so even without knowledge, provisions of Section 67 of Information Technology Act, 2000, would be attracted. Presumption of knowledge on the part of petitioner shall have to be assumed and onus will be upon the petitioner to rebut such presumption by leading evidence.

55. The next contention of learned senior counsel for the petitioner Mr. Siddharth Luthra is that FIR has been registered only against **petitioner-Ekta Kapoor** but not against her **Company** i.e. **ALT Balaji** and prosecuting the petitioner without prosecuting the Company of which the petitioner is the Joint Managing Director (JMD) is impermissible. He has referred to the citation of *Aneeta Hada vs. Godfather Travels and Tours Private Limited* reported in 2012(5) SCC Page 661 in which it has been laid down that the Director of Company cannot be held liable without impleading the Company. In the aforesaid case, the Company was not arraigned as an accused, hence, the proceedings against the Director of Company were quashed.

56. The aforesaid case pertained to offence under Section Negotiable Instruments Act, 1881 *(for short 'NI Act')* and a particular section involved was Section 141 of NI Act. The Hon'ble Apex Court, while dealing with the case, referred to Section 85 of Information Technology Act, 2000. Section 85 of the Information Technology Act, 2000, reads as under :-

> ***Section 85 of Information Technology Act, 2000.***
> **Offences by companies :-**
>
> *(1) Where a person committing a contravention of any of the provisions of this Act or of any rule, direction or order made thereunder is a company, every person who, at the time the contravention was committed, was in charge of, and was responsible to, the company for the conduct of business of the company as well as the company, shall be guilty of the*

contravention and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to punishment if he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention.

(2) Notwithstanding anything contained in sub-section (1), where a contravention of any of the provisions of this Act or of any rule, direction or order made thereunder has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

57. The Hon'ble Apex Court held that the word *"as well as the Company"* itself shows that neither the Director nor the Company can be prosecuted in isolation.

58. Responding to the aforesaid submission, learned Additional Advocate General for the respondent/State Mr. Pushyamitra Bhargava has submitted that the present case is only in the initial stage of investigation and charge-sheet has yet not been filed in the matter. He has drawn attention to the FIR lodged by the complainant which can be seen at page-48 of the compilation of petitioner in which it has been prayed by him that appropriate proceedings be instituted against ALT Balaji as well. Thus, the complainant had sought institution of proceedings against ALT Balaji as well but the Investigating Officer has presently named the petitioner only as an accused and it cannot be stated that ALT Balaji/Balaji Telefilms shall not be named as an accused when the charge-sheet is filed in the matter.

59. The aforesaid submission of learned Additional Advocate General for the respondent/State does have substance. The Investigating Officer has not ruled out the prosecution of ALT Balaji Company/Balaji Telefilms Limited and the aforesaid Company may be named as an accused during the course of investigation. Hence, it is premature to State that the prosecution needs to be quashed because ALT-Balaji/Balaji Telefilms Limited has not been arraigned along with the petitioner. It is to be further reminded that petitioner alone has so far been made accused in the matter on the basis of FIR lodged by the complainant and it was not in the hands of complainant to ensure that the Company is also named as an accused. The case of *Aneeta Hada* (supra) was a complaint case filed under Sections 138 and 141 of NI Act, 1881 and the responsibility was on the complainant to include the Company as an accused. Hence, the analogy of *Aneeta Hada*'s case (supra) cannot be taken at this stage of investigation in the present

case and it is premature to state that there has been a breach of Section 85 of Information Technology Act, 2000.

60. Reverting back to the consideration regarding applicability of Section 67 of I.T. Act, the prosecution should be able to show that the material which is published or transmitted in electronic form "*is lascivious or appeals to the prurient interest or if its effect is such as tend to deprave and corrupt persons who are likely having regard to all relevant circumstances, to read, see or hear the matter content or embodied in it.....* ". As already seen, the aforesaid words contained in Section 67 of I.T. Act are imported from Section 292 of IPC, which deals with obscenity.

61. Learned senior counsel for the petitioner has in his written submission as also in oral submissions stated that the episode does not attract obscenity because the test of obscenity propounded in various Supreme Court citations is not fulfilled. In the written submissions following citations of Apex Court have been referred to and the relevant paragraphs have also been reproduced from these citations :

(i) ***Ajay Goswami vs. Union of India, (2007) 1 SCC143*** It was held that per se nudity is not obscenity. In addition, inter alia, the Hon'ble Court held that "contemporary standards" and test of ordinary man are parameters to decide obscenity. Paragraphs 61, 67 and 71 of this judgment have been reproduced in the written statements which are as under :-

> ***61.*** *The American Courts, from time to time, have dealt with the issues of obscenity and laid down parameters to test obscenity. It was further submitted that while determining whether a picture is obscene or not it is essential to first determine as to quality and nature of material published and the category of readers. In 50 Am Jur 2 d, para 22 at page 23 reads as under:*
>
> *"Articles and pictures in a newspaper must meet the Miller test's constitutional standard of obscenity in order for the publisher or distributor to be prosecuted for obscenity. Nudity alone is not enough to make material legally obscene.*
>
> *The possession in the home of obscene newspaper is constitutionally protected, except where the such materials constitute child poronography."*
>
> *67. In judging as to whether a particular work is obscene, regard must be had to contemporary mores and national standards. While the Supreme Court in India*

held Lady Chatterley's Lover to be obscene, in England the jury acquitted the publishers finding that the publication did not fall foul of the obscenity test. This was heralded as a turning point in the fight for literary freedom in UK. Perhaps "community mores and standards" played a part in the Indian Supreme Court taking a different view from the English jury. The test has become somewhat outdated in the context of the internet age which has broken down traditional barriers and made publications from across the globe available with the click of a mouse.

71. *The test for judging a work should be that of an ordinary man of common sense and prudence and not an "out of the ordinary or hypersensitive man." As Hidayatullah, C.J. remarked in K.A. Abbas (SCC p. 802, para 49) : -*

> *"If the depraved begins to see in these things more than what an average person would, in much the same way, as it is wrongly said, a Frenchman sees a woman's legs in everything, it cannot be helped."*

(ii) Chandrakant Kalyandas Kakodkar vs. State of Maharashtra, (1969) 2 SCC 687**.** In this case it has been held that the concept of obscenity differ from country to country depending upon the standards of morals of contemporary suicide. Para 12 of this citation has been reproduced in written submissions as under :-

> *"The concept of obscenity would differ from country to country depending on the standards of morals of contemporary society. What is considered as a piece of literature in France may be obscene in England and what is considered in both countries as not harmful to public order and morals may be obscene in our country. But to insist that the standard should always be/or the writer to see that the adolescent ought not to be brought into contact with sex or that if they read any references to sex in what is written whether that is the dominant theme or not they would be affected, would be to require authors to write books only for the adolescent and not for the adults. In early English writings authors wrote only with unmarried girls in view but society has changed since then to allow litterateurs and artists to give expression to their ideas, emotions and objectives with full freedom except that is should not fall within the definition of 'obscene' having regard to the standards of*

contemporary society in which it is read. The standards of contemporary society in India are also fast changing. The adults and adolescents have available to them a large number of classics, novels, stories and pieces, of literature which have a content of sex, love and romance. As. observed in Udeshi's(1) case if a reference to sex by itself is considered obscene, no books can be sold except those which are purely religious. In the field of art and cinema also the adolescent is. shown situations which even a quarter of a century ago would be considered derogatory to public morality, but having regard to changed conditions are more taken for granted without in anyway tending to debase or debauch the mind. What we have to see is that whether a class, not an isolated case, into whose hands the book, article or story falls suffer in their moral outlook or become depraved by reading it or might have impure and lecherous thought aroused in their minds. The charge of obscenity must, therefore, be judged from this aspect."

(iii) ***Aveek Sarkar vs. State of West Bengal, (2014) 4 SCC 257*** - In this case the Supreme Court has held that for determining obscenity hick-line test is not correct test, but the community standard test is the correct test. Para 23 of this citation has been reproduced in the written submissions, which is as below :-

"23. *We are also of the view that Hicklin test is not the correct test to be applied to determine "what is obscenity". Section 292 of the Indian Penal Code, of course, uses the expression 'lascivious and prurient interests' or its effect. Later, it has also been indicated in the said Section of the applicability of the effect and the necessity of taking the items as a whole and on that foundation where such items would tend to deprave and corrupt persons who are likely, having regard to all the relevant circumstances, to read, see or hear the matter contained or embodied in it. We have, therefore, to apply the "community standard test" rather than "Hicklin test" to determine what is "obscenity". A bare reading of Sub-section (1) of Section 292 , makes clear that a picture or article shall be deemed to be obscene*

(i) if it is lascivious;

(ii) it appeals to the prurient interest; and

(iii) it tends to deprave and corrupt persons who are likely to read, see or hear the matter,

alleged to be obscene.

Once the matter is found to be obscene, the question may arise as to whether the impugned matter falls within any of the exceptions contained in Section. A picture of a nude/semi-nude woman, as such, cannot per se be called obscene unless it has the tendency to arouse feeling or revealing an overt sexual desire. The picture should be suggestive of deprave mind and designed to excite sexual passion in persons who are likely to see it, which will depend on the particular posture and the background in which the nude/semi-nude woman is depicted. Only those sex-related materials which have a tendency of "exciting lustful thoughts" can be held to be obscene, but the obscenity has to be judged from the point of view of an average person, by applying contemporary community standards.

(iv) ***Samaresh Bose vs Amal Mitra, (1985) 4 SCC 289-*** In this citation it has been held that obscenity is not the same as vulgarity. Para 35 of this citation has been reproduced in the written submissions, which is as below :-

"35. *We have read with great care. It is to be remembered that Sarodiya Desh is a very popular journal and is read by a large number of Bengalies of both sexes and almost of all ages all over India. This book is read by teenagers, young boys, adolescents, grown-up youngmen and elderly people. We are not satisfied on reading the book that it could be considered to be obscene. Reference to kissing, description of the body and the figures of the female characters in the book and suggestions of acts of sex by themselves may not have the effect of depraving, debasing and encouraging the readers of any age to lasciviousness and the novel on these counts, may not be considered to be obscene. It is true that slang and various unconventional words have been used in the book. Though there is no description of any overt act of sex, there can be no doubt that there are suggestions of sex acts and that a great deal of emphasis on the aspect of sex in the lives of persons in various spheres of society and amongst various classes of people, is to be found in the novel. Because of the language used, the episodes in relation to sex life narrated in the novel, appear vulgar and may create a feeling of disgust and revulsion. The mere fact that the various affairs and episodes with emphasis on sex have been narrated in slang and*

vulgar language may shock a reader who may feel disgusted by the book does mot resolve the question of obscenity. It has to be remembered that the author has chosen to use such kind of words and language in expressing the feelings, thoughts and actions of Sukhen as men like Sukhen could indulge in to make the whole thing realistic. It appears that the vulgar and slang language used have greatly influenced the decision of the Chief Presidency Magistrate and also of the learned Judge of the High Court. The observations made by them and recorded earlier go to indicate that in their thinking there has been kind of confusion between vulgarity and obscenity. A vulgar writing is mot necessarily obscene. Vulgarity arouses a feeling of disgust and revulsion and also boredom but does mot have the effect of depraving, debasing and corrupting the morals of any reader of the novel, whereas obscenity has the tendency to deprave and corrupt those whose minds are open to such immoral influences. We may observe that characters like Sukhen, Shikha, the father and the brothers of Sukhen, the business executives and others portrayed in the book are not just figments of the author's imagination. Such characters are often to be seen in real life in the society. The author who is a powerful writer has used his skill in focussing the attention of the readers on such characters in society and to describe the situation more aloquently he has used unconventional and slang words 80 that in the light of the author's understanding, the appropriate emphasis is there on the problems. If we place ourselves in the position of the author and judge the novel from his point of view, we find that the author intends to expose various evils and ills pervading the society and to pose with particular emphasis the problems which ail and afflict the society in various spheres. He has used his own technique, skill and choice of words which may in his opinion, serve properly the purpose of the novel. If we place our selves in the position of readers, who are likely to read this book, and we must not forget that in this class of readers there will probably be readers of both sexes and of all ages between teenagers and the aged, we feel that the readers as a class will read the book with a sense of shock, and disgust and we do not think that any reader on reading this book would become depraved, debased and encouraged to lasciviousness. It is quite possible that they come across

such characters and such situations in life and have faced them or may have to face them in life. On a very anxious consideration and after carefully applying our judicial mind in making an A objective assessment of the novel we do not think that it can be said with any assurance that the novel is obscene merely because slang and unconventional words have been used in the book in which there have been emphasis on sex and description of female bodies and there are the narrations of feelings, thoughts and actions in vulgar language. Some portions of the book may appear to be vulgar and readers of cultured and refined taste may feel shocked and disgusted. Equally in some portions, the words used and description given may not appear to be in proper taste. In some places there may have been an exhibition of bad taste leaving it to the readers of experience and maturity to draw the necessary inference but certainly not sufficient to bring home to the adolescents any suggestion which is depraving or lascivious. We have to bear in mind that the author has written this novel which came to be published in the Sarodiya Desh for all classes of readers and it cannot be right to insist that the standard should always be for the writer to see that the adolescent may not be brought into contact with sex. If a reference to sex by itself in any novel is considered to be obscene and not fit to be read by adolescents, adolescents will not be in a position to read any novel and will have to read books which are purely religious . We are, therefore, of the opinion that the Courts below went wrong in considering this novel to be obscene. We may observe that as on our own appreciation of the novel, we are inclined to take a view different from the view taken by the Courts below, we have taken the benefit of also considering the evidence given in this case by two eminent personalities in the literary field for proper appreciation and assessment by us. It has already been held by this Court in two earlier decisions which we have already noted that the question whether a particular book is obscene or not, does not altogether depend on oral evidence because it is duty of the Court to ascertain whether the book offends the provisions of S.292 I.P.C. but it may be necessary if it is at all required, to rely to a certain extent on the evidence and views of leading litterateurs on that aspect particularly when the book is in a language with which the court is not conversant . It is

indeed a matter of satisfaction for us that the views expressed in course of their evidence by the two eminent persons in the literary field are in accord with the views taken by us."

62. Thus in substance, it has been sought to be stated by way of written submissions that stray portrayal in the impugned material should not be yardstick for determining obscenity, that the test for judging is that of an ordinary man of commonsense and not that of a hypersensitive man, that the impugned material should be seen from the standards of contemporary society, which in India is fast changing and that vulgarity should not be confused with obscenity.

63. The test of contemporary society would be that what may have been considered obscene in the past may now not be considered so since the standards of society does not remain the same in the matter of considering as to what is obscene and what is not [vide *Ajay Goswami* (supra)].

64. Reverting back to the episode under consideration, the story revolves around aspects of sexuality wherein a lady desiring physical enhancements from a plastic surgeon, approaches him and is immediately shown to be enticing him and indulging in physical intimacy with him. The scenes of physical intimacy depict acts of copulation which are although not graphic in nature but are simulated which have been termed to be obscene. As per the complainant, depiction of such simulated sexual activity between these two persons who do not even know each other indulging in raw animal passion without involvement of emotions exposes the intent of the director/producer to arouse similar feelings in the minds of audience. Such scenes are shown on more than one occasion. Allegedly, similar act of indulgence in sex is shown between love interest of male protagonist and the male character. wherein the male is shown to be taking advantage without being emotionally involved with his love interest.

65. The question is whether such depiction would be considered to be obscene or not. In the written submissions, it has been stated that the web series is about interpersonal relationship and different circumstances/situations arising there from and does not depict sexual conduct in a patently offensive manner and that there is no graphic sexual intercourse.

66. The Apex Court in various cases has made observations in respect of discerning as to whether the material in question is obscene or has an artistic value.

67. The Supreme Court in the case of *Ajay Goswami vs. Union of India* (supra) has observed as under :-

***"66.** Where art and obscenity are mixed, what must be seen is whether the artistic, literary or social merit of the work in question*

outweighs its "obscene" content. This view was accepted by this Court in Ranjit D. Udeshi v. State of Maharashtra, AIR 1965 SC 881 case:

> *"Where there is propagation of ideas, opinions and information of public interest or profit the approach to the problem may become different because then the interest of society may tilt the scales in favour of free speech and expression. It is thus that books on medical science with intimate illustrations and photographs, though in a sense immodest, are not considered to be obscene but the same illustrations and photographs collected in book form without the medical text would certainly be considered to be obscene.*
>
> *Where art and obscenity are mixed, the element of art must be so prepondering as to overshadow the obscenity or make it so trivial/inconsequential that it can be ignored; Obscenity without a preponderating social purpose or profit cannot have the constitutional protection of free speech".*

68. Further in the case of *Ranjit D. Udeshi* (supra), the Apex Court has observed as under:-

> *28. This is where the law comes in. The law seeks to protect not those who can protect themselves but those whose prurient minds take delight and secret sexual pleasure from erotic writings. No doubt this is treating with sex by an artist and hence there is some poetry even in the ugliness of sex. But as Judge Hand said obscenity is a function of many variables. If by a series of descriptions of sexual encounters described in language which cannot be more candid, some social good might result to us there would be room for considering the book. But there is no other attraction in the book. As J.B. Priestley said, "Very foolishly he tried to philosophize upon instead of merely describing these orgiastic impulses; he is the poet of a world in rut, and lately he has become its prophet, with unfortunate results in his fiction, (The English Novel p. 142 (Nelson)). The expurgated copy is available but the people who would buy the unexpurgated copy do not care for it. Perhaps the reason is as was summed up by Middleton Murray:*
>
> *"Regarded objectively, it is a wearisome and oppressive book; the work of a weary and hopeless man. It is remarkable, indeed notorious for its deliberate use or unprintable words."*

69. The aforesaid citations show that the Court should be careful in reading

the true intent of the author of impugned material and should see to it that a patently obscene material is not being passed of euphemistically in the garb of study reflecting upon the psychological aspect of sexual behaviour in persons.

70. As per the complainant, in the depicted scenes of the episode under consideration, scenes of physical passion run through out the story line which discloses the intention of the producers and promoters of the episode to cater to the baser instinct of audience.

This submission was considered.

71. The Indian audiences have of course come of age from the times of two flowers cuddling each other symbolizing male and female union to more explicit manners of displaying such activity. Still, the acceptable norms of permissiveness in the society cannot be equated with declining moral values. What is patently obscene from an ordinary person's point of view, would remain to be so for all times to come. There is always a thin line between what are acceptable limits of display of physical intimacy and obscenity.

72. In the case of *Samaresh Bose vs Amal Mitra's* (supra) it has been held that for determining whether the impugned material is obscene or not, an objective assessment of the material is required. It has been warned that in the matter of objective assessment the subjective attitude of a judge hearing the matter is likely to influence his mind and his decision on the question and in order to eliminate any subjective element or personal preference on the part of the judge, the evidence on record ought to be considered and also the views expressed by a reputed or recognized authors of literature may also be taken help of. The following paragraph of the case of *Samaresh Bose vs Amal Mitra's* (supra) is being reproduced below :-

> *"In England, as we have earlier noticed, the decision on the question of obscenity rests with the jury who on the basis of the summing up of the legal principles governing such action by the learned Judge decides whether any particular novel, story or writing is obscene or not. In India, however, the responsibility of the decision rests essentially on the Court. As laid down in both the decisions of this Court earlier referred to, "the question whether a particular article or story or book is obscene or not does not altogether depend on oral evidence, because it is the duty of the Court to ascertain whether the book or story or any passage or passages therein offend the provisions Section 292 of I.P.C." In deciding the question of obscenity of any book, story or article the Court whose responsibility it is to adjudge the question may, if the*

Court considers it necessary, rely to an extent on evidence and views of leading literary personage, if available, for its own appreciation and assessment and for satisfaction of its own conscience. The decision of the Court must necessarily be on an objective assessment of the book or story or article as a whole and with particular reference to the passages complained of in the book, story or article. The Court must take an overall view of the matter complained of as obscene in the setting of the whole work, but the matter charged as obscene must also be considered by itself and separately to find out whether it is so gross and its obscenity so pronounced that it is likely to deprave and corrupt those whose minds are open to influence of this sort and into whose hands the book is likely to fall. Though the Court must consider the question objectively with an open mind, yet in the matter of objective assessment the subjective attitude of the Judge hearing the matter is likely to influence, even though unconsciously, his mind and his decision on the question. A Judge with a puritan and prudish outlook may on the basis of an objective assessment of any book or story or article, consider the same to be obscene. It is possible that another Judge with a different kind of outlook may not consider the same book to be obscene on his objective assessment of the very same book. The concept of obscenity is moulded to a very great extent by the social outlook of the people who are generally expected to read the book. It is beyond dispute that the concept of obscenity usually differs from country to country depending on the standards of morality of contemporary society in different countries. In our opinion, in judging the question of obscenity, the Judge in the first place should try to place himself in the position of the author and from the view point of the author the judge should try to understand what is it that the author seeks to convey and whether what the author conveys has any literary and artistic value. The Judge should thereafter place himself in the position of a reader of every age group in whose hands the book is likely to fall and should try to appreciate what kind of possible influence the book is likely to have in the minds of the readers. A Judge should thereafter apply his judicial mind dispassionately to decide whether the book in

> *question can be said to be obscene within the meaning of Section 292 I.P.C. by an objective assessment of the book as a whole and also of the passages complained of as obscene separately. In appropriate cases, the Court, for eliminating any subjective element or personal preference which may remain hidden in the sub-conscious mind and may unconsciously affect a proper objective assessment, may draw upon the evidence on record and also consider the views expressed by reputed or recognised authors of literature on such questions if there be any for his own consideration and satisfaction to enable the Court to discharge the duty of making a proper assessment".*

73. The above observation shows that in order to determine as to whether a particular matter is obscene or not, recording of evidence may be an important exercise. As far as the present case is concerned, it cannot be stated outrightly that the impugned episode is not obscene.

74. The learned counsel for the respondent/State has stated that not only the aforesaid episode is available for only persons above 18 years of age but any one can see the aforesaid episode without subscribing to the web series and thus the episode is extremely harmful and outrightly obscene from the point of view of minors also who are more prone to be influenced by such scenes.

75. If the aforesaid submission is true, then there would be little doubt that such unrestricted display of material would come in the realm of obscenity because minors are more prone to depravity of their minds on watching such material.

76. However, one must hasten to add that it is not intended that such dramas be written only in such a manner which are proper from the point of view of minors. The Apex Court in the case of *Chandrakant Kalyandas Kakodkar vs. State of Maharashtra,* (supra) has observed as under :-

> *"But to insist that the standard should always be for the writer to see that the adolescent ought not to be brought into contact with sex or that if they read any references to sex in what is written whether that is the dominant theme or not they would be affected, would be to require authors to write books only for the adolescent and not for the adults."*

77. Even in the case of *Ranjit D. Udeshi's* (supra), it has been held that barely a reference to sex by itself if were to be considered obscene, then no books can be sold except those which are purely religious. In the case of *Samaresh Bose vs Amal Mitra's* (supra) it has been observed in para 35 that if a reference to sex by itself in any novel is considered to be obscene and not fit to be read by adolescents,

adolescents will not be in a position to read any novel and will have to be read books which are purely religious.

78. The aforesaid excerpts of the Apex Court judgments are drawn in order to put across a view that in the present time it is not possible not even expected to shield adolescence from depictions of sensuality in pictorial form or in books. However, as already observed earlier, a line has to be drawn so that such depictions do not transgress such boundaries which may involve depravity of the minds of minors in a manner which impedes their wholesome growth of impressionable minds.

79. Coming now to the concept of obscenity in respect of persons who are more than 18 years of age, the Hon'ble Apex Court in the case of *Samaresh Bose* (supra) has laid down that the Court must take an overall view of the matter complained of as obscene in the setting of the whole work, but the matter charged as obscene must also be considered by itself and separately to find out whether it is so gross and that its obscenity was so pronounced that it is likely to deprave and corrupt and those minds are open to influence of this sort and into whose hands the book is likely to fall.

80. There is no doubt about the fact that the standard of obscenity is not the same in respect of minors and in respect of adult persons and the standard is that of an average person and not highly sensitive person. It would be apt to the Court the observations made by Hon'ble Apex Court in the case of *Director General, Directorate General of Doordarshan vs. Anand Patwardhan* reported in 2006 8 SCC 433 has held as under:

> *32(a) "whether an average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest.....*
>
> *(2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically, defined by the applicable state of law, and*
>
> *(3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value".*

81. Applying the test of obscenity from the point of view of an ordinary person as laid down in citations mentioned above, there is substance in the submissions of the learned counsel for State that the episode could be catering to the prurient interest of any normal major person, although one must hasten to add that it is through leading of evidence only, that the test of obscenity would be affirmed [(as per the observations made in the case of *Samaresh Bose* (supra)]. What is punishable is "obscenity" and once the material comes within the ambit of obscenity, it is immaterial that the person is major in terms of age. The only test

would be the test of an ordinary person and not hyper-sensitive person. The word **'prurient'** in Oxford dictionary means "having or engaging an excessive interest in sexual matters, especially the sexual activity of others". The word ' **lascivious'** means "feeling or revealing an overt sexual interest or desire".

82. During the course of argument, much stress has been laid upon the freedom of speech and expression guaranteed under Article 19(1) (A) of the Constitution of India. In the case of *Ranjit D. Udeshi'*s case (supra), the Hon'ble Apex Court has dealt with this aspect but has stressed upon the fact if the impugned material is such which is not in the interest of public decency or morality, the State may make the appropriate law to restrict such freedom of speech and expression. In para-8 of the above citation, it has been observed as under:-

> *"Speaking in terms of the Constitution it can hardly be claimed that obscenity which is offensive to modesty or decency is within the constitutional protection given to free speech or expression, because the article dealing with the right itself excludes it. That cherished right on which our democracy rests is meant for the expression of free opinions to change political or social conditions or for the advancement of human knowledge. This freedom is subject to reasonable restrictions which may be thought necessary in the interest of the general public and one such is the interest of public decency and morality. Section 292, Indian Penal Code, manifestly embodies such a restriction because the law against obscenity, of course, correctly understood and applied, seeks no more than to promote public decency and morality ".*

83. Thus, while considering as to whether a particular material is obscene or not, the aspects of morality and public decency will also be required to be kept in mind.

84. It has been submitted on behalf of respondent/State that in the impugned episode, a medical practitioner has been shown to be satiating his lust from his own patient/client which demeans and erodes the medical ethics, which is a breach of Hippocratic oath prohibiting such activities by medical practitioners with their patients and depiction of such scenes can only be considered to be against public decency or morality. The lady who approaches the male protagonist for her physical enhancement wants continuation of sexual relation with him even after knowing that he is none but her own son-in-law. Such indulgence by step mother-in-law, though falling short of incest, still breaches the unwritten code of acceptable moral conduct and decency as per Indian mores. Thus, as per learned counsel, primafacie there is not only a breach of public decency and morality calling for application of Article 19(2) of the Constitution of India, but as

discussed earlier, the depicted material is lascivious and appealing to the prurient interest of audience.

85. The aforesaid submissions are quite substantial and it would be a matter of deep deliberation and a convoluted exercise to determine as to whether the episode is obscene or not and at this stage, it would be inappropriate to take a final call.

86. Learned senior counsel for the petitioner has stated that depictions in the impugned material does not satisfy the *Miller Test (Miller vs. California* 413 US 25 (1973) which is considered as grundnorm in USA for testing as to whether the material is obscene or not. The aforesaid case is based on the standards prevailing in USA, which test, one is afraid cannot be imported for determining obscenity in peculiar Indian conditions.

87. It has also been mentioned that Internet is full of much more explicit forms of obscenity and therefore much ado ought not be made about the impugned material.

88. The flooding of obscene material on Internet is primarily because the concerned authorities have not been able to device a mechanism to isolate and prevent such material and such failure ought not to be considered to be valid rationalization on the part of petitioner. Such submission is akin to an excuse by a person who spreads garbage in a residential colony on the ground that the aforesaid colony is already unhygienic and unclean.

89. The petitioner has submitted that appropriate precautions have been taken by publishing a disclaimer that the programme contains a strong language, mature and intimate scenes between the characters and that neither ALT Balaji nor ZEE 5 intends to endorse, promote, encourage and support any actions.

90. Learned senior counsel for the petitioner submits that apart from the aforesaid disclaimer, terms of use placed at ***Annexure-P/6*** are also laid down in which it has been mentioned that subscriber has to be at-least eighteen years of age for watching such programme and that such subscribers shall not create a submission that any material transmitted is objectionable on any account. The following part of the terms and conditions were specifically referred to which are as under:-

> *"Users hereby acknowledged that certain content on the Site(s)/ App(s) is for use solely by responsible adults over the age of eighteen years or the age of consent in the jurisdiction from which it is being accessed. There are various genres of content suitable for the consumption by the users and also for the users below the age of eighteen years and also for the users above eighteen years of age, have attained the age of majority. Should the user choose to*

access such content intended for the consumption by the user above the age of eighteen years, then such user shall be making the following representations. "

(1) that the user has attained the age of majority or at-least eighteen years of age and has the legal right to access and/or possess the content meant for adults.

(2) that the user has voluntarily chosen to access such content, accused he/she wants to view the same and does not find the said content to be offensive or objectionable.

(3) that by view any part or portion of content intended for the consumption by the users above the age of eighteen years available on the application/website, the user agrees that the user shall not hold the owners of the application/website ALT-Balaji, its Directors or its employees responsible for any such material.

(4) that the user will exit this Site(s)/App(s) immediately should he/she be in anyway offended by the adult nature of the content.

(5) that the user understands and agrees to abide by the standards and laws of India or the jurisdiction from which it is being accessed.

91. Regarding such disclaimer and the terms of use preventing the subscriber from complaining do not insulate the petitioner from action against her if the material itself invokes application of Section 67 of Information Technology Act, 2000. Section 67 of Information Technology Act is a cognizable offence and no condition such as disclaimer etc can prevent a person from lodging the FIR in respect of such offence. *In Ranjit D. Udeshi'*s case (supra), it has been observed by Hon'ble Apex Court that the offence of obscenity involves strict liability and once the material is *primafacie* considered to be obscene, there can be no escape from the liability.

92. Learned senior counsel for the petitioner submits that a person who has paid the subscription fee is expected to know as to what kind of material would be transmitted and such person cannot later on complain that he or she was annoyed on watching such material. The citation of Bombay High Court in the case of *State of Maharashtra vs. Joycezed* reported in 1973 SCC Online Bombay Page 141 has been cited in support of such citation.

93. As per the facts of this case, on coming to know that an adult form of dance i.e. Cabaret Dance show being performed in a hotel, the police department had deputed a police officer who entered the hotel as a decoy customer. The dance was erotic in nature. Later on, the complaint was lodged by the same police officer. The Court held that any customer who goes to a hotel where Cabaret show is run

has implicitly given the consent to take the risk of mental harm of being annoyed by obscene sounds and dances which Cabaret performer may give. The maxim *'Volenti Non-Fit Injuria'* must apply to the annoyance, if any. Para Nos.10 and 26 in respect of Cabaret dance, are as under:

> ***Para 10:*** *It is well known that any person above eighteen who enters a hotel where a cabaret show is on the floor, must have so entered either to enjoy the show or to run the tempting risk of the harm of annoyance, if he so feels, as a result of the obscene acts and sounds normally making up such a cabaret show. It is not suggested in this case that any of the customers was below eighteen. Having once entered the floor of the hotel he must know that he will be compelled to run the risk of the alleged harm by way of mental annoyance, if any. Any reasonable and prudent person with average common sense knows or ought to know before entering a hotel like Blue Nile, where cabaret shows are run, that the cabaret artists, whether male or female or both, are bound to show acts and make sounds accompanied by cabaret music, sexual or erotic gestures and revelation and play of parts of male or human bodies normally not exposed to public view on account of modesty or current fashions in society. Any person who desires to avoid the alleged mental harm of annoyance or psychological shocks on seeing what to some may be secret, sacred or profane parts of the male or female body is at perfect liberty not to go to such hotels or buy tickets for such obscene or annoying shows.*
>
> ***Para 26:*** *The question as to whether, in principle, an adult person who buys a seat at a table in a hotel like Blue Nile, knowing that there is a cabaret show and watches the cabaret show, can complain of an offence under section 294 was not raised in that case. In my judgment, however, for the reasons stated already such a person can never complain in a Criminal Court of annoyance. Cabaret or similar strip-tease dances are known and done in many big cities "all over the world". They are advised in the newspapers. The hotels try to what public appetites by salicious advertising in their show-cases. A person who enters such a hotel to attend such show, runs the risk of both enjoyment or annoyance according to his own nature and the nature of the cabaret shows. A wise and prudent person who does not like to be annoyed with such dances.*

94. The above submission was considered.

95. Regarding this submission, it may be stated that Bombay High Court in the case of *Joycezed*'s case (supra), had drawn the conclusion on the basis of maxim of *volenti non-fit injuria.* However, I am afraid, this principle applies in a

matter involving tortuous liability and not criminal liability. Hence, in my humble opinion, once it is determined that the material is obscene, then person liable for depicting such material or causing to depict such material cannot escape his liability on the ground that the subscriber having opted to watch it cannot make a complaint thereafter. Further, the disclaimer only had warned against scenes of intimacy in the episode but if the depicted scenes transcend into such gross display of lust that transgressing bare depiction of intimacy, such scenes enter into the realm of obscenity, a subscriber would be well within his right to complain.

96. Thus, at this stage it cannot be stated that provisions of Section 67 of IT Act are not attracted. Regarding Section 67-A of IT Act also, one has to decide as to what is the true meaning of **sexually explicit acts** i.e. whether a graphic depiction would only constitute "explicit Act" or whether a simulated act of copulation may also result in invoking this provision.

97. Now coming to the submission that provisions of Section 294 of Cr.PC are not applicable. It has already been discussed that a subscriber may also feel annoyed because the portrayal in the episode may have breached his limits of tolerance when the aspects of morality and public decency also get involved along with lascivious character of the episode.

98. The other argument is that Section 294 of Indian Penal Code is not applicable because the web series can only be watched by subscribers and not by everyone who has not paid the subscription fees and therefore the episode is not shown in 'public space' but is limited to private space.

99. Learned senior counsel for the petitioner has referred to number of citations for interpreting as to what is a public place. He submits that public place is one such place where members of the public have uncontrolled rights to make ingress and exit. The citations are as under:-

MEANING OF PUBLIC PLACE - INTERPRETATION UNDER VARIOUS ACTS

1	Directorate of Revenue vs. Mohammed Nisar Holia **(2008) 2 SCC 370**	**NDPS Act** u/s 43. **Hotel room.** is not a public place.
2	Vennapusa Gangireddy @ Sadhu vs. State of A.P. 2007 Indlaw AP 51; **2007 (2) ALT-345**	**SC/ST Act** - Public place discussed.
3	Malathi vs. State of Kerala **(2002) 3 KLT (SN 71) 50 (KERALA HC)**	Section 133 CrPC - Public place discussed.

4	Cricket Association of India vs. Calcutta Municipal Corporation **2015 SCC Online Cal 756.** **Follows Calcutta Municipal Corporation, AIR 1959 Cal. 704.**	**Kolkata Municipal Corporation Act. -** Eden Garden Ground, inside of it or the portion which a person enters upon production of valid authority to enter, cannot be considered a public place within the meaning of **Section 204 of the Act.**
5	Corporation of Calcutta vs. Sarat Chandra Ghatak **MANU/WB/0199/1959**	**Calcutta Municipal Act, 1951,-** Section 299 of the Act defines Public Place as "Place to which the public has legal right to access." Cinema house is not a public place.
6	Lala and Others vs. Emperor **AIR 1930 Oudh 394**	**Gambling Act, - (S.13)** Public place is one which is in full view of public and one to which the public has access. (Set-aside order of conviction)
7	In Re: Muthuswami Iyer and Others. **Criminal Revision Petition 523 of 1936 (Dated 26.11.1936)**	Offence of Affray under Section 159 IPC- Whether a place is public or not does not necessarily depend on the right of public as such to go the place, though of course a place to which public can go as of right must be a public place. (Eg. given of railway platforms, theatre halls, and open spaces resorted to by Public for purposes of recreation, amusement, etc).
8	Chandrakant Masaram More vs. State of Maharashtra **Criminal Writ Petition No.1577 of 2010**	Bungalow cannot be said to be a public place as no member of public could freely walk into the bungalow.
9	Emperor vs. Babu Ram **AIR 1927 ALL 560**	**Public Gambling Act -** A place to which the public had not by right, permission, usage or otherwise, access could not be a public place.
10	Marsh v. Arscott **(1982) 75 Cr. App.R.211**	**Public Order Act, 1936, Section 9 as amended by Criminal Justice Act, 1972, Section 33.-** Public place includes any highway and other premises

		or place to which, at the material time, the public have or are permitted to have access whether on payment or otherwise.
11	Brannan. vs. Peek **[1948] 1 K.B. 68**	**Street Betting Act, 1906, -** A Public house is not a 'public place' withing the meaning of the Act.
12	William v. Director of Public Prosecution **[1992] 95 Cr. App. 415**	**Criminal Justice Act, 1967,** Section 91. - Distinction between people who gained access or gained access to enter a building went there as member of public or in private capacity. **The landing of flats that was secure and locked, accessible with a key is not a public place.**

100. Per contra, learned Additional Advocate General for the respondent/State has submitted that in the aforesaid citations, the term public place has been discussed with reference to the statute involved. However, the same term acquires a different meaning under Information Technology Act, 2000. The explanation of Section 80 of Information Technology Act has been referred to. Section 80 of Information Technology Act is being reproduced here as under:

> *"80. Power of police officer and other officers to enter, search, etc.-*
>
> *(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), any police officer, not below the rank of a Deputy Superintendent of Police, or any other officer of the Central Government or a State Government authorized by the Central Government in this behalf may enter any public place and search and arrest without warrant any person found therein who is reasonably suspected of having committed or of committing or of being about to commit any offence under this Act. Explanation.-For the purposes of this sub-section, the expression "public place" includes any public conveyance, any hotel, any shop or any other place intended for use by, or accessible to the public.*
>
> *(2) Where any person is arrested under sub-section (1) by an officer other than a police officer, such officer shall, without unnecessary delay, take or send the person arrested before a magistrate having jurisdiction in the case or before the officer-in-charge of a police station.*

> *(3) The provisions of the Code of Criminal Procedure, 1973 (2 of 1974), shall, subject to the provisions of this section, apply, so far as may be, in relation to any entry, search or arrest, made under this section."*

101. Learned Additional Advocate General for the respondent/State submits that the word *'accessible to the public'* itself shows that any member of the public who has attained the majority age can access the site on paying the subscription fees and thus, it is accessible to the public of above eighteen years of age on payment of subscription fees.

102. A perusal of aforesaid provision shows that hotel, shop, public conveyance are also *public place* as against some of the aforesaid citations and the word *"any other place intended for use by or, accessible to the public"* would not only include free to air transmissions, but also transmissions based on subscription. Thus, prima facie provisions of Section 294 of Indian Penal Code, 1860, are also attracted.

103. Regarding Section 298 of Indian Penal Code, 1860, again number of citations have been put-forth by learned senior counsel for the petitioner. Section 298 of IPC reads as under:

> **Section 298 in The Indian Penal Code**
>
> *298. Uttering, words, etc., with deliberate intent to wound the religious feelings of any person.—Whoever, with the deliberate intention of wounding the religious feelings of any person, utters any word or makes any sound in the hearing of that person or makes any gesture in the sight of that person or places, any object in the sight of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.*

104. The aforesaid provision has been said to be attracted when the love interest of male physician invites him for attending ***'Satyanarayan Katha'.*** Hearing this, the physician makes facial expression showing disgust at such invitation. However, such utterance or expressions of disgust has been shown in the background of intentions of male protagonist which is more inclined towards physical intimacy rather than attending the religious function/ceremony. Prima facie it does not appear that there was a deliberate intention to wound religious feelings of the complainant. Hence, there is substance in the submission that Section 298 of IPC is not attracted.

105. Regarding the submission that the episode depicts dishonor of national emblem and thereby an infringement of Section 3 of the State Emblem of India (Prohibition of Improper Use) Act, 2005, was committed by the petitioner, it would be appropriate to reproduce Section 3 which is as under :-

> ***"3. Prohibition of improper use of emblem.*** *Notwithstanding anything contained in any other law for the time being in force, no person shall use the emblem or any colourable imitation thereof in any manner which tends to create an impression that it relates to the Government or that it is an official document of the Central Government, or as the case may be, the State Government, without the previous permission of the Central Government or of such officer of that Government as may be authorised by it in this behalf. "*

106. As per complainant the objectionable scene attracting the above provision relates to an incident when the male protagonist is made to wear army officer's uniform by the wife of army officer before initiating sexual advancement by her and later on during the course of intimacy, forcibly unbuttons the said blazer of the uniform. As per the petitioner, the aforesaid scene is not intended in any way to harm or tarnished the reputation of Indian Army or uniform of Indian Army and the aforesaid scene is not the primal focal point of the story.

107. In the written submissions the petitioner has submitted that the impugned FIR does not disclose any allegations that the episode or the web series contained emblem or any colourable imitation thereof in any manner which tends to create an impression that it relates to the Government, which is an essential ingredient for constituting an offence under Section 3 of the State Emblem Act.

108. A perusal of Section 3 of the Act makes it clear that the breach of this provision would occur only when the emblem is used in order to create an impression that it relates to the Government or it is an official document of the Central Government. This provision could apply in cases where a person actually would use such emblem on his car or uniform, or any other place, thereby giving an impression that the aforesaid car, uniform etc. relates to the Government, i.e., it is Government property and the person shows as if he is authorized to use such property. Only such use of emblem is prohibited under the Act. Section 4 of the Act prohibits use of emblem for wrongful gain pertaining to any trade, business, patent or design etc. No other act or omission provides for punishment under the Act.

109. It is pertinent to mention that "The Prevention of Insults to National Honour Act, 1971", prohibits insulting National Flag and Constitution of India. This Act does not encompass National Emblem, regarding which Act of 2005 is the governing statute, provisions of which have already been discussed earlier.

110. After due consideration in view of the aforesaid discussions, it appears that the facts of the case are not such that this court may exercise its extraordinary powers under Section 482 of Cr.P.C for quashing the FIR atleast in respect of Section 67, 67-A of I.T. Act and Section 294 of IPC. Although, it would be fair enough to state that provision of Section 298 of IPC and the provision of the State Emblem Act are not found to have been breached.

111. Consequently, the petition filed under Section 482 of Cr.P.C, stands **dismissed.**

Application dismissed

I.L.R. [2020] M.P. 2880
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice Vishal Dhagat

M.Cr.C. No. 43474/2020 (Jabalpur) decided on 24 November, 2020

ANIRUDDH KHEHURIYA ...Applicant

Vs.

STATE OF M.P. …Non-applicant

***A. Criminal Procedure Code, 1973 (2 of 1974), Section 439(1)(b) & 482 – Modification/Alteration in Order* – Held – For modification in bail order, petitioner ought to file application u/S 439(1)(b) Cr.P.C. but has filed application u/S 482 Cr.P.C. – Without entering into technicalities, petitioner being a poor person and is in jail inspite of bail order, condition to deposit Rs. 75,000 in CCD, imposed in bail order is deleted – Application disposed.**

(Para 16)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 439(1)(b) व 482 – आदेश में उपांतरण/परिवर्तन – अभिनिर्धारित – जमानत के आदेश में उपांतरण हेतु याची को धारा 439(1)(b) दं.प्र.सं. के अंतर्गत आवेदन प्रस्तुत करना चाहिए परंतु उसने धारा 482 दं.प्र.सं. के अंतर्गत आवेदन प्रस्तुत किया है – चूंकि याची एक गरीब व्यक्ति है तथा जमानत आदेश होने के बावजूद जेल में है, तकनीकी बातों पर ध्यान न देते हुए, जमानत आदेश में अधिरोपित, सी.सी.डी. में रू. 75000/– जमा करने की शर्त हटा दी गई – आवेदन निराकृत।

***B. Criminal Procedure Code, 1973 (2 of 1974), Sections 437(5), 439(1)(b), 439(2) & 482 – Modification/Alteration in Order* – Held – Judicial Magistrate cannot alter or modify the conditions of bail order passed by it – Same can be modified or altered by Session Court or High Court exercising powers u/S 439(1)(b) Cr.P.C. – Magistrate, after deciding bail application becomes *functus-officio*, thus he rightly refused to modify the bail order passed by him.** **(Paras 13 to 15)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 437(5), 439(1)(b), 439(2) व 482 – आदेश में उपांतरण/परिवर्तन – अभिनिर्धारित – न्यायिक मजिस्ट्रेट, उसके द्वारा पारित जमानत आदेश की शर्तों को उपांतरित या परिवर्तित नहीं कर सकता – उक्त को सत्र न्यायालय अथवा उच्च न्यायालय द्वारा धारा 439(1)(b) दं.प्र.सं. के अंतर्गत शक्तियों का प्रयोग करते हुए उपांतरित या परिवर्तित किया जा सकता है – जमानत

आवेदन विनिश्चित करने के पश्चात् मजिस्ट्रेट पदकार्य निवृत्त हो जाता है, अतः उसने उसके द्वारा पारित जमानत आदेश को उपांतरित करने से उचित रूप से इंकार किया।

***C. Criminal Procedure Code, 1973 (2 of 1974), Section 362 & 439 – Modification/Alteration in Order – Power of Review* – Held – Though bail order is an interlocutory order, but Cr.P.C. does not provide power of review to Courts exercising power under criminal jurisdiction – Section 362 is mandatory in nature and it provides that only clerical and arithmetical errors can be corrected in orders/judgments. (Para 14)**

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 362 व 439 – आदेश में उपांतरण/परिवर्तन – पुनर्विलोकन की शक्ति – अभिनिर्धारित – यद्यपि जमानत आदेश एक अंतर्वर्ती आदेश है किंतु दं.प्र.सं., न्यायालयों को दाण्डिक अधिकारिता के अंतर्गत शक्ति का प्रयोग करते हुए पुनर्विलोकन की शक्ति उपबंधित नहीं करती – धारा 362 आज्ञापक स्वरूप की है और वह उपबंधित करती है कि आदेशों/निर्णयों में केवल लिपिकीय एवं गणितीय त्रुटियों का सुधार किया जा सकता है।

***D. Criminal Procedure Code, 1973 (2 of 1974), Sections 362, 437(5) & 439(2) – Interpretation* – Held – Power not directly and expressly provided to a Court cannot be said to be impliedly provided u/S 437(5) and 439(2) Cr.P.C. (Para 14)**

घ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 362, 437(5) व 439(2) – निर्वचन – अभिनिर्धारित – एक न्यायालय को प्रत्यक्ष एवं अभिव्यक्त रूप से जो शक्ति उपबंधित नहीं है उसे धारा 437(5) एवं 439(2) दं.प्र.सं. के अंतर्गत विवक्षित रूप से उपबंधित होना नहीं कहा जा सकता।

Case referred:

2002 Cri.L.J. 1362.

Naveen Giri Goswami, for the applicant.
H.S. Hora, P.L. for the non-applicant/State.

O R D E R

(Heard through Video Conferencing)

VISHAL DHAGAT, J.:- Petitioner has filed this petition under Section 482 of Code of Criminal Procedure making a prayer for modification of order dated 29.08.2020 passed in Bail Application No. 1219/2020 and order dated 01.10.2020 passed in Bail Application No. 1448/2020 by Special Judge, Sagar (MP).

2. Petitioner Anirudh Khehuriya had filed an application for grant of bail under Section 439 of Code of Criminal Procedure in Crime No. 305/2020 for offences punishable under Sections 420 and 34 of Indian Penal Code. Learned trial Court allowed the application for bail on condition that applicant will deposit an amount of

Rs.75,000/-in CCD. Thereafter, another application was filed before the Court stating therein that petitioner is a poor person and he cannot deposit Rs.75,000/-, therefore, condition to deposit the amount shall be scrapped by the Court.

3. Learned Court dismissed the application on the ground that changing of condition in bail order will amount to reviewing earlier order and there is no power of review, therefore, application was rejected.

4. Petitioner has approached this Court by filing the present petition under Section 482 of Cr.P.C. making a prayer to modify order dated 29.08.2020 and order dated 01.10.2020.

5. It is submitted by the counsel for the petitioner that petitioner is a poor person and he cannot deposit Rs.75,000/-, therefore, said condition may be modified and he is ready to comply with rest of the conditions imposed upon him.

6. Heard the counsel for the petitioner as well as respondent.

7. Before adverting to merits of the case, relevant provisions for deciding the issue are as under :

8. Section 362 of Code of Criminal Procedure provides as under:

> ***"362. Court not to alter judgment -*** *Save as otherwise provided by this Code or by any other law for the time being in force, no Court, when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error."*

9. **Section 439(1)(b) of Code of Criminal Procedure reads as under:**

> *"439(1) A High Court or Court of Session may direct-*
>
> *(b) that any condition imposed by a Magistrate when releasing any person on bail be set aside or modified:*
>
> *Provided that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence which is triable exclusively by the Court of Session or which, though not so triable, is punishable with imprisonment for life, give notice of the application for bail to the Public Prosecutor unless it is, for reason to be recorded in writing, of opinion that is not practicable to give such notice."*

10. **Section 437(5) of Code of Criminal Procedure reads as under :**

> *"(5) Any Court which has released a person on bail under sub-section (1), or sub-section (2), may, if it considers it necessary so to do, direct that such person be arrested and commit him to custody."*

11. **Section 439(2) of Code of Criminal Procedure reads as under:**

> *"(2) A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody."*

12. The High Court of Karnataka in case of *Brijesh Singh and etc. vs State of Karnataka and etc.* reported in 2002 Cri.L.J. 1362 has held as under :

> ***"13.*** *As regards compentency of the learned Sessions Judge to entertain revision against the order dated 12-7-2001 of the learned Magistrate in so far as it related to the bail for the husband, I find sufficient legal force and weight in the contention of Mr. M. T. Nanaiah. In the first instance, it must be pointed out that the argument of Smt. Pramila Nesargi for the wife highlighted to impress upon the Court that the trial Magistrate had no power to pass the subsequent order dated 12-7-2001 altering or amending or deleting the conditions of the earlier bail order dated 16-6-2001 in any manner whatsoever is unacceptable. Of course, sub-section (2) of section 437, Cr.P.C., under which the application was filed by the husband, does not confer any such power on the learned Magistrate. But then, sub-section (5) impliedly confers such power on him. This provision reads :*
>
> *"(5) Any Court which has released a person on bail under sub-section (1) or sub-section (2), may, if it considers it necessary so to do, direct that such person be arrested and commit him to custody."*
>
> *Once by this provision in section 437, Cr.P.C. when the learned Magistrate is conferred with the power to cancel his order, then, as a logical corollary, it follows that he does have the power as well to amend or effect necessary alterations, short of cancellation, in the earlier bail order passed by him. Then, it is needless to state that any bail order passed by a trial Court is an interlocutory order within the meaning of sub-section (2) of section 397, Cr.P.C. (vide* ***Usmanbhai Dawoodbhai v. State of Gujarat, (1988) 2 SCC271 : (AIR 1988 SC 922)****.*
>
> *Therefore, the contrary view taken by the learned Sessions Judge in his impugned order that the order of the learned Magistrate dated 12-7-2001 passed modifying his earlier order dated 16-6-2001 was without jurisdiction and was, therefore, subject to revision before him, is wholly erroneous. In that view of the legal position, the learned Sessions Judge ought not to have entertained the State's revision in Cr. R.P. No. 218/2001 by which the modified bail order of the learned Magistrate was challenged. As a necessary legal consequence, the order of the*

learned Sessions Judge dated 26-7-2001 passed setting aside the order dated 12-7-2001 of the learned Magistrate, by allowing the State's revision in Cr. R.P. No. 218/2001, is obviously an order without jurisdiction and is of no effect in the eye of law. The resultant legal position, therefore, would be that the order dated 12-7-2001 of the learned Magistrate passed in modification of his earlier order dated 16-6-2001 stands unaffected. Therefore, the husband's Cr. P. No. 2571/2001 is entitled to succeed, without more."

13. Considering the aforesaid provisions of law and also the judgment passed by the High Court of Karnataka in matter of *Brijesh Singh* (supra), I am of considered opinion that Section 439(1)(b) of Cr.P.C. is enabling provision which gives express power to High Court and Court of Session to modify or alter the conditions imposed by Magistrate while grating (sic : granting) bail. High Court and Sessions Court cannot modify or alter the conditions of bail order passed by it by a subsequent order. The High Court of Karnataka has held that since Sections 437(5) and 439(2) of Cr.P.C. give power to concerned Court, if it considers necessary, to direct a person who is released on bail to be arrested and commit him to custody, therefore, there is implied power to the concerned Court to modify or alter the conditions imposed in the bail order. I do not agree with the law laid down by the Single Bench of Karnataka High Court in matter of *Brijesh Singh* (supra). Legislature has expressly and directly provided power to change the condition of bail order passed by a Magistrate to the Court of Sessions and High Court. If legislature intended that Magistrate can also alter or change the condition of the bail order passed by it than (sic : then) such power could have been provided to the Magistrate. Since legislature has not expressly given power to Magistrate to change or alter the conditions of bail order, such power cannot be exercised by Magistrate impliedly under Section 437(5) and 439(2) of Cr.P.C.

14. Though bail order in (sic : is) an interlocutory order, but it has to be kept in mind that Cr.P.C. does not provide power of review to Courts exercising power under criminal jurisdiction and same has been provided to Courts exercising civil jurisdiction. Section 362 of Cr.P.C. is mandatory in nature and it provides that only clerical and arithmetical errors can be corrected in judgments signed or in final order disposing off a case. Final order and judgment shall not be reviewed but only for arithmetical or clerical errors. Condition of bail order is not a clerical or arithmetical error. Said condition is intentionally imposed by the Court granting bail to an accused person. Though, altering or modifying the condition will not change the tenor of bail order and order will remain same even if condition attached to bail is altered or reviewed, but such power has not expressly been provided to the Court which has passed the order. Therefore, power not directly and expressly provided to a Court cannot be said to be impliedly provided under Section 437(5) and 439(2) of Cr.P.C. Moreover, Section 439(1)(b)

expressly gives power to High Court and Sessions Court to alter or modify the condition of bail order passed by Magistrate. Court after deciding bail application become *functus-officio*.

15. In these circumstances, I do not find any error in the order dated 01.10.2020 passed in Bail Application No. 1448/2020. Sessions Court has rightly refused to modify the condition of bail order.

16. Though petitioner ought to have filed an application under Section 439(1)(b) of Cr.P.C. for modification or deletion or alteration of condition of bail order, but, petitioner has filed present petition under Section 482 of Cr.P.C. for modifying the condition. In such circumstances, without entering into the technicalities of the issue, as the matter relates to liberty of petitioner who is in jail in spite of bail order, I find it fit to interfere in the matter and delete the condition mentioned in bail order to deposit Rs.75,000/- in CCD, as imposed upon the petitioner vide order dated 29.08.2020.

17. In this view of the matter, this miscellaneous petition is **disposed off** and condition to deposit Rs.75,000/- in CCD mentioned in order dated 29.08.2020 passed in Bail Application No. 1219/2020 is deleted. The trial Court shall forthwith release the petitioner on furnishing bail bonds to the satisfaction of the trial Court.

18. C.C. as per rules.

Order accordingly

I.L.R. [2020] M.P. 2885 (DB)
MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice Sanjay Yadav, Acting Chief Justice &
Mr. Justice Sujoy Paul

M.Cr.C. No. 45501/2020 (Jabalpur) decided on 27 November, 2020

ARIF MASOOD ...Applicant

Vs.

STATE OF M.P. …Non-applicant

***A. Penal Code (45 of 1860), Section 153-A and Criminal Procedure Code, 1973 (2 of 1974), Section 438 – Anticipatory bail – Grounds* – Held – Objectionable material/speech is already in possession of police, no possibility of tampering with the recordings – Police issued character certificate to applicant, thus previous criminal history pales into insignificance – Looking to nature and gravity of accusation, role of applicant, false text of second FIR and its *prima facie* maintainability, necessary ingredients for grant of anticipatory bail fully satisfied – Application allowed. (Para 27 & 28)**

क. दण्ड संहिता (1860 का 45), धारा 153–A एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 438 – अग्रिम जमानत – आधार – अभिनिर्धारित – आपत्तिजनक सामग्री/भाषण पहले से ही पुलिस के कब्जे में है, रिकॉर्डिंग में हेरफेर करने की कोई संभावना नहीं – पुलिस ने आवेदक को चरित्र प्रमाण–पत्र जारी किया है, अतः पिछला आपराधिक पूर्ववृत्त महत्वहीन हो जाता है – अभियोग के स्वरूप तथा गंभीरता, आवेदक की भूमिका, द्वितीय प्रथम सूचना प्रतिवेदन की मिथ्या विषय–वस्तु तथा प्रथम दृष्ट्या उसकी पोषणीयता को देखते हुए, अग्रिम जमानत मंजूर करने के लिए आवश्यक घटक पूर्णतः संतुष्ट होते हैं – आवेदन मंजूर।

***B. Criminal Procedure Code, 1973 (2 of 1974), Section 82 & 438 – Absconder & Proclaimed Offender* – Held – As a rule of thumb, it cannot be said that an absconder against whom a proclamation u/S 82 Cr.P.C. is not issued, is not entitled for anticipatory bail – No proclamation issued against applicant – Anticipatory bail cannot be denied on ground that applicant is absconding. (Paras 20 to 23)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 82 व 438 – फरारी व उद्घोषित अपराधी – अभिनिर्धारित – एक सामान्य नियम के स्वरूप, यह नहीं कहा जा सकता कि एक फरारी जिसके विरूद्ध दं.प्र.सं. की धारा 82 के अंतर्गत उद्घोषणा जारी नहीं हुई है, अग्रिम जमानत का हकदार नहीं है – आवेदक के विरूद्ध कोई उद्घोषणा जारी नहीं हुई – अग्रिम जमानत इस आधार पर अस्वीकार नहीं की जा सकती कि आवेदक फरार है।

***C. Criminal Procedure Code, 1973 (2 of 1974), Section 154 – Second FIR – Maintainability* – Held – Apex Court concluded that second FIR by rival party giving a different version of same incident is permissible – In instant case, second FIR not lodged as counter complaint by a rival party – *prima facie* it appears that second FIR is not maintainable. (Para 18 & 19)**

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 154 – द्वितीय प्रथम सूचना प्रतिवेदन – पोषणीयता – अभिनिर्धारित – सर्वोच्च न्यायालय ने यह निष्कर्षित किया है कि समान घटना के बारे में भिन्न कथन देते हुए विरोधी पक्षकार द्वारा द्वितीय प्रथम सूचना प्रतिवेदन अनुज्ञेय है – वर्तमान प्रकरण में, विरोधी पक्षकार के द्वारा काउंटर परिवाद के रूप में द्वितीय प्रथम सूचना प्रतिवेदन पंजीबद्ध नहीं कराया गया – प्रथम दृष्ट्या यह प्रतीत होता है कि द्वितीय प्रथम सूचना प्रतिवेदन पोषणीय नहीं है।

***D. Penal Code (45 of 1860), Section 153-A – Ingredients – Freedom of Expression* – Held – *Prima facie*, applicant delivered speech and expressed his views which is certainly his valuable fundamental right – Right of freedom of expression must include freedom after expression as well, unless it is established with accuracy and precision that it has violated any legal/penal provision – No element in speech of applicant to attract Section 153-A. (Para 25)**

घ. दण्ड संहिता (1860 का 45), धारा 153–A – घटक – अभिव्यक्ति की स्वतंत्रता – अभिनिर्धारित – प्रथम दृष्ट्या, आवेदक ने भाषण दिया तथा अपने विचार व्यक्त

किये जो कि निश्चित रूप से उसका बहुमूल्य मूलभूत अधिकार है – अभिव्यक्ति की स्वतंत्रता में अभिव्यक्ति के बाद की स्वतंत्रता की शामिल होनी चाहिए, जब तक कि शुद्धता और यर्थाथता के साथ यह स्थापित नहीं हो जाता कि इससे किसी विधिक/दाण्डिक उपबंध का उल्लंघन हुआ है – आवेदक के भाषण में ऐसा कोई तत्व नहीं जो धारा 153–A को आकर्षित करता हो।

***E. Criminal Procedure Code, 1973 (2 of 1974), Section 438 – Anticipatory Bail – Factors & Parameters* – Discussed and enumerated.**
(Para 26)

ङ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 438 – अग्रिम जमानत – कारक व मापदण्ड – विवेचित एवं प्रगणित।

Cases referred:

2001 (6) SCC 181, 2013 (6) SCC 348, 2013 (6) SCC 384, 1980 (2) SCC 565, 2011 (1) SCC 694, 2012 (1) SCC 40, 1995 MPLJ 296, 1998 (2) MLJ 932, 2018 (4) SCC 579, 2012 (8) SCC 730, 2014 (2) SCC 171, M.Cr.C. No. 9567/2014 & M.Cr.C. No. 9568/2014 decided on 09.07.2014, M.Cr.C. No. 13420/2014 decided on 22.09.2014, M.Cr.C. No. 6405/2016 decided on 25.04.2016, M.Cr.C. No. 4357/2017 decided on 02.05.2017, 1975 (Supp.) SCC 1, (2004) 13 SCC 292, (2013) 5 SCC 148.

Vivek K. Tankha with *Ajay Gupta*, for the applicant.

Purushendra Kaurav, A.G. with *Pushpendra Yadav*, Addl. A.G. for the non-applicant.

O R D E R

The Order of the Court was passed by:

SUJOY PAUL, J.:- The applicant has filed this application under Section 438 of Code of Criminal Procedure, 1908 (sic : 1973) (for short Cr.P.C.) for grant of anticipatory bail arising out of Crime No.857/20 registered at Police Station, Talaiya, District Bhopal relating to offence under Section 153A of Indian Penal Code **(IPC).**

2. Draped in brevity, the case of applicant is that he is an Advocate, active politician and elected member of legislative assembly from Bhopal. On 29.10.2020, a protest was organized at Iqbal Maidan, Bhopal against the comments made by President of French Republic in reference to Islam. The applicant being an elected representative of his constituency also addressed the gathering and expressed his opinion on the comments of French President and condemned the comments made by him. The applicant also appealed the protesters to live with peace and harmony in society and not get instigated on the comments made by the President of France. The applicant also referred about the certain old incidence which had relation with patriotism and freedom movement of the country.

3. In the aforesaid gathering dated 29.10.2020, the police force was present at the spot to oversee the agitation. An FIR No.852/20 (first FIR) dated 29.10.2020 was registered against the applicant and other co-accused persons for committing offence under Section 188 of IPC. Subsequently, Section 269 and 270 of IPC and 51B of Disaster Management Act, 2005 were added by the police. It is pointed out that in the first FIR (Annexure A/2) there was no mention regarding any speech given by present applicant which attracts Section 153A of IPC.

4. After six days from the date first FIR was lodged, Dr. Deepak Raghuwanshi (complainant) claiming himself to be General Secretary of Dharam Sanskriti Samiti preferred a complaint which was reduced in writing as FIR on 4.11.2020 (second FIR) (Annexure A/3). This FIR No.857/20 is filed as Annexure A/3. It is averred that second FIR does not mention about the previous FIR.

5. Shri Vivek K. Tankha, learned senior counsel assisted by Shri Ajay Gupta, Advocate for the applicant urged that the first FIR was lodged by Sub Inspector Shiv Bhanu Singh who was present at the time of protest. As per the contents of first FIR, approximately 2,000 persons participated in the protest against the statement of President of France. These persons have not maintained social distancing and further violated the order passed under Section 144 of Cr.P.C. thereby committed offence under Section 188 of IPC. In the second FIR, following averments were made:

> *''आरिफ मसूद व उनके साथी सावर मंसूरी, अकील उल रहमान नईम खान, मो. सालार, इकराम हासभी, अब्दुल नईम द्वारा इकबाल मैदान में राष्ट्र विरोधी ओत प्रोत भाषण देकर वर्ग वैमनस्ता उन्माद फैलाने के प्रयत्न के संबंध मे महोदय निवेदन है की मै धर्म संस्कृति समिति के महामंत्री पद पर भोपाल से हूँ दिनांक 29/10/20 को इकबाल मैदान तलैया भोपाल दोपहर मे भोपाल मध्य क्षेत्र के विधायक श्री आरिफ मसूद के नेतृत्व मे हजारों लोगो ने प्रदर्शन कर फ्रांस के राष्ट्रपति का पूतला दहन किया गया उसी दौरान उन्मादी भाषण देकर अपमान जनक भाषण दिया गया तथा यह कहाँ गया की* ***फ्रांस के राष्ट्रपति के कार्य को भारत में बैठी हिन्दू वादी सरकार सहमति दे रही है तथा मध्य प्रदेश में बैठी हिन्दू वादी सरकार मुस्लिम वर्ग के अपमान को सह दे रही है अतः हिंदुस्तान की केंद्र व राज्य सरकारे कान खोलकर सुन ले यदि फ्रांस के उक्त कृत्य का विरोध नहीं किया गया तो हिन्दुस्तान में भी ईट से ईट बाजा देंगे*** *उसके द्वार दिये गए भाषण में भारत सरकार के एक मंत्री का उल्लेख भी किया गया है जिससे हिन्दू वर्ग आक्रोश पैदा हुआ है एवं भारत तथा फ्रांस से जो मैत्री पूर्ण संबंध है उस पर भी गलत प्रभाव पड़ने की संभावना है मध्य क्षेत्र के विधायक के साथ उनके साथी लोग द्वारा केंद्र व राज्य सरकार पर अभद्र भाषा में आरोप लगाए गए जिससे प्रदेश के सभी वर्ग धर्म जाती भाषाई व प्रादेशिक समूह द्वारा विधिवत निर्वाचित सरकार व वर्ग पर आघात लगा*

है भारत का संविधान धर्म निरपेक्ष है ऐसे मे मिथ्या रूप से दोषारोपण कर हिन्दू वादी सरकार का ठप्पा लगाया जाना पूर्णतः गलत है अत : धर्म संस्कृति इस प्रकार के कृत्य करने वालो के विरूद्ध कठोर से कठोर कानूनी कार्यवाही की जाये जिससे विभिन्न धर्मो के मध्य भय का वातावरन निर्मित हुआ है भविष्य में ऐसे कोई कृत्य न किए जाये।''

(Emphasis supplied)

The learned senior counsel placed reliance on the transcript of the speech of the applicant (filed with IA No.20571/2020) and argued that a simple reading of the transcript clearly shows that the aforesaid reproduced contents of the second FIR are factually incorrect and do not find place in the transcript/speech.

6. The applicant has already been granted bail by the competent court arising out of the first FIR. However, his application preferred under Section 438 of Cr.P.C. related to second FIR has been rejected by the Court below by order dated 16.10.2020.

7. The applicant has prayed for grant of anticipatory bail by contending that (i) the complainant of second FIR was not present at the place of protest whereas the Sub Inspector who lodged the first FIR was present at the said place; (ii) complaint is belatedly lodged as an afterthought which is malicious and contains false text; (iii) second FIR arising out of same incident is not maintainable and runs contrary to judgments of Supreme Court reported in 2001 (6) SCC 181 *(T.T. Antony vs. State of Kerala)*, 2013 (6) SCC 348 *(Amit Bhai Anil Chandra Shah vs. The CBI and others)*, 2013 (6) SCC 384 *(Anju Choudhary vs. State of UP)* and the judgment of this Court in the case of *Rahul Maheshwari Vs. State of M.P.* (M.Cr.C. No.7810/2012); (iv) the recording of speech of applicant is already available with the prosecution and; therefore, no tampering of the same is possible; (v) the Superintendent of Police (Headquarter) issued character certificate to the applicant on 25.10.2020 Annexure R/1 which shows that total 31 cases were registered against the applicant and applicant has been exonerated (because of acquittal/compromise/closure) in all such cases. The last offence registered against the applicant was Crime No.194/09 i.e. way back in the year 2009. The applicant contested the assembly election from a constituency in which the ratio of Hindu and Muslim population is almost 50:50.

8. The learned senior counsel for the applicant placed reliance on 1980 (2) SCC 565 *(Shri Gurbaksh Singh Sibbia and others vs. State of Punjab)*, 2011 (1) SCC 694 *(Siddharam Satlingappa Mhetre Vs. State of Maharashtra)* and 2012 (1) SCC 40 *(Sanjay Chandra vs. CBI)* to bolster his submission that necessary factors for grant of anticipatory bail are available in favour of present applicant. The order of Court below dated 17.11.2020 (filed with IA No.12878/2020) is referred to contend that the order of Court below is clear that no proclamation under Section

82 of Cr.P.C. has been issued by the Court. Before taking action under Section 82 of Cr.P.C., warrant was directed to be issued under Section 73 of Cr.P.C. to the applicant for securing his presence. In absence of any proclamation being issued under Section 82 of Cr.P.C, the applicant by no stretch of imagination can be treated to be a 'proclaimed offender'. Hence, there is no impediment in granting anticipatory bail to the applicant. Reference is also made to a Full Bench judgment of this Court reported in 1995 MPLJ 296 *(Nirbhay Singh vs. State of MP)* wherein it was held that even after the Magistrate issued process or at the stage of committal of the case to Sessions Court or even at a subsequent stage, if circumstances justify the invocation of Section 438 of Cr.P.C., anticipatory bail can be granted. This Full Bench decision was followed by Bombay High Court in 1998 (2) MLJ 932 *(Akhtar Ahmed Patel vs. State of Maharashtra)*. Lastly, it is reiterated that the objections taken by State regarding maintainability of this application, criminal antecedents of applicant and denial of bail being an absconder are devoid of substance.

9. Shri Purushendra Kaurav, learned Advocate General assisted by Shri Pushpendra Yadav, learned Additional Advocate General opposed the application by contending that (i) the first FIR contains partial facts relating to the protest whereas second FIR projects certain more events and contains information regarding the speech given by the applicant; (ii) second FIR is permissible in view of judgment reported in 2018 (4) SCC 579 *(P. Sreekumar vs. State of Kerala and others);* (iii) the contents of second FIR attracts Section 153A of IPC; (iv) the applicant did not join investigation and was not traceable. Hence a *"farari panchnama"* was prepared and an application was filed before the Court below for declaration of proclamation under Section 82 of Cr.P.C. The applicant being an absconder is not entitled to get anticipatory bail. Reliance is placed on the judgment of Supreme Court reported in 2012 (8) SCC 730 (*Lavesh vs State*), 2014 (2) SCC 171 *(State of MP vs. Pradeep Sharma)* and the orders of this Court passed in M.Cr.C. No.9567/2014 and M.Cr.C. No.9568/2014 *(Dr. Sudhir Sharma vs. State of M.P.)* dated 09.07.2014, order dated 22.09.2014 passed in M.Cr.C. No.13420/2014 *(Shailendra Yadav vs. State of M.P.),* order dated 25.04.2016 passed in M.Cr.C. No.6405/2016 *(Muna Singh vs. State of M.P.)* and on the order dated 02.05.2017 passed in M.Cr.C. No.4357/2017 *(Sobran Batham vs. State of M.P.).* The learned Advocate General has taken pains to contend that in view of these authorities, even if applicant is "absconding" and not declared as a "proclaimed offender", the question of granting anticipatory bail to him does not arise. Shri Kaurav argued that following portion of transcript attracts Section 153-A of IPC:-

''आरिफ मसूद मत कहना ये कहना चाहता हूँ नबी की सीरत को तुमने नहीं पढ़ा इसलिए गुस्ताख़ी की है लेकिन तुम्हें ये नहीं भूलना चाहिए उस नबी को चाहने वाले करोड़ो लोग अपनी जान की बाजी भी लगाने के लिए यहां हाजिर हुए हैं क़ाज़ी साहब हमारे बीच में आ गये हैं हम उनका भी इस्तक़बाल करते है फ्रांस की इस करतूत को पूरी दुनिया पूरा माशरा मज़म्मत कर रहा है लेकिन अफसोस भारत की सरकार भारत के अफेयर मिनिस्टर एक ट्वीट करते हैं और ट्वीट पर कहते हैं फ्रांस के राष्ट्रपति ने सही करा तो हम बता देना चाहते है भारत की सरकार को की मुग़ालते में मत रहना वो फ्रांस है ये हिन्दुस्तान है पहचान लो करोड़ो लोगो की आस्था के साथ खिलवाड़ नहीं कर सकते तुम्हें हमारे पैगाम को भेजना होगा आज हम लोग फ्रांस के राजदूत को ज्ञापन देना है ज्ञापन के जरिये उन्हें बताना होगा मुल्के हिन्दुस्तान खड़ा हो चुका और ऐलान करता है नबी की गुस्ताख़ी नबी की शान में गुसताख़ी बर्दाश्त नहीं करेंगे।''

Lastly, it is urged that judgment of *Nirbhay Singh* (Supra) was passed in a complaint case whereas present matter is arising out of an FIR. Hence, said judgment cannot be pressed into service.

10. The parties confined their arguments to the extent indicated above.

11. We have bestowed our anxious consideration on rival contentions and perused the case diary.

12. The stand of applicant is that freedom of expression is his valuable fundamental right, which includes the right to express his view even against a tweet of a government functionary. On the other hand, the stand of the government is that the applicant has misused the liberty/freedom and delivered a speech in a public gathering which has elements to attract Section 153-A of IPC. Thus, second FIR was rightly lodged. In the case of *Amitbhai Anilchandra Shah* (supra), the Apex Court has taken note of serious task of the Court while deciding issues relating to fundamental rights of citizen and power of police to investigate a cognizable offence. The Court expressed its view in following words:-

> ***"58.9.*** *Administering criminal justice is a two end process, where guarding the ensured rights of the accused under the constitution is as imperative as ensuring justice to the victim. It is definitely a daunting task but equally a compelling responsibility vested on the court of law to protect and shield the rights of both. Thus, a just balance between the fundamental rights of the accused guaranteed under the constitution and the expansive power of the police to investigate a cognizable offence has to be struck by the court. "*
>
> *(Emphasis supplied)*

13. K.K. Methew, J. stated that **the major problem of human society is to combine that degree of liberty without which law is tyranny with that degree of law without which liberty becomes licence; and the difficulty has been to discover the practical means of achieving this grand objective and to find the opportunity for applying these means in the ever shifting tangle of human affairs.** [See 1975 (Supp.) SCC 1 *(Smt. Indira Nehru Gandhi vs. Raj Narain)*]

14. Before dealing with the rival contentions of the parties, we deem it apposite to mention that during the course of hearing, on specific query from the Bench, learned Advocate General has fairly stated that he is not raising objection regarding the maintainability of this application. He fairly stated that transcript of speech of applicant (Annexure A/4) is in substance correct except certain typographical errors. Without hesitation, he fairly admitted that both the FIRs are founded upon the same incident of 29.10.2020.

15. In view of aforesaid stand of Shri Kaurav, it is crystal clear that the underlined portion of first FIR (reproduced in Para 5)) does not find place in the transcript. Thus, it is clear that this part of FIR is indisputably contains a false text. Since both the FIRs are founded upon the same incident of 29.10.2020, the question is whether second FIR could have been lodged. Parties have taken a diametrically opposite stand on this aspect. In order to examine this aspect, it is apt to refer the judgments on which reliance is placed.

16. In *T.T. Anthony* (supra), the Apex Court opined as under:-

> ***"20.*** *From the above discussion it follows that under the scheme of the provisions of sections 154, 155, 156, 157, 162, 169, 170 and 173 CrPC only the earliest or the first information in regard to the commission of a cognizable offence satisfies the requirements of section 154 CrPC. Thus there can be no second FIR and subsequently there can be no fresh investigation on receipt of every subsequent information in respect of the same cognizable offence or the* ***same occurrence or incident giving rise to one or more cognizable offences.*** *On receipt of information about a cognizable offence or an incident giving rise to a cognizable offence or offences and on entering the FIR in the station house diary, the officer in charge of police station has to investigate not merely the cognizable offence reported in the FIR but also other connected offences found to have been committed* ***in the course of the same transaction*** *or the* ***same occurrence*** *and file one or more reports as provided in section 173 CrPC."*

In *Amitbhai Anilchandra Shah* (supra), it was held as under:-

> ***"59.*** *In the light of the specific stand taken by CBI before this court in the earlier proceedings by way of assertion in the form of counter- affidavit, status reports, etc. We are of the view that filing of the second FIR and fresh charge-sheet is violative of fundamental rights under Articles 14, 20, and 21 of the constitution since the same relate to the alleged offence in respect of which an FIR had already been filed and the court has taken cognizance."*

By following the principles laid down in aforesaid cases, in *Anju Chaudhary* (supra), it was held as under:-

> ***"14****... ... ... The purpose of registering an FIR is to set the machinery of criminal investigation into motion, which culminates with the filing of the police report in terms of section 173(2) of the code. It will, thus, be appropriate to follow the settled principle that there cannot be two FIRs registered for the same offence. However, where the incident is separate; offences are similar or different, or even if subsequent crime is of such magnitude that it does not fall within the ambit and scope of the FIR recorded first, then a second FIR could be registered. The most important aspect is to examine the inbuilt safeguards provided by the legislature in the very language of section 154 of the code. These safeguards can be safely deduced from the principle akin to double jeopardy, rule of fair investigation and further to prevent abuse of power by the investigating authority of the police. Therefore, second FIR for the same incident cannot be registered."*
>
> *(Emphasis supplied)*

17. The common string in the aforesaid cases is that there can be no second FIR in respect of the same occurrence or incident giving rise to more than one cognizable offences. These judgments were sought to be distinguished by learned Advocate General on the basis of judgment of Apex Court in *P. Sreekumar* (supra). In this judgment, the Apex Court has considered its previous judgment reported in (2004) 13 SCC 292 *(Upkar Singh vs. Ved Prakash),* which was based on the judgment of *T.T. Anthony* (supra).

18. The Apex Court took note of the fact that in the case of *T.T. Anthony* (supra), the Court did not consider the legal right of an aggrieved person to file counter claim. However, an observation was made in the case of *T.T. Anthony* (supra),

which indicates that filing of counter complaint is permissible. The judgment of *Surendra Kaushik vs. State of U.P.* reported in (2013) 5 SCC 148 was also taken note of in *P. Sreekumar* (supra) wherein it was held that the second FIR by rival party giving a different version of same incident is permissible. Keeping in view the aforesaid principle of law in mind, the Apex Court in *P. Sreekumar* (supra) opined that second FIR filed by the appellant against respondent No.3 though related to same incident for which first FIR was filed by respondent No.2 against respondent No.3 and three bank officials, yet second FIR being in the nature of counter complaint is legally permissible.

19. In the instant case, the second FIR is not lodged as counter complaint by a rival party. This exception carved out in the case of *P. Sreekumar* (supra) is not applicable in the instant case. Thus, *prima facie* it appears that second FIR is not maintainable.

Similarly, the distinction drawn by learned AG for distinguishing the judgment of Full Bench in *Nirbhay Singh* (Supra) does not impress us. The principle laid down for grant of anticipatory bail in the said case will be equally applicable where application is arising out of an FIR.

20. The next question is whether the applicant can be denied bail only because he is absconding. In *Lavesh* (supra), the Apex Court dealt with this issue as under:-

> *"12. From these materials and information, it is clear that the present appellant was not available for interrogation and investigation and was declared as "absconder". **Normally, when the accused is "absconding" and declared as a "proclaimed offender", there is no question of granting anticipatory bail.** We reiterate that when a person against whom a warrant had been issued and is absconding or concealing himself in order to avoid execution of warrant and declared as a proclaimed offender in terms of Section 82 of the Code he is not entitled to the relief of anticipatory bail."*

21. In the case of *Pradeep Sharma* (supra), the principle laid down in *Lavesh* (supra) was followed. In the said case, it was brought to the notice of Supreme Court that a proclamation under Section 82 of Code was already issued on 29.11.2012. We are unable to persuade ourselves with the argument of Shri Kaurav that in *Pradeep Sharma* (supra), the Apex Court has taken a different view than the view taken in *Lavesh* (supra). In other words, it is not the ratio decidendi of *Pradeep Sharma* (supra) that anticipatory bail is not available to an absconder against whom a proclamation under Section 82 of the Code has not been issued. In

MCRC. No.9567/14, this Court declined anticipatory bail in the peculiar facts of the said case and by taking note of the fact that in spite of direction issued by High Court under Section 438(1-B) of the Code, the applicant remained absent, which shows lack of bonafides on his part. Similarly, in MCRC. No.13420/14, in the peculiar factual backdrops of the said case, anticipatory bail was declined. In *Muna Singh* (supra), although learned Single Judge held that judgment of Supreme Court made it clear that an absconder against whom proceeding under Section 82 of the Code *has been instituted* is not eligible for the grace of the Court under Section 438 of Cr.P.C., we are unable to agree with this view taken by learned Single Judge. At the cost of repetition, in *Lavesh* (supra) and *Pradeep Sharma* (supra), it was made clear that when the accused is absconding and also declared as a 'proclaimed offender', question of granting anticipatory bail does not arise. As a rule of thumb, it cannot be said that an absconder against whom a proclamation under Section 82 of Cr.P.C. is not issued, is not entitled to get anticipatory bail.

22. Shri Kaurav during the course of hearing fairly admitted that the applicant has not been declared as 'proclaimed offender'. No such proclamation under Section 82 of the Code has been issued, although an application for issuance of proclamation was filed by the State.

23. Considering the aforesaid, we are of the opinion that anticipatory bail cannot be denied on the ground that the applicant is absconding. More so, when it is shown that applicant has approached the Court below for grant of bail arising out of second FIR dated 04.11.2020 and after rejection of bail application from Court below, filed instant application with quite promptitude on 09.11.2020.

24. Parties are at loggerheads on yet another aspect. They have taken diametrically opposite stand about the nature of applicant's speech. As noticed above, the applicant stated that being a free citizen of India, he has every right to comment on the tweet of a government functionary. By taking this Court to the entire transcript of the speech (Annexure A/4), it is argued that its contents do not attract Section 153-A of the IPC. The speech, by no stretch of imagination, creates or encourages enmity on the ground of religion, place of birth, language etc. Indeed, the persons present were requested to maintain peace and follow law and order. The speech was totally patriotic in nature wherein past reference of some patriotic activity was also given. The stand of State is that Section 153-A is attracted on the plain reading of the transcript.

25. We have carefully gone through the contents of transcript and are unable to agree with the stand of learned Advocate General. Learned Advocate General has

pointed out a portion of speech reproduced hereinabove, which in the opinion of state attracts Section 153-A of IPC. In our view, the said portion of speech cannot be divorced from the complete text nor it can be read in isolation. *Prima facie,* we do not find any element in the speech of applicant which attracts Section 153-A of IPC. *Prima facie,* the applicant has delivered the speech and expressed his views which is certainly his valuable fundamental right. The right of freedom of expression must include the freedom after the expression as well, unless it is established with accuracy and precision that such expression has violated any legal/penal provision.

26. In *Siddharam Satlingappa Mhetre* (supra), the Apex Court laid down certain factors and parameters, which are required to be taken into consideration while dealing with the anticipatory bail. Some of the relevant factors are reproduced for ready reference:-

> *(i) The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;*
>
> *(ii) The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a court in respect of any cognizable offence;*
>
> *(iii) The possibility of the applicant to flee from justice;*
>
> *(iv) The possibility of the accused's likelihood to repeat similar or other offences;*
>
> *(v) Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her;*
>
> *(vi) Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people;*
>
> *(vii) The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which the accused is implicated with the help of Sections 34 and 149 of the Penal Code, 1860 the court should consider with even greater care and caution because overimplication in the cases is a matter of common knowledge and concern;*
>
> *(viii) While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors, namely, no*

prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

(ix) The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

(x) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail.

Reference may be made to another para of this judgment-

113. *Arrest should be the last option and it should be restricted to those exceptional cases where arresting the accused is imperative in the facts and circumstances of that case. The court must carefully examine the entire available record and particularly the allegations which have been directly attributed to the accused and these allegations are corroborated by other material and circumstances on record.*

(Emphasis supplied)

27. Considering the nature and gravity of accusation, role of present applicant, false text of second FIR and its *prima facie* maintainability, in our opinion, this is a fit case for grant of anticipatory bail. In view of character certificate issued by police headquarter dated 25.10.2020 (Annexure R/1), previous criminal history of the applicant pales into insignificance. The applicant is an elected representative of people and there is no possibility of his fleeing from justice. The objectionable material/speech is already in possession of the police and there is no possibility of tempering (sic:tampering) by the applicant with the recorded version. Hence, in our opinion, necessary ingredients for grant of anticipatory bail are fully satisfied in the present matter.

28. In view of aforesaid and without expressing any conclusive opinion on the merits of the case, we deem it proper to grant anticipatory bail to the applicant. The applicant shall join the investigation. He shall not leave the town without giving prior intimation to the local Police Station and he will not influence the evidence/material etc. in any manner. Accordingly, it is directed that in the event of arrest, the applicant **Arif Masood** be released on anticipatory bail on his furnishing a personal bond in a sum of **Rs.50,000/- (Rupees Fifty Thousand only)** along with one surety in the like amount to the satisfaction of arresting

officer for his appearance before the Investigating Officer during the course of investigation as and when directed. Conditions of Section 438(2) Cr.P.C. shall also apply on the applicant during currency of bail.

29. M.Cr.C. is **allowed.**

Application allowed